COMMONWEALTH OF THE BAHAMAS **IT / NES / 103 of 2018**

INDUSTRIAL TRIBUNAL

NASSAU

In The Matter of the Industrial Relations Act

KAYLEN JERVIS

Applicant

and

ANGLICAN CENTRAL EDUCATION AUTHORITY

Respondent

DECISION

Decision delivered by Her Honour Simone Fitzcharles, Vice President

The Dispute

By an Originating Application filed on 20 June 2018 the Applicant, Kaylen Jervis, claimed that the Respondent, the Anglican Central Education Authority (the "ACEA") wrongfully dismissed him and breached his fixed-term contract of employment to teach at St John's College. For alleged wrongs, Mr Jervis claimed that his employer the ACEA, is liable to pay him damages in the amount of $32,583.33 - the balance of funds he would have earned under the fixed-term contract, had the ACEA not prematurely terminated it. Without the appropriate referral by the Minister and supporting pleading in the Originating Application, Mr Jervis has sought to argue in Closing Submissions that he has also been unfairly dismissed. This Tribunal makes no determination on the issue of unfair dismissal as the Tribunal has jurisdiction to hear only those matters referred to it by the Minister. See **John Fox v. Island Hotel Company Limited**. [1] Therefore this decision pertains to wrongful dismissal and breach of the contract of employment only.

The Factual Matrix

1. Mr Jervis was a Social Studies teacher on a 2 year contract with the ACEA to teach at St Johns College (a school under the authority of the ACEA) from 1 September 2016. The ACEA is a body which governs and is the policy maker for Anglican Schools in the Bahamas. Mr Jervis received a promotion in the form of additional responsibilities as Head of the Humanities Department on 1 September 2017. With this promotion, he was to earn $34,000 yearly. This

[1] IndTribApp No 54 of 2017.

2-year contract was brought to an end by the ACEA on 22 September. Prior to the last contract, Mr Jervis was employed over a little more than 7 years by a series of fixed-term contracts with the ACEA.

2. While teaching his 11th Grade History class at St John's College on 19 September 2017, Mr Jervis noticed that one of his students left his chair without authorization and approached a fellow student. Mr Jervis threw a whiteboard marker at the student. The student turned towards the missile, which struck him in the inner corner of his left eye. The blow caused the student to sustain an injury described by an Opthalmologist as a subconjunctive haemorrhage and traumatic conjunctivitis. As a result of the incident, Mr Jervis was suspended without pay and, some days later, was dismissed from the employ of the ACEA without notice or pay in lieu of notice on the ground that he had engaged in gross misconduct. There was no dispute as to whether Mr Jervis did indeed throw the marker. He admitted to having done so and said that he wanted to get his student's attention. His only reservation concerning this incident was that he had no malice and did not intend to harm the student.

3. In the aftermath of the marker throwing incident, Mr Jervis noticed that the student's eye appeared to have been injured when the student left the class with a hand over his eye. Mr Jervis therefore accompanied the student to the office of the school nurse for evaluation. He testified that it was at that time that they realized how serious the injury looked. The nurse evaluated the student and decided to observe the injury. The next day the nurse recommended that an optometrist or ophthalmologist be consulted as the student's eye was red and swollen and he felt pain on closing the eye tightly. As for the student, after seeing the nurse on the day of the incident, he reported it to the school's principal, Dr Nevillene Evans. The Principal spoke to Mr Jervis twice on that day, first when the student was in her office and a second time, in the presence of the Vice Principal later on the day of the incident. At the behest of the Principal, the nurse, the student who was injured and Mr Jervis prepared written reports of the incident. The Principal also interviewed students who were in Mr Jervis' classroom at the time the incident occurred. She did not ask those students to write reports.

4. Both verbally and in his report Mr Jervis admitted to having thrown the marker at the student. He admitted that this occurred due to his "lapse in judgment" and he apologized for the incident. Mr Jervis was told that the matter would be referred to the Director of Education and he was not to report to duty until he received further notification. His report stated:

"During my 11th grade history class Antonio Beckford got out of his seat without permission to walk over to another student. I do not know why he got up. I threw a whiteboard marker at him to get his attention. Antonio shifted position and the marker struck him in the inner corner of his left eye. While it was not my intention for any injury, no matter how slight, I acknowledge and apologize for the lapse in judgement. I can assure you that regardless of the outcome, such an incident will not be repeated."

5. Before the decision to dismiss was made, the Director called Mr Jervis and spoke with him briefly. She requested that he report to Dr. Timothy Barrett for a routine evaluation. The Director explained that such evaluations are carried out routinely when incidents involving any trauma occur and it was for Mr Jervis' well-being. She said that Mr Jervis had just dealt with, during the previous year, a traumatic incident in which he had been driving a bus on a school field trip which overturned with 23 students, so she wanted to ensure that he could continue to work. However, no report from Dr Barrett was received or considered by the ACEA prior to the termination of Mr Jervis' contract of employment.

6. The Human Resources Committee of the ACEA took control of the matter in order to decide the fate of Mr Jervis' position with the school. This body was comprised of 6 persons and included the Director of Education - Mrs Italia Davies, the Deputy Director of Education - Mrs Sheryl Wood, Archdeacon James Palacious, Canon Curtis Robinson, Mrs Janice Munnings and Mr Winston Marshall. These six persons decided on Mr Jervis' matter. Ex officio members of the Committee were Bishop Laish Boyd and Dean Patrick Adderley. Mrs Davies explained that the HR Committee only meets in isolation when an serious incident occurs. Mrs Davies explained that her first knowledge of the incident came in a phone call from the Principal on the day of the incident. Thereafter, she received a report from the Principal, and those that the Principal had gathered from Mr Jervis, the student, the school's nurse and the Opthalmologist.

7. These reports were all consistent with Mr Jervis' admission and description of the throwing of the marker. In his report the student explained why he rose from his seat: he was apparently on his way to jolt another student awake with a slap who happened to be asleep in Mr Jervis' History class at the time of the incident. He was, it seems, engaged in some mischievous act.

8. Apart from the reports mentioned above, Mr Jervis also wrote to the Director of Education before a decision was made in relation to his job. In this letter he *inter alia* admitted to throwing the marker and pleaded for his job as he stated he expected that the incident would bring his time as an ACEA employee to an end.

9. The Principal also testified that it was her recommendation to Mrs Davies that Mr Jervis' services be terminated. She said this was her professional opinion based upon a history of incidents involving Mr Jervis in which students came to harm or students and parents complained of his behavior. Both Mr Jervis and the Principal gave consistent evidence on this series of events. Compiled, those events were:

   (1) Mr Jervis admitted to throwing objects at students before. He stated that in 2001 or 2002 he was verbally cautioned by the school's Senior Master for this behavior. He admitted

that there was nothing he could say to justify hitting a student with an object. The Principal did not testify about this event.

(2) In 2014 Mr Jervis put his hands around the neck of a female student and told her, "**You can do better than this.**" There were no witnesses to the incident, but the student complained to her parent that Mr Jervis choked her. The parent was upset as he indicated it was inappropriate for the teacher to put his hands around his daughter's neck. The parent attended the school to report the incident to the Principal, who called Mr Jervis in to explain. Mr Jervis admitted he put his hands around the student's neck but he said he did not choke her. He received a verbal caution from the Principal for this incident. Both Mr Jervis and the Principal testified about this. The Principal said it was a situation involving the teacher's word against the student's word as no witnesses were produced. Mr Jervis admitted to having put his hands around the student's throat, but said that he was "playing around." [2]

(3) In 2016 Mr Jervis was driving a bus with 23 students on a field trip. The bus and its passengers were involved in a serious accident. Mr Jervis received a written warning for this incident because he violated health and safety rules of the school. The warning stated that it was a rule of the school that for field trips the adult to student ratio should be at least 1 teacher to 12 students. It cited that days in advance of a Geography field trip Mr Jervis was instructed by the Director and Deputy Director to have another teacher accompany him on the field trip given that he had 23 students to transport on the journey. Contrary to this directive, Mr Jervis departed driving the bus to the field trip with only one adult – himself – and 23 students. He admitted in his testimony that he did so and that he was not feeling well that day. His explanation for the bus accident was that as he was driving the bus filled with students, he "**just blacked out**" and "**did not know what happened after that**". Apparently, what happened was that the bus turned over and students were injured.

(4) The incident involving the throwing of the marker and injury of the student in History class on 19 September 2017 was the last one involving Mr Jervis before the termination of his employment.

10. Mrs Italia Davies gave testimony concerning the termination of Mr Jervis' employment with the ACEA. She stated that she was also aware of Mr Jervis' previous violation, the incident of the bus accident in 2016. However, when the HR Committee made the decision to terminate Mr Jervis' employment, they were not aware of any of the other prior incidents recounted by the Principal in her testimony. Mrs Davies indicated that the Committee looked at the reports and Mr Jervis' email to her. They reviewed and discussed the policies of the school and the

[2] See Transcript at page 9, lines 11-30.

discipline matrix. She said that they only looked at the circumstances of this particular incident and they felt their investigation was complete. She further stated:

"To our mind there was no question that Mr Jervis was guilty or had in fact committed the act. He admitted it in his report. It was also said in the child's report and the principal's report. And then I also received an email from Mr Jervis saying he had in fact committed the offence and was asking for leniency for his job and he knew that this offence would be the end of the line for him and the end of his tenure with the Anglican Diocese...I entered it in my records as I do all correspondence. I also shared it with the HR Committee." [3]

11. Mrs Davies confirmed that the throwing of the marker was the only reason for Mr Jervis' dismissal. [4] She also indicated that after the Committee made the decision to terminate the employment of Mr Jervis, she prepared a dismissal letter and Mr Jervis was called to come to the office. When Mr Jervis attended on 22 September 2017, he met with Mrs Davies and Mrs Wood, the Deputy Director. Mrs Davies estimated that the meeting lasted for 1 hour and 15 minutes. She gave the termination letter to Mr Jervis. She said once Mr Jervis knew of his dismissal, he spoke and she and Mrs Wood asked questions. Mr Jervis also testified he asked whether firing him at this time was in the best interests of the school and the students. Mrs Davies replied that the school was at the beginning of a school year and they would be able to find someone to replace him. Mr Jervis also said that he had expected to be suspended for the incident for 3 to 5 days, and then kept until the end of the school year. However, thereafter he did not expect to receive a renewed contract of employment with the school. Mrs. Davies recalls that she said words to the effect that it wasn't easy but after looking at the facts the ACEA decided to terminate his employment. Mr Jervis then asked if there was someone else he could speak to about his dismissal. She replied that the Bishop is the final appeal.

12. Mr Jervis was cross examined about the appeal to Bishop Boyd. He said he did not write to the Bishop, but telephoned him. Following his call with the Bishop he made a decision not to lodge a written appeal. He next filed a dispute with the Ministry of Labour on 24 November 2017. Against this background, Mr Jervis' arguments against the ACEA's decision to terminate his employment may be summarized in three submissions:

(1) His impugned behavior was not gross misconduct, but rather just an accident;

(2) He was wrongfully dismissed because he had no opportunity to defend himself before the ACEA's HR Committee or to see the reports written about his behavior; and

---

[3] See Transcript page 44 lines 30-34 and page 45 lines 7-11.

[4] See Transcript at page 48, lines 24-28.

(3) The ACEA breached his contract of employment by not following the Discipline Matrix in relation to penalties against him.

Wrongful Dismissal

13. In a wrongful dismissal claim the duty of the Tribunal is to ascertain whether Mr Jervis' employers believed honestly and reasonably that he committed a fundamental breach of his contract. The words in the Termination Clause of his contract of employment are apt, namely if he committed an act which is repugnant to the interests of his employer he could be summarily dismissed. These words reflect the test of conduct for which a person may be summarily dismissed as set out in the Employment Act (the "EA"). The Tribunal accepts in accordance with **Staphanus Oosterbosch v FAG Aerospace Inc** [5] the general proposition that the onus is on the Respondent to establish that there was just cause for termination. In this dispute, we look to the EA for guidance. Sections 31 through 33 provide:

> **"31. An employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract of employment or has acted in a manner repugnant to the fundamental interests of the employer...**
>
> **"32. Subject to provisions in the relevant contract of employment, misconduct which may constitute a fundamental breach of a contract of employment or may be repugnant to the fundamental interests of the employer shall include (but shall not be limited to) the following –**
>
> **...(i) gross misconduct.**
>
> **"33. An employer shall prove for the purposes of any proceedings before the Tribunal that he honestly and reasonably believed on a balance of probability that the employee had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted."**

14. A roadmap for the required analysis was set out by the Court of Appeal in **Eden Butler v Island Hotel Company Limited** [6]:

> **"In wrongful dismissal the paramount principle is whether the employee's breach went to the root of the contract or constituted a fundamental breach of his contract. As such the Court was required to consider whether the nature of the breach alleged constituted a fundamental breach. It was then necessary to consider whether there was sufficient evidence so as to lead the appellant to have an honest and reasonable belief that the respondent had committed the misconduct in question...The question of whether the belief was reasonable will inevitably depend on the evidence available and the efforts made by way of investigation to ascertain the true facts. The nature of the investigations which are necessary in any particular case must be looked at in relation to the facts of that case. It**

---

[5] 2011 ONSC 1538.

[6] SCCivApp & CAIS No. 210 of 2017 at paragraphs 30 and 31.

must not be overlooked however, that the employer is not required to prove that the employee committed the offence but rather must show that they held an honest and reasonable belief in the guilt of the employee."

Nature and Context the Applicant's Action

15. Was Mr Jervis' breach fundamental in nature or repugnant to the interests of his employer? Mr Jervis argues that it was an accidental occurrence and relies upon the report written by the student, in which the student stated that he did not believe Mr Jervis was aiming for his eye, but the marker just happened to hit him there.

16. The Court of Appeal in **Super Value Food Stores v Vaccaro Adderley** [7], quoting Winder J in **Farah v Bank of the Bahamas** [8], stated that "**it is settled law that a single act of misconduct can justify summary dismissal**", but that such act is required to be "**serious, willful, and obvious**." If Mr Jervis' act was of this nature, then it must be ascertained whether the ACEA had an honest and reasonably held belief at the time of his dismissal that he committed the impugned act.

17. Based on the evidence given by the Applicant and the two witnesses for the Respondent, the Tribunal is persuaded that the employer believed Mr Jervis' throwing of the object and hitting the student was intentional, albeit he stated he did not intend to hit the pupil in his letter to Mrs Davies on 21 September 2017. The ACEA could have reasonably believed Mr Jervis' conduct was intentional because Mr Jervis offered the reason for throwing object both in his conversation with the Principal during the investigation and in his contemporaneous report of 19 September 2017, which was to get the attention of the student. He reiterated this reason in viva voce testimony and testified that he knew that he should call out to a student in order to get his attention. When asked during the trial how he intended for the incident to happen, he said that he thought the marker would "bounce off" of the student and he would then return to his seat. The Tribunal finds that the throwing of the marker was done with the intention of making contact with the student's body, which was the view held by the employer.

18. The resultant blow to the student's eye and injury might not have been intended by Mr Jervis, but the acts of throwing and hitting were. It is reasonable to find the employer must have believed that a risk was taken by Mr Jervis because the student was up and moving towards another student when the object was thrown at him. The obvious risk inherent in throwing an object at a moving target is that one is not certain where the missile will strike. If there are vulnerable spots on the target, the obvious risk is that a vulnerable spot could be struck. The obvious risk in hitting a vulnerable spot is causing injury, which happened in this case. Although the Tribunal accepts no harm was intended, the employer could reasonably have formed the

---

[7] IndTribApp No 158 of 2017.

[8] [2017] 2 BHS J No 132.

view that in throwing the object at the student, Mr Jervis disregarded, or was indifferent to, the possible consequences of doing so.

19. In cross-examination Mr Jervis indicated that the eye is a sensitive organ and even light force in hitting a person's eye could do damage. [9] He admitted that there was nothing he could say to justify throwing an object at a student. [10] He knew it was "dangerous and unprofessional." [11]

20. The employer has put emphasis on another material consideration - the particular legal and regulatory context in which Mr Jervis acted. A distinguishing feature of the ACEA school was that it was an environment highly-sensitized to violence prevention and detection. Based on the evidence given by the parties, there was a strictly-enforced, pervasive and well-defined violence prevention policy in the school. An anti-violence "mantra" was repeated every day in the school by faculty, staff and students, and was physically displayed in writing in every classroom. The mantra included the school's definition of violence. The policy against violence as set out in the ACEA Faculty Handbook provided in part:

> **"SCHOOL POLICY ON VIOLENCE AND WEAPONS**
>
> **In September 1999, the Anglican School System adopted the violence prevention and intervention programme, Respect & Protect developed by The Johnson Institute. BMES adopted the Vision Management program. Both programmes have as their foundation the principle that everyone is obliged to respect and protect the rights of others and has NO tolerance for violence. It promotes a system wide belief that, Violence is not acceptable – We do not tolerate it here.**
>
> **THE PURPOSE**
> **To give students, parents, staff, and the community at large a clear statement concerning the school's position against violent behavior and weapons.**
>
> **OBJECTIVES**
> **To ensure the safety of students and staff, their property, and the property of the school.**
> **To maintain a safe, supportive, nurturing, non-punitive school environment highly conductive to learning.**
>
> **DEFINITION OF VIOLENCE**
> **VIOLENCE IS ANY MEAN WORD, LOOK, SIGN, OR ACT THAT HURTS A PERSON'S BODY, FEELINGS, OR THINGS.**
>
> **STATEMENT OF POLICY**

---

[9] See Transcript at page 3, lines 16-22
[10] See Transcript at page 8, line21-30 and page 9, line 1-4.
[11] See paragraph 28 for content of letter of 21 September 2017.

No one is entitled to be violent. No form of violence will be tolerated from anybody at school, on school-sponsored transportation, or at school-sponsored activities away from school.

VIOLENCE IS NOT TOLERATED AT OUR SCHOOL

DEFINITION OF A WEAPON
A weapon is defined as any object that, by its design, use, intended use, or brandishing could cause bodily harm or property damage or could intimidate other persons...

Items not designed as weapons will be regarded as weapons under this policy if their use causes another person bodily harm or property damage...Such items include but are not limited to belts, sprays, pens and pencils, scissors and other sharp objects." [Underlined emphasis added].

21. In the context of this policy on violence prevention, a marker thrown at a student could qualify as a "weapon" where its use caused bodily harm, which is undisputed in this case. The decision to hit a student to get his attention could be seen as "violence" under this policy if it hurt the intended target's body or his feelings, according to the Director, Mrs Davies. Mrs Davies testified that the school's view in accordance with its anti-violence policy, was that the throwing of an object at a student by a teacher would likely be injurious to his feelings as it comes from someone the student reveres. The Tribunal considered that the definition calls for the act to be "mean" and Mr Jervis testified that he intended no malice. The Oxford Dictionary [12] defines "mean" as "**unkind or unfair**". I accept that in the context of comparing the choices the teacher had of methods to claim the student's attention, that is - calling the student's name or walking over to him – the throwing of an object to hit him was not respectful and decidedly unkind or unfair. Mrs Davies testified that the act could cause embarrassment to the child. The ACEA must reasonably have felt that the fact that the student was engaged in an unauthorized act did not justify the choice Mr Jervis as the teacher made, which was to answer it with another unauthorized act which was also unsafe.

22. Both common law and statute prescribe a duty of care which must be exercised by a teacher towards a student. At common law the teacher's duty is "**to take such care of the children in his charge as a careful parent would take of his own children.**"[13] See **Williams v Eady**. The standard of care generally expected of a teacher is that of a reasonably prudent parent judged not in the context of his own home but in that of a school.[14] See **Lyes v Middlesex County Council**. The statutory duty is to be found in Section 7 of the Health and Safety at Work Act, Chapter 321, which obligates every employee (including teachers) while at work –

---

[12] Concise Oxford English Dictionary, 11th Ed, Oxford University Press, 2004.
[13] (1893) 10 TLR 41, CA. See also Halsbury's Laws of England, Education, Volume 36 (2015), paras 1087.
[14] (1962) 61 LGR 443.

"7. (a) to take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions at work."

23. The ACEA argued that not only was Mr Jervis required to perform and meet this duty and standard of care for himself, but also so as not to put his employer's compliance with its duty towards students in jeopardy. In **Gower v Bromley London Borough Council**, [15] Auld LJ in the English Court of Appeal set out the relevant vicarious liability principle as follows:

"...[O]n the issue of the justiciability of a claim of vicarious responsibility of a school authority for negligent conduct or omissions of its teaching staff the path is now sufficiently clear not to require re-tracing. The two House of Lords' and other authorities establish the following propositions:

1. **A head teacher and teachers have a duty to take such care of pupils in their charge as a careful parent would have in like circumstances, including a duty to take positive steps to protect their well-being. Those responsible for teachers in breach of that duty may be vicariously liable for their negligence..."**

24. The employer reasonably believed that Mr Jervis in taking a positive step, not to protect or respond appropriately, but rather to hit a student with an object when there were other more reasonable, responsible and significantly less risky choices of action he could take, exercised poor judgment and a disregard for the risks of his actions. He did not live up to the 'careful and prudent parent' standard.

25. It is trite law that a breach of a duty of care is negligence. Further, gross misconduct can manifest in any of two wrongs – deliberate misconduct or gross negligence. See **Sandwell and West Birmingham Hospitals HHS Trust v Westwood**. [16]

26. The Tribunal finds that Mr Jervis' act of throwing an object at a student with the purpose of hitting him to get his attention, which resulted in an injury to the student, was in the nature of an act that is repugnant to the interests of the school having regard to the following factors:

(1) The duty of care owed by teachers and schools to pupils. Reasonable parents take reasonable steps to look after the health, safety and welfare of their children;

(2) The adverse effects of such an act to the employer which could manifest in legal, reputational and financial liability repugnant to the ACEA's interests;

---

[15] [1999] All ER (D) 919, [1999] Lexis Citation 3302.
[16] [2009] UKEAT 032/09/172.

(3) The fact that Mr Jervis was aware that the school specifically banned the acts of throwing objects at students and hitting students in the face in its policy Handbook and condemned "any mean word, look, sign or act that hurts a person's body, feelings or things;"

(4) The fact that Mr Jervis was aware, based on his admitted past acts of throwing objects at students, that it was prohibited behavior and he was specifically warned by a senior master of the school not to do so again; and

(5) The fact that as the teacher in these circumstances Mr Jervis was charged with the responsibility to engage in exemplary conduct before his pupils and not to engage in conduct which might cause students themselves to disregard the school's policies as propounded by the ACEA. This was reflected in another part of the ACEA Faculty Handbook under the Code of Ethics.

An Honest and Reasonable Belief

27. Was there sufficient evidence so as to lead the ACEA to have an honest and reasonable belief that Applicant committed the misconduct in question?

28. After the incident, in his first interview with the Principal Mr Jervis testified he confessed to her that he threw the marker. He stated he never denied what happened. He confessed he injured the student's eye. The Principal testified that he confessed and then apologized for his "lapse in judgment". He then consistently admitted to having done the act again in his written report. Following this, in a second written communique Mr Jervis wrote on 21 September 2017 about the incident in an email message to Mrs Italia Davies. He stated:

"Good evening Mrs Davies.
"I am writing this email to you to express my sincerest and most heartfelt apologies for the marker incident. I am fully aware that it was unprofessional and dangerous. Not to mention that, had it been a different child it could have placed the Diocese in a precarious legal position. It ws (sic) never my intent to actually hit him, much less in the eye. I know that I should never have thrown anything at a student. The throwing and the the (sic) fact that he was injured are working seriously against me."
"As a parent I can only imagine what would might (sic) have happened had it been my son on the receiving end. I am also aware that this incident may very well be the end of my journey as an employee of the ACEA. To this end I am pleading with you for mercy; that I suffer nothing beyond a suspension or at least be allowed to finish the school year.."
"I literally cannot afford to be unemployed. I know that my financial obligations are not your problem, and something that I should have thought about before and thus again I am pleading to the merciful part of you. I do not wish my family to suffer for my lack of judgement. If you decide

to allow me on (sic) more chance I vow to you, before God that nothing of this sort will ever happen again."
"Thank you for your mercy
Kaylen Jervis".

29. The HR Committee of the ACEA had for its consideration:

(1) the report from Mr Jervis dated 19 September 2017;
(2) the email of 21 September 2017 from Mr Jervis;
(3) a letter from the Principal in which she recounted her conversation with Mr Jervis, which did not contradict anything Mr Jervis reported to the ACEA;
(4) the report of the student which did not contradict anything Mr Jervis reported;
(5) the nurse's report which did not contradict Mr Jervis' accounts; and
(6) the Opthalmologist's report which confirmed the eye injury.

30. Any sort of investigation or enquiry made by the HR Committee at that point should have focused on whether they had sufficient evidence to believe honestly and reasonably that Mr Jervis committed the impugned act. As he admitted to having done it, and as no other reports and evidence before the HR Committee refuted what Mr Jervis thrice admitted, the Tribunal is satisfied that the HR Committee which made a decision to terminate Mr Jervis' employment, at the time of making their decision to dismiss Mr Jervis, did hold an honest and reasonable belief he committed gross misconduct repugnant to the interests of the ACEA. In this sort of claim it is not for this Tribunal to substitute its own decision as to what the Tribunal would do in a similar situation. See Dorsett v Pictet Bank [17] in which the Court of Appeal stated:

"...this is a matter of discretion for the employer, the question for us is not whether we would have dis-missed her in the circumstances, but whether dismissal was within the range of options open to a reasonable employer in the circumstances."

31. Where the Applicant makes relevant admissions and there is no dispute he committed the impugned conduct, the requirement for an investigation is affected. In **Super Value Food Stores v Vaccaro Adderley** [18] the Court of Appeal disagreed with a finding of the Industrial Tribunal to the effect that there was no reasonable investigation in a case where the Applicant admitted to the misconduct alleged and there was for the most part no dispute as to the facts. The Court stated:

" Whether a particular investigation was reasonable is a question of law and not of fact.
"The nature of the investigations which are necessary in any particular case must be looked at in relation to the facts of that case, and where there are admissions by the employee, then

---

[17] SCCivApp & CAIS No. 113 of 2011 at paragraph 29.
[18] IndTribApp No 158 of 2017 at paragraph 29.

the need to make further investigations is manifestly diminished." See London Swimming Pool Ltd v Garner EAT/380/98."

32. Although the argument was not couched in terms of the inadequacy or unreasonableness of the investigation, Mr Jervis contends that his admission to committing the impugned act did not disentitle him to see the reports and to appear before the HR Committee to defend himself. He argues that he was denied an opportunity to defend himself because:

    (i) he was not given a copy of any of the reports submitted to Mrs Davies by the Principal;

    (ii) he was not invited to meet with the HR Committee or any member of that body before they made the decision to terminate his employment; and

    (iii) the Bishop failed to give him an appeal as the Bishop did not have a meaningful conversation with him and did not meet with him to discuss the reports submitted by the Principal to the HR Committee.

33. Mrs Davies testified that the Principal was responsible for, and carried out her duty in, interviewing all concerned persons whenever a serious incident occurs in the school. She had a duty to gather reports and carry out the initial investigation, the results of which must be turned over to the ACEA for a decision. Considering the circumstances of this case, Mr Jervis got an opportunity to be heard and more than once to advance any defence he may have had both verbally and in writing. His relevant audiences were the Principal, Mrs Davies and the ACEA. He never advanced a defence and even in viva voce testimony did not venture to reveal a shadow of a defence concerning his act against the student. Instead, he consistently admitted his wrongdoing and no reports (despite the fact he did not see them) contradicted any of the representations he made. In other words, if he had seen the reports, they would not have made a difference to his case. They all agreed with his own accounts of the incident. I accept that usually a person accused of wrongdoing should be given full information about any allegations made against him and given an opportunity to answer those allegations. See Island Hotel Company Limted v Shikera Isaacs-Sawyer [19] in which the Court of Appeal stated that a reasonable investigation –

    "...would normally involve where it is considered necessary an account of the incident from as many eye witnesses or persons in the know as possible yet at the same time giving the employee an opportunity to be heard and to respond to the gathered information and complaint."

34. But the words "where it is considered necessary" are key. In this case, if the Tribunal had found any trace of an argument in any of the reports seen by the HR Committee which did not agree with Mr Jervis' own accounts of the incident, it would have found that he ought to

[19] IndTribApp No 80 of 2018.

have seen such reports in order to respond to the HR Committee. However, the reality is, this was not the case. The investigation in this case, was reasonable and although persons who must decide whether to dismiss an employee should allow that employee to see the results of an investigation for the purpose of defending himself, it was not necessary in this case because of Mr Jervis' admissions and the agreement with his accounts by all others who reported on the incident.

35. I find also that there was no requirement in this situation for Mr Jervis to have an audience with the HR Committee. Indeed, he admitted that he never asked for such an audience at the material time. Nor did he request copies of the reports written about the incident. He had nothing further to say than to plead for his job. In cross examination he admitted that if he had been given an audience by the HR Committee, he would have no defence to give them and that all he could do then was throw himself upon their mercy. [20] However, he had already pleaded to keep his job in writing which was put before them. [21] The law did not require the employer in these circumstances to give him a fourth opportunity to make representations for the sole purpose of advancing a further plea to keep his position. The fact that he did not get such an opportunity and did not see the reports does not vitiate the decision of the ACEA to terminate his employment and did not disentitle them from doing so.

36. The Tribunal finds that there was sufficient evidence for the ACEA to hold an honest and reasonable belief Mr Jervis committed the conduct alleged, and that belief was based on a reasonable investigation befitting these circumstances.

The Matrix Did Not Stand Alone

37. I now turn to Mr Jervis' argument that while his suspension without pay was within the contract of employment, the decision to terminate his employment was not. This is based on his contention that the Handbook which contained Matrix 4 was a part of the Applicant's contract of employment. The Matrix was a part of the Handbook which set out different kinds of prohibited conduct and penalties for committing of those acts. Mr Jervis asserts that Matrix 4 did not prescribe termination of employment for a first violation. He argues that all first violations in Matrix 4 are to be met solely with the penalty of suspension without pay pending investigation.

38. The Tribunal disagrees with the submission that the Matrix and Handbook were parts of the contract of employment of Mr Jervis. There was a written contract of employment between the ACEA and Mr Jervis dated 1 September 2016 ("contract of employment") along with annexed Terms and Conditions of Employment ("Appendix A") and the ACEA Faculty Handbook ("the Handbook").

---

[20] See Transcript at page 10, lines 21-32 and page 11 at lines 1-21.
[21] See Transcript, page 12 , line 31-32 and page 13, line 1-12.

39. It was a material term of the contract of employment embodied in Clause 4, that the **"Agreement is subject to the conditions set forth in the annexed Memorandum of Conditions of Service of Contract with the Authority in the Commonwealth of the Bahamas and the said Memorandum shall be read and construed in all respects as part of this Agreement."** Mr Jervis testified that with every contract of employment he received from the ACEA there would be a document attached called Appendix A which set out conditions of service. He said he read Appendix A and was familiar with it. Appendix A itself at Clause 17 stated that it (Appendix A) along with a letter of offer constituted the agreement made between the employee and the ACEA. It is clear that the Appendix A was intended by the parties to be read together with and as a part of the contract of employment. Clause 17 reads:

> **"17. Agreement**
>
> **The Letter of Offer and the accompanying document entitled 'Appendix A' constitutes (sic) the agreement made between the employee and the Authority.**
>
> **Any amendment made to this agreement by the employee and the Authority shall be in writing and shall be signed by both parties."**

40. Turning to the Handbook, it is not clear on what grounds Mr Jervis argues that it was a part of the contract of employment. Mrs Davies described the Handbook as a condensed portion of the policy manual. She stated that it refers to documents and policy relevant to staff and its purpose is to ensure staff know the policies of the school. It was distributed to staff at the beginning of each school year in an orientation exercise and the staff were made to go through the Handbook. Mrs Davies said that the Applicant received a copy of the Handbook. A reading of the Handbook reveals that it is a policy manual which is given to staff, but it could be changed from time to time as is common with policy manuals. In fact, the words "Subject to Amendment" appear on the face of the Handbook. There is no provision in the contract of employment inclusive of Appendix A, or even in the Handbook to the effect that the Handbook is meant to form a part of the contract of employment. It is a document which set out guidelines for the manner in which the ACEA and its Faculty would be expected to conduct the affairs of the educational institutions governed by the ACEA. The Tribunal is therefore satisfied that the Handbook was not a part of the contract of employment, but was created to set guidelines in relation to how the ACEA, Administration and Faculty would perform their roles at the school. However, for non-compliance with the guidelines, there could be adverse repercussions. Appropriately therefore, in this case each party expected that the other party would comply with these guidelines to the extent of their application in a given situation.

41. Appendix A (which is a part of the contract of employment) contained terms governing *inter alia* the appointment, salary, travel allowances, leave and termination of employment in relation to Mr Jervis. Particularly material to this dispute were the terms in relation to termination of employment as follows:

"12. **Termination**

(i) **The Authority may in its sole discretion, at any time summarily terminate the services of an employee, if the employee:**

a. **Shall at any time neglect or refuse or for any cause (except ill-health not caused by his own misconduct) become unable to perform any of his duties;**

b. **Fails to comply with any order of the Authority;**

c. **Discloses any information respecting the affairs of the Authority to any unauthorized person; or**

d. **Shall in any manner conduct himself or herself contrary to the principles and morals upheld by the Anglican Church and its school system, or behave in a manner repugnant to the fundamental interests of the Anglican Church and its school system.**

On summary dismissal under paragraph (i), all rights, benefits and advantages of the employee's appointment with the Authority shall forthwith cease." [Emphasis added].

42. The ACEA therefore embedded a right in Mr Jervis' contract of employment to exercise their discretion to terminate his employment if he engaged in conduct which fell within any of the categories described in 12(i)(a) through (d) - the termination clause of Appendix A ("the Termination Clause").

43. The Handbook contained three sets of policy guidelines relevant to this dispute – the Code of Ethics section, the Policy on Violence and the Faculty & Staff Progressive Discipline Matrix ("the Matrix"). The parties directed the Tribunal's attention to Matrix 4 on Corporal Punishment. There were two sections which the parties submitted were relevant as follows:

"**Progressive Discipline Matrix 4 – Corporal Punishment**

	Corporal Punishment Misconduct	First Violation	Second Violation	Third Violation
...2.	Hitting / Slapping a student in the face	Immediate suspension without pay pending investigation	Termination	
...6.	Throwing objects at a student (e.g. keys, chalk, ruler)	Immediate suspension without pay pending investigation"		

44. Mr Jervis argues that since this was the first time the ACEA had to consider that he hit a student in the face and/or threw an object at a student, the ACEA's hands were tied in that it could only have suspended him without pay. Moreover, he states that he only looked to the Matrix and never expected to be dismissed for his admitted misconduct. The ACEA argues that the Matrix was not the only document governing what they could do to respond to Mr Jervis actions. There was the contract of employment to which they could refer if they

decided that the proper course would be to end Mr Jervis' employment in circumstances where the ACEA had decided that Mr Jervis' actions were repugnant to the fundamental interests of the Anglican school system.

45. As for Mr Jervis' expectation not to be dismissed, the ACEA states that this is not true. Mrs Davies in her testimony stated that the HR Committee saw Mr Jervis' letter in which he expressed that he knew his violation would be "the end of the line for him." Indeed the Tribunal observes that Mr Jervis' argument that he expected not to be dismissed is incompatible with his letter to Mrs Davies in which he states that the incident may mark the end of his employment with the ACEA and because of this circumstance he pleaded to keep his job and to "suffer nothing beyond suspension". The argument as to his expectation that only what is in the Matrix would apply is therefore inaccurate.

46. The question is: in penalizing Mr Jervis for his admitted breach, was the ACEA confined to the Matrix or could it have resort to the Termination Clause? According to the Matrix if a teacher threw an object at a student for the first time, he would be immediately suspended without pay pending investigation. This occurred as the Principal complied with this guideline in suspending Mr Jervis immediately to carry out the initial investigation.

47. Suspension without pay is not a neutral act but seems to indicate the seriousness with which the ACEA intended to treat the violation. The phrase "**pending investigation**", was selectively applied in Matrix 4 to only some of the first violations. [22] A suspension pending investigation commenced a process by implementing a holding pattern until the conclusion of an investigation. There was nothing in the Matrix to suggest what would happen after the findings of the investigation were in hand for throwing an object at a student or for a first violation of hitting a student in the face. It is implicit that once the findings had been considered, the employer had to make a decision to do something concerning the employee.

48. In this analysis, the Tribunal finds that the contract of employment could not be ignored by Mr Jervis or the ACEA, especially where the latter considered that conduct repugnant to their interests was committed by the employee. It was explained by Mrs Davies in cross examination that the HR Committee did not only look to the Matrix but looked at it in the round with Appendix A (which contained the Termination Clause). She stated:

---

[22] For example, for placing a child under a table a teacher could expect 1 to 3 days' suspension without more, and taping a students' hands or feet attracted immediate suspension without pay and nothing further.

"The Discipline Matrix says suspension first of all pending an investigation. After the investigation, then we are able to go to this (referring to Appendix A) and decide or determine what is going to happen." [23]

49. The application of the Termination Clause in Appendix A was an option open to the ACEA in this case where, based on the results of the investigation, they found Mr Jervis' conduct to be sufficiently egregious or repugnant to the interests of the employer.

50. In relation to this issue, I did not find the case of **Mardi Dawson and FAG Bearings Ltd**, to which the Tribunal was referred by the Applicant, to be particularly relevant. In that case there was a question as to whether some of the violations were done by the plaintiff or by others, unlike Mr Jervis' case. There was also a failure of management in **Dawson** to follow the discipline policy set out. Such is not the case with Mr Jervis. Ms Dawson had no opportunity to defend herself to management. Mr Jervis had and took advantage of at least three opportunities to communicate his side of the story and any defences he felt he had to the Principal and the ACEA.

51. In a final argument, Mr Jervis contends that he was not given an appeal. Based on the evidence, it is clear he did not pursue an appeal with Bishop Boyd. After having what he admitted to be an informal exchange with the Bishop,[24] Mr Jervis' testimony revealed that he decided not to write a letter to pursue an appeal formally as he was "**not getting anywhere**" based on the Bishop's remarks. He agreed under cross examination that this was an informal way of proceeding and that it was not an official appeal. [25] Of the call to the Bishop, Mr Jervis recounted:

"I said to the Bishop that I thought it unfair that I was not allowed to plead my case and speak to the Committee that was responsible for my hiring and firing. And he said that is the way the working world is today. They did not have to tell me when they are firing me. In essence they can just fire me. They don't have to meet with me. And then he said that, truth be told, I could have been fired after the accident...That's with the St John's bus in 2016...Well, at that point I thought that this is not getting anywhere. So even after that I decided, what's the point of even writing a letter to him because that was kind of severed so I left it alone." [26]

52. In the view of the Tribunal, had Mr Jervis appealed, and been refused an audience or meeting with the Bishop, he could have asserted that he was denied an appeal. However, in these circumstances where he admits he did not pursue a formal appeal, based upon impressions

---

[23] See Transcript at page 48 lines 29-31 and page 49 lines 1-33.
[24] See Transcript at page 19 lines 13-22.
[25] See Transcript at page 19, lines 2-30.
[26] See Transcript at page 19 lines 1-22.

he formed from an informal telephone exchange with the Bishop, his complaint that he did not receive an appeal cannot succeed.

53. Many of Mr Jervis' submissions in this matter walked the line between wrongful dismissal and unfair dismissal points. To be clear we have dealt with them only in the context of wrongful dismissal considerations which could affect the employer's holding of the requisite honest and reasonable belief in the commission of gross misconduct.

54. In summary, based on a weighing of the written and oral evidence and relevant legal submissions in this matter, the Tribunal dismisses the application of the Applicant because:

(1) At the time of the dismissal of Mr Jervis, the ACEA held an honest and reasonable belief on a balance of probabilities that Mr Jervis committed gross misconduct;

(2) The belief of the ACEA that Mr Jervis had engaged in gross misconduct was based upon a sufficiently reasonable enquiry which, coupled with Mr Jervis' own confessions and consistent reports from other relevant persons, revealed the absence of any defence, and any dispute as to what occurred and why it happened; and

(3) The impugned acts of Mr Jervis were in the nature of being repugnant to the fundamental interests of the ACEA in the circumstances of this case.

THIS IS THE DECISION OF THE TRIBUNAL.

Dated this 28th day of November A.D. 2019.

Simone Fitzcharles

Vice President