

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 11
FEBRUARY 2019
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2019 WAIRC 00792

CORAM : PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MS R SINTON - BOARD MEMBER
MR D HILL - BOARD MEMBER

HEARD : TUESDAY, 22 OCTOBER 2019, WEDNESDAY, 23 OCTOBER
2019, THURSDAY, 24 OCTOBER 2019

DELIVERED : TUESDAY, 5 NOVEMBER 2019

FILE NO. : PSAB 3 OF 2019

BETWEEN : LYNETTE ANN CALVERT
Appellant

AND

PATHWEST LABORATORY MEDICINE WA
Respondent

CatchWords : Public Service Appeal Board – Appeal accepted out of time – Orders for discovery not granted – Allegations substantiated – Dismissal was unfair in the circumstances – Reinstatement not practicable – Appeal dismissed

Legislation : *Industrial Relations Act 1979* (WA) s 27(1)(a)(iv), s 27(1)(o) and s 80I

Industrial Relations Commission Regulations 2005 (WA) regulation 107(2)

Result : Appeal dismissed

Representation:

Appellant : In person

Respondent : Mr J Carroll (of counsel)

Cases referred to in reasons:

Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd (1995) 75 WAIG 1801

Jackamarra v Krakouer [1998] HCA 27; (1998) 195 CLR 516

Nicholas v Department of Education & Training [2008] WAIRC 01645; (2009) 89 WAIG 817

The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch (1985) 65 WAIG 385

Reasons for Decision

- 1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).
- 2 Ms Lynette Calvert was employed as a Medical Scientist by PathWest Laboratory Medicine WA (**PathWest**). In January 2018 she was given a third and final warning after PathWest found that she engaged in a breach of discipline. A few months later, arising out of three incidents that took place in March and April 2018, PathWest brought another disciplinary proceeding against Ms Calvert. That was finalised on 20 December 2018, with PathWest finding that the majority of the allegations were substantiated and that Ms Calvert had again breached the WA Health Code of Conduct. PathWest took disciplinary action against Ms Calvert in the form of a reprimand.
- 3 On 20 December 2018, PathWest informed Ms Calvert:

Please note that the Disciplinary Action of a reprimand constitutes a fourth reprimand. As you have been previously advised, if PathWest had grounds to reprimand you within 12 months of the final warning issued to you on 10 January 2018, PathWest has the right to dismiss you with notice.

Accordingly, PathWest Workforce has referred the matter to the Chief Executive for consideration.
- 4 On 23 January 2019, Ms Calvert received a further letter from PathWest which confirmed that, after considering Ms Calvert's written response, the Chief Executive had decided to dismiss her with notice.
- 5 Ms Calvert appealed to the Board on 11 February 2019. She said she was seeking a 'compensation payout for unfair dismissal', 'transfer to another position outside of Manjimup' and other outcomes relating to internal grievance processes and behaviour management at PathWest.
- 6 Though it is not clear from her notice of appeal, Ms Calvert clarified she appeals two decisions to the Board. First, she appeals PathWest's findings and its decision to give her a fourth reprimand on 20 December 2018. Second, she appeals PathWest's decision to dismiss her made on 23 January 2019.
- 7 Ms Calvert says she feels she has 'been unfairly dismissed as the bullying behaviours at the PathWest laboratory were not dealt with adequately and were allowed to escalate to mobbing led by the manager.'
- 8 PathWest says its findings made on 20 December 2018 in relation to alleged breaches of discipline can be substantiated, the disciplinary action of a reprimand was appropriate and it was not unfair to dismiss Ms Calvert after she received a fourth reprimand within 12 months of receiving a third and final warning.

Preliminary matters

- 9 Before dealing with the substantive appeal, the Board must consider three preliminary matters.
- 10 The first is an interlocutory application made by PathWest during the hearing to dismiss Ms Calvert's appeal. The second is whether to accept Ms Calvert's appeal of the findings and fourth reprimand out of time. The third is whether to grant Ms Calvert's two discovery applications.

Application to dismiss the appeal

- 11 On the first day of the substantive hearing, after Ms Calvert had finished her examination-in-chief, PathWest made an interlocutory application under s 27(1)(a)(iv) of the *Industrial Relations Act 1979* (WA) (**IR Act**) to dismiss Ms Calvert's appeal. PathWest said the appeal must be dismissed because even if the appeal were upheld, there would be no remedy available to the Board. PathWest submitted Ms Calvert had made it clear that she did not want to return to work at Manjimup, therefore reinstatement was not possible. Further, PathWest argued that the Board could not transfer Ms Calvert because that would go further than 'adjusting' PathWest's decision to dismiss her. It would instead be substituting a new decision. In those circumstances, PathWest said it would not be in the public interest to hear this matter.
- 12 In response, Ms Calvert said she would be willing to return to Manjimup if she had to, but would much prefer a transfer to another laboratory. She said: 'And actually after three years of being in the country it's actually supposed to be a priority, if you put in an expression of interest to transfer. I was happy to go anywhere. I was happy to go onto relief staff. I was happy to go anywhere. And I've got multiple emails that's in the records of me asking for transfer and it was ignored.' Ms Calvert said her appeal should not be dismissed.
- 13 In order to rule on PathWest's interlocutory application, the Board would have needed to hear evidence from witnesses who had yet to give evidence and then adjourn to consider whether it could order that Ms Calvert be re-employed and transferred to another location.
- 14 The Board must do all such things necessary for the expeditious and just hearing and determination of matters before it. Given the number and location of witnesses and the limited availability of the parties, witnesses and Board members had already caused delays to the hearing of the matter, the Board did not consider it should adjourn the hearing in order to consider PathWest's interlocutory application to dismiss the appeal. Accordingly, the Board reserved its decision on this point.
- 15 The Board considers that the substance of PathWest's interlocutory application to dismiss Ms Calvert's appeal is dealt with in these reasons.

Out of time

- 16 The first part of Ms Calvert's appeal relates to PathWest's findings and its decision to give her a fourth reprimand on 20 December 2018.
- 17 Regulation 107(2) of the *Industrial Relations Commission Regulations 2005* (WA) provides the time limit for filing an appeal to the Board. It states:

An appeal may be commenced within 21 days after the date of the decision, finding, determination or recommendation in respect of which the appeal is made or where that decision, finding, determination or recommendation is published in the *Government Gazette* within one month of the date of that publication.
- 18 Ms Calvert had until 10 January 2019 to appeal the findings made and disciplinary action taken on 20 December 2018. This part of her appeal is therefore 32 days out of time.
- 19 The Board must decide whether it should accept this part of her appeal out of time.

Relevant principles

- 20 The principles the Board must consider are set out in *Nicholas v Department of Education & Training* [2008] WAIRC 01645; (2009) 89 WAIG 817 from [10]-[14].
- 21 They include the length of the delay, the reason for the delay, whether the appellant has an arguable case and whether there would be any prejudice to the respondent if the appeal is accepted out of time.

Length of the delay

- 22 On 11 February 2019, Ms Calvert appealed PathWest's findings and its decision to give her a fourth reprimand made on 20 December 2018.
- 23 The delay is 32 days. It is a reasonably long delay relative to a 21-day time limit.

Reason for the delay

- 24 Ms Calvert says she filed her appeal of PathWest's findings and its decision to give her a fourth reprimand late because she 'had a lot going on at the time' and thought she could deal with the matter as part of PSAB 25 of 2018, which was a separate appeal she had before the Board. She says she was very stressed and it was hard to know what to do. Ms Calvert believes she has post traumatic stress disorder and says it clouds her thinking.
- 25 PathWest says the fourth reprimand was imposed one day before the notice of intention to terminate employment was sent. As a result, an employee could reasonably misunderstand that there are two separate appeal processes. Further, given Ms Calvert's mind would have been turned to responding to the notice of intention to terminate employment, there could be acceptable reasons for delay.

Consideration

- 26 At the time that Ms Calvert received PathWest's findings and its decision to give her a fourth reprimand, she was part way through proceedings before this same Board in relation to appealing the third and final warning she received from PathWest (**Previous Appeal**).
- 27 Shortly after the Previous Appeal was filed, the Board's Associate wrote to Ms Calvert on 15 November 2018 and directed her to the Commission's website page which contained information about appeals to the Board. It says:

Is there a time limit for matters to be referred to the Board?

Yes. An appeal must be commenced within 21 days after the date of the decision, finding, determination or recommendation. If the decision, finding, determination or recommendation is published in the Government Gazette, an appeal may be commenced within one month of the date of that publication (see regulation 107(2) *Industrial Relations Commission Regulations 2005*).

- 28 At the directions hearing in the Previous Appeal, held on 11 December 2018, the Board provided a copy of *Nicholas v Department of Education & Training* to Ms Calvert. The Board explained to her that this authority sets out the factors the Board would consider when deciding whether or not to extend the period for filing an appeal.
- 29 On 24 January 2019, Ms Calvert telephoned the Board's Associate and asked about getting 'advice for her case'. The Board's Associate explained she was not able to give advice, including legal advice, but suggested that Ms Calvert contact a community legal centre if she would like legal advice. Ms Calvert said she did not want legal advice and asked the Board's

Associate whether she should file an unfair dismissal claim. The Board's Associate again said she could not give legal advice, but explained step by step how Ms Calvert could access the Commission's guides and procedures online, including the guides for unfair dismissal and appeals to the Board.

- 30 On the notice of appeal Ms Calvert filed in both her Previous Appeal on 15 October 2018 and in this matter, PSAB 3 of 2019, the time limit for filing appeals to the Board is clearly marked. The form says:

Note: An appeal may be filed within 21 days after the date of the decision, finding, determination or recommendation in respect of which the appeal is made or where that decision, finding, determination or recommendation is published in the *Government Gazette* within one month of the date of publication.

The Board may accept a late appeal. It usually takes into account the length of the delay, any action taken by you to dispute the decision other than lodging this claim, whether there is merit in this claim, any prejudice to the respondent caused by the delay and other relevant matters.

- 31 The Board considers that when Ms Calvert received PathWest's findings and decision to give her a fourth reprimand, Ms Calvert was aware of the time frame for appealing such a decision. She was also aware of which form she would need to complete to make her appeal and where to find the Commission's information about appealing to the Board.
- 32 However, given that the notice of intention to dismiss was sent to Ms Calvert the day after she received the fourth reprimand, the Board accepts that Ms Calvert was focussed on responding to her proposed dismissal. Further, the Board accepts that in the circumstances of this matter, Ms Calvert was confused about whether the two appeal processes were separate or could both be dealt with by appealing her dismissal. The Board finds Ms Calvert has an acceptable reason for the delay.

Whether Ms Calvert has an arguable case

- 33 The essence of Ms Calvert's case is that the allegations were concocted by her colleagues and human resources, the investigation was poor, PathWest breached public sector standards and did not provide procedural fairness, and the penalty was disproportionate.
- 34 PathWest made no submissions about whether Ms Calvert has an arguable case.

Consideration

- 35 It would not be unfair to dismiss an appeal that was filed out of time if it could not succeed.
- 36 At this preliminary stage, the Board's assessment of the merits is 'fairly rough and ready': *Jackamarra v Krakouer* [1998] HCA 27; (1998) 195 CLR 516 [9] (Brennan CJ & McHugh J). The Board does not consider that Ms Calvert's claim could not succeed. Her case is arguable.

Whether there would be any prejudice to PathWest

- 37 Ms Calvert says there would be no prejudice to PathWest if her appeal is accepted out of time.
- 38 PathWest says it would not be prejudiced because it understood that Ms Calvert intended to challenge the conduct and the penalty underlying the reprimand.

Consideration

- 39 The Board accepts PathWest's submission that it would not be prejudiced if Ms Calvert's appeal is accepted out of time.

Conclusion

- 40 The Board has considered the length of the delay, Ms Calvert's acceptable reasons for the delay, that the case is arguable and that PathWest would not be prejudiced.
- 41 On balance, and in circumstances where PathWest does not oppose the Board granting an extension of time, the Board considers that it should accept Ms Calvert's appeal as it relates to the findings made and disciplinary action taken on 20 December 2018 out of time.
- 42 This means that the Board must consider whether to quash the findings made on 20 December 2018, whether the reprimand was a proportionate penalty and whether it should adjust the decision to dismiss Ms Calvert on 23 January 2019.

Discovery

- 43 Ms Calvert sent a number of discovery applications to the Registry. Two discovery applications were accepted for filing: one on 29 July 2019 and another on 16 August 2019 (**Discovery Applications**).
- 44 The Discovery Applications are very broad and almost identical. Each is 13 pages long and contains requests for a large number of non-specific documents that arise out of disciplinary investigations and grievance processes from the past seven years.
- 45 Ms Calvert says she requires these documents because 'PathWest will need to prove from the beginning that they did not breach procedural fairness, duty of care and that they were not negligent, in order to prove that the dismissal was not unfair.'
- 46 PathWest says the only findings and disciplinary process that can be impeached in these proceedings is the process leading to the reprimand on 20 December 2018. It says that 'the materials underlying those findings has been discovered.'
- 47 The Board must decide whether the documents Ms Calvert requests are necessary to resolve the matters in dispute.

What documents does Ms Calvert want?

- 48 In her Discovery Applications, Ms Calvert asks the Board for copies of the following:
- full and unredacted versions of all disciplinary and grievance complaints and investigation reports made in the PathWest laboratory that involve Ms Calvert and Ms Karen Hyde from 2013 to 2019;
 - all verbal and emailed complaints that were made to managers and human resources in relation to those disciplinary and grievance complaints between Ms Calvert and Ms Hyde, as well as how decisions were arrived at in all investigation reports;
 - all communications between Ms Marion Cutforth and Ms Nyree Fisher about all of the investigation processes;
 - all unredacted communication between Mr Peter Beringer and PathWest managers including Ms Cutforth, Ms Fisher, Ms Francis Brogden and Mr Martin Taylor;
 - all letters containing allegations against Ms Calvert in relation to all complaints;
 - all unredacted, internal communications between Ms Calvert and human resources, including detail about how decisions were arrived at in 'those reports', as well as who made the decision;

- all transcripts, notes and reports for the ‘intake sessions’ on 9 and 10 May 2018 conducted by Access Wellbeing Services/Centrecare by Ms Kirsty Staples;
- all transcripts, notes and reports for the mediation run by Ms Staples in 2016;
- all transcripts, notes and reports for the Manjimup Team Building Day;
- ‘RSSCAR1172 Friday 11/5/18 last day of work – Failure to Follow Protocol’;
- records of any training Ms Fisher has completed in relation to people management skills;
- ‘1 21802 Stresswise RiskAx’;
- all documents in relation to ‘PW17D02’ including ‘the letter from the nurse manager Jacqueline Heggie...and anyone else who reported the allegation to HR, including any input from my manager Nyree Fisher’;
- all documents in relation to the ‘bullying incident’ on 24 October 2017 and how it was managed;
- all audio of the ‘lawyers [sic] investigation interviews with staff from PW17D24’; and
- who initially reported the incident to human resources.

Relevant principles

- 49 Discovery is confined to what is in issue on the pleadings. The Board can only make an order for discovery under s 27(1)(o) of the IR Act if it is just to do so and necessary for the fair disposal of the case. ‘Just’ means ‘right and fair, having reasonable and adequate grounds to support it, well-founded and conformable to a standard of what is proper and right’: *Australian Liquor, Hospitality and Miscellaneous Workers Union, Miscellaneous Workers Division, Western Australian Branch v Burswood Resort (Management) Ltd* (1995) 75 WAIG 1801, 1805.
- 50 As set out above at [42], Ms Calvert’s appeal is limited to the findings made and reprimand imposed on 20 December 2018 and the decision to dismiss made on 23 January 2019. The questions for the Board are whether the findings can be substantiated, whether the reprimand was appropriate disciplinary action to take, and whether in dismissing Ms Calvert because she received a fourth reprimand within 12 months of receiving a third and final warning, PathWest’s lawful right to dismiss was exercised so harshly or oppressively against Ms Calvert as to amount to an abuse of that right: *The Undercliffe Nursing Home v The Federated Miscellaneous Workers’ Union of Australia, Hospital, Service and Miscellaneous, W.A. Branch* (1985) 65 WAIG 385, at 386 (**Undercliffe**).

Are the documents necessary to resolve the matters in dispute?

- 51 The Board understands Ms Calvert to be saying that she requests the documents set out above at [48] because they will allow her to demonstrate that PathWest did not treat her in a way that was procedurally fair or compliant with disciplinary and grievance policies.
- 52 PathWest says it is apparent from the nature of the documents that are sought that Ms Calvert seeks to conduct ‘a roving inquiry into the manner in which the respondent has dealt with complaints and grievances over the past seven years. However, that is not the role of this Board.’

53 PathWest says it has already provided Ms Calvert with the documents relevant to this appeal. None of the other material, for example in relation to managers receiving management training or the ‘Team Building Day’, is discoverable. It says the Discovery Applications should be dismissed.

Conclusion

54 Having heard from the parties, the Board is not persuaded that the documents Ms Calvert seeks to discover are necessary to resolve the matters in dispute.

55 Broadly, PathWest says it made the decision to dismiss Ms Calvert because of the number of reprimands she had been given. The third and final warning has not been successfully appealed so it stands. Almost all of the documents that Ms Calvert seeks appear to relate to issues that were the subject of those earlier reprimands or grievance processes unrelated to her dismissal.

56 The Board understands that Ms Calvert says these documents are necessary because they will demonstrate how PathWest treated her in a procedurally unfair way.

57 The Board’s task is to hear and determine de novo Ms Calvert’s appeal against the findings and reprimand dated 20 December 2018 and the decision to dismiss dated 23 January 2019. The Board is satisfied that PathWest has already made all relevant documents including the investigation report, letters of allegation and reasons for its decision available to Ms Calvert.

58 Based on what Ms Calvert has put to the Board, we consider that the remaining documents Ms Calvert seeks to discover do not sufficiently relate to the subject of this appeal. It is not necessary to order discovery of these documents for the fair disposal of the case and it would not be just to do so.

59 For these reasons, the Discovery Applications are dismissed.

What must the Board decide?

60 Ms Calvert’s appeal is limited to appealing PathWest’s findings and reprimand dated 20 December 2018 and its decision to dismiss her on 23 January 2019. The Board must decide whether it should adjust those matters.

Background

61 The first part of Ms Calvert’s appeal relates to allegations that she breached the WA Health Code of Conduct in three interactions with her colleagues that took place on two days. These allegations were put to her by letter dated 14 May 2018. They were:

1. On 14 March 2018 at the Manjimup Laboratory Ms Calvert interacted in an inappropriate and confrontational manner with her line manager Ms Nyree Fisher and colleague Ms Marcie Grant by:
 - a. demanding Ms Fisher follow up about a blood transfusion;
 - b. denigrating the work of a colleague, Ms Andrea Miolin;
 - c. standing over Ms Fisher and gesticulating with thrusting hand movements, whilst holding papers in her hand; and
 - d. later that day, aggressively stating to Ms Fisher, Ms Grant and Ms Hyde words to the effect of ‘what is this, bleach?’ when she sat down in a chair.

2. On the afternoon of 12 April 2018 at the Manjimup Laboratory Ms Calvert interacted with a colleague Ms Karen Hyde in an inappropriate manner by:
 - a. demanding that Ms Hyde vacate a computer immediately, stating loudly words to the effect of ‘Karen, you need to get off that computer and use another. I need it now’; and
 - b. repeating that demand in a confrontational manner using words to the effect of ‘it would be best if you didn’t use this computer at all.’

62 The allegations relating to 14 March 2018 were substantiated insofar as they related to Ms Fisher and Ms Hyde. The allegations relating to 12 April 2018 were substantiated. Ms Calvert was given a written reprimand, which was within 12 months of the final warning she received on 10 January 2018. PathWest says it was for this reason Ms Calvert was dismissed.

63 Ms Calvert denies the allegations. She says PathWest breached procedural fairness in relation to her many complaints and grievances about her colleagues. She says her complaints and grievances were not properly investigated or responded to. She believes she was bullied by her colleagues and was unfairly dismissed.

Witnesses

Ms Calvert

64 Ms Calvert was an inconsistent and unreliable witness. There were many material inconsistencies in her testimony. For example, when asked whether she could return to work in the Manjimup laboratory, Ms Calvert first said: ‘How could I go back there?’ and: ‘It is a nightmare of a place to work, the communication is appalling, the bullying is appalling. I have never experienced a workplace like it. It’s horrendous.’ Later, Ms Calvert said that she could return to work there. Ms Calvert tendered a medical report in support of her evidence that she has post traumatic stress disorder. Later she said that medical report was biased. Later still, when it suited her case, Ms Calvert said she trusted that medical report.

65 Ms Calvert was evasive when the answer to a question did not support her case. She was hostile and sarcastic to counsel for PathWest during cross-examination and she frequently refused to answer questions put to her. The Board had to direct Ms Calvert more than eight times to answer questions during her testimony. Ms Calvert’s evidence about her workers’ compensation case was improbable. For example, during cross-examination, counsel for PathWest put the certificate of outcome for the WorkCover conciliation conference to Ms Calvert. It states: ‘The applicant claims weekly payments of compensation for total incapacity from 18 May 2018 and ongoing’. He asked Ms Calvert: ‘Is it a fair characterisation of your [workers’ compensation claim] to say that the basis of your claim is that you allege that due to conduct in the workplace or conduct of the employer you have been left with a total incapacity for work?’. Ms Calvert responded: ‘No way’. Later, counsel asked: ‘And you would agree that you’re claiming workers’ compensation from my client?’ to which Ms Calvert responded: ‘Well, I don’t know’.

66 Finally, Ms Calvert frequently referred to her recollection of material events as ‘very poor’ and ‘fuzzy’ but then went on to dispute the recollection of others. She also refused to make concessions that clearly should have been made, such as that PathWest had concerns about her behaviour.

67 For these reasons, the Board has serious concerns about Ms Calvert's evidence and considers her an unreliable witness. To the extent that the evidence of PathWest's witnesses conflicts with Ms Calvert's evidence, the Board prefers the evidence of those witnesses.

Ms Hannaford

68 Ms Danielle Hannaford, a Technical Assistant in the Manjimup laboratory at the relevant time, gave evidence for Ms Calvert. Ms Hannaford saw and heard little of the incidents relevant to these proceedings. During her testimony she became uncooperative. She was hostile in response to questions that did not suit Ms Calvert's case, for example in relation to whether there was another computer Ms Calvert could have used. Ms Hannaford was evasive at times, for example when she was asked questions about whether she had given a copy of her own grievance to Ms Calvert. Ms Hannaford was evasive and argumentative when asked questions about whether she had told her manager that Ms Calvert had bullied and harassed her. When she eventually answered that question, she first denied that she had told her manager that Ms Calvert had bullied her, but it was plain from an email Ms Hannaford had sent at that time that she had told her manager that Ms Calvert had bullied and harassed her. The Board had to direct Ms Hannaford more than five times to answer questions while giving evidence. For these reasons the Board prefers the evidence of other witnesses to that of Ms Hannaford to the extent of any inconsistency.

Mr Grove

69 Mr Daniel Grove is PathWest's Human Resources Consultant and was the case manager for two of the disciplinary processes involving Ms Calvert. He gave evidence about the disciplinary and termination processes, as well as PathWest's management structure. His evidence was consistent and credible. It was not disturbed in cross-examination. The Board accepts Mr Grove's evidence.

Ms Fisher

70 Ms Nyree Fisher is the Medical Scientist in charge at the Manjimup laboratory. Ms Fisher was a cooperative witness. Her evidence was considered and consistent. She carefully answered all the questions that were put to her and made concessions when they were due. Ms Fisher's evidence was not disturbed in cross-examination. Ms Fisher was a credible, reliable witness and the Board accepts her evidence.

Ms Hyde

71 Ms Karen Hyde is a Technical Assistant at PathWest's Manjimup laboratory. Her recollection about some matters was poor. On those matters, the Board treats Ms Hyde's evidence with caution. At times Ms Hyde exaggerated her evidence, expanding upon some matters in a way that was inconsistent with earlier evidence. However, at its heart Ms Hyde's evidence about material matters was consistent with the evidence of Ms Fisher, Ms Grant and Ms Hannaford.

Ms Grant

72 Ms Marcelle Grant is a Technical Assistant at PathWest's Manjimup laboratory. She was cooperative and forthcoming when giving evidence. Her evidence was consistent, measured and free from exaggeration. Her evidence rang true to the Board and was not disturbed in cross-examination. Ms Grant impressed the Board as a credible, reliable witness. The Board accepts her evidence.

The unit of blood incident

- 73 Ms Calvert, Ms Fisher and Ms Grant gave evidence about this incident that occurred on 14 March 2018.
- 74 Ms Calvert gave evidence that she has a poor recollection of this incident because it happened nine weeks before the allegations were put to her. She said it was ‘a distant memory’ and that what she could tell the Board about it ‘is only from what [she] remembered through listening to the interviews’. In spite of this poor recollection, her evidence was that she asked Ms Fisher to follow up about a unit of blood. She was not demanding. Ms Calvert repeatedly said Ms Fisher was hostile, dismissive and not helpful. Ms Calvert agreed that she persisted and said that was necessary because the issue was urgent. She said she did not demand anything in an aggressive way. Her evidence was that being demanding is not something she would do. In cross-examination Ms Calvert would not accept that she criticised Ms Miolin’s work, although she agreed she complained about Ms Miolin’s lack of communication. Ms Calvert’s evidence was that she did say to Ms Fisher that Ms Miolin does not communicate well, but that it was a positive comment to try to improve the workplace communication. Ms Calvert says other staff could not have overheard the incident because the workplace is noisy.
- 75 Ms Fisher gave evidence that Ms Calvert demanded, rather than asked, that she follow up about the issue. She said Ms Calvert spoke to her in an aggressive tone and manner, although she was not yelling, and waved paperwork at her. Ms Fisher’s evidence was that Ms Calvert would not allow her to speak, would not seem to accept that she was busy and said things to her like ‘you fix this, you do this’. Ms Fisher denied speaking to Ms Calvert in a dismissive or hostile way. Ms Fisher said Ms Calvert came back 10 minutes later to insist Ms Fisher deal with the issue.
- 76 The effect of Ms Fisher’s evidence was that Ms Calvert denigrated Ms Miolin’s work by pointing out various things she had failed to do. Ms Fisher said: ‘You said she didn’t leave a note, she doesn’t do this, she doesn’t do that, ah, basically that she was incompetent was the impression that you were giving. You thought that she was incompetent was what I felt that you were trying or the impression you were giving me... that she always left a mess, um, things like that.’
- 77 Ms Grant gave evidence that she could hear this interaction between Ms Calvert and Ms Fisher, although she was trying not to eavesdrop. Her evidence was consistent with Ms Fisher’s evidence. Broadly Ms Grant said that Ms Calvert spoke to Ms Fisher in an argumentative, demanding and sharp tone, while Ms Fisher’s tone was even, reasonable and deflecting. Ms Grant said Ms Calvert was holding papers and indicating to them, telling Ms Fisher what to do about the issue.

The wet chair incident

- 78 Ms Calvert, Ms Fisher, Ms Hyde and Ms Hannaford gave evidence about the wet chair incident on 14 March 2018.
- 79 Ms Calvert gave evidence that she also has a poor recollection of this incident. She said: ‘I don’t know. I can’t remember. I just remember something vaguely about a chair that was wet and I said, ‘The chair’s wet. Is this bleach?’ and someone said, ‘No, it’s water.’ She described it as a ‘nothing event’ and a ‘non-event’. Ms Calvert denied she had a raised voice or an accusatory tone.

- 80 Ms Fisher gave evidence that while she and Ms Hyde were washing their hands at the sink, Ms Calvert leant over a chair and said: ‘What is this? Bleach?’ in a very rude tone and without any context. When asked by counsel to speak in the tone Ms Calvert had used, Ms Fisher did so in a tone that was abrupt and accusing. The effect of Ms Fisher’s evidence in cross-examination was that Ms Calvert did not generally raise her voice at work but she did during this incident.
- 81 Ms Hyde gave what counsel for PathWest generously described as a ‘colourful’ account of this incident. Her evidence was that Ms Calvert ‘started carrying on about the chair being all wet and “I hope bleach wasn’t used on it” and she was just going off really.’ When asked what she meant by ‘going off’, Ms Hyde said ‘Okay. Like, “who would use bleach” and “how did I know” and “did she use bleach on this chair” and “where is she” and “I want to know”.’ She said Ms Calvert’s tone was very rude, loud and abrupt. Ms Hyde was adamant in cross-examination that Ms Calvert’s voice was raised.
- 82 Ms Hannaford was not in the room during the incident but her evidence was that she could hear voices. She is not sure whose voices she heard. She said the tone of the conversation was normal and she did not hear any raised voices.

The computer incident

- 83 Ms Calvert and Ms Hyde gave evidence about the computer incident that occurred on 12 April 2018. Ms Hannaford gave evidence about what happened straight after the incident.
- 84 Ms Calvert’s evidence is that she said she needed to use a particular computer that Ms Hyde was using. She asked Ms Hyde: ‘Will you be long? What are you doing?’ and said ‘it might be better if you don’t use this computer at this time of day.’ Ms Calvert gave evidence that other staff always accepted moving so that Ms Calvert could use the computer when she wanted to. Ms Calvert described the incident as another ‘non-event’.
- 85 In her evidence, Ms Calvert said she thought she asked Ms Hyde: ‘Oh, will you be long?’. She denied standing behind Ms Hyde with her arms crossed. She said her voice was not raised and her manner was not demanding.
- 86 Ms Hannaford did not witness the incident but gave evidence that after the incident she heard Ms Hyde saying: ‘I have just been ordered off the microcomputer, not asked, ordered’. She said Ms Hyde said that loudly and aggressively and then said to Ms Grant about Ms Calvert: ‘Why is she such a bitch? Why is she always such a bitch?’.
- 87 Ms Hyde gave evidence that she was working on a particular computer when Ms Calvert came up behind her and said: ‘Karen, you need to get off that computer. I need it. You don’t need to be using it. You can use any other computer in the lab.’ Ms Calvert said: ‘I need that one to enter my micro and she was quite terse and quite, um, rude and like ‘you need to get off of that computer now’ like attitude.’ Ms Hyde said Ms Calvert’s voice was raised and her manner was rude. She was telling Ms Hyde what to do, rather than asking her. Ms Hyde’s evidence was that Ms Calvert said ‘get off that computer. I need it now and don’t you use this one ever again because you know I need it at this time of the day. There’s two other computers. Use one of those.’
- 88 Ms Hyde said she replied: ‘Look, Lyn, what’s the problem? I’ll be five minutes. I’ve got to answer this query.’ Ms Calvert said: ‘I need the computer now. Get off it.’ Ms Hyde then finished what she was doing, shut the computer down and told her manager what had just happened. Ms Hyde’s evidence was that Ms Calvert stood by the desk tapping her fingers

waiting for her to finish. Ms Hyde's evidence is that she could not recall saying 'Why is she such a bitch, why is she always such a bitch?' about Ms Calvert.

- 89 Like Ms Hannaford, Ms Grant did not witness the incident but gave evidence that after the incident she observed that Ms Hyde was very upset. She heard Ms Hyde say that Ms Calvert had asked her to get off the computer. When pressed in cross-examination, Ms Grant agreed that Ms Hyde was venting and had said: 'Why is she such a bitch? Why is she always such a bitch?'

Ms Calvert's conduct in the workplace generally

- 90 Evidence was given about Ms Calvert's conduct in the workplace more generally.
- 91 Ms Calvert's evidence was 'I think my behaviour was always totally appropriate at work in the situation.'
- 92 A consistent theme emerged from the evidence of Ms Fisher, Ms Grant and Ms Hyde. The essence of their evidence was that Ms Calvert was very critical of others and would constantly complain and nit-pick. On a daily basis she would leave rude sticky notes that pointed out others' mistakes for all to see, even though her manager had asked her not to. Ms Calvert cross-examined Ms Fisher:

CALVERT, MS: Well, you've said that you agree that there was not a total ban on sticky notes?---That's correct.

So – but to me it sounded like – you made it sound like I used sticky notes as a form of bullying. Do you agree that - - -?---Yes.

Is that what you think? Why would you think that?---Because your notes, sticky notes, were very aggressive in terms you would have one word or a question mark, um, they were left out in the middle of the bench where everybody could see it so the person who made the mistake and everybody else in the lab saw it and they felt intimidated on occasion, um, and upset because you know they'd made the mistake that had been brought to the attention of everybody, um, yes.

EMMANUEL C: How do you know that?---Because they asked – told me about it and they complained to me which is why we tried to reduce the use of sticky notes without totally banning them altogether because they do have a place, sticky notes, I agree. When you leave them for yourself that's useful for, you know, a couple of days or whatever but, um – yeah. So yes – no, there wasn't a total ban but we tried to reduce it and use verbal communication because people were feeling very, um, upset by them, the ones that Lyn would leave.

- 93 Further, Ms Hyde said Ms Calvert would be rude if things did not go her way. Ms Grant said Ms Calvert created conflict. Ms Fisher said Ms Calvert would harass others if they did not do what she wanted done in the way she wanted it done. She said Ms Calvert was the most difficult person she had ever managed.
- 94 Ms Fisher said at times when she tries to speak with Ms Calvert informally to resolve a matter, Ms Calvert 'basically, become[s] aggressive. [She] start[s] to harass me and then if I disagree with [her], [she] continue[s] to harass me.'
- 95 Ms Calvert denied she was a bully at work and that she left rude messages on sticky notes. Her evidence was that she left sticky notes as appropriate. She agreed they pointed out the mistakes of others and could be seen by everyone.
- 96 The Board accepts the evidence given by Ms Fisher, Ms Grant and Ms Hyde about Ms Calvert's behaviours generally in the workplace. As Ms Calvert rightly acknowledged at

the end of the third hearing day, she demonstrated the behaviours that are the subject of the allegations throughout the hearing. She was consistently demanding, insistent and discourteous. She repeatedly refused to follow the Board's directions.

- 97 The Board finds that Ms Calvert consistently demonstrated workplace behaviours that amount to a breach of the WA Health Code of Conduct.

The disciplinary and termination process

- 98 Mr Grove gave evidence about PathWest's process for investigating the allegations that Ms Calvert breached the WA Health Code of Conduct. It is apparent from the documents tendered by PathWest that Ms Calvert was given detailed allegations in writing, and she was given at least four opportunities to be heard throughout the process of investigating the allegations and determining what action PathWest would take. PathWest decided that the evidence substantiated in part the first breaches of the WA Health Code of Conduct on 14 March 2018, and substantiated the second breach of the WA Health Code of Conduct on 12 April 2018. It says that it was reasonable to give Ms Calvert a warning for that behaviour. Further, PathWest says because of the number and timing of warnings that Ms Calvert had already received, it exercised its lawful right to dismiss her in a way that was not harsh, oppressive or unfair.

Should the findings and fourth reprimand stand?

- 99 Throughout the hearing, Ms Calvert focussed on what she says is a history of bullying behaviours that she experienced at PathWest, as well as grievances and disciplinary investigations that are not the subject of this appeal, rather than the matters before the Board. Notwithstanding that, the Board understands that Ms Calvert denies the allegations against her.
- 100 PathWest argues that the evidence shows that its findings and the fourth reprimand should stand.
- 101 The Board finds that Ms Calvert spoke to Ms Fisher about the unit of blood in a demanding manner. When Ms Fisher did not immediately do what Ms Calvert wanted her to, Ms Calvert became increasingly insistent, demanding and rude. She gesticulated and waved paperwork around. Ms Calvert made negative comments about Ms Miolin's work. The Board is satisfied that Ms Fisher behaved in an appropriate, professional manner throughout the interaction. The Board finds that allegation about the unit of blood is made out.
- 102 The Board accepts that Ms Calvert's tone was aggressive and her voice was raised when she asked whether bleach had been used on the chair. The allegation about the wet chair is made out.
- 103 The Board accepts the evidence of Ms Grant and Ms Hannaford about Ms Hyde's reaction to the computer incident. That evidence is consistent with the essence of Ms Hyde's evidence about the computer incident. Notwithstanding Ms Hyde's exaggeration, the Board finds that Ms Calvert was insistent and rude in her interaction with Ms Hyde and repeatedly demanded that Ms Hyde get off the computer so that Ms Calvert could use it.
- 104 Ms Calvert's conduct was not consistent with the WA Health Code of Conduct. She did not treat her colleagues with courtesy and respect, in a way that promotes harmonious and productive working relationships. Ms Calvert's conduct amounts to breaches of discipline. For these reason, the Board is not persuaded it should interfere with the findings dated 20 December 2018.

105 The Board considers the appropriate disciplinary action for these breaches of discipline is a reprimand in the form of a warning.

106 For these reasons, the part of Ms Calvert's appeal that relates to the findings and fourth reprimand is dismissed.

Was the dismissal unfair?

107 Ms Calvert says her dismissal was unfair because she denies the behaviour that was the subject of the allegations that led to the fourth reprimand. She says her dismissal was harsh because the allegations are not serious enough to warrant dismissal and also because of its effect on her financial future. She says she is not eligible for welfare payments because she has savings and at the moment she cannot work.

108 PathWest says the dismissal was fair in the circumstances. Under cl 9.14(e) of the WA Health System – HSUWA – PACTS Industrial Agreement 2018 (**Industrial Agreement**), once Ms Calvert received the fourth reprimand, PathWest could have:

- dismissed Ms Calvert with notice;
- regressed one or more salary increments in the range of Ms Calvert's classification;
- demoted Ms Calvert to a classification not more than two levels lower than her classification; or
- stood Ms Calvert down without pay for a specified period not exceeding four weeks.

109 PathWest says it had the right to dismiss Ms Calvert. Given Ms Calvert had been given a third and final warning for similar conduct less than 12 months earlier, dismissal was a proportionate response in the circumstances.

Consideration

110 Given the nature of the findings that led to the fourth warning, the Board considers that dismissal was not warranted in the circumstances. In the Board's view, PathWest should have considered the possibility of transferring Ms Calvert to another location within PathWest. PathWest should have responded to the fourth reprimand by regressing Ms Calvert's salary increment in accordance with cl 9.14(e) of the Industrial Agreement, and then managed Ms Calvert appropriately. It then should have been made clear to Ms Calvert that her behaviour towards her colleagues was unacceptable and that continuing to behave in that way would result in her dismissal. In effect, Ms Calvert should have been given one final chance and her conduct in the workplace managed appropriately.

111 The Board considers that in the circumstances PathWest exercised its lawful right to dismiss Ms Calvert in a way that amounted to an abuse of that right: *Undercliffe*. The Board would have made an order adjusting PathWest's decision such that the employment relationship is restored. However, for the reasons outlined from [112] - [128], the Board considers it should not adjust PathWest's decision to dismiss Ms Calvert.

Could Ms Calvert return to work in the Manjimup laboratory?

112 Unprompted during her testimony, Ms Calvert described Manjimup laboratory as 'a nightmare of a place to work, the communication is appalling, the bullying is appalling. I have never experienced a workplace like it. It's horrendous. And what's followed has been even worse.'

113 She gave evidence:

EMMANUEL C: All right, so we understand that you would not be asking the Board to adjust the decision such that you'd be sent back to Manjimup, is that right?---No.

Okay. Well, it's important that we confirm these things, Ms Calvert?---How could I go back there?

Okay?---I couldn't. It's - - -

All right?---People are not going to change their - their ways of behaviour. It's going to take a long time. [A colleague] has got some serious trauma from childhood and she's got to really think about her behaviours. I gave her a lot of time to adjust and learn. But when they attack you the day after a team building day and - and it just continues on and HR continue to ignore it all, I don't see much hope. (name omitted)

114 In her closing submissions, Ms Calvert said 'I do consider that the Manjimup workplace did just degenerate into this highly toxic workplace'.

115 In evidence, Ms Calvert said she would be happy to go back to work at Manjimup 'but HR have to do their bit and follow through on their promises'. On another occasion, Ms Calvert said '[Manjimup] wouldn't be my first place of work, it'd probably be my last choice, but I would go back there because I actually strongly believe that these problems in the PathWest workplaces need to be addressed'. She seemed to be motivated by being an agent for change and repeatedly connected her return with problems being addressed. She said she wants human resources to create a safe working environment, train managers and address bystander behaviour.

116 In cross-examination, Ms Calvert described the workplace in Manjimup as a toxic environment that had caused her stress and anxiety. She said she had been bullied by every employee in the laboratory except Ms Hannaford. Ms Calvert considers the allegations against her are spurious and vindictive. She considers her manager colluded with her colleagues and human resources to concoct them. Yet, when it was put to her that there must be a lack of trust in those people, Ms Calvert would not concede that. At most she conceded there was a 'certain lack of trust' but said trust can be rebuilt and she is a forgiving person.

117 Ms Calvert agreed she considered her line manager and the person who is responsible for all medical scientists at PathWest had let her down and that her trust in them is at a low ebb.

118 When asked what would happen if Ms Calvert returned to work at the Manjimup laboratory, Ms Fisher, Ms Hyde and Ms Grant all said they would leave their employment.

Could Ms Calvert return to work for PathWest at another location?

119 Ms Calvert asks the Board to adjust PathWest's decision to dismiss her so that she is returned to work at PathWest at a different location.

120 PathWest argues that it would not be practicable for Ms Calvert to work for PathWest at any location, because the relationship of trust and confidence has broken down. Further, the medical report dated 1 April 2019 that Ms Calvert tendered makes it clear that she is not fit to work for six to 12 months anywhere and says she cannot work at PathWest because the relationship has broken down.

121 Ms Calvert agreed in cross-examination that she had concerns about the Acting Operations Manager of Regional Services and Acting General Manager of Regional Services. She said the human resources failures were colossal and she had been let down and betrayed by management. Ms Calvert agreed she had said that the Chief Executive had made disparaging

remarks about her and that a human resources consultant had duplicitous behaviour. She also agreed that she had called Ms Cutforth ‘extremely damaging and very duplicitous.’ Her evidence was ‘everyone’s wronged me’. She agreed she was angry about the disciplinary process and said several times that PathWest was not a safe organisation.

- 122 PathWest argues that Ms Calvert has a workers’ compensation claim that will be arbitrated in less than two months. The certificate arising out of conciliation makes it clear that her claim against PathWest is for a total incapacity for work due to PathWest’s conduct. In those circumstances, it says Ms Calvert could not be returned to work at PathWest. When counsel for PathWest put that to Ms Calvert, she was evasive and refused to answer his questions. Finally she maintained that she did not know what her workers’ compensation case was about or what she would be arguing at hearing.

Consideration

- 123 The Board finds that it would not be practicable to reinstate Ms Calvert to her position in the Manjimup laboratory. This is because it is clear from the evidence that Ms Calvert considers the Manjimup laboratory to be a toxic environment and she does not trust any of the employees who work there. The Board accepts that if Ms Calvert returned to that workplace at least three other employees, including her manager, would resign.
- 124 PathWest says the only way the Board could adjust its decision is by overturning the dismissal and reinstating Ms Calvert to her position in the Manjimup laboratory. Anything else would ‘amount to an adjustment, removing the dismissal and then imposing a new decision.’ Counsel for PathWest said that would be a two-step process rather than merely adjusting the decision.
- 125 The effect of PathWest’s alternative submission is that even if the Board could adjust the dismissal by ordering Ms Calvert be re-employed at a location other than Manjimup, the evidence shows that Ms Calvert has lost trust in PathWest to such an extent that it is not practicable for any employment relationship to exist.
- 126 In the Board’s view, because of the particular facts of this matter, it is not necessary to decide whether the Board has the power to adjust the decision to dismiss by ordering an employee be re-employed at a different location.
- 127 Even if the Board has the power to adjust PathWest’s decision to dismiss such that Ms Calvert is re-employed at a different location, the Board is not persuaded it should do so. This is because the Board finds that the employment relationship between Ms Calvert and PathWest has deteriorated to such an extent that even a transfer to another location would be unworkable. The employment relationship should not be restored.
- 128 It is clear from the evidence that Ms Calvert’s dissatisfaction with PathWest goes well beyond the Manjimup laboratory and extends to the organisation as a whole. She does not trust her laboratory colleagues, staff in human resources, the Operations Manager of Regional Services, the Acting General Manager of Regional Services nor the Chief Executive. Further, given the medical report and Ms Calvert’s claim for total incapacity in her workers’ compensation claim, the Board has concerns about Ms Calvert’s current fitness to work for any employer, let alone for PathWest.

Conclusion

- 129 Ms Calvert has not persuaded the Board that it should adjust PathWest’s decision to give her a fourth warning or to dismiss her. Accordingly, her appeal must be dismissed.