

Decision Summary Kipnis

- The charges have been dismissed.
- The Complaints Assessment Committee investigated a charge that Boris Kipnis behaved in an unprofessional manner amounting to serious misconduct and brought a complaint to the Disciplinary Tribunal, which is an independent entity, for a decision.
- The case concerns events over a five minute period where a student alleged he was manhandled.
- The Disciplinary Tribunal found there was not enough evidence to substantiate the allegation.
- Mr Kipnis was teaching music and works part time in a number of secondary schools across Auckland.
- He holds a limited authority to teach – this gives him authority to teach in a specialist area where there may be a shortage of skilled teachers.
- The school Mr Kipnis was working in at the time initiated a mandatory report.

BEFORE THE NEW ZEALAND TEACHERS DISCIPLINARY TRIBUNAL

UNDER the Education Act 1989

IN THE MATTER of disciplinary proceedings commenced by a
Complaints Assessment Committee of the
Education Council of Aotearoa New Zealand

BETWEEN **COMPLAINTS ASSESSMENT COMMITTEE**
Complainant

A N D **BORIS KIPNIS**
Respondent

DECISION OF TRIBUNAL

Tribunal: Kenneth Johnston (Chair), Graeme Gilbert
and David Turnbull

Hearing: 1-2 December 2015

Decision: 29 January 2016

Counsel: Stefan Kaminski for Complainant
Harry Waalkens QC and Hannah Stuart
for Respondent

Introduction

- [1] This case concerns events said to have taken place over a period of about five minutes during the afternoon of 4 April 2014. The essential allegation made by the Complainant, the Education Council of New Zealand's Complaints Assessment Committee, is that the Respondent, Mr Boris Kipnis, inappropriately man-handled a student.
- [2] At the conclusion of the hearing, having heard evidence from no fewer than nine students called to give evidence on behalf of the Complainant, and the Respondent, and having had the benefit of submissions from Mr Kaminski on behalf of the Complainant and Mr Waalkens and Ms Stuart on behalf of the Respondent, the Tribunal informed the parties that it had concluded that the Complainant had not made out its allegation of serious misconduct. The Tribunal indicated that it would provide its reasons in writing in due course. We now do so.

Charge

- [3] The Notice of Charge is dated 4 August 2015, and particularises the charge in these terms:

"Particulars of Charge

3. *The Complaints Assessment Committee, pursuant to Section 139AT(4) charges that **BORIS KIPNIS**, teacher of Auckland, behaved in an unprofessional manner amounting to serious misconduct and/or conduct warranting referral to the Disciplinary Tribunal in that while he was a teacher employed at St Peter's College, on or about 4 April 2014 he –*
- 3.1 *put his hands to the throat of a Student; and/or pushed him to the wall; and/or*
- 3.2 *pulled him back by the arm to the music playing space; and/or engaged in corporal punishment by pushing a Student down by his shoulders; and/or*
- 3.3 *assaulted the student by pushing him down on the shoulders.*

4. *The conduct alleged in paragraphs 3.1 to 3.3 either separately or cumulatively amounts to serious misconduct pursuant to section 139AB of the Education Act 1989 and Rule 9(1)(a), (c), (o) of the New Zealand Teachers Council (Making Reports and Complaints) Rules 2004, and/or conduct warranting referral to the Disciplinary Tribunal."*

[4] As will be evident, the Complainant's case is pleaded by way of a series of alternatives. We count five. So the possible permutations are many and varied. The practical way of approaching the case is to ask whether the evidence establishes to the necessary standard that the Respondent committed more than a technical assault on the student in question.

[5] The Chairman convened a pre-hearing telephone conference on 31 August 2015. Both parties were represented. At its conclusion, the Chairman set the case down for hearing and issued directions in relation to the filing and service of evidence and submissions.

Evidence

[6] Prior to the hearing the parties helpfully filed an Agreed Statement of Facts dated 5 November 2015 covering some core aspects of the background, and we set this out below:

"May it Please the Tribunal:

1. *The following is a summary of facts which are agreed on.*

Preliminary

2. *Mr Boris Kipnis is the holder of a Limited Authority to Teach (LAT), which expires on 9 December 2015. He is aged 51 years.*

3. *Mr Kipnis works part time at a number of secondary schools, teaching music.*

4. *The school to which this matter relates is St Peter's College, a boys' secondary school in Epsom, Auckland, and it was the maker of the Mandatory Report. Mr Kipnis had been employed as an itinerant music teacher at St Peter's College since 2011.*

5. *Mr Kipnis had given notice of his resignation from St Peter's College on 16 March 2014, with the notice period due to expire on 23 May 2014. The incident to which the Mandatory Report relates took place on 4 April 2014.*
6. *On that day, Mr Kipnis was teaching a class of 4 Year 9 boys, when an alarm sounded precipitating a practice "lock-down". The lock-down resulted in additional Year 9 boys entering, and temporarily staying in, the classroom of which Mr Kipnis was in charge. Of those resulting 9 boys in total, however, one [Student B], was not in the classroom at the relevant time.*
7. *The 8 boys who were in the classroom at the relevant time were [Students A, C, D, E, F, G, H and I].*
8. *Mr Kipnis' employment at the college ended on 23 May 2014.*
9. *Various documents are appended and identified as below. Their authenticity is agreed. They are not admitted as necessarily being truthful or accurate as to their contents.*

Student Statements

10. *Statements were taken from some of the boys after the incident, comprising dated and signed "Incident Statements", and undated and unsigned (Supplementary) statements taken during May 2014 by a barrister engaged by the College, as follows.*
11. **A1** *Incident Statement dated 7 April 2014 of [Student A]*
A2 *Supplementary Statement of [Student A]*
B1 *Supplementary Statement of [Student B]*
B2 *Incident Statement dated 17 August 2015 of [Student B]*
C1 *Supplementary Statement of [Student C]*
C2 *Incident Statement dated 17 August 2015 of [Student C]*
D1 *Incident Statement dated 6 April 2014 of [Student D]*
D2 *Supplementary Statement of [Student D]*

E1 Incident Statement dated 7 April 2014 of [Student E]

F Incident Statement dated 17 August 2015 of [Student F]

G1 Incident Statement dated 7 April 2014 of [Student G]

G2 Supplementary Statement of [Student G]

H Incident Statement dated 17 August 2015 of [Student H]

I Incident Statement dated 17 August of [Student I]

Kipnis Accounts

12. *J1 Statement dated 23 May 2014 Kipnis to College*

J2 Letter dated 24 June 2015 Kipnis to CAC

K Diagram of scene initialled by Kipnis

Kipnis Medical Certificate

13. *L Medical Certificate dated 15 May 2014 by Dr Bowden*

Kipnis Statements of Opinion

14. *M Letter dated 28 May 2014 from Stuart Sherwood*

N Letter dated 28 May 2014 from John Thomson

Kipnis References

15. *O1 Sherwood 14 May 2014*

O2 Thomson 14 May 2014

O3 Nyce 17 June 2015

O3 Donaldson 18 June 2015

O5 Tipi 23 June 2015"

[7] As we have already mentioned, the Tribunal heard evidence from all nine students referred to above as Students A – I.

[8] In opening the Complainant's case Mr Kaminski emphasised that neither those instructing him nor he had briefed the students'

evidence in the conventional way. The point he made was that the Complainant was not relying so much on what the students had said – or, rather, were reported to have said – at any stage prior to the hearing, but on what they said to the Tribunal. So, Mr Kaminski called each of the students and led their evidence without reference back to earlier statements made by them.

- [9] This was a responsible course for the Complainant and Mr Kaminski to adopt as it enabled each of the students to tell the Tribunal what they recalled of the events, rather than merely reiterating what they had said at some earlier stage, and we are grateful to Mr Kaminski in particular for adopting this approach.
- [10] We will come to the evidence offered by each of the students, but, at the outset, we record that it is common ground that during the afternoon on 4 April 2014 the Respondent was scheduled to teach two classes or periods at St Peter's, one after the other, and each involving four or five students. As it happens, towards the end of the first of these classes, St Peter's had a lockdown drill. As a result, the students from the first class, instead of moving on, remained with the Respondent, so that he had the students from both classes in his classroom for the second period. The charge concerns events during the second period. It seems clear that there was some incident or incidents involving the Respondent and one of the students during this class. The issue in this case is precisely what occurred, and whether in the course of that incident the Respondent acted inappropriately.
- [11] We refer briefly to the students' evidence below in the order in which they were called.
- [12] Student D is the student who the Respondent is alleged to have assaulted. His evidence was that during the course of the lesson the Respondent called him up to play and that this went smoothly until, *"... near the end, I started making a few mistakes which is when [the Respondent] acted with violence."* Asked to describe what happened, Student D said:

"... [the Respondent] stood up from the table which was in front of the stand and he approached me with [a] very angry

face. He came right up to me. He put his hand on my neck and squeezed with some force. He pushed me against the wall which was next to the door and the piano. He let go and then I took a few ... I took two steps forward. I looked out the window on my left, which was the window of the door. And then [the Respondent] put his hand on my right arm and he pushed my back against the wall."

- [13] Student D said that the Respondent had grabbed him by the throat with two hands, and, when asked how firmly, said:

"... I couldn't say he had any intention to kill me or anything, but he definitely, the tightness of the grip certainly he had an intention to hurt me, I would say."

- [14] Student D did not deviate from that version of events during cross-examination or when questioned by the Tribunal.

- [15] Student G's, whose evidence was not consistent with that of Student D on all points (for example Student D had said that the Respondent had been sitting at his table immediately prior to the incident, whereas Student G said that he had been standing next to Student D throughout), described the key events in these terms:

"... so I think he was, Mr Kipnis, was unhappy with the way that [Student D] was playing the violin and it was a repeated mistake and the mistake wasn't getting fixed and it kept on getting repeated and repeated. And then finally he grabbed [Student D] by the neck and then he pushed him like near the piano and held him there for about five seconds and then let him go."

- [16] Like Student D, Student G described the Respondent as gripping Student D around the neck with both hands. He added that he recalled the Respondent *"... looked kind of angry on his face."*

- [17] When cross-examined Student G accepted that he was a close friend of Student D.

- [18] Student B said that, whilst he had been in the classroom at the commencement of the class during which the incident occurred, he

had been "... pulled out to do an errand for the head of the music department ..." shortly thereafter. He thought that the students in the second class – which included Student D – had entered the classroom before he left, but he couldn't recall who was playing at the time that he left. In any event, he said that he did not "... recall seeing anything happen between [the Respondent] and [Student D]".

- [19] Student E said that he was amongst the first class. He did not recall who had played prior to the lock-down.
- [20] Mr Kaminski asked Student E whether he saw "... any incident taking place between [the Respondent] and [Student D]." His response was: "...No, nothing significant." He was then asked whether there had been some minor, less than significant, incident, and his reply was:

"... I saw [Student D], I think he was struggling to play a song or something along the lines of that and he sort of went to leave the room, so [the Respondent] pulled him back, but that was the only thing that I saw."

- [21] Questioned later by the Tribunal, Student E confirmed that he was paying attention to the Respondent during the time that Student D was playing and that he thought he could recall Student D returning to his seat afterwards. He confirmed that aside from the incident he recalled there was no other event involving the Respondent and Student D.
- [22] Student A said that he was amongst the students in the first class. He could not recall who in his class had played at the point they were joined by the students in the second class. He was not absolutely certain that Student D was amongst the second class of students but thought he was. Nor could he recall where Student D was sitting, but he did say that he remembered Student D playing, though he added that he wasn't paying particular attention to Student D's performance. When asked what if anything he had witnessed as between the Respondent and Student D he replied:

"... well it says he was playing the whole time, and what I think happened, he was playing at a fast pace, and I

remember clearly [the Respondent] telling him to slow down every now and again. And that happened about four or five times, yeah, four or five times he repeated "play slower, play slower" and I believe that whatever has happened, has happened as a result of that."

[23] He was then asked what he had seen happen and he replied:

"... I saw [the Respondent] like putting his hands on his shoulder and giving him a shake. And it's something that he does to like even me, but I don't see it as a threatening kind of action."

[24] It was then put to the witness that he had earlier said that the Respondent had grabbed Student D around the neck, he acknowledged that was what he had been reported as saying in an earlier statement but said:

"... but, yeah, in this it says that he [grappled him around the neck. I don't see that happen. Either I just ... either I didn't get to see it, or it never happened."

[25] Summarising the position at Mr Kaminski's invitation, Student A said:

"... yeah, so I practically said what I saw; he put his arms around him, around him as in on him, and gave him a bit of a shake."

[26] He said that a later stage when Student D "... was about to go out of the room...", the Respondent "... like pulled him back to come back." Having said that, the witness expressed some doubt about the reliability of his memory.

[27] Student C remembered the occasion of the lock-down when the two classes of students were in the Respondent's classroom for a period of time. But he said he could not remember any incident involving the Respondent and Student D.

[28] Student H was amongst the second group of students. He seemed to recall having played himself, but could not remember the order in which the other students had played. He recalled Student D playing,

but could not recall any incident between the Respondent and Student D adding:

"... at the time I was like day-dreaming I guess; I wasn't really paying attention as much, so I didn't see anything."

- [29] Nor, said this Student, did he hear anything. He did however say that he recalled the Respondent having to tell Student D to slow down as he was playing his piece very fast. He said that the Respondent *"... wasn't mad at the time; he was quite happy; he wasn't really annoyed or distressed."*
- [30] Student H said that he did not see the Respondent touching Student D at any stage.
- [31] Student F said that he was in the first group of students. He could recall Student D playing. When asked whether he had seen anything his reply was that he had not. He said he can recall hearing the Respondent and Student D speaking, but that the Respondent was *"... just correcting a... mistake."*
- [32] The final student who gave evidence was Student I who was clear in saying that he witnessed no incident between the Respondent and Student D.
- [33] Each of the student witnesses was cross-examined carefully by Mr Waalkens or Ms Stuart, and, in most cases, also answered questions from the Tribunal. In the case of Student A, having given his evidence, he then embarked upon a searching cross-examination of the Tribunal and other persons at the hearing as to matters of the Tribunal's procedure and the role of various participants in the hearing, exhibiting in the course of doing so a commendably enquiring mind.
- [34] The examinations-in-chief and cross-examinations of the students, and, to a lesser extent, the questions asked by the Tribunal, brought out a number of inconsistencies between what they had said in previous statements and what they told the Tribunal. That is unsurprising. The most honest and compelling of witnesses contradict themselves in statements and evidence given at different times, and we do not discount the evidence of any of the students

simply because what they told us at the hearing differed from their description of events when earlier asked about them.

- [35] However, the stand-out feature of this case is the radical differences in the description of events provided by the student witnesses. In this regard, we put to one side those witnesses who say they can no longer remember what occurred. Even so, the contrast between the evidence of Students D and G on the one hand who describe the Respondent having throttled Student D, and that of students [E, A, H, F, G] who say they observed some degree of interaction between the Respondent and Student D but saw nothing untoward through to witnesses [B, C, I] who categorically stated that there was no physical altercation between them. We will return to this theme in due course.
- [36] The Respondent gave evidence as we have already said. In the end, his evidence was no more convincing than that of the students.
- [37] He had made two previous statements, the first in the course of the school's investigation of this matter, and the second in the course of the CAC's investigation.
- [38] His descriptions of events of 4 April 2014 in those two statements and in his evidence to the Tribunal were consistent. He denied altogether that there had been any altercation with Student D of the sort described by Students D and G. He said that after Student D had played, and when he was being disruptive, he had approached him in the chair in which he was sitting and pushed him down. He accepted that in doing so he had acted inappropriately and said that he had subsequently apologised to Student D for that, adding that he believed that Student D's parents and Student D himself had accepted that apology. The Respondent added that as a teacher of the violin it was imperative that he touched students from time to time in order to correct their posture and the like, though he did not say that that was what he had been doing on this occasion. He denied the allegation that he had put his hands around Student D's neck at any stage. He said that, only after Student D had made a complaint had he ascertained that the allegation against him was that he had grabbed Student D around the neck, and he was shocked by this suggestion.

Submissions

- [39] It is unnecessary in this case for the Tribunal to outline in any detail the submissions made on the parties' behalves by counsel.
- [40] As will become clear, on the view the Tribunal takes of the case, the issues are factual. Both Mr Kaminski and Mr Waalkens made brief submissions on the evidence, Mr Kaminski contending that the evidence was sufficient to support the charge as laid and Mr Waalkens urging the opposite conclusion on us.

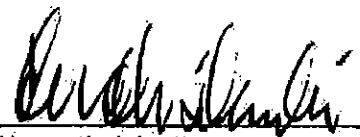
Burden and Standard of Proof

- [41] Professional disciplinary proceedings are civil in their nature, and the principles relating to the burden and standard of proof are too well settled to justify a detailed exposition here.
- [42] It is sufficient to say that the burden of proof remains throughout on the prosecutorial authority, and that it must establish the charge (here, the charge of serious misconduct) to the civil standard of the balance of probabilities. The evidence required is dependent on the seriousness of the charge – the more serious the allegation, the more cogent the evidence required.

Discussion and Conclusion

- [43] In this case, the Tribunal is faced with a direct allegation made by Student D (and supported by Student G) to the effect that the Respondent throttled Student D. That allegation is not supported by any other evidence. In particular none of the other students who were apparently present at the relevant time gave accounts of the incident which support the evidence of Students D and G. Indeed, putting aside the evidence of Students B and C (the former having been out of the room at the critical time, and the latter having told us that he could not recall anything of the occasion) the evidence of Students E, A, H, F and I appeared to contradict the evidence of Students D and G. And of course, the allegation is denied by the Respondent. There is no medical evidence.

- [44] In those circumstances, the Tribunal simply cannot be satisfied on the balance of probabilities that the primary allegation made by the CAC in this case has been made out.
- [45] On the Respondent's own version of events, he assaulted Student D at some point, in the sense that he made some form of physical contact with him as a means of correcting his behaviour. But on the Respondent's evidence – and his is the only evidence in relation to this – whilst that may have constituted a technical assault, it was at the very lowest end of the spectrum, and we are unable to conclude that it constitutes anything approaching serious misconduct.
- [46] In those circumstances, we have reached the conclusion that the Complainant has failed to make out the charge of serious misconduct on any of the alternative bases set out in the Notice of Charge, and the charge against the Respondent is dismissed accordingly.
- [47] The Tribunal has reserved costs, and the Respondent's application for permanent name suppression.
- [48] In order to assist the parties, we signal now that, without the benefit of argument, our preliminary view is that this may be a case in which it is appropriate for costs to be left to lie where they have fallen, and that there is no obvious basis for an order for the permanent suppression of the Respondent's name or other details. However, we have no concluded view on either of those matters, and they can be revisited if either party makes an appropriate application. Any such application by either party is to be filed and served within 15 working days of the date of this decision, and any responses are to be filed within a further 10 working days.



Kenneth Johnston
Chairman

NOTICE

1. A person who is dissatisfied with all or any part of a decision of the Disciplinary Tribunal under sections 402(2) or 404 of the Education Act 1989 may appeal to a District Court.
2. An appeal must be made within 28 days of receipt of written notice of the decision, or within such further time as the District Court allows.
3. Subsections (3) – (7) of section 356 apply to every appeal as if it were an appeal under subsection (1) of section 356.