APPEAL AGAINST THE DISCIPLINARY DECISION AND PENALTY GIVEN ON 29 AUGUST 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2020 WAIRC 00246
CORAM	**:**	PUBLIC SERVICE APPEAL BOARD SENIOR COMMISSIONER S J KENNER- CHAIRMAN MS H REDMOND - BOARD MEMBER MR G SUTHERLAND - BOARD MEMBER
HEARD	**:**	MONDAY, 4 NOVEMBER 2019, MONDAY, 20 JANUARY 2020; WRITTEN SUBMISSIONS 12 AND 21 FEBRUARY 2020
DELIVERED	**:**	TUESDAY, 5 MAY 2020
FILE NO.	**:**	PSAB 16 OF 2019
BETWEEN	**:**	JOHN PURCELL Appellant AND WESTERN AUSTRALIAN POLICE Respondent
Catchwords	**:**	Industrial law (WA) – Appeal against demotion and reduction in classification - Disciplinary penalty – Powers of Appeal Board - Penalty appropriate – Appeal dismissed
Legislation	**:**	*Industrial Relations Act 1979* (WA) ss 80I(1)(b), (d); *Public Sector Management Act 1994* (WA) ss 78(1)(b)(iv), 80A, 82A(3)(b)
Result	**:**	Appeal dismissed

Representation:

Counsel:

Appellant	:	Mr R Johnstone of counsel and with him Mr Amati
Respondent	:	Ms J Vincent of counsel and with her Ms F Jennings

Solicitors:

Appellant	:	
Respondent	:	State Solicitor's Office of Western Australia

Case(s) referred to in reasons:

Re v Inspector Custodial Services [2013] WAIRC 00830; (2013) 93 WAIG 1776

State Government Insurance Commission v Terence Hurley Johnson (1997) 77 WAIG 2169

Case(s) also cited:

Blyth Chemicals Limited v Bushnell [1933] HCA 8; (1933) 49 CLR 66.

Brackenridge v Toyota Motor Corporation Australia Ltd (1996) 142 ALR 99

Brown v Commissioner, Department of Corrective Services [2017] WAIRC 714.

Larne-Jones v Human Synergistics Australia Limited & Ors [2015] FCCA 968

Milentis v The Honourable Minister for Education (1987) 67 WAIG 1124

Quinn v Jack Chia (Australia) Ltd [1992] 1 VR 567

Raxworthy v The Authority for Intellectually Handicapped Persons (1989) 69 WAIG 2266.

Titelius v Ministry of Justice [1995] WAIRC 12136

Tolmie v Director General, Department of Planning and Infrastructure [2006] WAIRC 03630.

Reasons for Decision

Background

1 The appellant has been employed by the respondent since 1992. From 18 August 2010 to 1 July 2019 the appellant occupied the position of Assistant Director in the respondent's Office of Information Management. This is a Level 8 position and is a part of the senior executive within the respondent's corporate structure. In this position the appellant was responsible for the management of the Office of Information Management, which includes information and data management and security within the respondent's operations. The appellant's position was responsible for a considerable number of other employees and had a substantial multi-million-dollar budget.

2 Until the events relevant to this appeal, it was common ground that the appellant had an unblemished record of service with the respondent. On 18 March 2019 the respondent wrote to the appellant and informed him of four allegations of suspected breaches of discipline under s 80 of the *Public Sector Management Act 1994* (WA). The allegations were in connection with the misuse of the respondent's computer system, unauthorised release of official information and inappropriate behaviour. All of the allegations related to an extra-marital affair that the appellant engaged in with a young woman who was an employee of the respondent between 2011 and 2014. In the period between January 2013 and January 2014, the young woman concerned occupied a position in the Office of Information Management, overseen by the appellant. The allegations of misconduct extended over the period from 2011 to 2017.

3 In responding to the allegations, the appellant, by letter dated 16 April 2019, admitted three of them and made qualified admissions as to most of the fourth. In relation to the allegations, which were found to be substantiated, the appellant made a number of submissions in mitigation. The respondent, having considered the contentions advanced by the appellant, decided to impose a penalty of a permanent reduction in classification from Level 8.3 to Level 5.4. This was considered as an alternative to dismissal.

4 The appellant now appeals against the respondent's penalty decision. He maintained, that given the mitigating circumstances that he advanced in response to the allegations, including his unblemished record with the respondent, and what he maintained were his actions to redeem himself, the penalty imposed by the respondent on him was harsh and unfair. Instead, the appellant seeks an order for a reduction in penalty to a reprimand and a reduction in classification to Level 8.1.

The allegations

5 The allegations against the appellant were set out in a letter from Ms Roberts, the respondent's Director of Human Resources, dated 18 March 2019. Relevantly, formal parts omitted, the letter provided as follows:

> **SUSPECTED BREACH OF DISCIPLINE**
>
> It has come to my attention that you may have committed a suspected breach of discipline under section 80 of the *Public Sector Management Act 1994 (the Act)*. In particular, it has been alleged that:
>
> **Allegation 1: Computer Misuse - Offensive materials.**
>
> Between 19 July 2013 and 17 October 2016 you utilised the Western Australia Police Force (WA Police Force) computer system to receive images, via email, which are deemed obscene and offensive in nature, and without attempts to delete and cease the receipt of such emails.
>
> **Allegation 2: Information Security - Unauthorised release of official information.**
>
> Between 13 April 2015 and 29 July 2016, without lawful authority, you made disclosures of official WA Police Force information, via email, to an unauthorised person.
>
> **Allegation 3: Computer Misuse - Inappropriate use of email system**
>
> Between 2011 and 2017 you utilised the WA Police Force email system to engage in an excessive number of personal emails (23,736) to one particular person
>
> **Allegation 4: Misconduct - Inappropriate Behavior.**
>
> Between 28 July 2014 and 3 January 2017, you utilised the WA Police Force email system to make arrangements to meet with an individual on seven separate occasions for intimate liaisons during work hours.
>
> Full details of these allegations are provided at Appendix 1.
>
> As a result, I suspect you may have contravened Section 9(a)(i); (ii); (iii); and 9(b) of *the Act* by failing to comply with the Principles of Conduct that ale to be observed by all public sector employees:
>
> *(9) The principles of conduct that are to be observed by all public sector bodies and employees are that they -*
>
> *(a) are to comply with the provisions of -*
>
> *(i) in this Act and any other Act governing their conduct; and*

(ii) the Commissioner's instructions, public sector standards and codes of ethics; and

(iii) any code of conduct applicable to the public sector body or employee concerned,

and

(b) are to act with integrity in the performance of official duties and are to be scrupulous in the use of official information, equipment and facilities.

In particular, I suspect you have failed to:

- Comply with Commissioner's Instruction No. 7 - Code of Ethics by conducting yourself in a manner that does not demonstrate personal integrity and accountability

- Comply with the provisions of the Western Australia Police Force Code of Conduct by failing to act in accordance with the required values and behavioural expectations, engaging in inappropriate communication, breaching confidentiality, and contravening WA Police Force Policies:

  - AD-52.21 Management of Electronic Mail (Email)
  - AD-52.21.3 Email Misuse and Abuse
  - AD-84.03 Code of Conduct
  - AD-84.10 Conflict of Interest
  - L0-01.06 Restricted Access to Information on Police Computer Systems

- Act with integrity in the performance of your duties and be scrupulous in the use of official information and facilities….

Statement of material facts

6 The parties have helpfully set out in a detailed statement of material facts agreed matters in relation to each of the allegations. Whilst it is quite lengthy, reference to it will avoid the need to unnecessarily traverse the issues on the evidence. The statement of material facts, with the omission of the woman's name, is as follows:

STATEMENT OF MATERIAL FACTS

Allegation 1: Computer Misuse - Offensive Materials

1. Mr John Purcell received 12 emails with obscene and offensive images **(Offensive Material)** from (name omitted), a former employee with the WA Police Force **(WAPOL),** between 19 July 2013 and 17 October 2016, via the WAPOL computer system.

2. The images depicted (name omitted) either nude, semi-nude or wearing only underwear. The Offensive Material was identified following an email audit carried out by the WAPOL Internal Affairs Unit **(IAU).**
3. Mr Purcell advised he did not disseminate the Offensive Material. There is no evidence to the contrary.
4. The evidence shows that the Offensive Material was sent over a period spanning approximately 3 years (19 July 2013 to 17 October 2016). Evidence shows that Purcell replied to 10 of the 12 emails sent by (name omitted).
5. In one such instance on 11 July 2014, Purcell used his WAPOL email account to actively invite (name omitted) to send images, which she did shortly thereafter.
6. WAPOL Policy AD-52.21.3 regarding Email Misuse and Abuse states:

> "Police employees shall not use email to communicate information which is of an obscene or offensive nature."

The images received by Purcell via email from (name omitted) are deemed to be obscene and offensive.

7. WAPOL Policy AD-52.21 regarding Management of Electronic Mail (Email) states:

> "It is acknowledged that some private Email usage will occur. Acceptable personal use of the email system must not interfere with normal business activities and in no way bring [WAPOL] into disrepute or be in conflict with the acceptable personal use definition."

The emails comprising the Offensive Material are not considered acceptable personal use.

8. On 16 April 2019 Mr Purcell admitted to the allegation.

Allegation 2: Information Security - Unauthorised Release of Official Material

9. Between 13 April 2015 and 29 July 2016, without lawful authority, Mr Purcell made disclosures of official WAPOL information via email on 5 occasions to an unauthorised person, namely (name omitted).
10. The particulars of the official documents released by Mr Purcell to (name omitted) are:
    (a) "Memo to All Com AC DC ED FOI Restructure incorporating SDRM.DOCX" - sent via email on 13 April 2015;
    (b) "Ministerial Briefing Note - eNPC.docx" - sent via email on 21 June 2016;
    (c) "Response to Objective Offer- June 2016.docx" - sent via email on 28 June 2016;
    (d) "Response to Objective Offer - June 2016.docx" - sent via email on 29 June 2016; and
    (e) "RMC CB Decision Sheet - Redeployees.docm" - sent via email on 29 July 2016.
11. WAPOL Commander Lawrence Panaia confirmed via witness statement that the information released by Mr Purcell is considered to be commercially sensitive to WAPOL. He further confirmed that Purcell was not authorised to disclose this official information *"to any person or entity that was not a current employee of [WAPOL] at that*

time, or, thereafter." Between 13 April 2015 and 29 July 2016 (name omitted) was not an employee of WAPOL.

12. As well as the documentation considered commercially sensitive to WAPOL, the document listed at paragraph 11(b)[sic] above is considered highly sensitive and confidential to the State Government.
13. There is no evidence that Mr Purcell released the official documents for professional or financial benefit to himself or (name omitted).
14. WAPOL Policy AD-52.21.3 regarding Email Misuse and Abuse states:

> "Police employees shall not use email to access, distribute or disclose material prohibited by policy or law, breach confidentiality, or release police information without authorisation."

15. WAPOL Policy L0-01.06 regarding Restricted Access to Information on Police Computer states that business information held within WAPOL Restricted Access Computer Systems must not be accessed by users for release to other parties.
16. On 16 April 2019 Mr Purcell admitted to the allegation.

Allegation 3: Information Security - Unauthorised Release of Official Material

17. Mr Purcell utilised the WAPOL email system between 2011 and 2017 to engage in an excessive number of personal emails between himself and (name omitted), totalling of 23,736 emails.
18. Given the above, it is calculated that in respect of personal email usage, it is alleged there was an average of 16 emails per day exchanged between Purcell and (name omitted).
19. The nature of this correspondence included:
    (a) child support and Family Court matters;
    (b) the personal relationship between Mr Purcell and (name omitted);
    (c) emails of a sexual nature; and
    (d) emails attaching images (photographs).
20. WAPOL Policy AD-52.21.3 regarding Email Misuse and Abuse provides that the WAPOL email system may be used to send or receive personal email messages. However:

> *"Such usage must conform to these guidelines and disciplinary action may result where misuse or abuse is committed."*

21. Furthermore, WAPOL Policy AD-52.21 regarding Management of Electronic Mail (Email) states:

> "It is acknowledged that some private Email usage will occur. Acceptable personal use of the email system must not interfere with normal business activities and in no way bring [WAPOL] into disrepute or be in conflict with the acceptable personal use definition."

22. On 16 April 2019 Mr Purcell admitted to the allegation.

Allegation 4: Misconduct - Inappropriate Behaviour

23. There were a series of emails between Mr Purcell and (name omitted), using the WAPOL email system, to arrange intimate liaisons during work hours, on 7 separate occasions between 28 July 2014 and 3 January 2017.

24. Mr Purcell has admitted that he met with (name omitted) for intimate liaisons on 5 of the 7 occasions (namely on 28 July 2014, 4 September 2014, 26 March 2015, 2 August 2016 and 3 January 2017) during work hours.
25. Mr Purcell has admitted to arranging to meet with (name omitted) for intimate liaisons on 2 of 7 occasions (namely on 9 February 2015 and 28 November 2016) during work hours.
26. WAPOL Policy AD-52.21 regarding Management of Electronic Mail (Email) states:

> "It is acknowledged that some private Email usage will occur. Acceptable personal use of the email system must not interfere with normal business activities and in no way bring [WAPOL] into disrepute or be in conflict with the acceptable personal use definition."

27. WAPOL Policy AD-84.03 regarding Code of Conduct requires all WAPOL employees to uphold the highest standard of ethics, integrity and professional conduct. It requires all employees to abide by the WAPOL Code of Conduct, on and off duty.
28. In addition, WAPOL Policy AD-84.10 regarding Conflict of Interest requires all WAPOL employees to maintain the highest standard of ethics, integrity and professional conduct while carrying out any function of their employment.
29. On 16 April 2019 Mr Purcell admitted to the allegations to the extent outlined above.

Additional evidence

7 The appellant testified that in 2011 he struck up a friendship with the young woman at work. This developed into a relationship that continued as he put it in his evidence, "on and off" until 2017. The appellant had a partner at the time, who subsequently became his wife. There is also a child from the relationship between the appellant and the woman. The discovery of matters leading to the four allegations of a breach of discipline, arose from an internal investigation by the respondent's Internal Affairs Unit, in relation to the unauthorised release by the appellant of information. This process did not lead to criminal charges however the Internal Affairs Unit referred the matter to the respondent's Human Resources Department for its attention.

8 On receipt of the allegations in the letter from Ms Roberts dated 18 March 2019, the appellant said that he felt "mortified". He got advice from the Union and promptly admitted the allegations. The appellant said that he had attempted, prior to receiving the letter, to cease his relationship with the woman and had sought counselling and some guidance from his church from about June 2017 to June 2018. The appellant also joined the Freemasons in March 2015, but whilst he was still in the relationship. The appellant said that he took these steps to try to adjust his moral compass.

9 There was some evidence also as to illness of the appellant's parents. The appellant's father became ill with cancer in 2011 and subsequently died in 2014.

His mother also was elderly and had some serious health problems that the appellant said required a lot of his time and attention. She subsequently passed away also. The appellant said these matters added to his level of stress. The appellant also referred to some health issues of his own including a skin cancer diagnosis in 2010, however this does not appear to have been particularly serious.

10 The appellant testified that these issues, combined with the embarrassment and humiliation in connection with the allegations, placed him under very considerable emotional stress. The appellant admitted in cross-examination that despite having taken the step to join the Freemasons, he had not yet disclosed his extra-marital affair or its consequences to them. He said he knew what he did was wrong and whilst taking steps privately to try and redeem himself, and being remorseful, he did not at any time, raise or report his conduct to the respondent. In short, the appellant said he had hoped to keep his job throughout this time.

11 As to the first allegation, in relation to the sending of obscene images, the appellant said that in about mid to late 2017, he tried to stop the woman sending this sort of material to him. He thought he may have sent two to three emails to this effect, although none were produced in evidence. This is despite, in October 2016, the appellant responding to images sent by the woman to him in terms that can only be described as encouraging her to continue to do so (see exhibit A1 Bundle of Agreed Documents). Numerous email exchanges, with images attached, in exhibit A1, over some years back to July 2013, can only be reasonably construed as encouraging the woman to continue sending such material to the appellant.

12 Some evidence was also given by Dr Pederick, a parish priest of the Anglican Parish of Swan. Dr Pederick testified that the appellant came to his church in July 2017 and this was followed by some meetings with him in September and October 2017 to discuss the problems in the appellant's personal life. Dr Pederick said that the focus was on his marital problems. The appellant became active in the church and joined the parish council. The appellant informed Dr Pederick of the disciplinary proceedings brought by the respondent against him in late 2019.

13 Some character evidence was also given by a friend of the appellant, Mr Hughes, who is the chief executive officer of Crime Stoppers, who has known the appellant for about 20 years and who had worked with him on various projects over many years. Mr Hughes' general testimony went to the importance of the appellant's work to him, and that he was well regarded.

14 For the respondent, evidence was given by Ms Roberts. She testified as to the responsibilities of a Level 8 position in the respondent's organisation and the positions held by the appellant at the material times, they being the Assistant Director Office of Information Management and Assistant Director Property Management Division. She described these as senior management roles, having a

significant oversight of a large work area and including staffing and management functions. The positions involved access to confidential information. Ms Roberts was taken in her evidence to exhibit R11, the "Level 8 Profile", a document used for recruitment and performance management purposes. This sets out the key attributes of a Level 8 position. Amongst others, this includes the need for a high level of personal probity and integrity. As to these characteristics, Ms Roberts testified that the conduct of the appellant over such a long period; the receipt and condoning of inappropriate material; the misuse of the respondent's email system with tens of thousands of emails over many years; along with the use of working time for liaisons with the woman concerned, made the appellant's conduct particularly egregious. It fell short of the standard of conduct and behaviour expected of senior management positions within the respondent.

15 Ms Roberts was also taken through the specific responsibilities of the two positions occupied by the appellant. She described the Assistant Director Property Management position as one reporting to an Assistant Commissioner and involving the exercise of very significant autonomy. The job was responsible for key property and equipment of the respondent including weapons, ammunition, and other operational equipment. The position had access to commercially sensitive material and was responsible for a multi-million-dollar procurement budget, including the drafting of contracts.

16 As to the Office of Information Management position, Ms Roberts testified that this position, as a high level role within the respondent, again operated largely autonomously. The position was responsible for the overall management, strategic direction and operational performance of this area. This included the oversight of the records and information holdings of the respondent. In terms of supervision of staff, the position had four direct and 118 indirect reports.

17 As a part of her evidence, Ms Roberts was taken to her decision making in relation to the outcome of the disciplinary allegations against the appellant. As the decision maker, Ms Roberts said that she deliberated on the recommended penalty of dismissal which was put to her. Ms Roberts testified that on consideration of all of the aspects of the case, she came to the conclusion that the penalty of a reduction of classification to Level 5 was the appropriate outcome. Her decision is set out in a "Record of Decision" document dated 29 July 2019, a copy of which was tendered as exhibit R8. Rather than paraphrase what Ms Roberts said at that time, it is best expressed in her own words where she wrote:

> In noting the discipline investigator's recommended disciplinary action of **dismissal** (as defined in section 80A(g) of the *Public Sector Management Act 1994*), I have also sought input from the following relevant sources:
>
> - REDACTED

- Assistant Commissioner Gary BUDGE (PD5712) - Assistant Commissioner of Forensic, Legal & Legislation (PURCELL's portfolio head); and

- Superintendent Valdo SORGIOVANNI (PD6469) - Superintendent of Ethical Standards Division (part of Professional Standards portfolio).

Whilst it is my view that dismissal could be legitimately considered as a disciplinary action outcome, I have determined that a more appropriate disciplinary outcome would be the sanction of **reduction in the level of classification of the employee** in accordance with section 82A(3)(b)(i) (and as defined in section 80A(f)) of the Act.

In proposing this disciplinary outcome to PURCELL (providing him with the right of response to this proposed outcome), I gave serious consideration to recommending dismissal but have determined this proposed outcome to be more appropriate.

I have also decided (in proposing the outcome to PURCELL for his response) that the reduction in the level of PURCELL's classification be a reduction from his current substantive Level 8 position to a Level 5 (Increment 4) position. The basis of my proposal to reduce PURCELL's classification to Level 5 is that classification levels higher than that (Level 6, 7 and his substantive Level 8) inherently are more senior positions entrusted with greater responsibility, leadership of other employees, and carrying an expectation of modelled behaviour with sound judgement.

PURCELL's sustained actions over an extended period of time have demonstrated poor judgement and represent a significant deviation from the standards expected of a senior employee of the agency. They have significantly breached the trust and confidence that the agency can have in him. It is my view that these matters demonstrate that PURCELL requires close supervision and managerial guidance/oversight, which a Level 5 position will provide.

On the basis of the above considerations, I have determined that the proposed disciplinary outcome of a reduction in classification from Level 8 to Level 5.4 is an appropriate outcome and will demonstrate to PURCELL the seriousness of his actions over an extended period of time, while also ensuring the agency is protected in having appropriate oversight of PURCELL's performance and behaviour in the future.

18 For reasons set out at that time, Ms Roberts explained that a Level 5 position, and various examples were put to her, was appropriate because such a level of position works under deadline; has oversight and supervision; and is unlikely to have access to sensitive or confidential material. Such a position would also not have direct reports and not be responsible for procurement decisions. Ms Roberts' evidence was that higher level positions at Levels 6, 7 and 8, are senior leadership positions at the respondent and it was not considered suitable for the appellant to be appointed to such a position, given his breach of trust and the respondent's lack of confidence in the appellant as a result of his misconduct. In summary, Ms Roberts

testified that it was not tenable for the appellant to occupy a position that did not involve substantial oversight and supervision.

Consideration

19 For the following reasons, we are not persuaded that the Appeal Board should interfere with and adjust the respondent's decision in this appeal. The appellant's misconduct can only be described as brazen and cavalier. This is the more so given the appellant's senior position at the respondent where as such, he was responsible for upholding the respondent's policies and modelling exemplary behaviour. The duration, scope and magnitude of the appellant's behaviour make it particularly egregious.

20 It was clear on the evidence that the appellant's primary if not sole focus, was on his own personal life and his rehabilitation as he saw it, without regard to the impact of his various activities and behaviour on the respondent. The appellant's activities and behaviour displayed a complete disregard for his obligations to the respondent as a senior executive.

21 Before dealing with the appellant's submissions in relation to what were claimed to be mitigating circumstances, we need to first consider a submission made by the respondent as to the scope of the Appeal Board's powers under s 80I(1) of the Act to "adjust" a decision made by an employer under s 80I(1)(b) of the Act.

22 The respondent submitted that the Appeal Board's power to "adjust" the respondent's decision under s 80I of the Act only extended to reversing or quashing the decision. In reliance on the decision of the Appeal Board in *Re v Inspector Custodial Services* [2013] WAIRC 00830; (2013) 93 WAIG 1776, the respondent contended that it was not open for the Appeal Board to substitute another entirely different decision. It was contended that to grant the relief claimed by the appellant would have this effect. On this basis, the respondent submitted that the relevant "decision" in this case was to reduce the appellant's classification from his then Level 8.3 to Level 5.4. The submission was that it is not open to the Appeal Board to change the decision in such a way as to replace it with a different decision as sought by the appellant, to impose a reprimand and a Level 8.1 classification instead.

23 For the following reasons, we do not accept the respondent's contentions. Section 80I of the Act is in the following terms:

> **80I. Board's jurisdiction**

> (1) Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —
>
> (a) an appeal by any public service officer against any decision of an employing authority in relation to an interpretation of any provision of the *Public Sector Management Act 1994*, and any provision of the regulations made under that Act, concerning the conditions of service (other than salaries and allowances) of public service officers;
>
> (b) an appeal by a government officer under the *Public Sector Management Act 1994* section 78 against a decision or finding referred to in subsection (1)(b) of that section;
>
> (c) an appeal by a government officer under the *Health Services Act 2016* section 172 against a decision or finding referred to in subsection (1)(b) of that section;
>
> (d) an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed,
>
> and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).
>
> [(2) *deleted*]
>
> (3) A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in the Public Sector Management Act 1994 section 94 or 95A.

24 The meaning of "adjust" as used in s 80I was considered by the Industrial Appeal Court in *State Government Insurance Commission v Terence Hurley Johnson* (1997) 77 WAIG 2169. In that case, the Court considered the powers of the Appeal Board under s 80I of the Act to "adjust" a decision of an employer to dismiss a manager for misconduct. The issue had been referred to the Full Bench of the Commission as a matter of law, that being whether the Appeal Board had the jurisdiction to award compensation in a case of unfair dismissal, as a standalone remedy. In this case, in upholding the appeal, Anderson J (Franklyn and Scott JJ agreeing) said at 2170:

> The word "adjust" has various applications in common parlance and in any given case it obtains its precise meaning or sense from the context in which it is used. In this legislation, the context is provided by each of the paragraphs (a) to (e) of s 80I(1) and in the case under consideration the context is provided by para (e). The only "matter" which is referred to in that paragraph is "a decision, determination or recommendation ... that the Government officer be dismissed". It is that, and only that, which may be "adjusted" in the exercise of

> this particular aspect of the Board's jurisdiction. The power to "adjust" a decision or determination can only be a power to reform the decision in some way. In the case of a decision or determination by an employer to dismiss an employee with one month's pay in lieu of notice, the most obvious way to do that would be to reverse it. Whether there may be other ways of adjusting such a decision is perhaps an open question. It may be arguable that the power to adjust a decision of dismissal includes a power to adjust the period of notice. The issue does not arise in this case because no such adjustment was sought by the respondent. He made no claim to reform the decision in that way, that is, by altering the period of notice. He made only a claim for monetary compensation on the ground that the decision of dismissal itself was unfair. Hence, the Board was not asked to change the decision in any way. To give compensation to a dismissed employee is perhaps to change and thus to adjust the rights and obligations flowing from the decision to dismiss, or to super-add a consequence to the decision to dismiss, but it is not to adjust the decision to dismiss.

25 It is clear that his Honour considered that "adjust" takes its meaning from the context in which it is used. Scott J at 2171 made observations to that effect also. In *Johnson,* the context was an appeal under s 80I(e) of the Act from a decision by the employer to dismiss the employee. That being so, Anderson J considered ways in which a decision to dismiss may be "adjusted". As his Honour concluded, one obvious way to reform such a decision is to reverse it. There may be other ways, such as a change to any period of notice, but that was not sought by the respondent in that case. What the respondent sought in that case was an entirely different decision, which did not involve any change to the decision to dismiss.

26 In this case, the meaning of "adjust" is to be considered in the context of an appeal under s 80I(b) of the Act. That is an appeal against a decision or finding referred to in subsection (1)(b) of s 78 of the *Public Sector Management Act 1994* (WA). Thus, to obtain the precise meaning of "adjust" in this context, one must go to s 78(1)(b) of the PSM Act to determine the "matter" i.e. the decision or finding that is under challenge. In this case, the relevant "decision" is one to take "disciplinary action" under s 82A(3)(b) of the PSM Act.

27 Section 82A(3)(b) of the PSM Act does not define what "disciplinary action" is, rather it provides the power for an employer to take disciplinary action. To determine what disciplinary action is, one needs to go to s 80A where it is provided:

> In this Division —
>
> ***disciplinary action***, in relation to a breach of discipline by an employee, means any one or more of the following —
>
> (a) a reprimand;
>
> (b) the imposition of a fine not exceeding an amount equal to the amount of remuneration received by the employee in respect of the last 5 days during which the employee was at work as an employee before the day on which the finding of the breach of discipline was made;

(c) transferring the employee to another public sector body with the consent of the employing authority of that public sector body;

(d) if the employee is not a chief executive officer or chief employee, transferring the employee to another office, post or position in the public sector body in which the employee is employed;

(e) reduction in the monetary remuneration of the employee;

(f) reduction in the level of classification of the employee;

(g) dismissal;

section 94 breach of discipline means a breach of discipline arising out of disobedience to, or disregard of, a lawful order referred to in section 94(4);

serious offence means —

(a) an indictable offence against a law of the State (whether or not the offence is or may be dealt with summarily), another State or a Territory of the Commonwealth or the Commonwealth; or

(b) an offence against the law of another State or a Territory of the Commonwealth that would be an indictable offence against a law of this State if committed in this State (whether or not the offence could be dealt with summarily if committed in this jurisdiction); or

(c) an offence against the law of a foreign country that would be an indictable offence against a law of the Commonwealth or this State if committed in this State (whether or not the offence could be dealt with summarily if committed in this jurisdiction); or

(d) an offence, or an offence of a class, prescribed under section 108.

28 Thus, one category of disciplinary action in par (f) is a "reduction in the level of classification of the employee". This is the relevant "decision" in this case, whereby the appellant had his level of classification reduced from Level 8.3 to Level 5.4. Thus, the meaning of "adjust" in this case is to be considered in the context of the relevant disciplinary decision to reduce the appellant's level of classification. It must also follow, in our view, in applying the reasoning of Anderson J in *Johnson*, that the Appeal Board's power to "adjust" the respondent's reduction in classification decision, involves the power to reform it in some way. This is plainly not limited to reversing it. A decision to change an employee's level of classification is very different to a decision to dismiss an employee. An obvious way to reform a decision to reduce an employee's level of classification, would be to the restore the classification to that level originally held. There are, however, other ways, such as reforming the decision by not reducing the level of classification by as much as the original decision. It may also be the case that the Appeal Board, on the evidence and materials, considers that a lower level of classification is warranted, on the basis that, as a hearing de novo, the Appeal Board hears the matter afresh and makes up its own mind as to how the relevant decision should be adjusted, if that is what the Appeal Board decides should occur.

29 In our view, such decisions involve "reforming" or changing a reduction in classification decision, which is the relevant decision to be adjusted under s 80I(b) of the Act. This does not involve the making of a new decision by the Appeal Board.

30 Returning to the merits of the appeal, we do not need to canvass the allegations and factual admissions in any detail. They are set out in the Statement of Material Facts reproduced earlier in these reasons and they speak for themselves. The appellant's conduct did not involve one-off aberrant behaviour. It was sustained misconduct which took place over a number of years. That the misconduct involved breaches of the respondent's Code of Conduct, Code of Ethics and various of the respondent's policies, is self-evident. A cursory examination of these documents in exhibits R1 to R6 leads to this inevitable conclusion.

31 Additionally, as a very senior manager of the respondent, the appellant was largely immune from scrutiny and oversight, which enabled his behaviour to go undetected. As a senior employee, the respondent was entitled to place its trust in the appellant's integrity, probity, and the exercise of his managerial discretion, which trust was breached. As an example, as the custodian of the respondent's sensitive and confidential information, it was a serious matter to release documents to the woman concerned, who then had no connection with the respondent, for no reason other than to relieve the woman's boredom. Additionally, the unauthorised release of ministerial briefing material to the same person, external to the respondent, was plainly also a serious matter.

32 Other obvious examples are the receipt and continued receipt of explicit photographs, of the woman, in various stages of undress, including being naked and in sexually suggestive poses, all no doubt intended for the appellant's gratification. The appellant's responses to this material, as we have already mentioned, were not in any way directed to discouraging her from doing so, quite the opposite. We simply do not accept that the appellant did anything of moment to stop this conduct. As we have said, this material was sent to the appellant from July 2013 to October 2016. The suggestion, not established on the evidence, that sometime in the second half of the relationship this was discouraged by emails, despite over three years of such exchanges before then, has a somewhat hollow ring to it. To suggest this is in some way a mitigating circumstance, has no merit.

33 Furthermore, the fact that over the time of the misconduct occurring there were over 23,000 emails exchanged between the appellant and the woman, using the respondent's email system, represented a most profound abuse of the employer's official email system.

34 Some of the personal matters referred to by the appellant in his mitigation submissions, such as the illness of his parents and some of his own medical

problems, are personal circumstances that many employees may have to endure, whilst maintaining their employment. In our view, they cannot be relied upon in mitigation of sustained misconduct over many years of the present kind. Such circumstances may be relevant to a one-off incident of misconduct or a short period of poor performance for example, where an employee may legitimately claim to have been significantly affected and request some leniency be shown by an employer in those circumstances. The present circumstances, however, bear no resemblance to such a situation.

35 Several other matters were raised by the appellant in mitigation. These included his length of service; his unblemished service record and good character; his early admission of wrongdoing and his remorse; and the financial loss from the demotion. No doubt these matters can be considered as a part of determining an appropriate penalty. However, as in this case the initial recommendation was termination of employment, and in our view this was probably justified on the facts and circumstances, the retention of a position, albeit at a substantially lower salary level, can be said to have regard to such matters. The financial loss, although significant, is commensurate with the standard of conduct and behaviour engaged in by the appellant. Another matter raised by the appellant was his obligation in relation to child support payments, arising from the relationship. Obviously, this is not a matter for his employer and nor is it, in the circumstances of this case, a matter that can be legitimately considered.

36 As to the appellant taking steps to place his personal life on a more even keel, commendable though it is, and his assertion that he would not repeat the same conduct in the future, these matters more relate, if relevant to the employer's decision making, to the decision by the respondent to keep the appellant in employment, rather than to justify a far less severe penalty. In this respect, in our view, in the circumstances of this case, Ms Roberts showed the appellant considerable leniency in her decision not to dismiss the appellant. In this respect too, we consider Ms Roberts' evidence, set out above, that she chose the Level 5 classification as it would involve a degree of oversight and supervision, and not involve access to sensitive and confidential information, as being entirely appropriate.

Conclusion

37 For the foregoing reasons the appeal is dismissed.