

CITATION: *Firth v Tolios* [2022] NTLC 025

PARTIES: Justin Firth

v

Michael Tolios

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO(s): 22122876, 22122877, and 22120918

DELIVERED ON: 7 December 2022

DELIVERED AT: Darwin

HEARING DATE(s): 23 August and 18 October 2022

DECISION OF: Acting Judge O'Loughlin

CATCHWORDS: Failure to comply with Health Direction

Public and Environmental Health Act 2011
New Zealand Bill of Rights Act 1990
Criminal Code Act 1983

Yardley v Minister for Workplace Relations and Safety [2022] NZHC 291
Attorney-General S.A. v Corporation of the City of Adelaide (2013) 249 CLR 1
Kassam v Hazzard [2021] NSWSC 1320
Cotteril v Romanes [2021] VSC 498
Harding v Sutton [2021] VSC 741

REPRESENTATION:

Prosecution: Mr Mohammed

Defendant: Self

Decision category classification: B

Decision ID number: [2022] NTLC 025

Number of paragraphs: 86

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 22122876, 22122877, and 22120918

BETWEEN:

Justin Firth

Informant

AND:

Michael Tolios

Defendant

REASONS FOR DECISION

(Delivered 7 December 2022)

ACTING JUDGE O'LOUGHLIN

Introduction

1. The Defendant Michael Tolios operated the *Souvlaki Grill and Chill* at Nightcliff on Dick Ward Drive. The business was also registered as operated by co-Defendant *Corporation Capital One (NT) Pty Ltd* where both Mr Tolios and co-Defendant Ms Violet Krishna were managers.
2. The three Defendants have been charged with breaching section 56 of the *Public and Environmental Health Act 2011* ("PEHA") and these reasons apply to the three proceedings.

Law

3. In March 2020 the Minister for Health declared a public health emergency under section 48 of the PEHA in anticipation of the arrival of the Covid-19 disease. This declaration allowed the Chief Health Officer ("CHO"), pursuant to section 52 (1) of PEHA, to make Directions thought necessary to alleviate the public health emergency.
4. Section 56 of PEHA creates an offence if a person fails to comply with a health Direction:

"(1) a person commits an offence if:

 - (a) the CHO takes an action under section 52 (1) that involves giving a Direction, whether oral or written and whether specified in section 52 (3) or otherwise; and
 - (b) the person engages in conduct that results in a contravention of the Direction.

Fault elements:

The person:

- (a) intentionally engages in the conduct; and*
 - (b) is reckless as to whether the conduct would result in a contravention of the declaration or Direction.*
- (2) It is a defence to a prosecution for an offence against subsection (1) if the Defendant establishes a reasonable excuse.*

5. The CHO issued a number of Directions in respect of the pandemic including:
 - 5.1. CHO Directions 56 of 2020 requiring certain business to have a Covid safety plan, put in place Covid signage, and have a customer check-in register;
 - 5.2. CHO Directions 16 of 2021 imposing the "lock down" and requiring masks to be worn in most situations; and
 - 5.3. CHO Directions 35 of 2021 requiring businesses to have QR codes to record the presence of customers.
6. The Defendants are charged with breaching these Directions in late June and early July 2021 and thereby committing offences against section 56 of PEHA.

The Evidence

7. The prosecution called a number of police witnesses where very little of their evidence was challenged by the Defendants. The following is a summary of the evidence.

E Carter

8. Police officer Carter gave evidence that she attended the business on 30 June 2021. She stated that she saw Mr Tolios and Ms Krishna sitting in the courtyard of the business and neither were wearing masks. She asked them to put masks on and they said "no", claiming they, and their staff, had medical exemptions. Carter asked about the nature of the medical exemptions but they declined to elaborate.

S Hutchinson

9. On 2 July 2021 Police officer Hutchinson followed up with a further inspection of the Defendants' business where she saw a female and male employee (not the Defendants) who weren't wearing masks. The female employee claimed to have an exemption but did not produce it.
10. Hutchinson saw another male staff member not wearing a mask. He put one on briefly, but then took it off.
11. Hutchinson saw a customer but she couldn't recall if they were wearing a mask but assumes they were because she didn't speak to them. She did not say how long that customer stayed in the shop (this is explored below where details on check-in were only required if customers remained at the location for more than 15 minutes).

W Christie

12. This officer attended the shop on 6 July 2021 and did not see a QR check-in code near the entry. Christie saw staff who were not wearing masks. He asked why and the staff said that they did not have to do as it was contrary to their occupational health & safety plan.
13. He left but went back later and saw that the staff were still not wearing masks and there was still no QR code on display. He asked the female staff member where the QR was located and she said it was somewhere but did not produce it. He saw customers coming in but did not give evidence as to how long they remained. He told the staff they need to wear masks and he left.

M Jones

14. On 6 July 2021 Sgt Jones attended the shop and spoke to Mr Tolios and Ms Krishna.
15. He did not see any Covid safety signage and he issued an infringement notice based on information he had been told by some of the officers mentioned above.
16. He said he searched the government records for a safety plan and this search indicated no such plan had been lodged. He said a QR code is only issued by the Department of Health when a safety plan had been lodged.

R Engels

17. This officer contacted the CHO having heard reports from the above police officers and from the public.
18. This caused the CHO to generate Directions which were specific to the Defendants, directing the business to "immediately cease operating and be closed until compliance officers inspect and review what is required under the relevant CHO Directions".
19. The email was drafted by the CHO at 8:11 PM on 6 July 2021. Mr Engels went to the shop at 8:36 PM on the same day and saw three staff members not wearing masks and that there was still no QR code near the entrance nor any check-in book. He gave the Direction to a staff member called Stephanie who immediately complied by shutting the shop.
20. However Engels returned the next morning and saw the business had reopened and was trading. Mr Tolios subsequently claimed that he did not read or receive the email until 11 AM that day, but even if this were true, the shop was seen to be trading well after 11 AM.
21. Mr Engels spoke to Ms Krishna who identified herself as the owner and said the Directions were unlawful and she would not close the store. She was arrested. Mr Tolios was present and I find he and Ms Krishna had notice of the specific CHO Direction by at least 11 am on 7 July.

Stuart McClay

22. Mr McClay is the principal policy officer to the CHO. He searched the database of safety

plans on 2 July 2021 and determined that no safety plan had been lodged in respect of the business and that QR codes are only issued after the safety plan is lodged.

23. He said it was not until 7 July 2021 that the safety plan was lodged by the Defendants.
24. He inspected the business on 8 July in accordance with the specific CHO Direction applicable to that business. This was after the safety plan was lodged and he took out the QR code and signage and gave them to the Defendants.
25. The business was then allowed to reopen.

Findings on the above Evidence

26. As stated earlier, the Defendants challenged very little or any of the above and I accept all the above evidence by the police witnesses.

Evidence of Michael Tolios

27. Mr Tolios was the only Defendant to give evidence and he admitted the safety plan was not submitted until 7 July 2021.
28. In his evidence Mr Tolios denied having any medical conditions that prevented him from wearing a mask but he did tender a letter from a GP stating Ms Krishna "can't wear mask for health reason" (sic). This letter however is dated 18 August 2021 which is after the dates of all the alleged offences.
29. Michael Tolios did not claim that any of the face mask exemptions referred to in Direction 18 of CHO Directions 16 of 2021 applied to him. That is, he did not claim that the business was his residence, that he had a physical or mental health illness or condition, a disability etc.
30. In his cross examination of witnesses, Michael Tolios repeatedly put to witnesses the proposition that CHO Directions 16 of 2021 did not require an individual to wear a mask if that individual was more than 1.5 m away from others. He was repeatedly asked by the court to identify where this exemption was located in the Directions.
31. Mr Tolios eventually tendered a single page from what appeared to be a CHO Direction which stated:

"6. A person must wear a face mask at all times when the person is inside any premises or vehicle within any of the following places and cannot maintain a distance of 1.5 m from other people:..."
32. A search of other Directions suggest the above is part of CHO Directions 7 of 2022 which did not commence until 15 July 2022 (about one year after the alleged offences).
33. Mr Tolios also tendered other documents which appeared to be extracts from the Department of Health website from unknown times. These extracts stated "facemasks must be worn when you can't distance". No such rule or wording appears in the CHO Direction 16 of 2021 which are applicable at the time of these alleged offences. These tendered

documents appear to be from subsequent Directions and are therefore not relevant.

34. Mr Tolios in evidence, and in questions to witnesses, also argued that the wearing of masks was dangerous because the business used a charcoal rotisserie. This is not an exemption mentioned in CHO Directions 16 of 2021 and there was no suggestion that the cooking with charcoal was an emergency under Direction 18 (g). I do not find cooking with charcoal to be a reasonable excuse to not wear a mask.
35. Mr Tolios also wanted to tender expert evidence which I allowed over objection. This was in the form of a short extract of what appears to be a paper by a *Dr Denis G Rancourt PHD* claiming that masks do *not* work to prevent influenza type diseases. The qualifications and area of expertise of this author were not explained in the document or by Mr Tolios. This expert was not called, and Mr Tolios had not given any notice to the prosecution of relying on expert opinion evidence.
36. Although I received the document into evidence, I reject the proposition that masks do not reduce the risk of contracting or infecting others with influenza type diseases. Instead, I take judicial knowledge of the countless epidemiology experts who have repeatedly stated in the media over the last two years that masks *do* reduce the risk of the spread of Covid-19.

Defendants' Other Arguments

37. The Defendants filed useful written closing submissions which raised a number of arguments.
38. The first was that PEHA "did not confer the power to make the Directions that the CHO made".
39. The power to make Directions is contained in subsection 52 (1):
 - (1) *If an emergency declaration is in force, the CHO may take the actions (including giving oral or written Directions) the CHO considers necessary, appropriate or desirable to alleviate the public health emergency stated in the declaration.*
40. The Defendants argued that this power is not as broad as it appears and that powers are in fact confined to those specifically referred to in subsection 52 (3) which states:
 - (2) *The Directions the CHO may give **include** Directions requiring any of the following:*
 - (a) *a person to undergo a medical examination of a general nature, or of a stated kind, immediately or within the period stated;*
 - (b) *a stated person to remain in, or move to or from, a stated area or place immediately or within a stated period;*
 - (c) *a stated thing to be seized or destroyed;*
 - (d) *a stated person to provide oral or written information relating to the emergency."*
41. I have added the emphasis which suggests a weakness in the argument. Subsection 52 (3) lists only 4 specific powers which are stated as *included* in the otherwise very broad power granted by the subsection 52 (1). This subsection is clearly not attempt to be an exhaustive

list of the Directions that may be given, and is probably included to make it clear that the Directions may affect an individual's right to decline a medical examination, their property rights, and their liberty.

42. Furthermore, section 56 states an offence is committed if a person contravenes a Direction "whether specified in section 52(3) or otherwise".
43. The Defendants also argued that the PEHA did not grant broad powers as it was only intended to "deal with emergencies that were smaller and more localised than a state of emergency".
44. This is not what is suggested by the provisions relating to a declaration of a public health emergency, as these use broad language and subsection 49 (b) specifically states that there can be a declaration in the "whole of the Territory".
45. The Defendants referred the Court to *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 where Cooke J. dealt with laws or Directions requiring NZ police to be vaccinated. The case was determined by application of the *New Zealand Bill of Rights Act* where Cooke J found that the vaccine requirement limited the New Zealand citizen's right to refuse medical treatment (section 5). This was found not to be a reasonable limit on the applicants' rights that can be demonstrably justified in a free and democratic society (Section 11 of the *New Zealand Bill of Rights Act*).
46. No similar rights, or bill of rights exist in the NT and *Yardley* has no application here.
47. The Defendants also raised the 'principle of legality' where "*in the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms*", as stated by Heydon J in *Attorney-General S.A. v City of Adelaide* (2013) 249 CLR 1 at [148].
48. At least three recent superior courts¹ have rejected this argument involving arguably more extreme laws or restrictions in response to the Covid pandemic which essentially required citizens to be vaccinated to keep their employment. Like those decisions I find that freedoms are indeed abrogated but that PEHA clearly intends to abrogate these rights during an emergency. As Beech-Jones CJ said in *Kassam v Hazzard* at [8]:

"At least so far as the abrogation of particular rights are concerned, the presumption is of little assistance in construing a statutory scheme when abrogation is the "very thing which the legislation sets out to achieve" (Australian Securities and Investments Commission v DB Management Pty Ltd (2000) 199 CLR 321; [2000] HCA 7 at [43])."

Consideration of the Charges

Charge 1

49. Violet Krishna, Michael Tolios and Capital One (NT) Pty Ltd were charged with the same section 56 offence namely that between 29 June and 8 July 2021 they engaged in conduct

¹ *Kassam v Hazzard* [2021] NSWSC 1320, *Cotteril v Romanes* [2021] VSC 498 and *Harding v Sutton* [2021] VSC 741

that resulted in the contravention of a Direction made by the CHO under section 52 (1) where it is alleged the Defendants failed to have:

1. a Covid safety plan;
2. Covid signage; and
3. A check-in register.

Failure to have a Covid Safety Plan

50. The requirement for certain businesses to have a Covid safety plan was imposed by CHO Directions 56 of 2020 which commenced on 30 November 2020 and provided:

The person in authority for the place, business, activity, service or premises must prepare a COVID-19 safety plan, in a form approved by me.

51. This Direction applied to a business that sells food so it applied to the Defendants' business.
52. The evidence clearly showed that Mr Tolios and Ms Krishna managed and were in a position of authority at the business. The subsequent safety plan prepared by the Defendants recorded the business details as being operated by the Capital One (NT) Pty Ltd. Mr Tolios was a director of that corporate entity.
53. I accept the evidence of Stuart McClay that a Covid safety plan was not lodged until 7 July 2021 and the evidence suggests that it was not prepared until about this date.
54. I therefore find that all three Defendants failed to have a Covid safety plan approved until 7 July 2021, and charge 1 is made out in respect of this particular.

Signage

55. I accept the evidence of the police that there was no Covid signage which was required by Directions 29 and 30 of CHO Directions 56 of 2020. These provisions required "conspicuous" signage reminding customers to keep 1.5m apart, practice hand hygiene, and of other behaviours that would reduce the risk of the spread of Covid-19. No such signage was on display and I am satisfied beyond reasonable doubt that this particular of breach is made out.

Check-in

56. A record of a customer check-in is only required by CHO Directions 56 of 2020 if the person is staying for more than 15 minutes (Direction 18). Given the Defendants sold takeaway food, I have a reasonable doubt customers were there for longer than 15 minutes. This particular is therefore not proved.

Finding on Count 1

57. I find the actions of failing to have a Covid safety plan and Covid signage were intentional and the Defendants were reckless as to whether these actions would breach the CHO Direction. The Defendants have not suggested that there was a reasonable excuse for not having signage and a safety plan. I'm satisfied beyond reasonable doubt that between 29

June on 8 July 2021 all three Defendants are guilty of breaching a Direction of the CHO 56 of 2021 by failing to have a Covid safety plan and failing to have appropriate signage.

Remaining Charges

58. The remaining charges 2 to 5 were laid against Mr Tolios and Capital One (NT) Pty Ltd (not Ms Krishna).

Charge 2

59. This charge alleges Mr Tolios and the corporation failed to wear a mask thereby contravening a Direction made by the CHO and committing an offence contrary to section 56.
60. CHO Direction 16 of 2021 took effect on 28 June 2021 which put in place a "lockdown" over Darwin and other areas. Directions 17 and 18 imposed the following mask requirement:
- "17 Subject to Direction 18, a person must wear a face mask at all times while in the lockdown area.*
- 18. A person is not required to wear a mask if the person:*
is at the premises where the person resides; or
is in a private vehicle; or
is a child under the age of 12 years; or
has a physical or mental health illness or condition, or disability, which makes wearing a face mask unsuitable; or
is communicating with another person who is hearing impaired and visibility of the mouth is essential; or
is asked to remove the face mask to ascertain their identity; or
must remove the face mask in an emergency."
61. It is difficult to imagine a corporation being required to wear a mask² but section 43 BL of the *Criminal Code* can attribute physical acts of people to corporations:
- "if a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate"*.
62. Thus if an employee fails to wear mask that failure can be attributed to the corporate Defendant.
63. I accept the evidence of police officer Carter who attended on 30 June 2021 and spoke with Mr Tolios and Ms Krishna and neither were wearing masks.
64. The Defendants argued that they and their employees were essential workers and argued that CHO Directions 16 of 2021 did not require essential workers to wear face masks.

² Despite the law sometimes referring to the metaphor of the "corporate veil",

65. It is true that CHO Directions 16 of 2021 refers to “essential workers” and I accept that the Defendants and their employees met that definition. However this class of people were only exempted from the Directions regarding movement during the lock down, and not excused from the Directions as to mask wearing.
66. A medical certificate was tendered in respect of Ms Krishna, stating that she had a medical condition preventing her from wearing a mask but this was dated 18 August 2021 which was more than a month after the date of the alleged offence. Nevertheless it is possible that the unnamed medical condition could have existed at 30 June 2021 and I can't be satisfied beyond reasonable doubt that Ms Krishna was required to wear mask³.
67. I am satisfied that the business was not the residence of Mr Tolios and Ms Krishna, that Mr Tolios did not have a physical or mental health condition preventing him from wearing a mask, and that none of the other exemptions applied. The actions of Mr Tolios and therefore the corporate entity were intentional and they were reckless as to whether their conduct might breach the Directions.
68. I therefore find that Mr Tolios breached Direction 17 of CHO Directions 16 of 2021 and thereby committed an offence under section 56 of the act. As Mr Tolios was an agent and director of the corporation I find the corporation also committed the offence.

Charge 3:

69. This count alleges that on 2 July 2021 both Mr Tolios and the corporate entity failed to comply with a CHO Direction by failing to ensure:
 - a) a relevant Covid business QR code was displayed; and/or
 - b) there was a sign-in capability; and/or
 - c) that their staff wore facemasks.
70. An examination of the 2021 CHO Directions shows that the requirement to display a QR code was not imposed until 12 July 2021 (CHO Directions 35 of 2021). This was 10 days after the alleged offence so this particular of the complaint is dismissed.
71. As discussed above, the requirement to have a sign-in capability only applied if customers were staying for more than 15 minutes (Direction 18 of CHO Directions 56 of 2020). As this business was a souvlaki takeaway I have a reasonable doubt customers were there for longer 15 minutes and this particular is dismissed.
72. In respect of the allegation of staff failing to wear face masks, I accept the evidence of police officer Hutchinson that two staff were not wearing masks on 2 July 2021. There was no suggestion that the staff satisfied any ground for not wearing a mask (e.g. medical condition, communicating with a hearing-impaired person etc.). I find that cooking with charcoal is not within any of the stated exceptions and is not a reasonable excuse.

³ Ms Krishna was not charged in respect of this offence though.

73. There is no evidence that Mr Tolios was not wearing a mask on 2 July 2021 however I find that the staff were his representatives acting within their apparent authority. Section 116 (2) of PEHA states that "conduct engaged by a representative of a person within the scope of the representatives actual or apparent authority is taken to have been also engaged in by the person". Mr Tolios is therefore taken to have engaged in the conduct of not wearing a mask at the business on this day.
74. I also find that the staff are employees of the corporate entity which conducted the business.
75. I therefore find Mr Tolios and Capital One (NT) Pty Ltd guilty of count three. The actions were intentional and the Defendants were reckless as whether these actions might constitute a breach of the Directions.

Charge 4:

76. This count alleges that on 3 July 2021 Mr Tolios and the corporate entity failed to ensure the Covid safety plan was in force and thereby committed a section 56 offence.
77. I find that the business was required to have a safety plan in place pursuant to CHO 56 of 2020 which came into force in November 2020. Direction 6 therein required that "the person in authority for the place, business, activity... must prepare a Covid safety plan". I find that both Mr Tolios and the corporate entity were persons in authority.
78. I accept the evidence of Stuart McClay that this safety plan was not lodged until 7 July 2021.
79. The actions were intentional and the Defendants were reckless as to breaching the Directions and I therefore find that on 3 July 2021 both the corporate entity and Mr Tolios were in breach and committed a section 56 offence.

Charge 5:

80. The final count alleges that on 7 July 2021 Mr Tolios and the corporate entity failed to comply with a Direction to close its business.
81. This was a Direction made and/or recorded by email on 6 July 2021, after the CHO became aware of the other breaches of Directions described above.
82. The Direction was specific to the business in question and was drafted in the form of an email which stated:

"I... Chief Health Officer... consider it necessary, appropriate or desirable... [to make] the following Directions, effective immediately:

The Souvlaki Grill and Chill-26/159 Dick Ward Drive, Coconut Grove, NT 0810 to immediately cease operations and be closed until compliance officers inspect and review what is required under the relevant CHO Directions."

83. Section 52 of PEHA allows the CHO to issue Directions orally or in writing with no provisions requiring a particular form of signing or execution. If a Direction can be made orally I have no trouble in concluding that it can also be made by email.
84. The above specific Direction described the Defendants' business in a way which is consistent with other tendered documentation.
85. I accept the evidence of the police that the notice was given to a staff member at approximately 8:40 PM on 6 July 2021 and that staff member promptly closed the business that day. I also accept the evidence that the business was trading the next morning and I find it unlikely that Mr Tolios and Ms Krishna were not aware of the Direction until 11 AM in the morning of 7 July. Nevertheless it is clear that Mr Tolios knew of the Direction at least by 11 AM that morning and yet he refused to comply and allowed the shop to continue to operate.
86. Mr Tolios was reckless as to breaching the Directions. I therefore find that Mr Tolios and the corporate entity is guilty of this offence.

Orders

Firth v Tolios - 22122876

The Defendant Michael Tolios is guilty of counts one to five.

Firth v Capital One (NT) - 22122877

The Defendant Capital One (NT) Pty Ltd is guilty of counts one to five.

Firth v Krishna - 22120918

The Defendant is guilty of count one.