

UNDER Reference No. HRRT 011/2013  
BETWEEN THE HUMAN RIGHTS ACT 1993  
AND KEVIN ALLAN WATERS  
PLAINTIFF  
ALPINE ENERGY LIMITED  
DEFENDANT

AT TIMARU

BEFORE:

Mr RPG Haines QC, Chairperson

Ms DL Hart, Member

Hon KL Shirley, Member

REPRESENTATION:

Mr KA Waters in person

Ms AL Keir for defendant

DATE OF HEARING: 20 February 2015

DATE OF DECISION: 9 March 2015

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**DECISION OF TRIBUNAL ORDERING REDACTED DOCUMENTS  
BE PROVIDED TO PLAINTIFF<sup>1</sup>**

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**Background**

[1] The decision of the Tribunal in *Waters v Alpine Energy Ltd (Discovery)* [2014] NZHRRT 8 (20 February 2014) ordered (inter alia) Alpine Energy Ltd (Alpine Energy) to give discovery of the CV, application, employment history, listed qualifications, experience and other information relating to the applicants who were appointed to the positions of Engineering Officer and Maintenance Engineer respectively.

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<sup>1</sup> [This decision is to be cited as: *Waters v Alpine Energy Ltd (Discovery No. 2)* [2015] NZHRRT 7]

[2] In a judgment given on 11 November 2014 Gendall J set aside that order and remitted the case back to the Tribunal for the discovery issues to be considered afresh. See *Alpine Energy Ltd v Human Rights Review Tribunal* [2014] NZHC 2792 at [34]. This was because in determining whether a discovery order should be made in respect of the documents for which confidentiality has been claimed by Alpine Energy, the Tribunal failed to consider whether the documents were both relevant and sufficiently probative to the issues raised by Mr Waters to overcome the confidentiality interests sought to be protected by Alpine Energy. We refer in particular to the following passage from the judgment:

[31] Viewing the HRA powers in this light, as I see the position it would be antithetical to principles of fairness and natural justice to admit evidence into Court, in respect of which confidentiality is claimed, if it is either irrelevant or insufficiently probative. These two principles are fundamental tenets upon which our present system of evidence is founded. The admission of irrelevant evidence or insufficiently probative evidence has the potential to erode those foundations. I am satisfied therefore that a principled decision requires proper access to the evidence which is the subject matter of proceedings in order for a proper decision to be made. [footnote citations omitted]

[3] The High Court decision anticipated the Tribunal would need to assess the confidential documents in the context of a closed hearing and if disclosure was to be ordered, redaction of confidential but irrelevant information would be appropriate.

### **Scope of discovery narrowed post-High Court judgment**

[4] It is to be recalled two positions were advertised by Alpine Energy. The first was “Engineering Officer – New Connections” and the second “Maintenance Engineer”. Mr Waters applied unsuccessfully for both positions. In an affidavit sworn on 17 March 2014 Mr SM Small, Compliance Training Manager, deposed that no appointment was in fact made to the Maintenance Engineer position. In the High Court Mr JN Carter swore an affidavit dated 20 May 2014 identifying himself as the successful candidate for the position of Engineering Officer – New Connections and expressed concern at the release to Mr Waters of his (Mr Carter’s) personal information in the form of his CV submitted in support of his application.

[5] Subsequent to publication of the High Court decision Mr Waters by email dated 20 December 2014 gave notice that the scope of discovery sought by him had been narrowed by the evidence given by Alpine Energy in the High Court proceedings. He now seeks, in effect, only the following information relating to Mr Carter:

1. The full name of the successful person, who I understand at this time with a degree of uncertainty, because of a seemingly mixup of Engineering Officer positions referred to within the Defendants supplied, “Jan Nicolas Carter – Affidavit, dated May 2014”, regarding privacy, to be in fact Jan Nicolas Carter. Otherwise this Affidavit is of no value to this coming hearing.
2. The successful applicant’s age at the time of his application.
3. A full copy of the successful applicant’s application to the Defendant for the Engineering Officers position.
4. A copy of any other relevant correspondence or details to and from the successful Applicant, from 1 December 2011 to 30 May 2014 which led to his appointment.

I ask that it be noted that I have already sworn to the privacy of this information and that the only value of it to me is regarding the pending proceeding.

[6] Ms Keir concedes that Mr Carter’s age must be disclosed to Mr Waters. As to the balance of the information sought by Mr Waters, the evidence for Alpine Energy as set

out in a further affidavit by Mr Small sworn on 17 February 2015 is that Alpine Energy holds only the following documents:

<b>Author</b>	<b>Description</b>	<b>Date</b>
J N Carter	Curriculum Vitae	Undated 2011
J N Carter	Expression of Interest	9 March 2011
Alpine Energy	Letter of Offer	16 April 2012
J N Carter	Letter to Alpine Energy + handwritten notes	23 April 2012

[7] As to the second document (Expression of Interest) it is conceded by Alpine Energy that as this document was exhibited to the affidavit filed by Mr Carter in the High Court proceedings, a claim of confidentiality can no longer be advanced.

[8] In the result, when the hearing reconvened before the Tribunal at Timaru on 20 February 2015 only the three remaining documents identified by Mr Small were in issue.

### **Procedure followed at the hearing**

[9] The three documents for which confidentiality is claimed by Alpine Energy were presented for inspection by the Tribunal in a closed bundle of documents to which Mr Waters did not have access. In open hearing Ms Keir advanced written submissions in support of the confidentiality claim. However, when it became necessary for her to address the specific content of the closed documents Mr Waters was excluded from the hearing, the Tribunal receiving the closed submissions in a closed hearing. Thereafter Mr Waters was invited to return to the hearing and in the context of the resumed open hearing presented his submissions in opposition to the confidentiality claim. Contrary to the suggestion made by Gendall J at [33] counsel assisting was not appointed as the Tribunal has no power to appoint such counsel. See *Director of Human Rights Proceedings v Sensible Sentencing Group Trust (Application by Victims to be Heard)* [2013] NZHRRT 26 (19 August 2013) at [33] to [37], a decision apparently not cited in argument before Gendall J.

### **Confidentiality v Discovery – discussion**

[10] There is a substantial degree of difficulty determining relevance ahead of trial, particularly when the parties have not yet filed their statements of evidence. Nevertheless, the written submissions presented by Mr Waters at the hearing helpfully articulated the grounds of his discrimination claim as presently formulated. We are required to determine only whether the withheld documents are relevant to those issues and whether they are sufficiently probative to overcome the claimed confidentiality.

[11] In this context the most relevant contention advanced by Mr Waters is that Alpine Energy lowered the requirements of the advertised Engineering Officer position to a lesser “entry level” so that Mr Waters’ application could be disregarded. That is, by reducing the level of the position it facilitated the appointment of a younger person who would learn “on the job” and the rejection of any applicant (such as Mr Waters) who was already qualified. The written submissions filed by Mr Waters expressed the point in the following terms:

6. That the reducing the level of an advertised position to an “Entry Level” one, in order to appoint a younger person to it, and to exclude qualified applicants such as myself from it, is in fact derived age discrimination.

7. That the successful applicant did not have the appropriate qualifications and experience to directly undertake the advertised position's intermediate level Engineering Officer Duties.
8. That the successful applicant did, only after his appointment to the position, start progress towards gaining the Defendants desired qualifications, knowledge and skills to enable him to carry out the full range of duties of the actual advertised position.
9. That I was the best qualified and experienced applicant the Defendant received for the actual advertised position, who could directly and professionally carry out the duties of the position.
10. That a lawful reasonable employer seeking to fill the actual advertised position, would have offered me the position.

[12] Mr Waters submits the information sought by him is relevant to the stated issues, that is whether discrimination occurred.

[13] With this submission in mind we address now the three documents in question.

### **The CV**

[14] The contention is that Mr Carter's CV is directly relevant to the question whether he (Mr Carter) already had the required qualifications and experience or whether he had yet to gain those qualifications and accumulate that experience.

[15] Having inspected Mr Carter's two page CV we are of the clear view that it is indeed highly relevant to the central issue raised by Mr Waters. It is therefore a document which is required to be discovered under standard discovery as defined in High Court Rules, r 8.7 which the Tribunal applies in proceedings before it. While the parties have not yet filed their evidence we believe it is clear that without access to the CV Mr Waters will be severely disadvantaged in presenting his case as earlier articulated. Upholding the claim to confidentiality will, in effect, shield Alpine Energy from the claim to discrimination. Because the right to be free from discrimination is, as recognised by Gendall J at [27] of his judgment, a most important civil right, we would be most reluctant to uphold the confidentiality claim unless there were real and substantial grounds for doing so.

[16] We turn then to the evidence said to establish the confidentiality interest in the CV. In this regard Mr Carter says in his High Court affidavit that he is a private person by nature and gave the information to Alpine Energy on the clear understanding it was private and confidential. He says his personal information is none of Mr Waters' business.

[17] That may be so, but as s 69 of the Evidence Act 2006 makes clear, confidentiality can be overridden in the public interest:

#### **69 Overriding discretion as to confidential information**

- (1) A *direction under this section* is a direction that any 1 or more of the following not be disclosed in a proceeding:
  - (a) a confidential communication;
  - (b) any confidential information;
  - (c) any information that would or might reveal a confidential source of information.
- (2) A Judge may give a direction under this section if the Judge considers that the public interest in the disclosure in the proceeding of the communication or information is outweighed by the public interest in—
  - (a) preventing harm to a person by whom, about whom, or on whose behalf the confidential information was obtained, recorded, or prepared or to whom it was communicated; or
  - (b) preventing harm to—

- (i) the particular relationship in the course of which the confidential communication or confidential information was made, obtained, recorded, or prepared; or
  - (ii) relationships that are of the same kind as, or of a kind similar to, the relationship referred to in subparagraph (i); or
- (c) maintaining activities that contribute to or rely on the free flow of information.
- (3) When considering whether to give a direction under this section, the Judge must have regard to—
- (a) the likely extent of harm that may result from the disclosure of the communication or information; and
  - (b) the nature of the communication or information and its likely importance in the proceeding; and
  - (c) the nature of the proceeding; and
  - (d) the availability or possible availability of other means of obtaining evidence of the communication or information; and
  - (e) the availability of means of preventing or restricting public disclosure of the evidence if the evidence is given; and
  - (f) the sensitivity of the evidence, having regard to—
    - (i) the time that has elapsed since the communication was made or the information was compiled or prepared; and
    - (ii) the extent to which the information has already been disclosed to other persons; and
  - (g) society's interest in protecting the privacy of victims of offences and, in particular, victims of sexual offences.
- (4) The Judge may, in addition to the matters stated in subsection (3), have regard to any other matters that the Judge considers relevant.
- (5) A Judge may give a direction under this section that a communication or information not be disclosed whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged.

**[18]** Addressing the statutory considerations we find there is no evidence of any “harm” to Mr Carter other than his discomfort at the prospect of Mr Waters gaining access to the two page CV. In his affidavit Mr Carter argues that even though the CV (and related documents) might be redacted and even though Mr Waters has given a written undertaking to the Tribunal that he will respect the confidentiality of the documents and will not disclose them to any third party except with the leave of the Chairperson of the Tribunal and will not make further disclosure of the documents, he (Mr Carter) objects to the disclosure of the information and feels “very uncomfortable”.

**[19]** In our view such discomfort seems, in the circumstances, somewhat exaggerated. Above all, however, such discomfort is not evidence of harm in terms of s 69 of the Evidence Act. On the other hand, the content of the CV will be of central importance to Mr Waters’ case and there is no other way for him to obtain the evidence. The right to be free from discrimination is a right of first importance. The public interest in the disclosure of the CV is therefore high. The “harm” to Mr Carter is minimal, if not almost absent. His “discomfort” will be sufficiently addressed by the redaction of irrelevant information and by the fact that Mr Waters has given a confidentiality undertaking in the following terms:

I, Kevin Allan Waters, hereby expressly acknowledge that the documents received by me from Alpine Energy and Farrow Jamieson in the course of my proceedings before the Human Rights Review Tribunal in HRRT011/2013 may be used for the purpose of those proceedings only and except for the purposes for those proceedings, I will not make them available to any other person without leave of the Chairperson of the Tribunal (unless the document has been read out in open court).

I undertake to maintain the confidence of the documents, to store them securely and to return or destroy copies after the final determination of these proceedings.

**[20]** In summary, while society has an interest in protecting individuals against unjustifiable intrusion into their privacy, that interest can be outweighed by competing interests. In the present case, for the reasons given, the countervailing public interest in

combating discrimination effectively requires disclosure. The evidence is highly probative while the confidentiality interest is of a low order and can be adequately addressed by the making of redactions and by the undertaking given by Mr Waters.

[21] The information to be redacted from the CV is as follows:

[21.1] Mr Carter's address, telephone number and email address.

[21.2] Under the heading "Personal" the second paragraph is to be redacted so that only the following words remain:

I emigrated to New Zealand from the UK in 2008 and hold full permanent residency status.

[21.3] The third paragraph beginning "I enjoy ..." is to be redacted in its entirety.

[21.4] Under the heading "References", five documents were said to be attached. Three were from customers and two from employers. In our view the identity of the customers is not relevant to these proceedings and their names are to be redacted. The balance of the information is to remain. It is necessary to add we have not been given the references said to be attached to the CV. Ms Keir advised the documents can no longer be found. We therefore express no opinion on whether the references should be disclosed to Mr Waters.

#### **The letter of offer dated 16 April 2012 from Alpine Energy to Mr Carter**

[22] By letter dated 16 April 2012 Alpine Energy wrote to Mr Carter offering the position of Engineering Officer – New Connections. Apart from a paragraph stipulating the remuneration offered for the position, the letter contains no confidential information.

[23] In open hearing we asked Mr Waters whether the remuneration offered to Mr Carter was relevant to the way in which Mr Waters intends advancing his case. Specifically we enquired whether he alleged Alpine Energy had offered the position to a "younger and cheaper" applicant. Mr Waters responded that remuneration is not part of his case. He emphasised that at the hearing he will focus on the question of age and what he has described as the reconceiving of the advertised position as a lesser "entry level" opening.

[24] In these circumstances we are of the view the letter dated 16 April 2012 is relevant as it confirms that the position was offered to Mr Carter but the remuneration offered is not relevant. The third sentence in which the remuneration is stipulated is to be redacted along with the address to which the letter was sent. Otherwise the letter is to be released to Mr Waters in its entirety.

#### **Letter of acceptance dated 23 April 2012 from Mr Carter to Alpine Energy**

[25] In this letter Mr Carter accepted the offer made by Alpine Energy but requested that consideration be given to various personal matters affecting the terms of employment. As those matters are not relevant to the proceedings they are to remain confidential and are to be redacted.

[26] However, in paras 5 and 6 Mr Carter refers to his intention to continue to study for a project management diploma and to study towards an electrical engineering diploma (NZDE). He asks for the support of Alpine Energy. A handwritten notation next to both paragraphs contains a tick followed by the word "Done". As these two paragraphs (and the handwritten annotations) are relevant to the contention that Mr Carter was

underqualified for the advertised position, these two paragraphs are to be disclosed to Mr Waters. As in the case of the CV, we can see no harm to Mr Carter in the disclosure of this information, particularly as much of it can be discerned from the CV itself. Specifically, the CV discloses that Mr Carter does not have a NZDE qualification and is studying for a management diploma.

[27] In the result, in relation to Mr Carter's letter dated 23 April 2012 the entire letter is to be redacted apart from:

[27.1] The addressee "Stephen Small, Alpine Energy Ltd etc" through to the fourth line which ends "... on a few points".

[27.2] Paragraphs numbered 5 and 6 together with the associated handwritten margin comments.

[27.3] The sign off "Yours sincerely, Nick Carter".

[28] We turn finally to the further information requested by Mr Waters.

### **The further information requested by Mr Waters**

[29] By email dated 19 February 2015 Mr Waters sought the following information:

Did the new appointed Engineering Officer person start a "Diploma in NZ Engineering" course or similar after or before gaining the 2012 Engineering Officer position?

If so what date did he start?

What was the title of the course?

And at January 2012 what percentage of the course had successful completed?

[30] This request was addressed briefly during the resumed hearing. Mr Waters explained the requested information is relevant to his contention that the appointee was an "entry level person". It was agreed that because consideration of Mr Waters' request could be affected by the Tribunal's ruling in relation to the three documents for which confidentiality is claimed, the request is to be revisited once the Tribunal's decision is released.

[31] Given the rulings we have made in relation to the three documents, Mr Waters would appear at first sight to have an arguable case for the discovery to him of the requested information.

[32] Although the matter has not yet been the subject of argument it would furthermore seem that, as conceded by Ms Keir, Mr Waters will be entitled to put these questions to the witnesses called by Alpine Energy at the hearing. No doubt because Alpine Energy now has the written submissions of Mr Waters tendered at the hearing on 20 February 2015 particularising how he intends presenting his case and because Alpine Energy also now has the list of intended questions, it would be unsurprising were the information not to be included in the written statements of evidence to be filed by Alpine Energy. In these circumstances little point would appear to be served by now withholding the information from Mr Waters. Such withholding will secure little by way of forensic advantage and disclosure may indeed help narrow the issues and the length of the hearing.

[33] If a formal ruling is sought from the Tribunal it will be necessary for there to be a hearing (on the papers) and our tentative and informal views will play no part in the determination of the issues.

### **FORMAL ORDERS**

[34] For the reasons given our formal orders are:

[34.1] The CV of Jan Nicholas Carter is to be disclosed to Mr Waters once it has been redacted to comply with the terms of this decision.

[34.2] The letter dated 16 April 2012 from Alpine Energy to Mr Carter is to be disclosed to Mr Waters once it has been redacted to comply with the terms of this decision.

[34.3] The letter dated 23 April 2012 from Mr Carter to Alpine Energy is to be disclosed to Mr Waters once it has been redacted to comply with the terms of this decision.

[34.4] Should either party require clarification about any part of this decision and in particular which parts of the three documents are to be redacted, application can be made to the Chairperson who will provide the clarification sought.

[34.5] The redacted documents are to be provided to Mr Waters within five working days of the date on which this decision is delivered.

### **Future conduct of case**

[35] The timetable directions given by the Chairperson on 19 December 2014 are in need of enlargement given the interruption caused by the hearing on 20 February 2015 and the need for the terms of this decision to be implemented. It is also to be noted that on the application of Ms Keir the substantive hearing of these proceedings is to be moved from August 2015 to September 2015. They will now commence on Monday 14 September 2015. Four days are to be set aside.

[36] Consequently new timetable directions follow.

### **Case management directions**

[37] The following directions are made:

[37.1] Written statements of the evidence to be called at the hearing by Mr Waters are to be filed and served by 5pm on Thursday 2 April 2015. By the same date Mr Waters is to provide Ms Keir with a list of documents Mr Waters wishes to have included in the common bundle of documents.

[37.2] Written statements of the evidence to be called at the hearing by Alpine Energy are to be filed and served by 5pm on Friday 24 April 2015. By the same date Ms Keir is to provide Mr Waters with a list of documents Alpine Energy wishes to have included in the common bundle of documents.

[37.3] Should Mr Waters wish to file any statements in reply, such statements are to be filed and served by 5pm on Friday 15 May 2015.



**[37.4]** In consultation with Mr Waters, Ms Keir is to prepare the common bundle of documents and that bundle is to be filed and served by 5pm on Friday 5 June 2015.

**[37.5]** The proceedings are to be heard at Timaru on 14, 15, 16 and 17 September 2015 at the Timaru District Court.

**[37.6]** If for any unforeseen reason these case management directions need to be revisited application can be made to the Chairperson. Leave is reserved to both parties to make further application should the need arise.

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**Mr RPG Haines QC**  
**Chairperson**

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**Ms DL Hart**  
**Member**

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**Hon KL Shirley**  
**Member**