IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA396/2022
[2023] NZCA 456

BETWEEN	STEPHEN EUGENE FOLEY Appellant
AND	THE KING Respondent

Hearing: 24 August 2023

Court: Goddard, Whata and Downs JJ

Counsel: S M Kilian for Appellant
J A A Mara for Respondent

Judgment: 19 September 2023 at 11.00 am

JUDGMENT OF THE COURT

A Leave is granted to both parties to adduce further evidence on appeal.

B The appeal is allowed.

C The sentence imposed in the District Court is set aside.

D The proceeding is remitted to the District Court for sentencing.

E Any matters that arise in relation to bail pending sentencing are to be determined by the District Court.

REASONS OF THE COURT

(Given by Goddard and Downs JJ)

[1] Mr Foley was convicted in the District Court of 28 charges of aiding and abetting two companies to withhold Pay As You Earn (PAYE) tax, pursuant to

ss 143A(1)(d) and 148 of the Tax Administration Act 1994. The companies had failed to pay PAYE tax of $356,132.18 over a period of approximately two and a half years. Mr Foley was sentenced to two years and eight months' imprisonment.[1] He appeals against that sentence.

Background

[2] Mr Foley is a qualified builder. He was a shareholder and director of two construction companies: HPTP (2014) Limited (HPTP) and Point to Point Construction Limited (Point to Point). He was the effective controller of both companies. Mr Foley decided which creditors would be paid, and which would not, when the companies encountered cash flow difficulties. He chose to pay employees and suppliers in preference to paying PAYE amounts owing to the Inland Revenue Department (IRD). The ultimate PAYE deficit was, as already mentioned, $356,132.18. HPTP was placed in voluntary liquidation on 23 January 2017. Point to Point was placed in liquidation on 9 June 2017.

[3] Mr Foley says he established the companies because of his concern about the large number of unemployed people in New Zealand. He believed a number of those people had potential to work in construction. His companies created opportunities for these individuals, helping them develop a set of practical skills and become employable. At its peak the companies had 89 employees: Mr Foley considers that one of the reasons the business failed is that it grew too fast because he was anxious to help people. He says he spent a significant amount of his time working for the companies coaching, counselling and mentoring individuals with a troubled background.

[4] The period of offending was 31 December 2014 to 31 December 2016 (in respect of HPTP) and 28 February 2017 to 30 April 2017 (in respect of Point to Point).

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1 *R v Foley* [2022] NZDC 14390 [District Court sentencing notes]. At [16] the Judge described the sentence as "29 months' imprisonment or two years and eight months". Two years and eight months is 32 months, not 29 months. It seems clear from the calculation undertaken by the Judge that the reference to 29 months was an error, and that the sentence imposed was, and was intended to be, two years and eight months' imprisonment.

[5] There were multiple delays in bringing the charges against Mr Foley on for trial, for various reasons not attributable to him, including the Covid-19 pandemic. The trial eventually took place in mid-2021. A conviction was entered on 2 July 2021. Sentencing took place more than a year later on 29 July 2022.

[6] Mr Foley has no previous convictions.

[7] Mr Foley had been a director of other failed companies which went into liquidation with unpaid debts including tax debts. He was adjudicated bankrupt in August 2001, and again in 2018. In 2006 he was prohibited from acting as a director of a company for two years and nine months on the grounds that he had been a director of three companies that went into liquidation.[2]

District Court Sentencing

[8] Judge Gibson began by outlining the circumstances of the offending. He noted that no payments had been made in respect of the unpaid PAYE, and up to the date of sentencing there had been little prospect of recovery of any of those monies as Mr Foley had been adjudicated bankrupt in respect of other debts owed to IRD.[3]

[9] The Judge then considered the starting point for the sentence. As the Judge noted, there is no guideline for this type of offending.[4]

[10] Mr Dalton, who appeared for Mr Foley in the District Court, submitted that the starting point should be two and a half years. The Crown sought a higher starting point. The Judge adopted a starting point of three years' imprisonment. He said (emphasis added):

> [12] Deterrence must be a factor in sentencing and the starting point needs to be a sentence of imprisonment. The appropriate starting point having regard to the premeditated nature of this offending and the manipulation that the defendant engaged in with the Inland Revenue Department *and the fact that he was not exactly inexperienced in this type of offending* means that a starting point of three years' imprisonment is appropriate, having regard to the period of offending and the quantum of loss.

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2 This appears to have been a prohibition by the Registrar of Companies under s 385 of the Companies Act 1993.

3 District Court sentencing notes, above n 1, at [2].

4 At [8].

> [13] As I already have mentioned, KiwiSaver deductions were not made, student loan repayments were not made, child support payments were not made from the companies controlled by the defendant *so the losses were felt not only by the revenue but by the defendant's employees who he was purporting to want to help*. The breach of trust is also reasonably significant as PAYE is essentially held on trust for the revenue.

[11] The Judge then considered what discounts should be applied to that starting point.

[12] No discount was allowed for remorse, as the Judge considered that Mr Foley was not remorseful in light of the period of offending and his past conduct.[5]

[13] The Judge then addressed whether there should be a discount for good character. He considered that the matters that could be taken into account included "the conduct in relation to bankruptcies, not paying taxes, trading while insolvent which are all reflected in his past history."[6] The Judge said that normally for a man of 54 years of age and of good character with no previous convictions a discount of up to 15 per cent would be available. Some recognition could be given to Mr Foley because he set the businesses up to try to assist other people, "but that to a great extent is overtaken by his past conduct in relation to other matters and so the good character discount to me would seem … to be only modest".[7] The Judge allowed a 5 per cent discount for good character.[8]

[14] The Judge reviewed the s 27 report that had been obtained, describing Mr Foley's background and personal circumstances. The Judge noted that there was some violence during his childhood and some dysfunctionality with his family, but did not consider that there was any nexus between those matters and the offending. Accordingly no discount was awarded for those matters.[9]

[15] The Judge allowed a discount of 5 per cent for Mr Foley's poor health in recent years, and for the poor health of his wife.[10]

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5 At [14].
6 At [14].
7 At [14].
8 At [14].
9 At [15].
10 At [16].

[16] At the sentencing the Judge had been handed an unsigned employment agreement purportedly between Mr Foley and an entity known as the Kaimanawa Development Trust (Trust). It was suggested by Mr Foley that he would be capable of earning, if able to be employed, $140,000 per annum from which he could make some payments towards the unsatisfied PAYE debt.[11] The Judge appears to have discounted this last-minute indication of an ability and willingness to provide reparations: he did not consider whether there should be any order for reparations, or any discount for willingness to provide reparations.

[17] The total discount accepted by the Judge was 10 per cent. The end sentence was thus two years and eight months' imprisonment.[12]

[18] In order to accommodate a medical appointment that Mr Foley had shortly after sentencing, the Judge deferred the start date for the sentence for 28 days. Bail was granted for that 28 day period. Mr Foley remains on bail pending determination of this appeal.[13]

Submissions on appeal

[19] Mr Kilian, who appeared for Mr Foley, submitted that the sentence imposed was manifestly excessive for four reasons:

(a) The three year starting point adopted was excessive, by reference to similar cases. He submitted that an appropriate starting point would have been between two and two and a half years.

(b) The Judge erred in declining to apply a discount for the factors outlined in the s 27 report, as well as prior good character.

(c) The Judge erred in failing to take into account the employment opportunity identified by Mr Foley, and the reparation offer made by him in relation to the unpaid tax.

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11 At [3].
12 At [16].
13 Mr Foley has not commenced serving his sentence, in reliance on s 344(3) of the Criminal Procedure Act 2011.

(d) The Judge granted an insufficient discount for Mr Foley's health conditions.

Discussion

Starting point

[20] The starting point for a sentence is set by reference to the characteristics of the offending for which the defendant is being sentenced. It takes into account aggravating and mitigating features of that offending. Any aggravating and mitigating factors personal to the offender are then taken into account at the next stage.[14]

[21] In determining the starting point of three years, the Judge appears to have taken into account Mr Foley's previous conduct as a director of insolvent companies that failed to meet tax liabilities, and his disqualification as a director. Hence the reference to Mr Foley being "not exactly inexperienced in this type of offending".[15]

[22] There are three difficulties with this observation. First, Mr Foley's previous conduct should not have been taken into account when determining an appropriate starting point: the focus should have been on the offending for which he was being sentenced. Second, that previous conduct was not the subject of any convictions: it was not open to the Judge, on the limited material available to him, to conclude that Mr Foley's previous conduct had involved "offending" of this or any other kind. Third, Mr Foley's previous conduct as a director of failed companies was (appropriately) taken into account when considering the level of good character discount that should be provided. Taking it into account at that stage as well as in setting the starting point risks inappropriate double counting.

[23] The Judge also erred in suggesting that losses caused by the offending were felt not only by IRD (and thus, the public) but also by the employees of the companies whom Mr Foley was seeking to help.[16] As Mr Mara, who appeared for the Crown, confirmed IRD attributes amounts disclosed within a PAYE return to the relevant

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14 See *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.
15 District Court sentencing notes, above n 1, at [12], set out at [10] above.
16 At [13], set out at [10] above.

employee, and accrues a debt owed by the employer where the amount due is left unpaid. The loss fell on the revenue, not on the individual employees. We accept Mr Mara's submission that evasion of tax has a corrosive effect on society as a whole, and that in this indirect sense all New Zealanders, including the employees of the companies, were affected by Mr Foley's offending. But in proceeding on the basis that there was a direct harm to the employees, the Judge was in error.

[24] We accept Mr Kilian's submission that the offending in this case is no more serious than the offending in *R v Smith*, where a starting point of two and a half years was adopted by the District Court and described by this Court as "within the range available".[17] We were not much assisted by the other cases referred to by counsel. Focussing solely on the offending, as we must, we consider that a starting point of two and a half years would be appropriate.

Section 27 report

[25] Mr Kilian next contends the Judge erred by not providing a discount for Mr Foley's background, as discussed in a s 27 cultural report. Mr Kilian argues that report discloses a causative contribution between Mr Foley's background and the commission of the offending.[18]

[26] Mr Foley described his upbringing to the report writer as "a typical Māori household where alcohol and violence was pretty normal". However, Mr Foley said his family was reasonably well off as his mother held a prestigious job in the Ministry of Education. They "always had clothing and food, the bills were paid, and his parents owned a 'nice' car". Mr Foley said he helped raise his brothers as he always looked after people. Mr Foley said he carried this approach into business. HPTP, he said, created opportunities for those who are labelled as "fugitives" but the company "grew too fast".

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17 *R v Smith* [2008] NZCA 371, [2009] 24 NZTC 23,004 at [38].
18 See *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.

[27] Mr Kilian adds the Judge overlooked that Mr Foley's approach was consistent with "Māori culture of looking after the wider whānau", even though that approach was misplaced.

[28] Our sense is that the arguments in relation to Mr Foley's background have developed on appeal. Mr Kilian did not act in the District Court, and the Judge said nothing in his sentencing remarks about Mr Foley's alleged propensity to help others or the potential cultural dimension.

[29] We do not consider that the information provided about Mr Foley's childhood helps "to explain in some rational way why the offender has come to offend".[19]

[30] The argument that Mr Foley's desire to assist others was a relevant causative factor that goes to his culpability is problematic at a number of levels. In *Easton* the High Court concluded several factors mitigated the offending, so as to permit "a lenient approach":[20]

> (a) Mr Easton was a first offender and deserved credit for prior good character.
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> (b) Mr Easton's companies were "caught in a financial crisis" which Mr Easton had struggled to manage.
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> (c) Mr Easton was intent on ensuring that he and his companies paid their debts.
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> (d) The misapplication of PAYE was "genuinely thought to be a short term measure".
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> (e) Mr Easton and other companies in the group had paid significant sums to settle debts to the Commissioner.
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> (f) The remaining operating companies and their employees were dependent upon Mr Easton as their "inspirational driving force".

[31] This analysis was firmly rejected by this Court on an appeal by the Solicitor-General:[21]

> In our view, the mitigating factors which the Judge appeared to regard as justifying "a lenient approach to sentencing" need to be viewed in context and

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19 At [16(c)].
20 *R v Easton* [2013] NZCA 677 at [30], citing *R v Easton* [2013] NZHC at [19].
21 At [35] (footnotes omitted).

> balanced against the negative consequences. Mr Easton, in ensuring that he and his companies "paid their debts", misapplied some funds that, if not paid, were claimable as a preferential debt in an insolvent liquidation. The fact that some of those moneys were used to pay creditors of lesser priority meant that the Commissioner was less likely to receive payment in full from a liquidation. That can hardly be seen as a mitigating factor, whether or not Mr Easton "genuinely thought [it was] a short term measure". Nor, in our view, can the fact that Mr Easton and other companies in the Group had paid significant sums to settle debts to the Commissioner be seen as substantially mitigating, when all that was done was to meet a legal obligation. That seems to be nothing more than the absence of an aggravating factor. There is no doubt that Mr Easton's motive was to save the three companies and protect their employees, but those motives did not justify the offending. In the end, all of this was done at the expense of the Commissioner by deliberate choice with full knowledge of the serious consequences. In truth, the only mitigating factor justifying a reduction from the starting point was that Mr Easton was of prior good character.

[32] This Court did not accept the contention that Mr Easton's loyalty to the companies and employees mitigated his offending in any way.

[33] It may be that genuine cultural drivers, for example whanaungatanga, in the sense of discharging obligations to care and support others within a familial matrix or within a community could provide some form of mitigation in terms of moral culpability. But, related concepts of mana, utu and ea, and the duty to discharge obligations to others, including in this case the wider public, must also be brought into consideration.[22] We see nothing in the information before us to suggest that the balance of these considerations favours a discount.

[34] We thus conclude, in agreement with the Judge, that the background matters referred to in the s 27 cultural report do not justify a further discount. Even if they can be said to have contributed to his offending, they did not do so in a manner that mitigates his culpability.

Good character

[35] The Judge deducted five per cent for Mr Foley's previous good record. Mr Kilian contends the discount should have been 10 per cent. Mr Kilian emphasises the (two) character references given to the Judge, which described Mr Foley as generous.

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[22] For discussion of the operation of whanaungatanga and utu in the context of debt recovery, see *Doney v Adlam (No 2)* [2023] NZHC 363, [2023] 2 NZLR 521 at [106].

[36] As Mr Mara for the respondent observes, whether a good character discount is given is "very much a matter of impression" having regard to the overall sentence; the period for which the defendant had good character; and the extent to which that is based on an absence of convictions as against contributions to the community. The nature and duration of the offending are also relevant considerations.

[37] Mr Foley can point to an offence-free life until middle age and positive references. His objectives in setting up and running these companies appear to have been largely altruistic, and deserve recognition. But, as against these factors, those the Judge treated as aggravating the offending were relevant here: Mr Foley has been a director of several failed companies; had been disqualified from being a director; and had been adjudicated bankrupt twice. His offending lasted two years and five months. It was serious in nature. It caused the community loss.

[38] We agree with the Judge that a discount of 15 per cent for good character was not justified. A discount in the range of 5 per cent to 10 per cent could be justified. The Judge did not err in awarding a discount of 5 per cent.

Health issues

[39] The Judge deducted another five per cent for Mr Foley's ill health and that of his wife. Mr Kilian contends this discount should have been 10 per cent.

[40] A defendant's ill health may mitigate a sentence, as may the ill health of another family member when the defendant's incarceration would cause disproportionately severe hardship. But, as the authors of *Adams on Criminal Law* note, the courts have been cautious to ensure ill health "does not become a licence to offend and avoid accountability".[23] For this reason, discounts tend to be modest, albeit much turns on the facts.

[41] *Whiteford v R* provides an example.[24] The defendant suffered ulcerative colitis. Incarceration had aggravated his symptoms. The self-medication regime had caused

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[23] Mathew Downs (ed) *Adams on Criminal Law – Sentencing* (online ed, Thomson Reuters) at [SA8.13A].

[24] *Whiteford v R* [2020] NZCA 130.

the defendant both embarrassment and challenge as the medication had to be administered rectally. There had also been delays in accessing medical attention within prison and securing medical attention beyond it. This Court concluded that "Mr Whiteford's presentation is quite unlike most prisoners who may suffer chronic medical or psychological conditions", and imprisonment had caused "a disproportionately severe effect".[25] It held a 10 per cent deduction was warranted.

[42] Mr Foley did not adduce medical evidence in the District Court or before us. Instead, he relied on letters and notes from doctors and specialists. That approach gives rise to practical difficulties for a court in understanding the significance and relevance of the material provided. Based on this material, we apprehend Mr Foley suffered a heart attack in October 2021.[26] Mr Foley appears to have ongoing heart problems and a more recent urological problem. The pre-sentence report says Dianne Foley, Mr Foley's wife, "had a 'nervous breakdown' in February 2021" and is seeing a psychotherapist "for [ongoing] treatment".

[43] We are not able to conclude from this material that serving a term of imprisonment would be particularly onerous for Mr Foley. Nor is there any evidence that Mr Foley is playing a significant role as a caregiver for his wife, or that a sentence of imprisonment would cause her serious hardship.

[44] We are not persuaded that the discount for health issues should have been greater than 5 per cent.

The sentence should be set aside

[45] We discuss below the submission that credit should be given for reparations offered by Mr Foley. But in light of the factors already identified, we consider that Mr Foley's sentence was manifestly excessive and should be set aside. A starting point of two years and six months' imprisonment should be adopted, and there should be discounts of at least 10 per cent.

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25 At [40].

26 The cultural report refers to two additional heart attacks. This appears to be based on self-reporting.

Reparation — and further credit for reparation?

[46] That leaves the question of reparation. Mr Foley says that he has already paid reparation of $15,000 to IRD, and has put aside an additional $25,000 which could be paid by way of reparation. If he is able to work (which depends on whether he receives a sentence of home detention rather than imprisonment) he is willing to pay a further $80,000 in monthly instalments of $5,000, which would result in total reparations of $120,000: approximately one-third of the unpaid tax debt of the companies.

[47] Mr Kilian contends this warrants a 10 to 15 per cent deduction, and this in turn raises the possibility of a sentence of home detention.

[48] Mr Foley sought to adduce further evidence in relation to his proposed role with the Trust from himself, and from Dr Karl Hellyer on behalf of the Trust. In short, these affidavits say Mr Foley is now discharged from bankruptcy; is owed $38,500 by the Trust; may continue to earn remuneration for services to the Trust; has paid $15,000 to the Commissioner; proposes to pay a further $15,000; and would pay further money incrementally in the event of a sentence of home detention. It appears that what is now envisaged is that Mr Foley would be a contractor to the Trust, rather than an employee.

[49] The Crown sought to adduce further evidence in response to Mr Foley's evidence by way of affidavit from Ms Lisa Davies of IRD, advising that there is no record within IRD's system of any current employment of Mr Foley. However as she properly noted, there would not be any such record if Mr Foley was self-employed.

[50] The evidence sought to be adduced by Mr Foley and the Crown is relevant, and fresh to the extent that it relates to events after sentencing. We grant leave to adduce it.

[51] However even with the benefit of that fresh evidence, which goes well beyond the limited material available to the Judge, we have limited information about Mr Foley's likely earnings over the next two years and his ability to pay the proposed reparation. And as Mr Mara points out, the additional $25,000 immediate payment offered by Mr Foley has not yet been received by IRD: it appears to be held by the

Trust pending instructions from Mr Foley on how it should be dealt with. We consider that the District Court will be better placed to sentence Mr Foley once the $25,000 referred to above has been paid to IRD, and once further detail has been provided of the contractual arrangements for Mr Foley to carry out work for the Trust, together with information about his expected earnings pursuant to that arrangement over the relevant period.

[52] In those circumstances, we consider that it is preferable for sentencing to be remitted to the District Court. That Court will be better placed to consider what order should be made for future reparations, and what credit should be given for reparation already provided at the time of sentencing.

[53] Credit for these reparations may well bring Mr Foley's sentence down below the two year threshold, at which point home detention can be considered. The District Court will be best placed to make a decision about whether a sentence of home detention is the least restrictive sentence that is appropriate, having regard to all relevant factors including the reparation paid at that time and any further reparation provided for in the sentence imposed.

Result

[54] Leave is granted to the parties to adduce further evidence on appeal.

[55] The appeal is allowed.

[56] The sentence imposed in the District Court is set aside.

[57] The proceeding is remitted to the District Court for sentencing.

[58] Any matters that arise in relation to bail pending sentencing are to be determined by the District Court.

Solicitors:
Kilian and Associates, Auckland for Appellant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent