IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA263/2023
[2023] NZCA 609

BETWEEN	DAVID JOHN GOWER Appellant
AND	THE KING Respondent

Hearing:	8 November 2023
Court:	Courtney, Fitzgerald and Churchman JJ
Counsel:	N P Chisnall KC and L A Elborough for Appellant H D L Steele and K F L Lee for Respondent
Judgment:	20 November 2023 at 3.30 pm
Reasons:	1 December 2023

JUDGMENT OF THE COURT

A The appeal is allowed.

B The sentence of two years and three months' imprisonment is set aside.

C A sentence of four months' community detention is substituted.

D The sentence is to be served at 40 Colemans Road, Springlands, Blenheim.

E The curfew period is between the hours of 8.00 pm and 7.00 am.

F The sentence is subject to the standard conditions set out in s 69E of the Sentencing Act 2002.

G The sentence will begin on 21 November 2023.

H Mr Gower is to travel directly from prison to the community detention address.

REASONS OF THE COURT

(Given by Churchman J)

Introduction

[1] The appellant was convicted and sentenced to two years and three months' imprisonment on one representative charge of aiding and abetting offending under s 143A(1)(d) of the Tax Administration Act 1994.[1] The appellant appealed against that sentence.

[2] On 20 November 2023 we issued a results judgment allowing the appeal. This decision now sets out our reasons.

Background

[3] The appellant was the sole director of a large company which was having financial difficulties. One of the responses adopted by the appellant was to stop paying PAYE (including pay-as-you-earn taxes as well as student loan, KiwiSaver and child support deductions, collectively referred to in this judgment as PAYE) to Te Tari Taake | Inland Revenue Department (IRD). Between 15 July 2014 and 5 December 2016, payments of PAYE deducted from employees' wages were either missed or not paid in full on 49 non-consecutive pay periods. In total, the sums unpaid by the relevant due dates, including interest and penalties, amounted to $2,069,539. The core tax said to have been avoided was in the region of $1.3 million. Various late payments were made and arrangements entered into with the IRD in an attempt to clear the debt. However, in December 2016, following failed attempts to clear the debt, the IRD applied to place the company in liquidation.

[4] The appellant was initially charged with 49 charges, being one charge for each relevant pay period. The appellant defended the matter at trial. During the trial, the IRD identified an error in its calculations, and the core shortfall was corrected to $1,007,761. After seven days of trial before a jury, the appellant entered a guilty plea to one representative charge of aiding and abetting offending under s 143A(1)(d) of the Act.

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[1] Maximum penalty five years' imprisonment and/or $50,000 fine.

[5] It is not in dispute that by the time of sentencing in the District Court, the appellant had made a further payment of $300,000 from his own funds towards clearing the core shortfall outstanding.

District Court decision

[6] There is no guideline judgment for offending under s 143A(1)(d) of the Act. The Judge identified four factors that he saw as relevant. First, the Judge considered the degree of planning and premeditation was "significant".[2] Second, the Judge noted that the offending took place over a two-and-a-half-year period, in which in 49 of the 58 pay periods during that time PAYE was either not paid or not paid in full.[3] Third, the Judge noted that the total quantum not paid by the relevant due dates was $2,069,539, and the ultimate shortfall was $1,007,000.[4] Fourth, the Judge considered that, in respect of the degree of harm, the voluntary compliance-based tax system was "vulnerable to abuse and that is what happened on this occasion".[5]

[7] The Judge declined to grant the appellant a discharge without conviction.[6] He considered that the offending was serious, which remained moderately serious offending even after mitigating factors were considered,[7] and the direct and indirect consequences of a conviction were not out of all proportion to the gravity of the offending.[8] That decision was not appealed.

[8] In determining the appropriate sentence, the Judge adopted a starting point, reached on the basis of his analysis of the relevant authorities, of four years and two months' imprisonment.[9] The Judge granted a five per cent discount for the appellant's very late guilty plea following what he described as "on any assessment, an overwhelming Crown case",[10] as well as a 15 per cent discount for the appellant's good conduct and "blameless life" prior to the offending.[11] The Judge also gave a 10 per cent discount in recognition of the efforts that the appellant had made both in

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2 *R v Gower* [2023] NZDC 9941 [sentencing decision] at [6].
3 At [7].
4 At [8].
5 At [9].
6 At [40].
7 At [33]–[34].
8 At [35]–[39].
9 At [41].
10 At [16] and [42].
11 At [43].

the lead-up to the offending and the background efforts of resolving these matters, as well as a further 15 per cent discount for the "not insignificant" reparations the appellant had paid towards the outstanding core tax balance.[12]

[9] This resulted in an end sentence of 27.5 months' imprisonment, which the Judge rounded down to 27 months.[13] The Judge noted this was not a sentence he had the ability to convert to a lesser sentence and sentenced the appellant to two years and three months' imprisonment.[14]

Submissions

Appellant's submissions

[10] The appellant submits the end sentence of two years and three months' imprisonment was manifestly excessive. The appellant takes no issue with the discounts provided. However, the appellant says the starting point adopted by the Judge was too high.

[11] Although the Judge undertook a comparative review of 12 decisions in determining an appropriate starting point, the appellant submits that the Judge did not grapple with the relevance of the fact that the offending largely constituted the delayed payment, rather than wholesale evasion, of tax. The appellant says this significantly attenuated the gravity of the offending, which in turn reduced the utility of the decisions that the Judge used as comparators. The appellant then says there are two other material errors regarding the comparability of the appellant's offending with other cases in which starting points in excess of four years have been adopted. In particular these relate to the duration of the period of the offending and the absence of any misleading behaviour in pursuit of self-gain on the part of the appellant. In not taking into account these matters, the appellant says the Judge adopted a starting point that was significantly out of step with other cases.

Respondent's submissions

[12] The respondent submits the end sentence of two years and three months' imprisonment cannot be seen as manifestly excessive for sustained and premeditated

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12 At [43].
13 At [43].
14 At [44]–[45].

offending that resulted in a $1 million loss of public funds. During the course of the hearing, counsel acknowledged that when the $300,000 paid by the appellant prior to sentencing was taken into account the actual loss was in the order of $700,000.

[13] The respondent submits that the starting point adopted of four years and two months' imprisonment was within the available range and reflected aggravating factors that the sentencing judge was well placed to assess. The respondent says significant discounts were also given to reflect previous good character, efforts to clear the debt, reparation payments and the appellant's very late guilty plea. It says that even if the starting point was stern, the substantial discounts provided meant the end sentence was within the available range.

Discussion

Starting point

[14] The maximum penalty for offending under s 143A is five years' imprisonment.[15] In assessing the submission that the starting point adopted by the Judge was too high, we have had regard to the authorities cited by the Judge and by counsel in this appeal. We note that because of the significantly varying facts of the differing authorities, they have to be applied with care.

[15] In *Foley v R*, Mr Foley failed to account for PAYE for monthly pay periods over two and a half years, resulting in a total unaccounted amount of $481,964, with the ultimate shortfall being $356,132.[16] As in this case, Mr Foley's offending was not for personal gain but rather to keep his business afloat. This Court overturned the three-year starting point adopted in the District Court and held that the appropriate starting point was two years and six months' imprisonment.[17] Overall, we assess this case as being less serious than the present case.

[16] In *James v R*, Mr James was sentenced to two years' imprisonment on 19 charges of tax evasion.[18] Over eight years, he knowingly failed to file tax returns, intending to evade the assessment or payment of tax, as well as knowingly aiding and abetting four companies to avoid payment of tax. This was done to provide "a very

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15 Tax Administration Act 1994, s 143A(8)(d).
16 *Foley v R* [2023] NZCA 456.
17 At [24].
18 *James v R* [2010] NZCA 206, (2010) 24 NZTC 24,271.

comfortable lifestyle" for his family, including the construction of an expensive home, and this Court described Mr James' offending as comparable to theft.[19] This Court was not required to scrutinise the starting point, and indeed, no starting point was mentioned. The District Court notes indicated a starting point of two years and three months had been adopted. This Court did not interfere with the end sentence of two years' imprisonment. Although this case has the aggravating features of failing to file tax returns, an eight-year duration of the conduct and substantial personal benefit to the defendant, the unpaid tax was significantly less than in the present case. Overall, it could be said to be slightly less serious than the present case.

[17] In *R v Easton*, Mr Easton helped six companies evade tax of approximately $200,000 over a period slightly exceeding one year.[20] Similarly to the appellant in the present case, Mr Easton used the diverted funds to keep the businesses afloat, rather than for his personal use. On appeal by the Solicitor-General this Court considered that a starting point of at least one year's imprisonment would have been justified.[21] This Court did not accept that the motivation underpinning Mr Easton's offending, which was to ensure the survival of his businesses, was a mitigating factor, nor was the fact that Mr Easton and some of the companies had paid significant sums to settle debts, this Court noting that this was done to meet a legal obligation.[22] This Court found that there was premeditation in Mr Easton's "deliberate choice [to offend] with full knowledge of the serious consequences", given that he had been warned by the IRD a month before the offending commenced that it was a criminal offence not to pay over PAYE deductions to the IRD and a criminal prosecution could be taken if amounts deducted from wages were not paid over.[23] Despite the similarities with the present case, the substantially lower amount of tax involved makes it less serious.

[18] On resentencing in the High Court, the Court adopted the one-year starting point identified by this Court, but ultimately imposed sentences of community detention, community work and reparation.[24]

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19 At [6].
20 *R v Easton* [2013] NZCA 677 [*R v Easton* (CA)].
21 At [37].
22 At [35].
23 At [35].
24 *R v Easton* [2014] NZHC 522, (2014) 26 NZTC 21-066.

[19] In *Mehmood v R*, Mr Mehmood had evaded core tax of $1 million in PAYE and GST over five and a half years.[25] Mr Mehmood used a relatively sophisticated employment scam to under-report his business's earnings, and filed 144 false returns, which enabled him to improve his personal financial position. This Court endorsed a starting point of four years' imprisonment, observing it was "well justified". In doing so, this Court considered such a starting point was justified by the scale of the offending, which the Court described as defrauding the public "in a calculated and systematic way and in gross breach of trust."[26] The aggravating features of this case make it more serious than the present case.

[20] In *R v Smith*, the offending involved evasion comprising the filing of false returns and the non-payment of PAYE and GST over five years which resulted in a $570,000 loss.[27] The offending was described as premeditated for "distinct financial advantage".[28] The District Court Judge adopted a starting point of two and a half years' imprisonment, which this Court said was within range.[29] When compared to the other cases discussed above, that could be seen to be a generous approach. The case also involved substantially less tax than the present case.

[21] Having regard to the authorities, we consider that the starting point adopted in this case of four years and two months' imprisonment was excessive and that a starting point of three years and four months is appropriate. We now explain why.

[22] This case differs from many of those cited by the Judge in setting an appropriate starting point because of the absence of any attempt to mislead the IRD, particularly through the filing of false returns or failing to file any returns. In this case, the company filed accurate returns and there was no subterfuge or deception in its calculation of the tax owed. It is also not a case where money that should have gone in payment of tax went to fund the appellant's lifestyle. This distinguishes this case from a number of the cases referred to by the Judge in particular *Smith*, *James* and *Mehmood*, where the offender actively misled the IRD by filing false returns designed

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25 *Mehmood v R* [2015] NZCA 338.
26 At [27].
27 *R v Smith* [2008] NZCA 371.
28 At [33].
29 At [38].

to evade the assessment of tax, or failed to file any returns. Such cases squarely breach the high trust tax compliance model.

[23] The respondent rightly points out that the maximum penalty is the same (five years' imprisonment) under both s 143(1)(d), under which the appellant was charged, and s 143B, in cases involving a dishonest failure to file tax returns and cited by the Judge. Although the Judge was entitled to have regard to authorities involving offenders who actively misled the IRD, and/or who utilised funds for their personal gain, we consider there should have been some allowance made, in setting an appropriate starting point, to reflect the fact that in this case there was no suggestion of deception on the part of the appellant by way of filing false returns or not filing any returns. Neither did the appellant use the unpaid tax for personal gain. As a result of the Judge's failure to have regard to these factors, the starting point adopted was excessive in relation to comparable authorities.

[24] Second, the Judge failed to recognise that the appellant's offending in this case was substantially less sustained than that in other cases where lower starting points have been adopted. The Judge essentially treated the appellant's offending as comparable to that in cases involving similar or greater amounts withheld from the IRD but over longer periods of time. We consider the Judge ought to have taken into account the fact that the offending in this case took place over two and a half years, as compared to five years in *Smith*, five and a half years in *Mehmood*, and seven years in *James*. We consider that the failure to make any adjustment to take into account that the offending was sustained over a shorter period of time than in the cases referred to, was one of the factors that resulted in the Judge adopting a starting point that was excessive.

[25] We have considered whether an allowance should be made to the starting point for the efforts that the appellant had made, both in the lead-up to the offending and during it in attempting to resolve the matter.

[26] The appellant accepts that the offending, in the partial non-payment of tax, "propped up" the business. However, this was done to enable the business to be sold as a going concern so the company's creditors — including, importantly, the core tax owed to the IRD — could be paid. The appellant was transparent with the IRD and

acted in good faith. As this Court noted in *R v Easton*, even if such offending is motivated by hopes such as saving companies and protecting the employees of those companies, such motives do not justify the offending.[30] However, we consider that the broader context in which the appellant's offending came about, the efforts made by him to reach a position whereby the company's debts, including to the IRD, would be paid, and the engagement with the IRD, do provide the basis for an assessment of lower culpability on his part.

[27] However, at sentencing, the Judge took these factors into account by giving a discount of 10 per cent at the second stage of the sentencing exercise.[31] To also reflect them in the starting point would accordingly provide for "double credit" to Mr Gower. We therefore make no further allowance for these matters.

[28] We do not think the Judge erred in identifying premeditation as a relevant factor in the offending. In referring to the appellant's deliberate decision not to account for PAYE, the Judge rightly had regard to the appellant's particular role within the company and the high level of control that the appellant exercised as well as the IRD's numerous attempts to arrange payment. The appellant was fairly put on notice by the IRD of the potential consequences of not paying the tax. The appellant's efforts to resolve the debts, both to creditors and to the IRD, and his subsequent transparency with the IRD, goes to his culpability, but does not diminish the deliberate decision to withhold the funds from the IRD in the first place.

[29] We are also not convinced that the Judge failed to grapple with the relevance of the offending constituting delayed payment rather than wholesale tax evasion. The Judge highlighted the difference between the tax outstanding at various times and the ultimate shortfall, and was mindful of the significance of the final amount outstanding at the end of the charge period. The Judge did not err in so doing.

[30] In terms of an appropriate starting point, we note the respondent's submission that the appellant's offending in this case is much more significant than that in *Foley*.[32] While it spanned a similar time period, the appellant's company in this case was much larger, with twice-monthly filing deadlines and a total quantum outstanding after late

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30 *R v Easton* (CA), above n 20, at [35].
31 That is, in addition to the 15 per cent discount given for the $300,000 payment by Mr Gower.
32 *Foley v R*, above n 16.

payments of almost three times that in *Foley*. The respondent submits that a loss of some $700,000 to the public must be a significant aggravating factor which should place the starting point substantially higher than that adopted by this Court in respect of Mr Foley.

[31] We agree with that submission. Having regard to the authorities, and taking into account the factual differences and factors relevant to this offending we have identified, we consider an appropriate starting point would have been three years and four months' imprisonment, or 40 months.

Mitigating factors

[32] We do not think any adjustment is necessary with regard to the discounts applied in this case in respect of mitigating factors. We do note our view, with regard to the appellant's submissions in respect of a guilty plea discount, that the appellant is wrong to describe the trial as essentially a disputed facts hearing. It involved seven days of jury trial time and the appellant's guilty plea came only after the close of the Crown case and in the view of what was described by the Judge as "overwhelming" evidence.[33] While the Crown had suggested at sentencing that a discount of up to 10 per cent could have been available for the appellant's guilty plea, there was no error in granting only a five per cent discount in these circumstances.

[33] Accordingly, we are satisfied that there was no error in the determination and calculation of discounts in this case.

Appropriate end sentence

[34] Taken against an amended starting point of 40 months, a 45 per cent discount results in a nominal end sentence of 22 months, which is a short sentence of imprisonment. There is therefore the ability to convert the sentence to a lesser sentence. The appellant asks the Court to substitute a sentence of either community detention or home detention. The appellant, relying on the decision in *Easton*, submits that where offending is not fuelled by self-serving financial gain, a sentence lower in the hierarchy than home detention may be considered. The appellant submits that given the strong amalgam of personal mitigating factors present in the appellant's case,

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[33] Sentencing decision, above n 2, at [16].

a sentence of community detention will achieve the applicable purposes of general deterrence and denunciation, while also recognising that there is no requirement to personally deter the appellant.

[35] The relevant purposes of sentencing for offending of this kind are to hold the offender accountable, promote a sense of responsibility, denounce and deter (both personally and in a general sense).[34] These purposes are to be considered in deciding whether it is appropriate to convert a short sentence of imprisonment to home detention (or lesser). We accept that the purposes of imposing a sentence of imprisonment have largely been met by the fact that Mr Gower has already served six months in prison. From the evidence before us, it is apparent these criminal proceedings have greatly impacted the appellant.

[36] A sentence of 22 months' imprisonment would normally translate to a sentence of home detention of around 11 months. We are satisfied that the purposes of sentencing can be achieved by a sentence other than imprisonment.

[37] Overall, we are satisfied that a community-based sentence is an appropriate sentence in this case. The appellant has not previously been subject to any community-based sentence and his ability to comply is currently untested. However, the writer of the pre-sentence report identified no barriers that would impact the appellant's ability to comply. We were advised that the address detailed in the pre-sentence report as being suitable for an electronically monitored sentence remains available.

[38] We agree that this is a case which sits on the cusp between home detention and community detention. The appellant has volunteered for a number of years with the Coast Guard, and reported to the writer of the pre-sentence report that he would like to continue doing so. We consider that had the appellant not already served over six months' imprisonment, a sentence of home detention could be said to be the least restrictive outcome in the circumstances. However, the time the appellant has spent in prison means that the sentencing objective of deterrence and denunciation inherent

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[34] Sentencing Act 2002, s 7(1)(a), (b), (e) and (f).

in a sentence of home detention has already been achieved and it is appropriate to give consideration to community detention.

[39] Section 69B of the Sentencing Act 2002 provides that a court may sentence an offender to community detention when the offender is convicted of an offence punishable by imprisonment. The sentence may be for a period of up to six months. The court must specify a curfew period and the curfew address. The total curfew period in any week may not be for more than 84 hours.[35]

[40] A sentence of community detention may be combined with another sentence. In the case of *Ganley*[36] this Court replaced a sentence of two years and three months imprisonment, which the appellant had already served five months of, with a sentence of six months community detention combined with a period of 12 months supervision. The appellant in that case had rehabilitative needs that the appellant in the present case does not have. We do not see the need for the imposition of a supervision order in the present case.

[41] We are satisfied that the principles of sentencing are, in the circumstances, satisfied by the imposition of a sentence of four months' community detention.

Result

[42] The appeal is allowed.

[43] The sentence of two years and three months' imprisonment is set aside.

[44] A sentence of four months' community detention is substituted.

[45] The sentence is to be served at 40 Colemans Road, Springlands, Blenheim. The curfew period is between the hours of 8.00 pm and 7.00 am. The sentence is subject to the standard conditions set out in s 69E of the Sentencing Act 2002. The sentence will begin on 21 November 2023. Mr Gower is to travel directly from prison to the community detention address.

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35 Sentencing Act, s 69B(4).
36 *Ganley v R* [2011] NZCA 449.

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