

Reference No. HRRT 011/2013

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN KEVIN ALLAN WATERS

PLAINTIFF

AND 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

Mr SG Graham for defendant

DATE OF HEARING: 10 February 2014

DATE OF DECISION: 20 February 2014

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**DECISION OF TRIBUNAL ORDERING FURTHER AND BETTER  
DISCOVERY BY DEFENDANT**

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**Introduction**

[1] In 2012, when 62 years of age, Mr Waters applied for two positions advertised by Alpine Energy Ltd (Alpine Energy). Both applications were unsuccessful and Mr Waters alleges that, in terms of s 22 of the Human Rights Act 1993 (HR Act), he was discriminated against by reason of his age.

[2] Following a teleconference convened by the Chairperson on 12 August 2013 the parties were required, as a preliminary step in the proceedings, to give informal discovery of the documents in their possession or control and on which they intended to

rely or which adversely affected their own case, or which adversely affected the opposing party's case or which supported the opposing party's case.

[3] Following initial disclosure by the parties Mr Waters made application for further and better discovery and for a direction under s 69 of the Evidence Act 2006 requiring disclosure of communications or information in respect of which Alpine Energy has claimed confidentiality.

[4] A brief overview of the case as presently pleaded will aid an understanding of the issues to be determined.

### **Background circumstances**

[5] As these proceedings are still at the pre-trial preparation stage no evidence has been filed. The narrative of "facts" which follows has been taken from the statement of reply filed by Alpine Energy. We have adopted this narrative largely because the present application falls to be determined according to the circumstances as pleaded by Alpine Energy.

[6] Mr Waters was an employee of Alpine Energy from 1975 to 2008 when he resigned. On 9 January 2012 Mr Waters applied for the advertised position of "Engineering Officer – New Connections" with Alpine Energy and later that month, on 30 January 2012 he applied for a further advertised position of "Maintenance Engineer" with Alpine Energy.

[7] Alpine Energy invited Mr Waters to attend an interview for the second position (Maintenance Engineer) on 11 April 2012. At the same time he was advised that he would not be interviewed for the first role (Engineering Officer) because initial screening indicated that applications had been made by candidates better suited. Indeed, on or about 4 May 2012 Alpine Energy appointed to the position of Engineering Officer a person who, in its opinion, was best suited to the role by reason of appropriate qualification, experience and organisational fit.

[8] Alpine Energy did not, however, receive the level of interest it had hoped for in respect of the second position (Maintenance Engineer), attracting candidates with fewer qualifications than expected. It then engaged a recruitment agency, Farrow Jamieson, to assist in finding the ideal candidate.

[9] Alpine Energy contacted Mr Waters to explain that the process had changed and to seek his authority to hand over to Farrow Jamieson notes made by Alpine Energy regarding the earlier part of the recruitment process. The application by Mr Waters was then considered by Farrow Jamieson, together with other applications arising out of an extended advertising process. Farrow Jamieson made candidate recommendations to Alpine Energy. Those recommendations did not include Mr Waters.

[10] Alpine Energy interviewed the top-ranked candidates for the Maintenance Engineer role recommended by Farrow Jamieson. It then made an appointment of the person it considered best suited to the role by reason of qualification, experience and organisational fit. That appointment was made on or about 12 April 2013.

[11] Alpine Energy denies the allegations made by Mr Waters that age or employment status was relevant to its consideration of the application by Mr Waters for the first role of Engineering Officer.

[12] Alpine Energy further pleads that in relation to the Maintenance Engineer role (the matter handed over to Farrow Jamieson) it was not responsible for the shortlist. It

denies that it gave directions to Farrow Jamieson regarding the application by Mr Waters or that age or employment status were considerations relevant to its treatment of Mr Waters' application.

### Discovery

[13] As mentioned, at a directions teleconference convened by the Chairperson on 12 August 2013 standard discovery was ordered. Such discovery was to be on an informal basis in the first instance. The terms of the discovery order are set out in the *Minute* dated 12 August 2013 at paras [31.1] to [31.3] and need not be repeated here.

[14] Both parties complied with the discovery order but Mr Waters disputed the adequacy of the discovery given by Alpine Energy. The Chairperson therefore convened a further teleconference on 22 October 2013. In a further *Minute* issued on that date he recorded that Alpine Energy would be filing an amended list of documents by 8 November 2013. Evidence and submissions in opposition to the application made by Mr Waters were required to be filed and served by 29 November 2013.

### The amended list of documents filed by Alpine Energy

[15] The amended list of documents filed by Alpine Energy on 8 November 2013 identified the following documents as either having been released with redactions or not released at all:

	Date	Description	Comment	Reasons	Pages
10.	June 2010	Alpine Energy summary of job applications	Released with redactions	Confidential information under section 69(1)(b) of the Evidence Act 2006 – contains personal details (names, addresses, contact numbers)	1
17.	Undated 2012	Alpine Energy summary of job applications	Released with redactions	Confidential information under section 69(1)(b) of the Evidence Act 2006 – contains personal details (names, addresses, contact numbers)	3
21.	27 July 2012	Farrow Jamieson summary of referee checking	Withheld	Confidential information under section 69(1)(a) and (b) of the Evidence Act 2006 – communication was made in expectation that it would be confidential and contains evaluative comments	6
26.	Various	Communication between Alpine Energy & Young Hunter, including emails and notes of telephone conversations	Withheld	Legal Professional Privilege	

[16] In addition the following documents were identified by Alpine Energy as “no longer in its possession or control which may be relevant to this proceeding”:

Date	Description	Comment
Various 1	Application and CV's of applicants for Maintenance Engineer and Engineering Officer.	Destroyed 3 months following appointment.

Various 2	Notes of interviews with applicants for Maintenance Engineer and Engineering Officer.	Destroyed 3 months following appointment.
Various 3	Documents gathered by Farrow Jamieson in Maintenance Engineer recruitment.	Never provided to Alpine Energy not in its possession or control.

### **Summary of the evidence relied on by Alpine Energy to oppose further discovery**

**[17]** In an affidavit sworn on 28 November 2013 Mr SM Small, Compliance and Training Manager, deposed (inter alia) that:

**[17.1]** Documents numbered 10 and 17 of Alpine Energy’s amended list of documents relate to a summary list of applicants who applied for positions either as a Maintenance Engineer or Engineering Officer. The summary list contains the full name, email and contact details, home address, home phone number, work phone number and cellphone number of each applicant.

**[17.2]** The personal details of each applicant are confidential. On that basis the documents have been released with redactions to preserve their anonymity.

**[17.3]** Document number 21 contains details of a referee check conducted by Farrow Jamieson. The front page of the document records that the information is highly confidential and contains evaluative comments made about an individual by a referee nominated by the candidate. It further says that it has been prepared and made available to Alpine Energy on the clear understanding that its confidentiality, including non-disclosure to candidates, will be respected now and in the future.

**[17.4]** As to the documents no longer in the control of Alpine Energy (Various 1, 2 and 3), these documents relate to applications and CVs of applicants for the Maintenance Engineer and Engineering Officer positions, notes of interviews with applicants for Maintenance Engineer and Engineering Officer positions and documents gathered by Farrow Jamieson in the Maintenance Engineer recruitment exercise. These documents were either destroyed by Alpine Energy three months following the appointment of the successful candidate or were never provided to Alpine Energy by Farrow Jamieson.

**[18]** In a separate affidavit sworn on 30 November 2013 Mr GW McNabb deposed that at one point of his career he was employed by Alpine Energy and worked with Mr Waters. On 27 July 2012 he was contacted by a recruitment consultant working for Farrow Jamieson. She said she was conducting a reference check for Mr Waters. Mr McNabb was happy to provide a reference for Mr Waters and answered all of the questions put to him by the recruitment consultant. Mr McNabb assumed that what he said would be held confidential solely for the purpose of assisting Alpine Energy with their recruitment process. He would not have provided the information had there been a likelihood that parties other than Farrow Jamieson and Alpine Energy would review it.

### **The case for Alpine Energy**

**[19]** The position taken by Alpine Energy is that:

**[19.1]** The withholdings which apply to documents numbered 10, 17 and 21 are justified under s 69(1)(a) and (b) of the Evidence Act. The employment applications submitted by persons other than Mr Waters (and to which Mr Waters

seeks access) were provided in the expectation of confidence, as was the reference provided by Mr McNabb.

**[19.2]** The documents in the Various 1, Various 2 and Various 3 categories are not within the possession or control of Alpine Energy. The first two categories were destroyed by it and the last category (the documents gathered by Farrow Jamieson) have never been provided to Alpine Energy. It is submitted Farrow Jamieson were never, in law, “agents” of Alpine Energy for the purpose of exposing Alpine Energy to liability under the HR Act for unlawful discrimination.

**[19.3]** Mr Waters is on a fishing expedition and the documents sought by him are at best only of indirect relevance to his claim that Alpine Energy treated him differently to the other applicants by reason of his age.

### **The case for Mr Waters**

**[20]** Expressed generally, the case for Mr Waters is that full access to all documents properly discoverable is required by him as they might assist in establishing, albeit indirectly, that the “record” shows that persons of younger age, with lesser skills, lesser qualifications, lesser direct experience and lesser time engaged in similar work or in similar positions were considered more favourably and were ultimately successful in being appointed to the two advertised positions. He adds that it is possible that in relation to one position the disappointing response to the advertisements led to the position being re-defined and re-advertised. He has sought disclosure in relation to that circumstance, if indeed he is correct in asserting that the position was re-advertised.

**[21]** As to the Farrow Jamieson documents, he submits that Alpine Energy do in fact have control as Farrow Jamieson was acting as agents for Alpine Energy when recruiting for the position of Maintenance Engineer.

**[22]** Mr Waters accepts that he does not require the personal names, addresses and contact details of the other applicants, particularly the successful applicants. He does, however, seek an order that for both successful applicants he be provided with their CV, experience, previous employment history and related details so that a comparison can be made with Mr Waters’ own CV, employment history and the like. He believes this is important information critical to the proceedings. If nobody was appointed to either position, then this information is also requested. He accepts that release of the information can be ordered on terms requiring that the information be kept confidential to the parties to these proceedings, thereby having no real effect upon the appointed applicants and the unsuccessful applicants.

**[23]** As to the specific categories of documents, Mr Waters has set out more detailed submissions in an email dated 20 September 2013 updated with further additions made on 12 December 2013. In his oral submissions Mr Waters more particularly submitted:

**[23.1]** As to document 17, while it was accepted that the successful applicant’s name and contact details could be redacted, Mr Waters should be provided with the person’s CV, employment history and the like together with the following information (if not already recorded in the document):

**[23.1.1]** Whether the successful applicant was interviewed.

**[23.1.2]** Whether referee checks were carried out.

These submissions apply to both positions namely Engineering Officer and Maintenance Engineer.

**[23.2]** As to document 21, the same information is sought. Mr Waters referred to his need to know whether a referee check took place and whether someone was in fact appointed to the Maintenance Engineer position between August 2012 to December 2012 or whether the position remained unfilled under that title.

**[23.3]** As to Various 1, Mr Waters says that while Alpine Energy may have destroyed the documents in question, he believes that in relation to each successful applicant the company would nevertheless have on record that applicant's CV, work experience and the like. So while the original documentation may have been destroyed, the information (or much of it) would have been transferred into Alpine Energy's human resources files. He submits it would be unusual were the company not to hold, for the successful applicant, that person's CV, employment history, list of qualifications and experience and other information relating to the applicant being retained either as an Engineering Officer or as a Maintenance Engineer. Mr Waters also seeks the Farrow Jamieson "candidate summary" for both positions. He knows that such document exists for each of the candidates (whether successful or unsuccessful) as during the discovery process he was provided with the candidate summary pertaining to him personally.

**[23.4]** As to Various 2, Mr Waters, while acknowledging the claim that the notes of interviews with applicants for the two positions were destroyed by Alpine Energy, submits that where any of the information contained in those documents was transferred into other Alpine Energy records or held in other forms, this information should be provided.

**[23.5]** As to Various 3, while it may be the case that Farrow Jamieson never provided Alpine Energy with the documents gathered by Farrow Jamieson in connection with the Maintenance Engineer recruitment, Mr Waters asks for those discoverable documents over which Alpine Energy has control. In the alternative, it is submitted that where Alpine Energy has stored or recorded the information elsewhere in its system, those documents should be provided.

**[24]** As a general point Mr Waters expressed concern that Alpine Energy destroyed discoverable documents. He points out that Alpine Energy was made aware as early as May 2012 both by Mr Waters and by the Human Rights Commission that Mr Waters was engaged in a complaint of age discrimination. As Alpine Energy had a duty to preserve all relevant documents (see by analogy High Court Rules, r 8.3) it would not be unreasonable for secondary sources of the destroyed information to be requested by Mr Waters.

**[25]** In his oral submissions Mr Waters identified several instances in which he would be happy with information as opposed to documents. We refer, of course, to the information he has sought by way of questions. In legal terms, this might more properly be described as discovery by way of interrogatories. It appears to us sensible that Alpine Energy provide the information requested by Mr Waters as this may well simplify the overall discovery process. For this reason our attempt (under the Formal Orders heading) to capture the questions posed by Mr Waters is not to be treated as exhaustive. We note Mr Graham stated that while he had no explicit instructions whether to oppose or consent, he accepted that in principle there would be little or no difficulty in providing the requested information. It includes:

[25.1] The dates on which the successful applicants applied for the positions.

[25.2] The dates on which the successful applicants were appointed to their positions.

[25.3] Whether there was a successful applicant for the Maintenance Engineer position or did Alpine Energy decide to withdraw the position altogether?

[25.4] Were the key duties (or a significant part) for the advertised Maintenance Engineer's position assigned to the new position of Electrical Engineer which was advertised in October or November 2012?

[25.5] A copy of the job description for the position of Electrical Engineer as at October-November 2012.

## DISCUSSION

### Discovery in proceedings before the Tribunal

[26] Under s 104(5) of the HR Act the Tribunal has power to regulate its procedure in such manner as the Tribunal thinks fit. By virtue of the Human Rights Review Tribunal Regulations 2002, Regulation 16(1) the Chairperson may give directions that are necessary or desirable for the proceedings to be heard, determined or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice:

#### 16 Conduct of proceedings: power to give directions, etc

- (1) Subject to decisions of the Tribunal, the Chairperson may give any directions and do any other things—
  - (a) that are necessary or desirable for the proceedings to be heard, determined, or otherwise dealt with, as fairly, efficiently, simply, and speedily as is consistent with justice; and
  - (b) that are not inconsistent with the Act or, as the case requires, the Privacy Act 1993 or the Health and Disability Commissioner Act 1994, or with these regulations.

[27] As noted by the Chairperson in the *Minute* issued on 12 August 2013 at paras [15] to [18], the basic structure of discovery before the Tribunal is (subject to all necessary modifications) that found in the High Court Rules, Part 8 (rr 8.1 to 8.33). To reduce cost and inconvenience, discovery is usually directed to be carried out on an informal basis in the first instance. More formal directions are required from time to time depending on the facts of the particular case.

### Relationship between the Human Rights Act and the Evidence Act

[28] While the facts of the present case do not call for an extended discussion of the relationship between the HR Act and the Evidence Act, it is relevant to note that by virtue of s 106 of the HR Act the Tribunal has a broad discretion to receive as evidence any statement, document, information, or matter that may, in its opinion, assist to deal effectively with the matter before it, whether or not it would be admissible in a court of law. Subject to this discretion the Evidence Act applies to the Tribunal "in the same manner as if the Tribunal were a court within the meaning of that Act:

#### 106 Evidence in proceedings before Tribunal

- (1) The Tribunal may—
  - (a) call for evidence and information from the parties or any other person;
  - (b) request or require the parties or any other person to attend the proceedings to give evidence;
  - (c) fully examine any witness:

- (d) receive as evidence any statement, document, information, or matter that may, in its opinion, assist to deal effectively with the matter before it, whether or not it would be admissible in a court of law.
- (2) The Tribunal may take evidence on oath, and for that purpose any member or officer of the Tribunal may administer an oath.
- (3) The Tribunal may permit a person appearing as a witness before it to give evidence by tendering a written statement and, if the Tribunal thinks fit, verifying it by oath.
- (4) Subject to subsections (1) to (3), the Evidence Act 2006 shall apply to the Tribunal in the same manner as if the Tribunal were a court within the meaning of that Act.

**[29]** In the case of inconsistency between the provisions of the Evidence Act and the HR Act, the provisions of the HR Act prevail. See the Evidence Act, s 5(1):

### **5 Application**

- (1) If there is an inconsistency between the provisions of this Act and any other enactment, the provisions of that other enactment prevail, unless this Act provides otherwise.

### **Confidentiality – jurisdiction to determine**

**[30]** By virtue of s 69 of the Evidence Act the Tribunal has jurisdiction to direct that a confidential communication or any confidential information not be disclosed:

#### **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.

**[31]** In the context of discovery, if a party challenges a claim to confidentiality, that party may apply to the Tribunal for an order setting aside or modifying the claim. See High Court Rules, r 8.25:

#### **8.25 Challenge to privilege or confidentiality claim**

- (1) If a party challenges a claim to privilege or confidentiality made in an affidavit of documents, the party may apply to the court for an order setting aside or modifying the claim.
- (2) In considering the application, a Judge may require the document under review to be produced to the Judge and may inspect it for the purpose of deciding the validity of the claim.
- (3) The Judge may—
  - (a) set aside the claim to privilege or confidentiality; or
  - (b) modify the claim to privilege or confidentiality; or
  - (c) dismiss the application; or
  - (d) make any other order with respect to the document under review that the Judge thinks just.

#### **Confidentiality – determination on the facts**

**[32]** It is understandable that a person who submits an application for employment would ordinarily have a reasonable expectation of confidentiality, as would a person providing a reference. However, the exercise of the discretion in s 69 of the Evidence Act is not dependent on the expectation of the person who has made the communication or provided the information. Nor is it dependent on the desire of the person in whom a confidence has been reposed or to whom confidential information has been given. The focus of s 69 is on public, not private interests. See generally Mahoney and others *The Evidence Act 2006: Act and Analysis* (2<sup>nd</sup> ed, Brookers, Wellington, 2010) at EV69.02.

**[33]** As pointed out by Hammond and Fogarty JJ in *R v X (CA553/2009)* [2009] NZCA 531, [2010] 2 NZLR 181 at [69], s 69(2) of the Evidence Act is constructed on the footing that **all** relevant information is disclosable in litigation (even if confidential) but it may be prevented from disclosure on the terms set out in s 69. Confidential information may be disclosed in court unless the judge gives a direction under s 69(2) having regard to the factors in s 69(3).

**[34]** It was further held by Hammond and Fogarty JJ at [81] that an applicant under s 69 should lay an evidential foundation to support any argument that confidential relationships would be harmed by disclosure.

**[35]** Turning then to the weighing or proportionality exercise mandated by s 69(2), we begin by acknowledging public interest in preventing discriminatory conduct being hidden behind a cloak of “confidentiality”.

**[36]** The right to be free from discrimination on the grounds set out in s 21 of the HR Act is enshrined in s 19 of the New Zealand Bill of Rights Act 1990. It is a right of first importance. The international analogue is Article 26 of the International Covenant on Civil and Political Rights, 1966. Commenting on this Article, Manfred Nowak in *UN Covenant on Civil and Political Rights: CCPR Commentary* (2<sup>nd</sup> rev ed, NP Engel, Kehl, 2005) at p 598 observes that along with liberty, equality is the most important principle imbuing and inspiring the concept of human rights. He further points out at 598 that:

Experience has shown that specific prohibitions of privilege or discrimination as the negative side of the principle of equality flow from the political need to counteract particular, deep-rooted inequalities in law and practice ...

When certain groups of the population have traditionally been subjected to especially grievous detrimental treatment at the hands of State organs or other groups of the population, then mere statutory prohibitions of discrimination are often insufficient to guarantee true equality. In these cases, States must resort to positive measures of *protection against discrimination*, such as temporary privileges for traditionally disadvantaged groups, compulsory integration measures for artificially segregated groups or the granting of statutory protection against discrimination by private owners or providers of public transportation facilities, schools, restaurants, jobs, apartments or similar institutions and facilities of importance for the general public. [emphasis in original].

**[37]** In New Zealand statutory protection against discrimination in the employment field is provided by Part 2 of the HR Act. These provisions must be applied purposely. Recognition must be given to the fact that discrimination can be easily disguised and difficult to prove. A claim to confidentiality must not be allowed to shield alleged discriminatory acts from investigation.

**[38]** Bearing these factors in mind the public interest in the full and rigorous investigation of alleged unlawful discrimination must be given significant weight in the weighing or proportionality assessment mandated by s 69(2) of the Evidence Act. In addition, proper recognition must be given to the principle that **all** relevant information is disclosable and a claim to confidentiality should not be lightly upheld.

**[39]** We have also taken into particular account the following additional factors:

**[39.1]** The other interests to be weighed or assessed must be “public” interests. Private interests are excluded from the assessment exercise under s 69(2) of the Evidence Act except to the extent that those private interests can be elevated into a public interest, possibly via s 69(3).

**[39.2]** There was no evidence by Alpine Energy that a confidentiality direction under s 69 was necessary to prevent harm to a person or to a particular relationship, or relationships of similar kind, or to maintain activities that rely on the free flow of information. The evidence given by Mr Small and by Mr McNabb came nowhere near to establishing that those submitting applications for employment or those providing references will be inhibited in any material way by knowing that the information provided will be admissible in proceedings before the Tribunal under the HR Act. To the contrary, they may be assumed to believe that if, during the recruiting and interview process, there is discrimination on one or more of the prohibited grounds of discrimination, it would be both desirable and necessary that such discrimination be exposed.

**[39.3]** At common law a party to proceedings who gains access to documents through the discovery process gives an implied undertaking to use those documents only for the purpose of those proceedings. This principle is now incorporated into the discovery process mandated by Part 8 of the High Court Rules. See particularly r 8.30(4):

- (4) A party who obtains a document by way of inspection or who makes a copy of a document under this rule—
  - (a) may use that document or copy only for the purposes of the proceeding; and
  - (b) except for the purposes of the proceeding, must not make it available to any other person (unless it has been read out in open court).

We are of the view that this sufficiently safeguards the “privacy” interests of those who, like Mr Waters, submitted applications for one or other or both of the positions in question. To avoid any doubt that Mr Waters is aware of his obligations (they were explained to him in the course of the hearing), it will be seen that the formal orders which follow at the end of this decision require him to file with the Tribunal a written undertaking to the Tribunal that he will respect the confidentiality of the documents provided by Alpine Energy in the discovery process and will not disclose those documents to any third party without leave of the Chairperson. The form of undertaking is attached to this decision as a Schedule.

[40] In these circumstances we decline to give a confidentiality direction under s 69 of the Evidence Act.

### **Confidentiality – disclosure of information relating to the successful applicant only**

[41] In his submissions Mr Waters, responsibly endeavouring to narrow the ambit of the further discovery sought by him, acknowledged that while he sought discovery in its fullest terms, he would be willing to accept only the employment details of the successful applicants.

[42] As to this, once a ruling is made (as here) that no confidentiality direction is warranted on the facts, the additional discovery sought by Mr Waters cannot be so narrowed. All the job applications, whether of successful or unsuccessful applicants, must be disclosed by Alpine Energy. All of this material is relevant to the issue whether there has been discrimination as alleged. The pool of evidence from which both Mr Waters and Alpine Energy can draw to support their respective cases would otherwise be artificially small. This has the potential of working unfairness and cannot be justified.

[43] It follows that because we decline to make a confidentiality direction under s 69 of the Evidence Act, it will be necessary for Alpine Energy to give full discovery of all relevant documents apart from those for which legal professional privilege has been claimed.

[44] We do, however, accept (as did Mr Waters) that addresses and contact details may be redacted. But we see no reason for names to be redacted as well. Without the names of the applicants the information may be difficult to use or manage.

### **Destroyed documents – other sources**

[45] The general rule is that as soon as a proceeding is reasonably contemplated, parties or prospective parties must take all reasonable steps to preserve discoverable documents, including preserving electronic documents in readily retrievable form, even if such documents would otherwise be destroyed or deleted in the ordinary course of business. This obligation is now set out in the High Court Rules, r 8.3.

[46] Mr Waters says that he gave to Alpine Energy prompt notice of his claim of discrimination on the grounds of his age. We did not, however, at the hearing on 10 February 2014 have opportunity to explore this issue in any depth. The point is mentioned, however, to explain why we have allowed Mr Waters some latitude in seeking from Alpine Energy other documents which may record the information submitted with the job applications. We have also encouraged Alpine Energy to be forthcoming in answering the “interrogatory” style questions posed by Mr Waters.

[47] We are of the view that the provision of this information will go some distance towards overcoming the potential disadvantage to the parties caused by the premature destruction of the discoverable documents. We therefore direct that Alpine Energy give discovery of the CV, employment history, listed qualifications, experience and any other information relating to the successful applicants appointed to the Engineering Officer and Maintenance Engineer positions respectively. The contact details of the appointees may be redacted but we see no reason for their names to be withheld.

[48] We turn now to the documents held by the employment agency, Farrow Jamieson.

### **Documents in the control of Alpine Energy – the Farrow Jamieson file**

[49] As explained by Mr Graham in his written submissions, the role of Farrow Jamieson was to assist with the recruitment of a Maintenance Engineer. Alpine Energy consented to Farrow Jamieson acting on its behalf in assisting with shortlisting a number of candidates for the position. Farrow Jamieson considered a number of applications and made recommendations to Alpine Energy. Alpine Energy then interviewed the top ranked candidates recommended by Farrow Jamieson. The final decision, in terms of the successful candidate, rested with Alpine Energy. For completeness it is mentioned that in his affidavit sworn on 30 November 2013 Mr McNabb described being contacted by someone from Farrow Jamieson who “introduced herself as a recruitment consultant working on behalf of Alpine Energy who indicated she was conducting a reference check for Mr Waters”.

[50] Although the amended list of documents asserts that the Farrow Jamieson file relating to the Maintenance Engineer position is not in the possession or control of Alpine Energy, at the hearing Mr Graham responsibly accepted that the documents were indeed within the control of Alpine Energy. Given the information placed before the Tribunal this concession was inevitable.

[51] It follows that all documents held by Farrow Jamieson which come within Alpine Energy’s disclosure obligation must be discovered. The documents in question are plainly of potential relevance to the question whether there was age discrimination in the appointment process as alleged by Mr Waters.

[52] The determination that the documents held by Farrow Jamieson are in the “control” of Alpine Energy for the purposes of discovery does not, of course, dispose of the submission by Alpine Energy that Farrow Jamieson was not its “agent” for the purpose of fixing liability under s 68 of the HR Act. This is a question for determination in the context of the substantive hearing.

### **FORMAL ORDERS**

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

[53.1] The application by Alpine Energy for a confidentiality direction under s 69 of the Evidence Act 2006 is dismissed. It follows that all documents withheld by Alpine Energy on the grounds of confidentiality must be discovered.

[53.2] All relevant documents held by Farrow Jamieson must be discovered by Alpine Energy.

[53.3] Alpine Energy is 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.

**[53.4]** Alpine Energy is to provide Mr Waters with answers to the following questions:

**[53.4.1]** The dates on which the successful applicants applied for the positions.

**[53.4.2]** The dates on which the successful applicants were appointed to their positions.

**[53.4.3]** Whether the successful applicants were interviewed.

**[53.4.4]** Whether referee checks were carried out for the successful applicants.

**[53.4.5]** Whether someone was in fact appointed to the Maintenance Engineer position between August 2012 to December 2012 or whether the position remained unfilled under the title.

**[53.4.6]** Whether there was a successful applicant for the Maintenance Engineer position or did Alpine Energy decide to withdraw the position altogether?

**[53.4.7]** Were the key duties (or a significant part) for the advertised Maintenance Engineer's position assigned to the new position of Electrical Engineer which was advertised in October or November 2012?

**[53.4.8]** A copy of the job description for the position of Electrical Engineer as at October-November 2012.

**[53.5]** Mr Waters is to give a written undertaking to the Tribunal that he will respect the confidentiality of the documents provided by Alpine Energy in the discovery process, 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 those documents. The form of undertaking is attached to this decision as a Schedule. On execution it is to be lodged with the Secretary of the Tribunal.

**[53.6]** Should either party require clarification whether any particular document or item of information is within these formal orders, application can be made to the Chairperson who will provide the clarification sought.

### **FUTURE CONDUCT OF CASE**

**[54]** In the closing stages of the hearing the Tribunal discussed with Mr Waters and Mr Graham a timetable for the completion of the interlocutory stages of these proceedings, including the filing of briefs of evidence. In this context Mr Graham helpfully volunteered to undertake the preparation of the common bundle of documents. As for a time estimate Mr Waters thought that he might be calling two or three witnesses. Alpine Energy will similarly call approximately three witnesses. Mr Graham estimated that perhaps a two day hearing will be required. As to this, the Tribunal wishes to ensure that once the hearing commences it continues without interruption to its conclusion. A part heard hearing is unsatisfactory for a number of obvious reasons and it is best that a generous allocation of time be given. In these circumstances we direct that the case be

set down for four days. If the hearing concludes sooner than this, well and good but the parties will be spared the inconvenience and inherent unfairness of an adjournment.

**[55]** To ensure that these proceedings are progressed to a hearing without delay, the following directions are made:

**[55.1]** The further discovery by Alpine Energy is to be given on or before 5pm on Friday 21 March 2014. This is to be done not only by the filing of an amended list of documents but also by providing Mr Waters with copies of the discoverable documents.

**[55.2]** Mr Waters is to sign and file the undertaking on or before Friday 21 March 2014. If for any reason he is unable to comply (for example, if he is absent on holiday) he may apply to the Chairperson for an extension of time.

**[55.3]** Written statements of the evidence to be called at the hearing by Mr Waters are to be filed and served by 5pm on Friday 2 May 2014. By the same date Mr Waters is to provide Mr Graham with a list of documents he wishes to have included in the common bundle of documents.

**[55.4]** Written statements of the evidence to be called at the hearing by Alpine Energy are to be filed and served by 5pm on Friday 23 May 2014. By the same date Mr Graham is to provide Mr Waters with a list of documents Alpine Energy wishes to have included in the common bundle of documents.

**[55.5]** Any written statements of evidence in reply by Mr Waters are to be filed and served by 5pm on Friday 6 June 2014.

**[55.6]** In consultation with Mr Waters, Mr Graham is to prepare the common bundle of documents and that bundle is to be filed and served by Friday 13 June 2014.

**[55.7]** The proceedings are to be heard at Timaru on a date to be fixed. Four days are to be set aside.

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

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

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

**SCHEDULE**

**Form of undertaking to be given by Mr KA Waters**

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

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**UNDERTAKING BY PLAINTIFF REGARDING DOCUMENTS OBTAINED FROM  
ALPINE ENERGY LTD BY WAY OF DISCOVERY**

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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.

Dated at Timaru this                      day of    2014

Signed by Kevin Allan Waters    .....

In the presence of:

Name: .....

Address: .....

Signature: .....