

**IN THE DISTRICT COURT
AT WELLINGTON**

**I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA**

**CIV 2022-485-330
[2024] NZDC 11935**

UNDER the New Zealand Bill of Rights Act 1990 and
the Declaratory Judgments Act 1908

BETWEEN KELVYN ALP
Plaintiff

AND THE ATTORNEY-GENERAL
Defendant

Hearing: 15 and 16 May 2024

Counsel: M Hague for Plaintiff
S Leslie and K Budgen for Defendant

Judgment: 29 May 2024

RESERVED JUDGMENT OF JUDGE K D KELLY

Introduction

[1] Kelvyn Alp is the director of, and a reporter for ‘Counterspin Media’ which has its registered office in Whangarei.

[2] On 22 October 2021 Mr Alp was arrested outside the High Court in Wellington on suspicion of having travelled from Auckland (at COVID-19 alert level 3) to Wellington (at alert level 2), contrary to a COVID-19 order.

[3] A person may be arrested and taken into custody without warrant where the constable has good cause to suspect that person of having committed an offence punishable by imprisonment.¹

[4] At the time of Mr Alp's arrest, a breach of a COVID-19 order was an imprisonable offence.² The relevant COVID-19 order states that a person in one alert level may go into, out of, or through one alert level to another alert level if the travel is for one or more of the permitted purposes and the person, so far as reasonably practicable, travels directly without stopping while in the other alert level.³ A permitted purpose for travel is for "Key Communications" (i.e. news including news production and broadcast media)⁴

[5] Mr Alp says that he was in Wellington to report on a High Court trial, and that the Police had ample information about his connection with Counterspin Media, and that he travelled to Wellington for media work.

[6] In public view, Mr Alp was handcuffed and escorted to the corner of the street where he was held for a period of 15-20 minutes before being transported to the Upper Hutt Police station in a custody van. Mr Alp says he was humiliated in the process. He was released from the Police station, for lack of evidence, after about 37 minutes.

[7] Mr Alp contends that his arrest and detention was unlawful, in breach of a number of his civil and political rights, and that his being handcuffed amounts to battery. Mr Alp seeks compensation accordingly.

Issue

[8] The parties agree that the question for the Court is whether the Police had good cause to suspect that Mr Alp had committed an offence of failing to comply with a COVID-19 order by travelling into, out of, or through one alert level to another alert level other than for a permitted purpose.

¹ Crimes Act 1961, s 315

² COVID-19 Public Health Response Act 2020, s 26

³ COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) 2021, cl 17 and 18(1)

⁴ COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) 2021, cl 18(1) and Schedule 5, activity 1.29

Legal principles

[9] Mr Alp has the right not to be arbitrarily arrested or detained.⁵ His arrest will be arbitrary, and therefore unlawful, if it is without reasonable cause.⁶ His detention, in turn, will be a false imprisonment if it is without cause.⁷ Applying handcuffs to Mr Alp may be a battery if those handcuffs were applied without lawful justification.⁸

[10] Moreover, if Mr Alp has been unlawfully arrested, in addition to his right not to be arbitrarily arrested or detained, his other rights will likely also have been breached, namely: his right to peaceful assembly;⁹ his freedom of movement;¹⁰ and his right to be secure against unreasonable search and seizure.¹¹

[11] The power to make an arrest without a warrant comprises two elements. First, the Police must have had an actual suspicion that Mr Alp was committing an offence punishable by imprisonment. This element is subjective on the part of the arresting constable.

[12] The second element is that arresting constable must have had good cause to hold that suspicion. This element is objective and it is for the Court to decide whether on the facts there was good cause for that suspicion.

[13] The requirement that there be ‘good cause to suspect’ requires a degree of satisfaction, not necessarily amounting to belief on the Police’s part, but more than speculation as to whether an event has occurred or not.¹²

[14] It follows that if there was not ‘good cause to suspect’, prima facie all of Mr Alp’s causes of action will be made out. If, on the other hand, there was good cause to suspect, all of Mr Alp’s causes of action must fail.

⁵ New Zealand Bill of Rights Act 1990 (NZBORA), s 22

⁶ *Neilsen v Attorney-General* [2001] 3 NZLR 433 at [34]

⁷ *Beagle v A-G* [2007] DCR 596, at [32]

⁸ *Hayward v O’Keefe* [1993] NZLR 181, at 192

⁹ NZBORA, s 16

¹⁰ NZBORA, s 16

¹¹ NZBORA, s 21

¹² *R v Thompson* (1995) 13 CRNZ 546 (HC) at 557, see also *Prescott v New Zealand Police* [2019] NZHC 3376 at [34] and following

[15] The first inquiry that needs to be made is what information did the arresting officer have at the time of the arrest?¹³

[16] At this juncture, I accept Ms Leslie's submission that Senior Sergeant Patrick Thomas was the arresting officer assisted by Constable Tyler Wickham who performed the arrest. The Police operate by command and control.¹⁴ Senior Sergeant Thomas was the senior and supervising officer and it is impractical and unrealistic to think that Constable Wickham was in any real position to refuse his sergeant. I consider that between Snr Sgt Thomas and Constable Wickham they needed to have the good cause to suspect¹⁵ although, based on the evidence which I discuss below, I consider that both suspected Mr Alp had committed an offence in their own right.

[17] After determining what information Snr Sgt Thomas and Constable Wickham had at the time of the arrest, to determine whether there was good cause for holding this suspicion, the question is whether a reasonable person would be of that opinion. A constable's own view as to the significance of the information he or she had is irrelevant.¹⁶

[18] Good cause to suspect too, does not equate to good cause to commit for trial, to leave to a jury, or to convict. Nor does there need to be a prima facie case. For this purpose, reasonable suspicion need not rest on evidence which would be legally admissible. An arresting officer may also rely on information from other officers provided that he or she has first equipped themselves with sufficient information before the power of arrest is exercised. It does not matter if the information acted upon subsequently turns out to be incorrect,¹⁷ or whether the officer's state of mind may be mistaken as to the law,¹⁸ or that he or she even has in mind the wrong offence when making the arrest.¹⁹

¹³ *Caie v A-G* [2005] NZAR 703, at [85]

¹⁴ Above n 6, at [29]

¹⁵ *YP v Youth Court at Upper Hutt* HC Wellington CIV-2006-485-1905, 30 January 2007, Mallon J, at [46] – [48]

¹⁶ *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 (HL), [1997] 1 All ER 129 at 139

¹⁷ Above n 16

¹⁸ *Gaskin v Police* [2009] SASC 351, (2009) 54 MVR 508 at [55]-[64]

¹⁹ *Prescott v New Zealand Police*, above n 12

[19] A failure to make proper inquiries may be relevant,²⁰ depending on such things as the strength or otherwise of the evidence available, the ease with which additional inquiries could have been made and the likely bearing that those inquiries would have had on the issue of good cause to suspect, as well as any exigencies of the case.²¹

Positions of the parties

[20] The essence of Mr Alp's claim is that objectively, based on the information known to the Police at the time, the Police did not have reasonable grounds to suspect that an offence had been committed by Mr Alp. That is, when Mr Alp was arrested it is submitted that the Police lacked sufficient information to suspect that he was not permitted to travel.

[21] Mr Alp submits that the COVID-19 order did not prohibit all travel and that:

- (a) if he was travelling from Whangarei (at level 2), he was permitted to travel through Auckland (at level 3) for work purposes;²² and
- (b) if he was travelling from Auckland, he was permitted to do so for media purposes.²³

[22] Mr Alp says that he was targeted by the Police and that the Police also had a closed mind as to whether he had travelled from Whangarei. This, he says, was despite him repeatedly saying that he did so, and him producing a utility statement with his Whangarei address on it. Mr Alp also submits that the circumstances were that there was a Police National Intelligence Application (NIA) noting that he had travelled from Whangarei to Auckland on several occasions in the months prior to his arrest, and a noting which said that he had travelled to Wellington in connection with the High Court proceedings. Moreover, it is submitted that the complaint to the Police did not say he was there to participate in the protest.

²⁰ *Dumbell v Roberts* [1944] 1 All ER 326 (CA); *Craig v Attorney-General* (1986) 2 CRNZ 551

²¹ *Niao v A-G* (1998) 5 HRNZ 269 at 287-288; CP 22/96 (HC) Rotorua) 11 June 1998, Randerson J, at 24

²² COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) 2021, cls 18(3) and (4)(a)

²³ COVID-19 Public Health Response (Alert Level Requirements) Order (No 12) 2021, cl 18(1) and Schedule 5, activity 1.29

[23] Mr Alp says further that there was no pressing need to arrest him without making basic inquiries including checking the Companies Register (which would have showed his place of business to be Whangarei), and the Police border transit tracking log on the Police internal “Ten-One” website (which Mr Alp says would have showed that he had travelled through the Auckland border without issue). Mr Alp submits that the Police asked only one question of him about the purpose of his travel and that was in the context of a line of questions about him previously having been in Auckland, the implication being that they were asking about previous travel rather than his travel to Wellington on this occasion.

[24] The Attorney-General’s position is that the arresting officers, Snr Sgt Thomas and Constable Wickham, had grounds to suspect Mr Alp of having committed an offence under the COVID-19 Act,²⁴ and that they were justified in making the arrest.

What information did the Police have at the time of the arrest?

[25] That the Police must have had an actual suspicion that Mr Alp was committing an offence punishable by imprisonment does not appear to be challenged. Rather, what Mr Alp challenges is whether objectively the information that the Police had amounts to good cause to suspect the commission of an offence.

[26] As noted, the first thing that I must consider centres on what information the Police had at the time of arresting Mr Alp.

[27] The evidence of Constable Wickham is that on the morning of 22 October 2021 he had been briefed by Snr Sgt Patrick Thomas that the Police had intelligence that Mr Alp had travelled from Auckland to Wellington. This is corroborated by Snr Sgt Thomas’ evidence who said that he had seen an intelligence slide from the Wellington District Intelligence Team that stated Mr Alp had been seen outside the High Court.²⁵

[28] This intelligence slide was sent to Snr Sgt Thomas at 9.50 pm the previous evening²⁶ and says that recent information was that Mr Alp had been residing in

²⁴ Above, n 2

²⁵ Affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [16]–[17]

²⁶ NoE at page 78

Favona, Auckland during the level 3 restrictions and had travelled to Wellington (level 2) in breach of COVID-19 travel restrictions. The intelligence slide was also sighted by Constable Wickham.

[29] This intelligence was based on a complaint from a member of the public and Snr Sgt Thomas' and Constable Wickham's unit was tasked with speaking to Mr Alp to ascertain his movements.²⁷ The complaint named Mr Alp and said that he was watching a High Court case having come from Auckland where he lives, and which was at level 3.²⁸

[30] Before going to the High Court, Constable Wickham says that as a group the Police made additional NIA inquiries. This is consistent with Snr Sgt Thomas' evidence.²⁹

[31] Mr Alp told the Court that the Favona, Auckland address is a family home which he stays at when he is in Auckland and sometimes is also a mailing address.³⁰

[32] As well Constable Wickhams says he saw a noting on NIA dated 21 August 2021 where Mr Alp was warned for attending a protest in Aotea Square during a level 4 lockdown and which stated that Mr Alp said that he had been "stuck living in Auckland for level 4".³¹

[33] Mr Alp acknowledged that during the protest he attended on 21 August 2021, as stated in the noting, he was staying in Auckland during Level 4 and became stuck there when alert levels were announced.³² Mr Alp denied, however, that he was issued with a warning notice to the effect that attending the protest was a breach of the Act and that he was directed to return home or he would be arrested. Mr Alp's recollection is contrary to what is stated in the NIA noting on this point.³³ As noted in NIA, Mr Alp

²⁷ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [16]

²⁸ Intelligence noting dated 21 October 2021

²⁹ Affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [18]

³⁰ NoE at page 45

³¹ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [17]

³² NoE at page 10

³³ NoE at page 11

said at that time he advised the Police that he and Ms Spierer were media from Counterspin.³⁴

[34] Constable Wickham also saw a photograph of Mr Alp sitting in a car on 27 August 2021 in Queen Street and saw that an infringement notice had been issued to Mr Alp.³⁵ This infringement notice records Mr Alp's address as being in Favona Auckland. Mr Alp's address was updated in NIA on the same day. Constable Wickham says that police procedure is to confirm a person's name, address and phone number when issuing an infringement notice which would explain why the address was updated that day.³⁶ There was no evidence to counter this procedure.

[35] For his part, Mr Alp denies being issued with the infringement notice saying that he has never seen this.³⁷ The evidence suggests it is more than likely that he did. What matters, however, is the notice seen by Constable Wickham which states that Mr Alp resided in Auckland on 27 August 2021.

[36] Constable Wickham says that the NIA entries in relation to both the 21st and 27th of August 2021, Mr Alp claimed to be a media reporter for Counterspin Media with permission to leave his home. The Police, however, had not accepted that Counterspin was a legitimate media organisation for the purposes of the COVID-19 rules.³⁸ This is also consistent with Snr Sgt Thomas' evidence.³⁹

[37] On the day of the arrest, Constable Wickham says that he was generally aware that Mr Alp and his partner Ms Hannah Spierer were linked to Counterspin Media and that morning the Police had discussed the likelihood that Mr Alp might say that he was an official for Counterspin Media as he had done previously. Constable Wickham says the Police discussed that Counterspin did not have official accreditation from the Ministry of Business Innovation and Employment (MBIE) to travel for business reasons or essential travel under the COVID-19 order.⁴⁰ Before the Court, however,

³⁴ NoE at page 10

³⁵ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [17]

³⁶ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [18]

³⁷ NoE at page 14

³⁸ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [17]

³⁹ Affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [18]–[19]

⁴⁰ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [19]

neither Constable Wickham nor Snr Sgt Thomas knew why Police had earlier made the assessment that Counterspin was not a legitimate media organisation.⁴¹

[38] Senior Sergeant Thomas' evidence is that he knew that without an exemption, the COVID-19 restrictions would not have allowed Mr Alp to travel out of Auckland at any point since August 2021. Accordingly, he instructed Constable Tyler to attend the High Court and to seek further information about Mr Alp's residence and travel to Wellington.⁴²

[39] Constable Wickham was alerted to Mr Alp's arrival at the High Court at about 10:10 am.⁴³ Constable Wickham says that he identified Mr Alp walking along Molesworth Street toward the entrance to the High Court. Senior Sergeant Thomas arrived a short time later.⁴⁴

[40] After Mr Alp's arrest, Constable Wickham completed a job sheet which included the intelligence slide noting that he had reviewed Mr Alp's address links in NIA and that he was last linked to his Whangarei address on 11 May 2021 and to his last Auckland address on 27 August 2021.⁴⁵ Constable Wickham said that he could not confirm when Mr Alp relocated from Auckland to Whangarei and that there was no evidence of Mr Alp moving through either the northern or southern border check points.⁴⁶

[41] Constable Wickham's conversation with Mr Alp was filmed by Ms Spierer⁴⁷ and this Court has had the benefit of viewing it.

[42] In the video Constable Wickham is seen approaching Mr Alp and advising him that the Police wished to speak to him because the last information they had was that he resided in Auckland.

⁴¹ NOE at pages 65 & 81

⁴² Affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [20]

⁴³ Affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [23]

⁴⁴ Affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [24]

⁴⁵ NoE at page 80 and jobsheet in Affidavit of Kelvyn Glen Alp dated 15 December 2023 at Exhibit K6

⁴⁶ NoE at page 80

⁴⁷ NoE at page 80

[43] Mr Alp confirmed this but then clarified that he lives in Whangarei.

[44] Before the Court Mr Alp gave evidence that he was confused as to whether the Police thought he had breached the COVID-19 rules on this occasion or on an earlier occasion.⁴⁸ Mr Alp also says that he had no idea why the Police thought that he had travelled from Auckland and that he advised them to check with the authorities that manned the Auckland northern and southern borders at the time he travelled through.⁴⁹ This, however, is not borne out by the video of the interaction. Mr Alp insisted he said this but also said that one cannot see this in the video.⁵⁰

[45] In the video Mr Alp showed Constable Wickham something on his phone which Constable Wickham says was a Vodaphone bill which showed Mr Alp's Whangarei address but not a date.⁵¹ Constable Wickham also said that Mr Alp advised him he could look at the Companies Officer register but that Mr Alp did not bring this up by way of either a document, or link to a website, on his phone.⁵² The video supports Constable Wickham's evidence.

[46] For his part Mr Alp says that he tried to show Constable Wickham the company registration documents for Counterspin.⁵³ Elsewhere he says that he did show the address of where the company office is registered.⁵⁴ Mr Alp says that he also tried to show Constable Wickham a rental account for his property in Whangarei.⁵⁵ This is apparent in the video or from other evidence.

[47] Given his confusion as to whether the Police thought he had breached the COVID-19 rules on this occasion or on an earlier occasion, Mr Alp says that he asked the Police what Auckland had to do with his travels and presence in Wellington on the day, and whether they thought he had breached the order on this occasion or on a previous one. Mr Alp says that no answer was forthcoming.⁵⁶ That he asked this

⁴⁸ Affidavit of Kelvyn Glen Alp dated 15 December 2023 at [37]

⁴⁹ Affidavit of Kelvyn Glen Alp dated 15 December 2023 at [39]

⁵⁰ NoE at page 26

⁵¹ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [24.6] and NoE at page 86

⁵² Affidavit of Constable Tyler Wickham dated 25 January 2024 at [24.6] and NoE at page 86

⁵³ Affidavit of Kelvyn Glen Alp dated 15 December 2023 at [38] and [40.5]

⁵⁴ NoE at page 4

⁵⁵ Affidavit of Kelvyn Glen Alp dated 15 December 2023 at [40.5]

⁵⁶ NoE at page 21

question, however, is not apparent in either the video or the transcript of the video contained in Mr Alp's affidavit.

[48] Mr Alp also says that he advised the Police of his purpose of travel, saying "we're media" and that on the company's website they would see the company's address as being in Whangarei.⁵⁷ This too, however, is not borne out by the video. Rather, Mr Alp only says "we're media" after he was arrested.⁵⁸ Before the Court Mr Alp said that every police officer in the country knew that he and Ms Spierer were media.⁵⁹

[49] When advised further by the Police that their information was that Mr Alp was located in Auckland, Mr Alp said that he had relocated. When Constable Wickham said that they had intelligence that he was spoken to in Queen Street and sought confirmation about Mr Alp's move from Auckland, the video shows that Mr Alp confirmed his Whangarei address but that after further questions from the constable seeking to clarify him having two addresses, Mr Alp replied that he had already confirmed his address and that he was not going to say anything more.

[50] Constable Wickham says that he could see that Mr Alp was becoming irritated with his questions and was becoming less cooperative.⁶⁰ The video supports Constable Wickham's evidence that Mr Alp was becoming less cooperative and when speaking to him and Snr Sgt Thomas he was becoming irritated.

[51] Constable Wickham says further that at no time during this interaction prior to arrest did Mr Alp say that he was entitled to travel as an essential worker or as a media representative and he did not say why he had come to Wellington. Nor did Mr Alp offer any proof that he had an exemption for essential travel and did not say that he was a media representative.⁶¹ This is consistent with what the video shows prior to Mr Alp's arrest.

⁵⁷ Affidavit of Kelvyn Glen Alp dated 15 December 2023 at [41]

⁵⁸ NoE at pages 28-29 and Affidavit of Kelvyn Glen Alp dated 15 December 2023, Exhibit K4

⁵⁹ NoE at page 29

⁶⁰ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [24.9]

⁶¹ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [24.10] and [26.2]

[52] Constable Wickham's evidence is also that at protests he has attended he usually finds that media personnel wear face masks, have film cameras with them, and generally do not enter into the fray setting up an assigned area away from the protesters instead. Constable Wickham's evidence is that protesters also commonly photograph or film protests. This latter point is again apparent from the video.⁶²

[53] Prior to the arrest, Constable Wickham spoke to Snr Sgt Thomas. Senior Sergeant Thomas' evidence is that he wanted to establish Mr Alp's purpose of travel to Wellington and whether he had authority to do so. To do that Snr Sgt Thomas says that they needed to know where he had come from, and if he had been in Auckland, and whether he had authority to leave that alert level. Senior Sergeant Thomas says the position would be the same if he had come from Whangarei as he would still have to have travelled through Auckland unless he flew.⁶³

[54] While Constable Wickham was in discussion with Snr Sgt Thomas, Mr Alp asked whether he was being arrested or detained. Senior Sergeant Thomas replied that he was detaining him at that moment for the purpose of finding out as much information as they could from Mr Alp. In response, Mr Alp said the Police were not getting any more information and that he had given them all the information they had got. This is clear in the video.

[55] It was at this point Snr Sgt Thomas says that he was satisfied that there was a sufficient basis to arrest Mr Alp⁶⁴ and said they would be arresting him. A further discussion ensued where Snr Sgt Thomas and Constable Wickham asked Mr Alp to stop and give them more information so they could determine whether or not he had complied with the COVID-19 order and to let them do their investigation. Again, Mr Alp said that they just got the information.

[56] At this point Snr Sgt Thomas said he made the decision to arrest Mr Alp⁶⁵ and instructed Constable Wickham saying: "Arrest, I'm happy that he's in breach of COVID". Constable Wickham then arrested Mr Alp.

⁶² Affidavit of Constable Tyler Wickham dated 25 January 2024 at [5]-[6]

⁶³ Affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [26]

⁶⁴ Affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [28]

⁶⁵ NoE at page 72

[57] Constable Wickham and Snr Sgt Thomas both say that Mr Alp did not provide sufficient information or evidence about his authorisation to leave Auckland after 27 August 2021 or about why he was permitted to travel to Wellington.⁶⁶

[58] Senior Sergeant Thomas says that he did not hear Mr Alp say that he had an exemption to travel under the alert level settings on account of being a media official for Counterspin Media at any time prior to his arrest, or at any time while they waited for the custody van. Senior Sergeant Thomas does recall, however, that Mr Alp said that he was being targeted despite being media.⁶⁷ Again that Mr Alp did not say he had an exemption to travel as a member of the media is consistent with the video.

[59] Ms Hannah Spierer, Mr Alp's partner, also gave evidence for Mr Alp. Ms Spierer says she is a director of, and journalist with, Counterspin Media and that they travelled from Whangarei to Wellington to cover the High Court case over two days.⁶⁸ As noted, Ms Spierer filmed Mr Alp's arrest on her mobile phone⁶⁹ to which reference has already been made.

[60] Ms Spierer says that when Mr Alp was questioned by the Police, she made it clear that they were there in their capacity as journalists for the purpose of covering the High Court case and that she had made it clear that they had travelled from Whangarei to Wellington.⁷⁰ Ms Spierer confirmed to the Court that they drove to Wellington.⁷¹ The video, however, does not support Ms Spierer saying this. In cross-examination Ms Spierer agrees saying from her memory she said it, but just says that this was not recorded on the video.⁷²

[61] In terms of the applications to film the Court proceedings, Ms Spierer says that notwithstanding a High Court Minute there was no record of any applications having been made, she vividly recalls being denied the ability to film.⁷³

⁶⁶ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [24.10] and affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [28]

⁶⁷ Affidavit of Snr Sgt Patrick Thomas dated 25 January 2024 at [35]

⁶⁸ Affidavit of Hannah Yamuna Spierer dated 15 December 2023 at [1] and [7] and NoE at page 49

⁶⁹ Affidavit of Hannah Yamuna Spierer dated 15 December 2023 at [15]

⁷⁰ Affidavit of Hannah Yamuna Spierer dated 15 December 2023 at [19]

⁷¹ NoE at page 49

⁷² NoE at pages 54 - 55

⁷³ NoE at page 60 and 62

Does the information that the Police had amount to good cause to suspect?

[62] Having regard to the above, I am satisfied that the last information that the Police had prior to the day of Mr Alp's arrest was that he resided in Auckland. This was apparent from the infringement notice issued to him on 27 August 2021. I accept Constable Wickham's evidence that at the time of issuing this infringement notice, the Police would have confirmed Mr Alp's arrest.

[63] Further the complaint to which the Police responded said that Mr Alp resided in Auckland.

[64] In addition, the NIA noting says that on 21 August 2021 Mr Alp said that he was stuck living in Auckland during the level 4 lockdown.

[65] There is no suggestion here that the notings in NIA were wrong.

[66] While Mr Alp told Constable Wickham that he lived in Whangarei, he did not verify when he relocated there from when they last knew him to have been in Auckland.

[67] Nor does the video evidence show that Mr Alp expressly said that he had travelled from Auckland or Whangarei.⁷⁴ Mr Alp only confirmed during the hearing that he had travelled from Whangarei through Auckland.⁷⁵

[68] While the Police knew that Mr Alp was associated with Counterspin Media and that he claimed to be media, Constable Wickham and Snr Sgt Thomas knew from internal NIA notes that Counterspin Media was not considered by the Police to be a legitimate media organisation for the purposes of the COVID-19 order. It does not matter whether this position is correct or not. The noting was internal intelligence and guidance that Constable Wickham and Snr Sgt Thomas were entitled to rely on.⁷⁶

⁷⁴ Affidavit of Constable Tyler Wickham dated 25 January 2024 at [24.10]

⁷⁵ NoE at page 2

⁷⁶ *O'Hara v Chief Constable of the Royal Ulster Constabulary*, above n 16 at 139

[69] The Police also say that they knew that Counterspin Media did not have MBIE accreditation. While Ms Spierer says they did, this was not produced to the Police. I do not consider it credible that if Mr Alp and Ms Spierer had documentation from MBIE allowing them to travel through the Auckland borders, as Ms Spierer claims, that both she and Mr Alp would have failed to refer to it, or to provide it to the Police when they were questioned, or in the subsequent period leading up to trial, or at trial. There is simply no evidence that any such accreditation existed.

[70] While Snr Sgt Thomas confirmed that there was NIA information that would have been available to him prior to Mr Alp's arrest including NIA intelligence notes dated 29 June 2021, 10 July 2021 and 26 August 2021 which give detailed descriptions of episodes on current events broadcast by Counterspin, and which refer to Mr Alp travelling to and from Whangarei,⁷⁷ these notes precede the NIA note of 27 August 2021 being the day when Mr Alp was issued an infringement notice, and which states that Mr Alp's address is in Auckland.⁷⁸

[71] Moreover, there was nothing about the behaviour of Mr Alp and Ms Spierer to indicate that they were media personnel. They were not wearing face masks as other media tended to, and Ms Spierer was also filming on her mobile phone rather than using other types of camera equipment. They were not set up in an area away from the protesters as Constable Wickham said other media did. I am satisfied that their appearance would not be distinguishable from protesters who also commonly photographed or film protests.

[72] In any event, again, the Police internal advice was that Counterspin was not a legitimate media organisation.

[73] The Police were also aware that Mr Alp appeared to have relocated from Whangarei to Auckland at some point between 21 May 2021 and 27 August 2021. They did not, however, know anything more about this relocation, hence their inquiries. When Mr Alp showed them a utilities bill (which I am satisfied was a Vodaphone bill), which showed a Whangarei address, no date was evident. That

⁷⁷ NoE at pages 74 & 75

⁷⁸ NoE at page 76 - 77

Mr Alp says that he showed the Police other evidence of his address is not borne out by the video surrounding the arrest.

[74] I do not accept that Mr Alp was only asked about his travel on one occasion. The video shows that Mr Alp declined three times to provide any further information.

[75] At no stage did Mr Alp show the Police that he had other documentation to establish his exemption as media, and nor did he even refer to this. I simply do not find this credible that if Mr Alp had other documentation that would have provided him permission to travel that he would not at least say that he had this. Rather, Mr Alp appeared to rely on the Police knowing that he was media. Against this, as already stated, was internal Police advice that Counterspin Media was not an accredited or legitimate news organisation.

[76] Again, at no time did Mr Alp say that he had travelled from Whangarei through Auckland to Wellington. Even if he did, the situation would have been the same as regards his ability to cross alert levels. While Ms Spierer says that she told the Police that they travelled from Whangarei, this is not borne out in the video.

[77] I also find it highly improbable given that Ms Spierer was filming the arrest and would be the person most easily heard on the video, that she told the Police that she and Mr Alp were at the High Court in their capacity as journalists.

[78] Further, contrary to what Mr Alp says in his affidavit that he advised the Police of his purpose of travel, Mr Alp did not say he was media until after he was arrested. To say that every officer in the country knew he was media is speculative on his part and does not negate his lack of response when asked about the reason for his travel to Wellington.

[79] I am satisfied that the Police did try to glean as much information that they could from Mr Alp but that he simply refused to provide anything further.

[80] There are also other inconsistencies in Mr Alp's evidence that diminish the credibility of his evidence. For example, Mr Alp denies showing Constable Wickham

a Vodaphone bill saying that he was on Spark. Mr Alp did not produce evidence of a Spark bill. His affidavit of documents also refers to a Vodaphone statement. No mention is made of a Spark bill or other document.⁷⁹

[81] Mr Alp also says that he thinks the tenancy or lease agreement he referred to was provided by way of disclosure, but no reference is made to this in the affidavit of documents. Mr Alp then said it was an email from Quinovic Property Management in Whangarei but again this is not in the affidavit of documents. It has never been produced.

[82] In relation to the documents Mr Alp says were in his car, he says that included in these documents was an application to film the High Court case.⁸⁰ Mr Alp says that this application was made by his lawyers.⁸¹ I do not accept this to be credible. Again, in a minute of Cooke J dated 31 January 2024 in relation to an application for documents relating to the case before the Court,⁸² Cooke J makes clear that there was no application by Mr Alp or by Counterspin to film the hearing on record, and nor could he recall any such application.⁸³ I accept, however, as Cooke J himself said, that any such application would only cover media as defined in the In-Court Media Coverage Guidelines.

Did the Police fail to make inquiries?

[83] As part of considering whether the Police had good cause to hold their suspicion of a breach of the COVID-19 order, I must also consider whether the Police failed to make further inquiries.

[84] Mr Alp's evidence is that he tried to prove that he did not breach the rules but that the Police did not seem interested in what he had to say and did not inquire into what evidence he had in his possession that would have cleared the matter up.⁸⁴ Mr Alp also says that in addition to attempting to supply evidence of his address and

⁷⁹ Plaintiff's Affidavit of Documents dated 28 September 2013

⁸⁰ Affidavit of Kelvyn Glen Alp dated 15 December 2023 at [44] and NoE at page 30

⁸¹ NoE at page 30

⁸² Minute of Cooke J (Access to Court documents), *Four Aviation Security Service Employees v Minister of COVID-19 Response and others*, CIV-2021-485-509 (31 January 2024)

⁸³ At [2] and [4]

⁸⁴ Affidavit of Kelvyn Glen Alp dated 15 December 2023 at [35]

origin of travel, he also had evidence in his vehicle across the road that would have backed his assertions, that information containing court applications for filming, communications from his lawyers, his company certificate amongst other documents. Mr Alp says he was asked for none of this before being arrested.⁸⁵

[85] Ms Spierer also says that she and Mr Alp had this documentation,⁸⁶ but confirmed that these documents were not provided to the Police. Nor were the Police told that she or Mr Alp had any relevant documents that could clear up the situation, although Ms Spierer also says that the Police never asked for them.⁸⁷

[86] Again, Ms Spierer also referred to having documentation from MBIE which allowed them to pass through the Auckland borders but while Mr Alp was being arrested, she did not provide this documentation.⁸⁸ Nor did Mr Alp refer to this documentation.

[87] Having regard to the construction of the COVID-19 order I am satisfied that the order restricts travel unless it is expressly permitted. That is, it is for the person claiming to have permission to establish that permission. The Police cannot prove a permission existed if they are not told about it or otherwise do not know of it, as was the case here.

[88] I am satisfied that the Police did what they could to establish Mr Alp's movements but Mr Alp was not forthcoming as to the basis on which he considered he could travel other than that he considered that the Police ought to have known that he was media. As it turns out, as already stated, they did not consider him to be legitimate media and they are entitled to rely on this advice from colleagues even though they did not know the underlying basis for it.⁸⁹ In a similar way a constable is entitled to rely on legal advice without fully appreciating the reasoning behind that advice.

⁸⁵ Affidavit of Kelvyn Glen Alp dated 15 December 2023 at [44] and NoE at page 4

⁸⁶ Affidavit of Hannah Yamuna Spierer dated 15 December 2023 at [21] and NoE at page 50

⁸⁷ NoE at page 56

⁸⁸ NoE at page 58

⁸⁹ *O'Hara v Chief Constable of the Royal Ulster Constabulary*, above n 16, at 139

[89] Constable Wickham also confirmed that prior to 22 October 2021 he knew of the Police system on “Ten-One” used by the Police to record movements through the northern and southern borders of Auckland during the lockdowns. Constable Wickham said that while there was nothing stopping him from accessing this system before the arrest, given the necessity of policing the protest at the High Court and engaging with people there, he had limited time to do so.⁹⁰ Senior Sergeant Thomas says something similar, namely that the Police were under a time constraint given the COVID-19 pandemic and their concern was that Mr Alp might be a potential spreader if he moved from a higher alert level.⁹¹

[90] I accept that the exigencies of the situation involving a protest during a pandemic, where Snr Sgt Thomas only received the intelligence slide at 9:50 pm the night before, were such that the constables were precluded from making further inquiries beyond those that they undertook on the day.

[91] In terms of making inquiries of the Ten-One tracking system, Snr Sgt Thomas said that he did not know who an authorised user of the Ten-One system was although he did not think about stopping to think who an authorised user might be.⁹² Before the Court Senior Sergeant Thomas said he did not know who any of these users were.⁹³

[92] The uncontested evidence of Mr Alexander Dymnikov, senior developer for the Police who was responsible for developing the Ten-One web module related to COVID-19 enforcement, is that information submitted by officers at checkpoints was not automatically or manually transferred into NIA and the information would not have appeared on a person’s NIA profile.⁹⁴ Mr Dymnikov’s evidence is also that Constable Wickham and Snr Sgt Thomas did not have permission to access the transit tracking tab of the system, and if they inputted Mr Alp’s vehicle registration plate on the day of his arrest, they would only have been able to view on the data entry tab Mr Alp’s movements for the previous 12 hours. It was therefore impossible for them to have seen Mr Alp’s and Ms Spierer’s border movements from 20 October 2021

⁹⁰ NoE at page 84

⁹¹ NoE at page 69

⁹² NoE at page 71

⁹³ NoE at page 78

⁹⁴ Affidavit of Alexander Dymnikov dated 25 January 2024 at [13]

using their own credentials.⁹⁵ The transit tracking tab of the system was only able to be used by approximately ten authorised users including Mr Dymnikov.⁹⁶ Mr Dymnikov is not aware that Constable Wickham or Snr Sgt Thomas contacted an authorised user to do so.⁹⁷

[93] Having regard to the strength of the evidence available to the Police on the day, these additional inquiries would have added nothing, even if it had been easy to make the additional inquiries, which I accept it was not. Those inquiries would not have provided them with any additional information in the circumstances.

[94] In short, I do not accept that any so-called failure on the part of the Police to make further inquiries means that the Police lacked good cause for suspicion that Mr Alp had committed an imprisonable offence by breaching the COVID-19 order.

Result

[95] On the evidence, I am satisfied that the Police were suspicious about whether Mr Alp breached the COVID-19 order, and that objectively there was good cause for their suspicion.

[96] Accordingly, Mr Alp's causes of action must fail. They are dismissed accordingly.

Costs

[97] The defendant is prima facie entitled to costs. The defendant is invited to file and serve a memorandum on costs, and the plaintiff is to file and serve a memorandum in response 10 working days after receiving the defendant's memorandum. A decision will then be made on the papers in the usual way.

K D Kelly
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 29/05/2024

⁹⁵ Affidavit of Alexander Dymnikov dated 25 January 2024 at [20]

⁹⁶ Affidavit of Alexander Dymnikov dated 25 January 2024 at [11]

⁹⁷ Affidavit of Alexander Dymnikov dated 25 January 2024 at [21]