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<http://www.legislation.govt.nz/act/public/1989/0024/latest/DLM155054.html>

**IN THE YOUTH COURT
AT WHANGAREI**

**I TE KŌTI TAIOHI
KI WHANGĀREI-TERENGA-PARĀOA**

**CRI-2019-227-000007
[2020] NZYC 45**

**NEW ZEALAND POLICE
Prosecutor**

v

**[EL]
Young Person**

Hearing: 30 January 2020
Appearances: Sergeant R Cameron for the Prosecutor
C Cull for the Young Person
Judgment: 30 January 2020

NOTES OF JUDGE G L DAVIS ON SENTENCING

[1] [EL] is before the Court today. He has 18 charges for which he was sentenced to an order of supervision with residence by me on 17 October 2019. The term of the supervision with residence order was for five months and three weeks. Today is the date by which [EL] is required to come back to Court and for the Court to consider whether he should be released early from the supervision with residence order. If that is the case, the supervision with residence order would then be replaced by a supervision order.

[2] Before the Court can consider those matters, it must receive a report from a social worker under s 334 and s 335 Oranga Tamariki Act 1989. In addition to that, I have a report under s 314 Oranga Tamariki Act from [the Youth Justice residence], which sets out the proposed orders and the rationale for that order, and the Court must turn its mind to the mandatory matters under s 314 Oranga Tamariki Act.

[3] Section 314 provides:

314 Court must in certain cases release young person from custody before expiry of supervision with residence order

(1) The court must on the date on which under section 311(2A)(a) it will consider early release under this section release a young person from the custody of the chief executive pursuant to an order under section 311 if satisfied that during the period that the young person has been in that custody—

(a) the young person has neither absconded nor committed any further offences; and

(b) either the young person's behaviour and compliance with any obligations placed on the young person by the plan prepared under section 335 in respect of the order have been satisfactory or any misbehaviour and non-compliance of the young person have been minor; and

(c) the young person has complied satisfactorily with any condition of the order that the young person undertake any specified programme or activity.

(2) The chief executive must, as soon as practicable before the date on which under section 311(2A)(a) the court will consider early release under this section, prepare for, and furnish to, the court a report addressing the matters specified in subsection (1)(a) to (c).

[4] The critical thing is that the Court must release a young person from custody if it is satisfied that during the period that [EL] is in custody:

- (a) He has neither absconded nor committed any further offences.
- (b) [EL]'s behaviour and compliance with any obligations placed on the young person by the plan, prepared under s 335 in respect of the order, have been satisfactory, or any misbehaviour and non-compliance has been minor.
- (c) That he has complied with any condition of the order that he undertake any specified programme or activity.

[5] Today it is accepted by the police that [EL] has neither absconded from custody, nor has he committed any further offences. It is not seriously challenged that [EL] has complied satisfactorily with any condition of the order that he undertake a specified programme or activity. What is really at issue are two things. From the police perspective, there are concerns about incidents involving [EL] in October 2019, three in November 2019, one in December 2019, and one in January 2020 while [EL] was in residence. In addition to that, they are concerned that the proposed residence at which [EL] will live when he is subject to the supervision order is not a suitable address for him to live. They have concerns about the occupants, they have concerns about [EL] returning to the environment that he committed this offending in, and it follows from that the police are concerned that if [EL] is released, he will play up further.

[6] This matter was called before the luncheon adjournment and I signalled after hearing from all of the parties that I would be making the order for early release and these are the reasons.

[7] Turning to the sections of the Act that are at issue, namely [EL]'s behaviour and whether it has been satisfactory, or any misbehaviour or non-compliance has been minor, it is accepted by the police that [EL] has not been charged with any offences

arising from the incidents that have occurred while he is in residence. The first incident is recorded in the s 314 report as follows:

Staff document that during the evening shower routine, a young person was agitated and started pacing up and down the unit wing, focusing his aggression on a young person. This resulted in a physical altercation. During this, [EL] approached the young person and also became involved in the altercation. [EL] approached the young person in an intimidating manner, challenging the young person to a fight. The young person witnessed this and questioned [EL] as to what he was doing, [EL] interpreted this as the young person challenging him. [EL] and the young person became involved in a physical altercation. [EL] and the young person were admitted to the Secure Care Unit as a result.

[8] The second incident on [date deleted] November is recorded as follows:

The staff documents that due to [EL]'s increasingly threatening and intimidating behaviour towards staff and young people during the day, a decision was made to admit [EL] to the Secure Care Unit. He was admitted to the Secure Care Unit due to the risk of harm he presented to staff and young people.

[9] The third incident on [date deleted] November is recorded as follows:

The staff documented that on the afternoon of [date deleted] November, a young person became upset at some news given to him. The young person made threats towards staff, [EL] was in the room, overheard this, and became upset and exited his room. [EL] then started to walk towards the young person, the staff quickly intervened and [EL] was directed back to his room, which he complied with, however, not before exchanging words with the young person. The young person then advanced towards [EL]. The staff again quickly intervened and moved the young person away from [EL] and admitted the young person to Secure Care.

[10] The fourth incident on [date deleted] November is as follows:

The young person was admitted to [the Youth Justice residence]. The young person was observed to walk into the classroom, stood in the corner, observing. The young person then walked up to another young person, querying what had been said to him. As a result, a physical altercation occurred. This resulted in most people, including [EL], becoming involved. An urgent request for further staff assistance was made due to the escalation of young people fighting with each other, staff intervened, and most young people were removed from the classroom. As this was happening, [EL] stood on the classroom table and started yelling gang slogans, doing gang gestures towards the young person. [EL] was directed to move off the table, which he complied with. [EL] and others exited the classroom, continuing to yell abuse at the new young person. It led to [EL] and other young persons failing to de-escalate. All were admitted to the Secure Care Unit.

[11] The next incident:

Staff noted that while on [date deleted] December 2019, the staff noted that while a young person was working on activity, the young person started to challenge young people in the class about his missing resources, who had taken them and who had taken them. He became increasingly upset and challenged the other young people that unless some of the resources were returned, he would fuck them up. Staff and teachers attempted to calm the young person, but he continued to make threats, directing them to [EL] and another young person. The young person threatened [EL], saying he would come over and fuck [EL] up. As [EL] was standing up, the young person making the threats jumped over the classroom table and hit [EL]. Staff intervened and [EL] was removed from the classroom. Because the young person who hit [EL] continued to remain agitated, a decision was made to admit him, I am assuming that to mean the other young person, to Secure Care Unit.

[12] A final incident was on [date deleted] January 2020:

Staff document that during the community meeting held in the morning, the staff leader advised all the young people which areas were going to be cleaned in the unit. Just as the shift leader was starting to explain, [EL] interrupted her, stating in a loud voice he was not going to clean the walls, but he would clean windows. The shift leader advised [EL] that he was going to clean the walls. [EL] continued to raise his voice and disputed having to clean the walls. [EL] was directed to have some time alone. While walking to the wing for some time, he started wrapping his jersey around the hand. When the shift leader attempted to talk to [EL], he refused, instead preparing to play with his jersey wrapped around his hand. After some time, [EL] agreed with the shift leader about cleaning the unit but stated he would clean the windows.

At about 9.30 am while having breakfast, [EL] loudly said he was Spiderman, he said he was going to use his webs to cover the staff radio transmitters, cover the staff in webs and then take the other young people out the unit courtyard. [EL] then threatened to grab the shift leader's keys. He was directed by the shift leader to timeout and staff assistance was requested, as [EL] was admitted to the Secure Care Unit because of his threats made to access the staff member's keys. He walked to the Secure Care Unit.

[13] Those are the incidents. As one will see, some of those incidents have been [EL] playing up. In other incidences, there are others directing their anger towards [EL], but by and large, looking at those incidents, while of course they are disruptive and in many respects not helpful to the easy management of other young people, I take the view that these incidents are nothing more than minor.

[14] As for the incident where [EL] has threatened to take the keys from the staff member and cover them in spider webs like Spiderman, that would seem to me to be more silly young person bravado talk than any actual threat to cover them in spider webs. If [EL] had been able to do that, I am sure we would have heard more about

that by now. The short point is, in my view, these incidents cannot be considered anything more than minor.

[15] As for the police concern about the appropriateness of the address that [EL] is going to go to, I agree with the police there are concerns that everybody should be alive to. However, looking at the mandatory considerations set out in s 314(1) Oranga Tamariki Act, the placement of [EL] at an address is not one of the Court's mandatory considerations.

[16] I share the police's concerns about [EL]'s future overall. That will require careful management by the social worker, it will require active management by the social worker, not simply periodic check-ins from time to time to ensure that everything is going well for [EL]. He has been in custody, both pursuant to the supervision with residence order and on remand, for a considerable period of time. As far as I am aware, about six or eight months in total. It is going to take some time, I imagine, for [EL] to transition back to living with his whānau, transition back to living in [location deleted].

[17] I am mindful of the obligations that now fall upon everybody exercising the functions and powers pursuant to the provisions of the Oranga Tamariki Act as they are set out in ss 4, 5, 4A and 7AA Oranga Tamariki Act. Importantly, s 7AA Oranga Tamariki Act imports into now the Oranga Tamariki Act specific duties that fall upon the Chief Executive in relation to the Treaty of Waitangi or Te Tiriti o Waitangi.

7AA Duties of chief executive in relation to Treaty of Waitangi (Tiriti o Waitangi)

(1) The duties of the chief executive set out in subsection (2) are imposed in order to recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi).

(2) The chief executive must ensure that—

(a) the policies and practices of the department that impact on the well-being of children and young persons have the objective of reducing disparities by setting measurable outcomes for Māori children and young persons who come to the attention of the department:

(b) the policies, practices, and services of the department have regard to mana tamaiti (tamariki) and the whakapapa of Māori children and young persons and the whanaungatanga responsibilities of their whānau, hapū, and iwi:

(c) the department seeks to develop strategic partnerships with iwi and Māori organisations, including iwi authorities, in order to—

(i) provide opportunities to, and invite innovative proposals from, those organisations to improve outcomes for Māori children, young persons, and their whānau who come to the attention of the department:

(ii) set expectations and targets to improve outcomes for Māori children and young persons who come to the attention of the department:

(iii) enable the robust, regular, and genuine exchange of information between the department and those organisations:

(iv) provide opportunities for the chief executive to delegate functions under this Act or regulations made under this Act to appropriately qualified people within those organisations:

(v) provide, and regularly review, guidance to persons discharging functions under this Act to support cultural competency as a best-practice feature of the department's workforce:

(vi) agree on any action both or all parties consider is appropriate.

(3) One or more iwi or Māori organisations may invite the chief executive to enter into a strategic partnership.

(4) The chief executive must consider and respond to any invitation.

(5) The chief executive must report to the public at least once a year on the measures taken by the chief executive to carry out the duties in subsections (2) and (4), including the impact of those measures in improving outcomes for Māori children and young persons who come to the attention of the department under this Act and the steps to be taken in the immediate future.

(6) A copy of each report under subsection (5) must be published on an Internet site maintained by the department.

[18] Earlier in the day, I drew to the attention of the Youth Court in general the jurisprudence that has emerged from the Waitangi Tribunal regarding the principles of the Treaty of Waitangi. Most significantly, I drew to the attention of practitioners two reports, the Tū Mai te Rangi Report¹ and the Napier Hospital and Health Services Report². Those reports are significant because they address what is now a well-

¹ Tū Mai te Rangi: Report on the Crown and Disproportionate Reoffending rates: Wai 2540

² The Napier Hospital and Health Services Report: Wai 692

established principle that falls upon the government of active protection. This extends to the need to actively protect the interests of young people, including [EL]. Of course, the Waitangi Tribunal was not looking at the principles through an Oranga Tamariki lens in considering each of those reports, but the duty, being an active duty, was underlined by the Tribunal. It was not a passive duty, it was not good enough for those exercising functions and powers pursuant to the Oranga Tamariki Act to sit on their hands. Rather, it required positive responses from those exercising their functions and powers in accordance with the Act.

[19] Most significantly though, two principles were discussed by the Tribunal that in my view are important. The principle of inequality and the principle of deprivation. Those principles said in essence that where it has been established that there are inequalities or deprivation, there was an active duty upon a Treaty partner to ensure that those inequities or inequalities, that deprivation are addressed. I do not see how a Treaty partner, namely the Crown, acting in good faith, would have enacted these important changes to the Oranga Tamariki Act without also recognising that some of the changes, some of the responsibilities are going to have fiscal implications.

[20] I accept the Tribunal made it very clear there was not a bottomless pit of money or resources that were available, but a Treaty partner acting in good faith would have been aware that the duties that I have spoken about are likely to come at a cost. I encourage those exercising their functions and powers, pursuant to the Oranga Tamariki Act, to ensure that [EL] is properly monitored during the course of his supervision order, but in addition to that, this is about creating a pathway forward for [EL] to independent living, where he is free from the temptations that surround him in [location deleted]; where he is free from the likelihood of those temptations dragging him back down a pathway towards further offending; where it is more likely than not that if one were to bump into [EL] in six months or 12 months' time and ask what he was up to and how he was going, that he would be telling us positive stories about work, education and employment, free from dependency on the State. Those are what I perceive the Oranga Tamariki amendments had in mind, not creating further deprivation and further inequalities.

[21] So while I have signalled these important principles, I underline that the police concerns, in my view, are relevant and valid, but it falls upon the system to make sure that the police concerns now in the forefront of everyone's thinking are not brought to full fruition. I do not see those concerns though should prevent the Court from making the order today that [EL] be released from custody.

[22] In turn, what will be put in place is a supervision order, pursuant to the provisions of s 283(K) Oranga Tamariki Act for six months, beginning today, 30 January 2020. In accordance with the social worker's report under s 335 from [the social worker], it is to incorporate the provisions under s 305 of the Act as they are numbered 4.1 to 4.6, and under s 306, additional conditions for support, care and control, as they are set out in paragraphs 5.1 to 5.10 of [the social worker]'s report.

Judge GL Davis
Youth Court Judge

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