

**CITATION:** *Kuhn v Deputy Commissioner of Police Brett Pointing* [2017] QCAT 16

**PARTIES:** Michael Kuhn  
(Applicant)  
v  
Deputy Commissioner of Police Brett Pointing  
(Respondent)

**APPLICATION NUMBER:** OCR049 - 16

**MATTER TYPE:** Occupational regulation matters

**HEARING DATE:** 16 November 2016

**HEARD AT:** Brisbane

**DECISION OF:** **Member McLennan**

**DELIVERED ON:** 18 January 2017

**DELIVERED AT:** Brisbane

**ORDERS MADE:**

- 1. The order of the Respondent that Michael Kuhn be demoted from Senior Constable pay point 2.9 to Constable pay point 1.6 for the period of 12 months dated from 29 March 2016 is set aside.**
- 2. In its place it is ordered that Michael Kuhn be demoted from Senior Constable pay point 2.9 to Constable pay point 1.6 for the period of six months dated from 29 March 2016.**

**CATCHWORDS:** OCCUPTATIONAL REGULATION - Police discipline – review of sanction – charge of inappropriate force - inappropriate cell extraction – misconduct – whether level of sanction excessive – relevance of guilty plea and co-operation – use of comparative judgments – new evidence of Enterprise Bargaining Agreement ratification

*Police Service Administration Act 1990* (Qld), s 1.4, s 7.2  
*Police Service (Discipline) Regulations 1990* (Qld), s 2, s 3, s 9(1)(f), s 10, s 12  
*Crime and Corruption Act 2001* (Qld), s 219G,

s 219H, s 219L(2)  
*Queensland Civil and Administrative Tribunal Act 2009* (Qld), s 17, s 18, s 19, s 20

*Briginshaw v Briginshaw* (1938) 60 CLR 336  
*Crime and Misconduct Commission v Deputy Commissioner Barnett, Queensland Police Service* [2013] QCAT 477  
*Aldrich v Ross* [2001] 2 Qd R 235  
*Police Service Board v Morris* (1985) 156 CLR  
*Queensland Police Service v Compton (No 2)* [2011] QCATA 246  
*O'Brien v Assistant Commissioner Stephen Gollschewski, Queensland Police Service* [2014] QCATA  
*Belz v Assistant Commissioner Wilson* [2011] QCAT 632  
*Belz v Assistant Commissioner Wilson* [2012] QCATA 185  
*McKenzie v Acting Assistant Commissioner Wright* [2011] QCATA 309

**APPEARANCES:**

**APPLICANT:**

Mr T Schmidt of Counsel represented Mr Kuhn

**RESPONDENT:**

Mr S McLeod of Counsel represented Deputy Commissioner Brett Pointing

**REASONS FOR DECISION**

- [1] Michael Kuhn is a Senior Constable in the Queensland Police Service (QPS). He has over 26 years of policing service. In a Notice of Formal Finding Misconduct dated 29 March 2016 Deputy Commissioner Brett Pointing (Respondent, decision-maker or Deputy Commissioner) found that allegations of misconduct against Mr Kuhn (Applicant) were substantiated.
- [2] The Deputy Commissioner imposed a sanction whereby Mr Kuhn was reduced in rank from Senior Constable pay point 2.9 to Constable pay point 1.6. After a period of 12 months Mr Kuhn could return to the rank of Senior Constable pay point 2.9 subject to satisfactory completion of conditions:
- (a) A satisfactory performance review report by the Darling Downs District Officer certifying your satisfactory work performance and suitability to return to the level of senior constable 2.9;

(b) perform 50 hours of community service during the 12 month period;

(c) meet with a Human Services Officer (HSO) once a month for the next six months or such longer period that is recommended by the HSO to assist you in developing coping and management strategies in relation to your personal circumstances outlined in your submissions;

(d) attend the Integrity and Performance Group, Ethical Standards Command and complete a program on professionalism and ethical decision making within three months from the date this sanction is imposed.

(e) If you do not satisfactorily complete these conditions during the 12 month period, you will be subject to a report by the Darling Downs District Officer certifying your satisfactory work performance and suitability, progress to Senior Constable pay point 2.1 and consequently progress pursuant to normal industrial arrangements.<sup>1</sup>

[3] Mr Kuhn filed an application for review of the disciplinary sanction in the Queensland Civil and Administrative Tribunal (Tribunal).<sup>2</sup> He submits that the sanction was excessive.

[4] The application to review is confined to the sanction, the basis of which is set out in the Disciplinary Charge and the Further Particulars.

### **Disciplinary Charge**

[5] **Matter One**

That on 18 August 2014, at Toowoomba your conduct did not meet the standard of conduct the community reasonably expects of a police officer in that you:

(a) Inappropriately applied force to the person of [name deleted].

*Section 1.4 and 7.2 of the Police Service Administration Act 1990, section 9(1)(f) of the Police Service (Discipline) Regulations 1990, sections 2 (Personal Conduct), 10 (Performance of Official Duties) and 12 (Conduct Towards Members and other Persons) of the Standard of Practice, Professional Conduct as contained in the Human Resource Policies and section 14.3 (Use of force) of the Operational Procedures Manual.*

### **Further and better particulars**

Investigations have identified that:

- On 18 August 2014, you were rostered from 9am to 5pm to perform the duties of watchhouse officer at the Toowoomba Watchhouse;
- at this time [name deleted], had been remanded since 13 August 2014 into the custody of the Queensland Police Service at the Toowoomba Watchhouse by virtue of a return to prison warrant;

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<sup>1</sup> Notice of Formal Finding Misconduct dated 29 March 2016.

<sup>2</sup> 12 April 2016.

- at about 12:25pm on 18 August 2015, you opened the meal access door on [name deleted]'s cell for the provision of her lunch meal;
- at this time a conversation appears to occur between yourself and [name deleted];
- moments later, you open the door to [name deleted]'s cell and appear to have a further brief conversation with [name deleted].

### **In relation to Matter One**

- you suddenly took hold of [name deleted]'s jumper and right arm and using an 'arm drag' technique pulling her quickly from the cell into the common-room cell exercise area;
- whilst in the common-room cell exercise area adjacent to the cell, you took hold of [name deleted]'s throat with your right hand whilst retaining your grip of her jumper with your left hand;
- the throat grip you applied to [name deleted] was not an approved 'Lateral Vascular Neck Restraint' pursuant to section 14.3.3 of the Operational Procedures Manual; and
- at the same time you then forced her to walk backwards from the common-room cell exercise area adjacent to the cell through an open doorway along a hallway to the watchhouse padded cell;
- on reaching the padded cell doorway, you use both of your hands to forcefully push [name deleted] backwards into the padded cell where, as a consequence, she stumbled backwards and fell to the floor of the cell landing on her posterior;
- the force of her momentum caused her upper body to strike the wall of the padded cell.

[6] In his reasons for decision, the Deputy Commissioner acknowledged that he needed to be satisfied that the charge was substantiated on the basis of the *Briginshaw*<sup>3</sup> standard of proof. He acknowledged Mr Kuhn's admissions that the matter against him was substantiated and constituted misconduct.<sup>4</sup> He also stated that there was sufficient evidence to find the matter substantiated independent of Mr Kuhn's acceptance.<sup>5</sup>

[7] As a preliminary matter, based on his review of CCTV footage and the doubt arising from imperfect footage, the Deputy Commissioner concurred with Mr Kuhn's submission that the prisoner's head did not make contact with the cell wall.<sup>6</sup> This qualified concession did not for the Deputy Commissioner, alter the seriousness of the conduct which remained improper in the method adopted by Mr Kuhn to escort the prisoner and push her into the cell.<sup>7</sup> He found that "it is not of the standard expected of a police officer with your experience and training."<sup>8</sup>

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<sup>3</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>4</sup> Notice of Formal Finding Misconduct page 4.

<sup>5</sup> Notice of Formal Finding Misconduct page 6.

<sup>6</sup> Notice of Formal Finding Misconduct page 6.

<sup>7</sup> Notice of Formal Finding Misconduct page 7.

<sup>8</sup> Notice of Formal Finding Misconduct page 7.

- [8] The Deputy Commissioner in his analysis of Mr Kuhn's actions with the prisoner stated:

"It is my view, the more appropriate best practice response in the circumstances would have been to exercise 'situational containment' by leaving [name deleted] in the cell and ignoring her insolent comments and behaviour. My attention is drawn to comment by Sergeant Peacock, Operational Skills Section, where at page 3 of his report he observes 'I find this threat assessment reasonable under the circumstances, however the use of the VDC<sup>9</sup> appears to be more akin to punishment for verbal insolence rather than a risk management control measure to mitigate the threat of physical harm' (emphasis added)."<sup>10</sup>

- [9] The Deputy Commissioner emphasised that the whole action undertaken by Mr Kuhn was not a sound, well-reasoned decision.<sup>11</sup> So seriously did he view Mr Kuhn's misconduct and his suitability to be a police officer the Deputy Commissioner initially considered the sanction of dismissal.<sup>12</sup> To impose this sanction, he had to be satisfied that the purpose of discipline could not be achieved by any other sanction.<sup>13</sup>

- [10] The Deputy Commissioner in consideration of the sanction he imposed was mindful of the purpose of police discipline which included the maintenance of public confidence in the QPS; the protection of its reputation and the maintenance of the proper standards of conduct in QPS officers.<sup>14</sup>

- [11] Mitigating circumstances included Mr Kuhn's:
- a) readiness to undertake further training to improve his operational skills;
  - b) continued good work performance;
  - c) good service history;
  - d) positive comments contained in references; as well as evidence of
  - e) diligent and ethical service, all attributes valued by the QPS and the community.<sup>15</sup>

- [12] The Deputy Commissioner accepted "that the combination of family and financial stressors and your head injury have contributed to the sense of anxiety and frustration that you felt at the time."<sup>16</sup> He accepted that these internal and external stressors contributed to Mr Kuhn's "out of character reaction" with the prisoner and that this singular incident must be viewed in the context of a lengthy period of good service.<sup>17</sup>

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9 Violent Detention Cell.

10 Notice of Formal Finding Misconduct pages 8-9.

11 Notice of Formal Finding Misconduct page 9.

12 Notice of Formal Finding Misconduct page 18.

13 *Crime and Misconduct Commission v Deputy Commissioner Barnett, Queensland Police Service* [2013] QCAT 477 paragraph 65.

14 Notice of Formal Finding Misconduct page 4.

15 Notice of Formal Finding Misconduct page 19.

16 Notice of Formal Finding Misconduct page 16.

17 Notice of Formal Finding Misconduct page 18.

- [13] Nevertheless, the Deputy Commissioner intended the sanction to convey the gravity of the misconduct.<sup>18</sup>
- [14] The tribunal notes that Mr Kuhn has other discipline history.<sup>19</sup>

### New Evidence

- [15] At the time of the hearing, an application for submission of new evidence<sup>20</sup> was addressed. Following discussions, counsel for both parties had agreed that fresh evidence in the form of an affidavit signed by Mr Kuhn<sup>21</sup> should be admitted for consideration by the Tribunal with the exclusion of paragraphs 12 to 14 inclusive. Mr Kuhn's affidavit addressed the effect on his salary rates<sup>22</sup> and stated that the financial impact on him would be approximately \$18,935.29 which figure included a 21% rotational shift worker allowance. That approximation was based on 1 July 2015 pay rates and so did not include the 3% pay rise from the Enterprise Bargaining Agreement (EBA) rates.<sup>23</sup>
- [16] In the affidavit Mr Kuhn addressed his completion of the Ethical Standards courses required by the sanction as well as the regular meetings with a Human Services Officer. Mr Kuhn notified his intention to take a week's long service leave to perform the required community service.
- [17] Further submitted evidence consisted of updated details of the financial impact the 12 month sanction of demotion has had upon Mr Kuhn's circumstances. Mr Schmidt, counsel for Mr Kuhn, explained that the current EBA of a 3% pay rise had been ratified and backdated in effect to 1 July 2016. He submitted calculations of the salary effects on Mr Kuhn although he emphasised that these calculations could only be approximate.<sup>24</sup> He submitted the current salary rates applicable to Mr Kuhn<sup>25</sup> and the draft comparative salary rates applicable 1 July 2016.
- [18] Section 219H of the *Crime and Corruption Act 2001* (Qld) (CCC Act) provides for the conduct of proceedings relating to reviewable decisions:

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<sup>18</sup> Notice of Formal Finding Misconduct page 19.

<sup>19</sup> Notice of Formal Finding (Substantiated) 16 August 2012 found misconduct with a sanction imposed of two penalty units.

<sup>20</sup> Dated 10 November 2016.

<sup>21</sup> Affidavit sworn by Mr Kuhn 9 November 2016.

<sup>22</sup> Paragraphs 4 – 7.

<sup>23</sup> Paragraphs 6 – 7.

<sup>24</sup> Exhibit 1 Instrument made under the *Industrial Relations Act 1999*: draft form Salary Rates 1 July 2016; 1 July 2017; 1 July 2018.

<sup>25</sup> Exhibit 1 Instrument made under the *Industrial Relations Act 1999* Appendix 1 Salary Rates Police Officers 1 July 2014 - 2.2% Increase.

- (1) A review of a reviewable decision is by way of rehearing on the evidence (**original evidence**) given in the proceeding before the original decision-maker (**original proceeding**).
- (2) However, QCAT may give leave to adduce fresh, additional or substituted evidence (**new evidence**) if satisfied—
- (a) the person seeking to adduce the new evidence did not know, or could not reasonably be expected to have known, of its existence at the original proceeding; or
- (b) in the special circumstances of the case, it would be unfair not to allow the person to adduce the new evidence.
- (3) If QCAT gives leave under subsection (2), the review is—
- (a) by way of rehearing on the original evidence; and
- (b) on the new evidence adduced.

- [19] The new evidence was admitted pursuant to paragraph 219H(2)(a) on the basis that it was not available on 29 March 2016 at the time the sanction was imposed and could assist the Tribunal in its review.

### **Tribunal's review**

- [20] Sections 219G and 219H of the CCC Act and sections 17 – 20 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) (QCAT Act) provide that the purpose of the Tribunal's review is to produce the correct and preferable decision on the evidence which was before the original decision-maker and any new evidence that has been admitted by the tribunal.

#### **19 Exercising review jurisdiction generally**

*In exercising its review jurisdiction, the tribunal—*

- (a) must decide the review in accordance with this Act and the enabling Act under which the reviewable decision being reviewed was made; and
- (b) may perform the functions conferred on the tribunal by this Act or the enabling Act under which the reviewable decision being reviewed was made; and
- and
- (c) has all the functions of the decision-maker for the reviewable decision being reviewed.

#### **20 Review involves fresh hearing**

- (1) The purpose of the review of a reviewable decision is to produce the correct and preferable decision.
- (2) The tribunal must hear and decide a review of a reviewable decision by way of a fresh hearing on the merits.

- [21] It is a fresh hearing on the merits. The Tribunal brings a public perspective to the evidence before it.<sup>26</sup> It must reach its own decision on review of the evidence before it but it is appropriate for the Tribunal to give considerable weight to the views of the original decision-maker and his particular expertise in internal discipline.<sup>27</sup>
- [22] The Tribunal may suspend the sanction imposed by the original decision-maker if the tribunal considers it appropriate to do so in the circumstances.<sup>28</sup>

<sup>26</sup> *Aldrich v Ross* [2001] 2 Qd R 235 at 257 per Thomas J.

<sup>27</sup> *Aldrich v Ross* [2001] 2 Qd R 235, at 257-258.

<sup>28</sup> CCC Act, s 219L(2).

- [23] It is clear in the Deputy Commissioner's reasons for decision that he found Mr Kuhn's actions in the circumstances were a concerning over-reaction to the apparent insolent abuse from the prisoner. The Deputy Commissioner found that Mr Kuhn's action of opening the cell door was a discretionary decision based on a reasonable risk assessment in the circumstances.<sup>29</sup> He acknowledged that Mr Kuhn's limited hearing capacity may have contributed to that decision.<sup>30</sup>
- [24] He found the actual, though unnecessary, extraction from the cell was effective and followed police standard procedure when Mr Kuhn used the "arm drag" technique.<sup>31</sup> The Deputy Commissioner however found that Mr Kuhn compounded his poorly thought out actions by:
- a) not seeking other Watchhouse assistance;
  - b) not transferring the prisoner to "arm escort such as a come-along hold or wrist lock"; and
  - c) employing a throat grip, though not intended to choke the prisoner, and walking her backwards.<sup>32</sup>
- [25] The Deputy Commissioner considered that "the more appropriate best practice response in the circumstances would have been to exercise 'situational containment' by leaving [name deleted] in the cell and ignoring her insolent comments and behaviour." The Tribunal considers it likely that verbal abuse may well constitute part of the daily occurrence for an officer situated in a Watchhouse location. The Tribunal accepts the submission of counsel for the Respondent, Mr McLeod, that a police officer is regularly confronted with difficult work situations but is required to meet these with propriety and integrity.<sup>33</sup>
- [26] In this present matter, the situation that confronted Mr Kuhn did not appear challenging but his actions were apparently peremptory and inappropriate in the circumstances.
- [27] In his reasons the Deputy Commissioner was mindful of the necessity to protect those prisoners who are remanded within police custody:
- "The seriousness of your conduct cannot be downplayed. You committed a serious act in applying excessive force to [the prisoner], who was in police custody at the time. Police officers swear to protect and serve the people of Queensland and you have clearly failed in this regard."<sup>34</sup>
- [28] The Tribunal notes that the Deputy Commissioner has referred to Mr Kuhn's application of "excessive force" to the prisoner but that the actual charge was "inappropriately applied force".<sup>35</sup> It seems to the Tribunal that

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<sup>29</sup> Notice of Formal Finding Misconduct page 8.

<sup>30</sup> Notice of Formal Finding Misconduct page 7.

<sup>31</sup> Notice of Formal Finding Misconduct page 9.

<sup>32</sup> Notice of Formal Finding Misconduct page 9.

<sup>33</sup> Respondent's Outline of Submissions 16 October 2016 page 5.

<sup>34</sup> Notice of Formal Finding Misconduct page 15.

<sup>35</sup> Notice of Formal Finding Misconduct Matter 1.



the charge against Mr Kuhn focuses on the incorrectly applied extraction and movement method as well as the actual force employed.

- [29] It is clear that the Deputy Commissioner, in his analysis of Mr Kuhn's ill-considered actions, particularly in pushing the prisoner who offered no resistance, backwards into the VDC, was mindful of the potentially serious injury to the prisoner. At the core of the Deputy Commissioner's decision was this potential serious injury to the prisoner as well as the intemperate reaction of Mr Kuhn which was inappropriate and was not conduct expected of an officer of his experience, rank and responsibility.

## Sanction

- [30] The issue before the Tribunal is the appropriateness of the sanction in the circumstances of the misconduct admitted by Mr Kuhn and independently substantiated by the Deputy Commissioner. The focus of the review is whether the sanction of 12 month demotion and its consequent financial detriment is excessive.
- [31] In imposing the sanction, the Deputy Commissioner emphasised the disparity between Mr Kuhn's experience, rank and training and the unnecessary actions he undertook in the removal of the prisoner to the VDC. The Tribunal considers the comments of the Deputy Commissioner fairly differentiated the purpose of the sanction: that the primary purpose was not to cause financial detriment, rather to act as both general and specific deterrent to repetition of such action.<sup>36</sup> The remuneration paid at the level of Senior Constable 2.9 was in recognition of the professionalism required for performance at that level:

"On consideration of the evidence before me, including your submissions, I hold great concern in regard to your ability to fulfil the role of senior constable in a manner which maintains confidence in the ability of the QPS to fulfil all of its statutory functions and to maintain public confidence. I no longer have confidence in your ability to perform your role as a senior constable and it is for this reason that I have imposed the sanction I have in this matter."<sup>37</sup>

- [32] The Tribunal agrees with the Mr McLeod's submissions that:

"The purpose of police disciplinary proceedings encompasses deterrence, protection of the public, maintenance of proper standards and promoting and maintaining public confidence in the police service. The sanction imposed must signify the disapproval with which the conduct is viewed: *Police Service Board v Morris* (1985) 156 CLR 397 and *Queensland Police Service v Compton (No 2)* [2011] QCATA 246 at [25]."<sup>38</sup>

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<sup>36</sup> Respondent's Outline of Submissions 16 October 2016 referring to pp 91-92, vol. 1, Material.

<sup>37</sup> Submissions of Respondent referring to pp 91-92, vol. 1, Material.

<sup>38</sup> Submissions of Respondent 19 October 2016 page 3.

[33] The Tribunal also notes section 3 of the *Police Service (Discipline) Regulations 1990* (the Regulations):

*The object of these regulations is to—*

*(a) provide for a system of guiding, correcting, chastising and disciplining subordinate officers; and*

*(b) ensure the appropriate standards of discipline within the Queensland Police Service are maintained so as—*

*(i) to protect the public; and*

*(ii) to uphold ethical standards within the Queensland Police Service; and*

*(iii) to promote and maintain public confidence in the Queensland Police Service.*

[34] Mr Schmidt invited the Tribunal to find error in the Deputy Commissioner's apparent initial decision to dismiss Mr Kuhn<sup>39</sup> but various mitigating factors such as lengthy good service record, internal and external stressors and the availability of alternative sanctions moderated his decision.<sup>40</sup> The task before the Tribunal is, with respect, to review on its merits the application on the sanction actually imposed.

[35] In this review, the Tribunal considers that the Deputy Commissioner's perspective on Mr Kuhn's misconduct was open to him and his reasons for the imposition of the sanction of temporary demotion were properly founded. In the view of the Tribunal, Mr Kuhn's inappropriate actions constituted conduct concerning to public expectations of use of police power.

[36] There is then a separate question as to whether the sanction was excessive in view of any applicable mitigating circumstances.

### **Comparable Tribunal decisions**

[37] While consistency in Tribunal decision-making is desirable particularly in the imposition of sanctions with respect to police discipline, every matter turns on its own facts and an independent mind must be brought to the circumstances.<sup>41</sup>

[38] Mr Schmidt provided four precedent Tribunal cases for comparison of the imposed sanctions and the effect on remuneration.<sup>42</sup> He submitted that *Belz* illustrated more serious charges that attracted a similar sanction.

[39] In *Belz* the matter charged was use of "excessive force",<sup>43</sup> on two separate occasions, against a prisoner in custody by removal of the prisoner by holding her hair. The sanction for the substantiated misconduct was demotion:

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<sup>39</sup> Notice of Formal Finding Misconduct page 18.

<sup>40</sup> Notice of Formal Finding Misconduct pages 18 - 19.

<sup>41</sup> *O'Brien v Assistant Commissioner Stephen Gollschewski, Queensland Police Service* [2014] QCATA per Hon JB Thomas Judicial Member paragraph 48. (*O'Brien* appeal)

<sup>42</sup> *Belz v Assistant Commissioner Wilson* [2011] QCAT 632 (*Belz*)

*Belz v Assistant Commissioner Wilson* [2012] QCATA 185 (*Belz* appeal)

*McKenzie v Acting Assistant Commissioner Wright* [2011] QCATA 309 (*McKenzie* appeal).

<sup>43</sup> *Belz* page 2.

“ . . . in rank from Sergeant 3.3 to Senior Constable 2.9 for a period of 12 months (from 29 October, 2010). At the end of the 12 month period and depending upon your successful completion of your Performance Planning and Assessment (PPA), I order you be eligible to apply for the rank of Sergeant”.<sup>44</sup>

[40] The officer in *Belz* was similarly located in duties and responsibilities to Mr Kuhn. In *Belz* Member Richards dismissed the application to review the imposition of the sanction. On appeal the application for leave to appeal against sanction was refused.<sup>45</sup>

[41] Mr Schmidt submitted that the officer in *Belz* demonstrated an ongoing lack of insight into his behaviour or remorse at his actions. On the leave to appeal the review decision, the officer again sought to reopen the issue of substantiation of the charges.

[42] Mr Schmidt submitted that in *Belz* the sanction of actual demotion establishes the upper range in terms of sanctioning Mr Kuhn.<sup>46</sup> The officer in *Belz*:

- a) had substantiated misconduct involving two instances of use of excessive force;
- b) demonstrated an ongoing lack of insight into his behaviour or remorse at his actions;<sup>47</sup>
- c) removed from the cell by her hair a female prisoner in handcuffs and slight of statute [*sic*];<sup>48</sup>
- d) showed very substantial error of judgement;<sup>49</sup> and
- e) exposed the officer and his colleagues to potential criminal assault proceedings.<sup>50</sup>

[43] In contrast Mr Kuhn was charged with a single application of inappropriate force. He demonstrated:

- a) an early acknowledgment of his action;
- b) acceptance of responsibility for his actions;
- c) remorse and insight over the incident;<sup>51</sup>
- d) early co-operation with the disciplinary process;
- e) admission of his misconduct in its entirety;<sup>52</sup>
- f) agreement to the imposition of managerial action requiring he vacate his position at the Watchhouse; and

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<sup>44</sup> *Belz* pages 2 – 3.

<sup>45</sup> *Belz* appeal per Hon J Thomas AM QC, Member. Other matters also appealed were refused and dismissed.

<sup>46</sup> Submissions for the Applicant 9 August 2016 paragraph 27.

<sup>47</sup> On appeal the officer sought a rehearing on the principal issue of whether his actions in assaulting the female prisoner amounted to misconduct in the circumstances and to justify his actions: *Belz* appeal pages 3 - 4.

<sup>48</sup> *Belz* page 8.

<sup>49</sup> *Belz* page 9.

<sup>50</sup> *Belz* page 8.

<sup>51</sup> Notice of Formal Finding Misconduct page 15.

<sup>52</sup> Submissions for the Applicant 9 August 2016 paragraph 23.

g) agreement to meet HSO on a monthly basis and undertake a period of community service.<sup>53</sup>

- [44] Mr Schmidt submitted that vacation of the Watchhouse position further demonstrated Mr Kuhn's insight and professionalism.<sup>54</sup>
- [45] Contrary to Mr Schmidt's submissions, the Tribunal is not persuaded of any significant difference in seniority between Mr Kuhn as Senior Constable at pay point 2.9, an officer of 26 years experience and the Sergeant in *Belz*. Both officers were in similar positions of trust, in supervisory roles and were guilty of serious misconduct.<sup>55</sup>
- [46] More persuasive are the factors that the Deputy Commissioner accepted as mitigating.<sup>56</sup> He accepted that community references indicated that Mr Kuhn was highly regarded as a competent and committed police officer.<sup>57</sup> Favourable reference was made to Mr Kuhn's QPS Medal and citations for diligent and ethical service.<sup>58</sup> The Deputy Commissioner also noted that Mr Kuhn had continued to perform his duties in a professional, positive and committed manner in his new position.<sup>59</sup>
- [47] The Tribunal is not persuaded by Mr Schmidt's submission that the correct sanction should have been merely a reduction in pay points without demotion.<sup>60</sup> The mitigating factors in themselves are insufficient to outweigh the concerning misconduct by Mr Kuhn.
- [48] The Tribunal considers that statements made in the *McKenzie* appeal are helpful:
- "In disciplinary proceedings the main relevance of an early indication of acceptance of the charge is that it indicates honesty and remorse, and a willingness to face up to obligations. We are not at this stage prepared to attempt to introduce any system comparable to that in the criminal courts where substantial and measurable discounts are allowed for early pleas of guilty. The main relevance of such conduct in this disciplinary jurisdiction is its indication of remorse and responsibility. It is worth mentioning that these can be very significant and influential factors."<sup>61</sup>
- [49] The Tribunal adopts this statement as useful in the present case. As noted above, Mr Kuhn has demonstrated full co-operation with the disciplinary process and willingness to fulfil the conditions attached to his demotion.

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<sup>53</sup> Notice of Formal Finding Misconduct page 15.

<sup>54</sup> Submissions for the Applicant 9 August 2016 paragraph 27

<sup>55</sup> Respondent's Outline of Submissions 16 October 2016 paragraph 14.

<sup>56</sup> See paragraphs 11 - 12 above.

<sup>57</sup> Notice of Formal Finding Misconduct page 15.

<sup>58</sup> Notice of Formal Finding Misconduct page 19.

<sup>59</sup> Notice of Formal Finding Misconduct page 16.

<sup>60</sup> Submissions for the Applicant 9 August 2016 paragraph 28.

<sup>61</sup> *McKenzie* appeal per Justice Alan Wilson, President, Hon JB Thomas AM, QC, Judicial Member at page 6.

- [50] It is acknowledged in the present case, as it was in the *McKenzie* appeal:  
“The effect of demotion must be recognised as very severe. Apart from the disgrace associated with it, the demotion is accompanied by what is on any view a serious financial sanction.”<sup>62</sup>
- [51] In *McKenzie*, the appeal Tribunal expressed frustration with the lack of reliable estimates that could be provided by counsel of the financial effect of salary reductions upon the appellant.<sup>63</sup> In the present case counsel for Mr Kuhn could only provide approximation of the financial effect upon Mr Kuhn of the salary reduction over the 12 month demotion period. This approximation has become even less reliable with the new evidence of the EBA 3% pay rise backdated to 1 July 2016 and with the salary increments into 2017.
- [52] The Deputy Commissioner emphasised that financial detriment is not the primary purpose of the sanction. As indicated, the Tribunal considers that temporary demotion was an appropriate sanction in the context of a serious action against a prisoner in the custody of the QPS by an officer in a position of trust and supervisory responsibility and remunerated accordingly.
- [53] As a result of the 3% pay rise backdated to 1 July 2016 there is an unintended consequential and additional penalty on Mr Kuhn’s salary. While the degree of this economic impact should not be overstated, the Tribunal considers that the 12 month demotion which is now compounded financially by the effect of the EBA should be taken into account.
- [54] Of more significance are the factors that have already been enumerated that demonstrate Mr Kuhn’s willingness to absorb the disciplinary process in the right spirit and to co-operate with it.
- [55] The Tribunal considers that a six month demotion dated from 29 March 2016 is appropriate.
- [56] The required completion of all conditions imposed upon Mr Kuhn on 29 March 2016 remains.

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<sup>62</sup> *McKenzie* appeal page 10.

<sup>63</sup> *McKenzie* appeal pages 9 – 10.