APPEAL AGAINST A DECISION OF THE COMMISSION IN MATTER NUMBER U 145/2019 GIVEN ON 16 APRIL 2020
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION	**:**	2020 WAIRC 00757
CORAM	**:**	CHIEF COMMISSIONER P E SCOTT SENIOR COMMISSIONER S J KENNER COMMISSIONER T EMMANUEL
HEARD BY WRITTEN SUBMISSION	**:**	FRIDAY, 22 MAY 2020, TUESDAY, 16 JUNE 2020
DELIVERED	**:**	WEDNESDAY, 2 SEPTEMBER 2020
FILE NO.	**:**	FBA 3 OF 2020
BETWEEN	**:**	DEPARTMENT OF EDUCATION WESTERN AUSTRALIA Appellant AND SPYKER LEGAL PTY LTD First Respondent SARAH COLOMB Second Respondent

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ON APPEAL FROM:

Jurisdiction	**:**	**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**
Coram	**:**	**COMMISSIONER D J MATTHEWS**
Citation	**:**	**2020 WAIRC 00218**
File No	**:**	**U 145/2019**

CatchWords	**:**	Industrial law (WA) – Appeal against decision of the Commission – Unfair dismissal application – Whether resignation of employment as part of workers' compensation claim was voluntary – Summons to

		produce documents objected to – Order made at first instance for production of some documents not subject to legal professional privilege – Whether Commissioner erred in law in finding that applicant did not waive privilege over documents — Whether applicant in possession of documents – A finding under s 49(2a) of Industrial Relations Act 1979 (WA) – Appeal regarding finding is in public interest – Issues influencing applicant's state of mind when signing settlement offer which required resignation – Applicant impliedly waived legal professional privilege – Documents to be produced as part of summons – Appeal upheld – Decision at first instance to be varied
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Appeal upheld

Representation:

Counsel:

Appellant	**:**	Mr J Carroll (of counsel)
First Respondent	**:**	Mr W Spyker (of counsel)
Second Respondent	**:**	Ms S Colomb

Case(s) referred to in reasons:

Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd and others [1996] HCA 15; (1996) 137 ALR 28

Australian Crime Commission v Marrapodi [2012] WASCA 103; (2012) 42 WAR 351

Australian Reliance Group Pty Ltd v Coverforce Insurance Brokers Pty Ltd [No 3] [2017] WASC 60

Bennett v Chief Executive Officer of the Australian Customs Service [2004] FCAFC 237; (2004) 140 FCR 101

BrisConnections Finance Pty Ltd (Receivers and Managers appointed) v Arup Pty Ltd [2016] FCA 438

Civil Service Association of Western Australia v Dr Ruth Shean, Chief Executive Officer, Disability Services Commission [2005] WAIRC 02043; (2005) 85 WAIG 2993

Commissioner of Taxation v Rio Tinto Ltd [2006] FCAFC 86; (2006) 151 FCR 341

Commonwealth of Australia v Albany Port Authority [2006] WASCA 185

Council of the New South Wales Bar Association v Archer [2008] NSWCA 164

Durham v Western Australian Government Railways Commission trading as Westrail (1995) 75 WAIG 3163

Federated Ship Painters and Dockers Union v. Adelaide Steamship Co 94 CAR 579

Goldberg v Ng [1995] HCA 39; (1995) 185 CLR 83

Gough & Gilmour Holdings Pty Ltd v Caterpillar of Australia Limited (No 1) (2001) 106 IR 239

Mann v Carnell [1999] HCA 66; (1999) 201 CLR 1

Northern Territory v Maurice and others (1986) 161 CLR 475

Perpetual Trustees (WA) Ltd v Equuscorp Pty Ltd [1999] FCA 925

Re Australian Insurance Employees' Union; ex parte Academy Insurance Pty Ltd [1988] 62 ALJR 426; 78 ALR 466

Re Gas Industry Award 104 CAR 376

Re Journalists Metropolitan Daily Newspapers Agreement (1960) 94 CAR 760

Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others [1989] WAIRC 11873; (1989) 69 WAIG 1873

Telstra Corporation Ltd v BT Australasia Pty Ltd (1998) 85 FCR 152

Reasons for Decision

SCOTT CC and KENNER SC:

Introduction

1 This appeal is against the decision of the Commission at first instance ordering that 'Spyker Legal Pty Ltd produce to the Registry of the Western Australian Industrial Relations Commission notes taken by anyone acting for Sarah Colomb at the conciliation conference in the WorkCover WA Workers' Compensation Conciliation Service on 19 August 2019, where those notes are of events at which those representing the Director General, Department of Education were also present'.

2 The summons which brought about the order was issued by the Department of Education Western Australia (the Department) and sought '[a]ny document touching upon or evidencing:

> 1. any agreement for Spyker Legal Pty Ltd (Spyker Legal) to provide services to Ms Sarah Colomb in relation to her workers' compensation claim made against the Department of Education in 2019 (Claim),
>
> 2. any correspondence from Slater and Gordon to Ms Colomb or Spyker Legal relating to fees owed by Ms Colomb to Slater and Gordon in relation to the Claim, and in what circumstances any such fees would fall due,
>
> 3. what occurred during the conciliation conference held on 19 August 2019, including any file note from the conciliation conference that led to settlement of the Claim on 19 August 2019, and
>
> 4. any advice given by Spyker Legal, or any of its employees, to Ms Colomb in relation to any offer made by the Department of Education to settle the Claim, including any advice as to the reasonableness of any such offer and any advice as to whether Ms Colomb would owe Spyker Legal fees for its services if the offer was rejected.

Background

3 Ms Sarah Colomb claims that she was harshly, oppressively or unfairly dismissed from her employment as a teacher by the Department. Ms Colomb had resigned her employment as part of the settlement of a workers' compensation claim. The question of whether she had been dismissed for the purposes of her claim of unfair dismissal arises in the matter currently before the Commission at first instance.

4 The unfair dismissal claim was the subject of a hearing on 16 January 2020 relating to the Commission's jurisdiction. The Department submitted that the claim ought to be dismissed pursuant to s 27(1)(a)(ii) of the *Industrial Relations Act 1979* (WA) (the Act), that further proceedings were not necessary or desirable in the public interest because Ms Colomb had not been dismissed, and that the Commission did not have jurisdiction under s 23A of the Act to deal with a claim of harsh, oppressive or unfair dismissal because there had been no dismissal.

5 Ms Colomb's case was that her resignation as part of the settlement of the workers' compensation claim was not voluntary, that the Department's actions had denied her free will, and that it was necessary for the Commission to go behind the letter of resignation and the agreement to settle the workers' compensation matter.

6 The Department said that Ms Colomb was represented by a legal practitioner in the workers' compensation negotiations, she had time to unwind the settlement before it came into effect and had a real, if not a 'great', choice as to whether to settle and resign and she made that choice.

The jurisdiction hearing

Ms Colomb's evidence

7 Ms Colomb represented herself in the hearing at first instance. We think it is necessary to note that her evidence was less than clear and was not entirely consistent between examination-in-chief and cross-examination. The Commissioner at first instance led her through evidence-in-chief and made significant efforts to give her evidence some direction and clarity. Taking into account and looking at the totality of Ms Colomb's evidence, we have identified the following sequence of events. Ms Colomb had been employed by the Department from August 2012. She was absent from work and made a workers' compensation claim. Ms Colomb's workers' compensation claim was subject to conciliation by WorkCover WA. There was a conciliation conference on 29 October 2018, however, no agreement was reached. The stumbling block to resolving the matter was that the Department sought that, as part of the settlement, Ms Colomb resign. She did not want to resign.

8 Ms Colomb intended to represent herself at conciliation and, if it became necessary, arbitration, in the resolution of her workers' compensation claim. While the timeframes are not entirely clear, it was not in dispute that she engaged law firm Slater and Gordon. She understood that she engaged them on a no-win, no-fee basis, which she understood to include that a settlement of the claim would be regarded as a win and therefore, she was liable to pay the fees if the claim was settled. At some point, Ms Colomb came to understand that if she refused a reasonable offer of settlement then she would be liable for the fees. However, she did not wish to settle if it involved her resigning.

9 Ms Colomb ceased engaging Slater and Gordon. Slater and Gordon provided her with an invoice but indicated that she would only have to pay the legal fees if she settled the claim and as there was no settlement, they waived the fees. She later re-engaged them, at which point Slater and Gordon informed her that the fees were now payable. Ultimately, she engaged Spyker Legal. The contractual arrangements appear to have been similar, if not the same, for Spyker Legal and Slater and Gordon.

10 Ms Colomb says that the fee for Slater and Gordon would have been around $10,000 and for Spyker Legal was around $10,000 reduced to $5,500. However, during her evidence, Ms Colomb also referred to a total figure of around $13,200.

11 Settlement was not achieved during the formal WorkCover conciliation process and the dispute was to be arbitrated. Ms Colomb intended to represent herself in the arbitration.

12 In around June 2019, the Department informed Ms Colomb that it was prepared to negotiate a settlement without requiring her to resign. At the beginning of the arbitration process, the Department informed her that while she may be able to represent herself at the arbitration, the Department would not further negotiate with her for a settlement unless she was represented by a lawyer.

13 There was a pre-arbitration conference at WorkCover WA on 19 August 2019. Ms Colomb agreed that prior to that conference, her union, on her behalf, had approached the Department, informing them that Ms Colomb would consider resigning from her employment as part of a

settlement. However, Ms Colomb submitted that this was separate to the workers' compensation matter but she also recognised that they were in some way connected or contingent.

14 At the pre-arbitration conference, Ms Colomb was represented by Mr Spyker of Spyker Legal. As Ms Colomb and Mr Spyker attended for the conference, the Department's lawyer informed them that his instructions had changed, and her resignation was now an essential term of any settlement.

15 The conciliation proceeded with the parties in separate rooms and the conciliator moving between them. According to Ms Colomb, the parties remained separated. Ms Colomb says that she was 'rattled' by the Department's sudden change of instructions, requiring her resignation as part of the settlement. She said she did not have a conversation with Mr Spyker about not wanting to continue settlement negotiations in the circumstances, and Mr Spyker then proceeded with the to-ing and fro-ing of the settlement negotiations.

16 According to Ms Colomb, during her discussion with Mr Spyker, he presented to her a copy of Slater and Gordon's invoice and Spyker Legal's invoice. Ms Colomb understood that if she did not settle her claim, she would be liable for the costs of both law firms. She also understood from her discussion with Mr Spyker that if she refused an offer of more than $10,000, it would be considered as refusing a reasonable offer.

17 Ms Colomb said that as she had no money to pay those fees, she had no option but to settle the claim on the terms offered which included her resignation. She did not want to resign but believed she had no choice. She could have gone to arbitration but would have represented herself, still had to pay the legal fees and had no sure outcome. She said that she was under the impression that even if she got up and walked out of the negotiations, she would still have to pay all of the fees. Ms Colomb said she did not think Mr Spyker played a part in putting pressure on her to accept the settlement.

18 The Department put a Memorandum of agreement to her to settle her claim. It included her resignation. She said to Mr Spyker that she did not wish to resign, that the Department was forcing her to, and that she had no choice. He changed the wording provided in the Memorandum to say that instead of her 'wish(ing) to resign' to say that she 'hereby resigned'. She signed the agreement and provided a letter of resignation which said that her resignation would take effect from the date upon which WorkCover WA's Director of Conciliation Services confirmed that she did not intend to disapprove the settlement of the workers' compensation claim. The Director did so on 10 September 2019.

19 The settlement sum agreed between them was $72,000 and was due to be paid to Ms Colomb by 24 September 2019. It had not been received by 17 October 2019. Spyker Legal wrote to the Department on 17 October 2019 noting the breach of the agreement; reserving Ms Colomb's rights in respect of the breach; foreshadowing suing for breach, seeking damages, interest and legal costs. The settlement sum was received by Spyker Legal the next day, 18 October 2019.

20 Ms Colomb said that she wished to call Mr Spyker to give evidence about what had occurred but had not understood that it was necessary for the purposes of the jurisdiction hearing.

The parties' arguments

21 Ms Colomb said that she was required by the Department to engage a lawyer, that this involved her incurring significant costs which she could not afford to pay unless she reached a satisfactory conclusion, that the Department's change of instructions requiring her resignation rattled her, and that she was tricked into going into negotiations and then into resigning against her will.

22 Ms Colomb says that she did not try to get out of the deal and get her job back because she did not know that she could do so and that even if she did, she had no way of paying the legal fees that she had incurred.

23 Ms Colomb filed the unfair dismissal claim on 21 October 2019. If her resignation took effect on 10 September 2019, it was out of time by a number of weeks. She said that in respect of the timing of filing the application, that she did not know at the time of settlement of the concept of constructive dismissal. She said 'I just signed because my lawyer said I had to. And I didn't want to incur that $13,200'. While Ms Colomb was asked whether she concluded the settlement negotiations with the benefit of advice, she said she would not call it "advice per se".

24 Ms Colomb waited until she received payment of the settlement sum before filing her unfair dismissal claim. She said she wanted to have the money to pay her lawyers' fees and her medical expenses before she took steps to challenge her resignation.

25 The Department said that Ms Colomb's union's suggestion to the Department that she may be prepared to settle and resign, subject to the amount of settlement, occurred very soon before the Department's representative advised that it intended to change its position and require a resignation in finalising any settlement for the workers' compensation matter. Ms Colomb was not tricked in that regard.

26 The Department argued that the Commission ought not to entertain further proceedings on the basis that there was no dismissal. The agreement and the letter of resignation were said to make the question of whether there was a dismissal separate from any question of unfairness.

27 The Commissioner at first instance engaged with counsel for the Department on the issue of whether Ms Colomb's evidence was that she received advice, and whose responsibility it was to bring evidence of whether or not she did. The Department's counsel said that it would not be for the Department to call Mr Spyker because Ms Colomb would need to waive legal privilege to enable him to give evidence about that advice.

28 The Department pointed out that Ms Colomb acknowledged that negotiations by her union involving her possible resignation were separate from the workers' compensation claim in settlement negotiations, although they were connected. Counsel submitted that if Ms Colomb says her lawyers let her down, that has nothing to do with the Department's conduct, which is the only basis upon which she could challenge that her resignation constituted a constructive dismissal.

29 The Department said that the following factors were relevant to the Commissioner's consideration:

1. Ms Colomb was represented by a lawyer during the negotiations and she had time to unwind the settlement in that she signed the resignation letter quite a while before it came into effect;
2. The Department was in breach of the agreement, but she wanted the settlement money; and
3. Ms Colomb had a real choice 'neither of which was great for her, but she had a real choice' (ts 43). It was to resign with a sum of money or to keep her job, press on with arbitration and take her chances.

30 The Commissioner reserved his decision regarding jurisdiction at the conclusion of proceedings on 16 January 2020. However, on 7 February 2020, the Department issued a summons to Spyker

Legal to produce any documents that touched upon or evidenced the four matters set out in paragraph [2] above.

The Summons hearing

31 Spyker Legal sought to have the summons set aside on the grounds that the requested documents were subject to legal professional privilege and Ms Colomb said that she did not waive privilege.

32 The Department says that Ms Colomb waived privilege by an implied waiver.

33 During the course of the hearing, Ms Colomb said that she had documents covered by requested documents 1 and 2 but she did not have them with her at the jurisdiction hearing. She agreed to provide them to the Department prior to the substantive hearing. On this basis, the Commissioner found that those two items fell away.

34 As to the other items in the summons, the learned Commissioner acknowledged that he had in effect created the circumstances leading to the summons being issued because he took issue with the phrase used by counsel for the Department about Ms Colomb having the benefit of legal advice, when in fact the issue was not significant, except that what mattered, in his mind, was that Ms Colomb had competent counsel available to her, not whether she received competent or appropriate advice or whether she accepted or acted on that advice.

35 The Commissioner then went on to express the view that 'what is really important is not whether Ms Colomb benefitted from any particular advice, but that she had it available to her – that is, that she had competent counsel representing her …' (ts 60). He said 'the quality in her mind of that advice is to my mind neither here nor there'. Rather, he said, in a case of constructive dismissal, what was important was what the respondent did, and 'that insofar as Ms Colomb said she had a state of mind, it's insofar as the respondent created that state of mind that is important'.

36 The learned Commissioner went on to say that what he was interested in was that Ms Colomb said that she was induced to enter settlement negotiations on the basis that resignation was completely off the table and when she got to the conference, it was back on the table.

Reasons for decision

37 The Commissioner issued his Reasons for Decision ex tempore immediately at the conclusion of the hearing on 16 April 2020 and issued more expansive Reasons in writing the following day. He found that items 1 and 2 of the summons fell away.

38 The Commissioner found that:

(a) what happened in the conciliation conference before WorkCover WA may be relevant to determination of the matter;

(b) insofar as what happened was recorded by Ms Colomb's legal representatives, those documents are relevant and amenable to production under the summons;

(c) any note from the conference that is subject to legal professional privilege was not required to be provided;

(d) legal professional privilege had not been waived in respect of the documents in points (3) and (4) of the summons (paragraphs [11] and [18]).

39 The Commissioner said that Ms Colomb's state of mind at the conference is relevant to her unfair dismissal claim as she said her actions at the conference were unfairly induced by the Department

and she did not freely bring her employment to an end. He said that if a person's state of mind includes that they relevantly believed "A" based on legal advice then it followed that the person had opened themselves up to a powerful argument that they may not resist production of the advice on the basis that it is privileged. Ms Colomb gave evidence that while she had a lawyer at the conference she was not provided by him the "advice per se" about whether or not "to accept the offer put by the Department", and he referred to p 36 of the transcript of 16 January 2020. He said that saying that "one has not received 'advice per se' cannot amount to waiver of privilege in relation to something, either expressly or impliedly". [19]

40 The Commissioner found, though, that in his view "Ms Colomb's state of mind, as that state of mind was affected by advice or a lack of advice from her lawyer, is not that which is relevant here. In my view, while it is relevant that Ms Colomb had access to competent counsel, what that person did or did not tell her is not particularly relevant." [20] What was relevant was Ms Colomb's state of mind insofar as it "was created or influenced by the respondent, not her state of mind insofar as it was created or influenced by her own advisers." [21]

41 The Commissioner found that "[w]hat is important is whether anything Ms Colomb has said is inconsistent with a claim of privilege." [24] He went on to say "in a situation where Ms Colomb clearly had competent representation, the question of whether she got any, or any good, advice is not material to the matter of whether her resignation was a constructive dismissal. Accordingly, it cannot be said it would be unfair to the respondent for Ms Colomb to further her claim of constructive dismissal without us knowing more about the exchanges between her and her representative." [25]

42 The Commissioner issued the order set out in paragraph [1] above.

Grounds of appeal

43 The first ground of appeal is that the learned Commissioner erred in law in finding at [11] and [18], that Ms Colomb had not impliedly waived privilege over documents within items 3 and 4 of the summons. This is said to relate in particular to Ms Colomb's state of mind as to why she accepted the offer to settle. Was it because her will was overborne because of the Department's conduct, or did the advice of her lawyer and the issue of the legal fees affect her state of mind?

44 The second ground of appeal is that in finding at [10] that item 2 of the summons fell away, the Commissioner made an error of fact by implicitly finding that Ms Colomb has in her possession all of those documents. The Department says her evidence was that she did not have a copy of Slater and Gordon's bill provided by them to Spyker Legal [t 14], that while Mr Spyker showed her copies, he retained them himself. The Department says that although Ms Colomb said at the summons hearing that she would provide them, her evidence under oath was that she did not have them. Therefore they are appropriate to be produced under the summons.

45 Spyker Legal did not wish to be heard and submits to any orders the Full Bench may make.

46 Ms Colomb's submissions dealt with a number of issues. Firstly, she said that the summons is not valid because it was directed to a company and not a person. Her other submissions relate to the merits of her claim.

Consideration and conclusions

A finding

47 Section 49(2a) of the Act provides that:

> An appeal does not lie under this section from a finding unless, in the opinion of the Full Bench, the matter is of such importance that, in the public interest, an appeal should lie.

48 A finding is a decision, determination or ruling made in the course of proceedings that does not finally decide, determine or dispose of the matter to which the proceedings relate (s 7(1) of the Act).

49 In our view, the proceedings to which this decision relates is Ms Colomb's claim that she was unfairly dismissed. The decision deals with an interlocutory matter as part of those proceedings in that it relates to whether a summons for the production of documents directly dealing with evidence in the unfair dismissal proceedings ought to have been set aside.

50 Such matters are interlocutory as such do not finally determine or dispose of the substantive proceedings (See *Commonwealth of Australia v Albany Port Authority* [2006] WASCA 185 [15] per Steytler P and *Australian Crime Commission v Marrapodi* [2012] WAIRC 103; (2012) 42 WAR 351 [11] per McLure P). Therefore the appeal is against a finding.

Public interest

51 The question is then whether, in accordance with s 49(2a), the matter is of such importance that in the public interest an appeal should lie.

52 The Full Bench in *Robe River Iron Associates v Amalgamated Metal Workers and Shipwrights Union of Western Australia and Others* [1989] WAIRC 11873; (1989) 69 WAIG 1873 at 1879 set out the principles to be applied in determining what constitutes the public interest in this regard. They are that:

(a) The "public interest" should not be narrowed to mean "special or extraordinary circumstances".

(b) An application may involve circumstances which, because of their very generality are of great importance in the public interest (see *Re Australian Insurance Employees' Union; ex parte Academy Insurance Pty Ltd* [1988] 62 ALJR 426; 78 ALR 466).

(c) "The question of sufficient importance cannot be decided on the basis of case law. Each case will be a question of impression and judgment whether the appeal has the required degree of importance" (*Re Gas Industry Award* 104 CAR 376, per Wright and Moore JJ. and Gough C).

(d) "An appeal will not lie unless the Commission has formed a positive opinion on the public interest of the matter. Doubts or misgivings are not sufficient" (see *Re Journalists Metropolitan Daily Newspapers Agreement* (1960) 94 CAR 760 at 768).

(e) Important questions with likely repercussions in other industries and substantial matters of law affecting jurisdiction can give rise to matters of sufficient importance in the public interest to justify an appeal.

(f) There is no "general standard or degree of importance which will satisfy the test of such importance. Every case must be viewed on its merits according to its individual circumstances." (see *Federated Ship Painters and Dockers Union v. Adelaide Steamship Co* 94 CAR 579).

53 The Full Bench in *Civil Service Association of Western Australia v Dr Ruth Shean, Chief Executive Officer, Disability Services Commission* [2005] WAIRC 02043; (2005) 85 WAIG 2993, (per Sharkey P with whom Beech CC and Gregor SC agreed) accepted the *Butterworths Concise Australian Legal Dictionary* definition of "an interest common to the public at large or a significant portion of the public and which may or may not involve the personal or proprietary rights of individual people."

54 Therefore, in that context, the Full Bench is required to consider the degree of importance of the particular circumstances of this case.

55 Ms Colomb was not represented in the hearing before the Commission. She gave her evidence-in-chief under questioning from the Commissioner. She recited the circumstances of the pre-arbitration conference; the Department communicating its change in instruction; her communications with her lawyer and his producing the invoices and her not having the money to meet the legal bills; that she said in response to a question by the Commissioner asking "did you have in your mind what would happen to Mr Spyker's claim of $5,500, if you said 'I'm not settling today'?"; she said "He may well have said that the settlement was a win." (ts 14). She confirmed that she had been thinking about it at the time, that if she walked out, was she liable for the fees and she said she was under the impression that she was liable, because the bills for both sets of fees were given to her by Mr Spyker at the time. Ms Colomb said she then had the fact of the Department now requiring her resignation as a condition of settlement sprung on her. She said "so I was rattled with the sudden…". The Commissioner asked her:

> "So the thing that rattled you was the Department's lawyer coming up and saying his client's instructions had changed and they now require a resignation?",

to which she answered "That's right" (ts 15).

56 After dealing with those issues over a number of pages of transcript, at p 16, Ms Colomb said:

> "So essentially, the - from the Department's actions and saying they didn't require a settlement in two months, I had gone from zero legal fees to 13,200 that I had no way of paying."

and that:

> "So I felt forced, I felt like I had no other option but to settle."

57 (While we note Ms Colomb's words "they didn't require a settlement in two months", we suspect she may have meant that the Department did not require <u>resignation</u> over the two months of negotiations.)

58 We agree with the Commissioner that Ms Colomb's state of mind as it was affected by the Department's conduct is a very important issue in her decision to settle and resign. However, in our respectful opinion, her evidence makes it clear that this was not the only influence on her state of mind. The other matters were the fact of her having engaged and re-engaged Slater and Gordon, having engaged Spyker Legal, being faced with substantial legal fees, having those legal fees drawn to her attention by Mr Spyker, and Mr Spyker's advice to settle. The respondent ought to be able to test Ms Colomb's evidence by reference to the documents set out in points (3) and (4) of the summons. The Commission would then need to consider the role each of those matters played in forming Ms Colomb's state of mind, not just the Department's conduct, and weigh the respective influences.

59 In our view, unless the Commission has before it the documents sought to be obtained by the summons, the Commission will be denied the opportunity to consider the full picture. The

Department will be denied the opportunity of a fair hearing because it will not be able to properly put its case.

60 The situation will not be able to be recovered on appeal if the final decision goes against the Department because Spyker Legal is not a party to proceedings. If it were to be recoverable, then further costs, time and delay would eventuate.

61 In our opinion, these circumstances are important to the resolution of this claim, and it is in the public interest to allow the Department to appeal so as to avoid the real prospect that important evidence affecting Ms Colomb's state of mind is excluded, and would not be able to be remedied later. Therefore we conclude that an appeal should lie against the decision regarding the finding.

Ground 1

The advice

62 While the learned Commissioner concluded that Ms Colomb had not relied on advice, by reference to her evidence at transcript p 36 that "he didn't provide advice, per se", other parts of her evidence indicate otherwise. At transcript p 13, Ms Colomb said that after the Department's lawyer had spoken to her and Mr Spyker, the Department's lawyer "went to his room". She then recited what occurred between her and Mr Spyker. The Commissioner asked Ms Colomb about what happened in her discussion with Mr Spyker. He asked:

> The first thing Mr Spyker did was produce the two letters, the two invoices?---Yes.
>
> All right. What did he say to you?---Yeah, so he said, "Well, this is the first offer I'm going to put in". And I said, "I don't want to resign". And he said, "Well, you have to, there's - they've - you've heard what they've just said, they force you to resign". So negotiations continued and then - then he gave me the $13,000 - I think it's $13,200 altogether.

63 On being questioned by counsel for the Department about advice provided by Mr Spyker, Ms Colomb said:

> Well, he didn't provide advice, per se. But I knew that me refusing an offer because it was reasonable, I would still incur $13,200, and I would be back - I suddenly had a debt which I shouldn't have had if the employer hadn't lied about requiring resignation in June.
>
> So you considered the offer was reasonable, then, because you thought - I'll stop there. You considered the offer was reasonable?---Well, yeah - it wasn't $1, so I didn't think I would have any grounds, and I wouldn't be able to have a fight with a lawyer and say that it wasn't. If a lawyer thinks it's reasonable - yeah. (ts 36)

64 Then at transcript page 37, Ms Colomb said that she did not go through all of the documents with a fine-tooth comb at the time:

> "I just signed because my lawyer said I had to. And I didn't want to incur that $13,200."

65 This demonstrates that Ms Colomb gave express evidence that she received and acted on Mr Spyker's advice.

66 While the Commissioner said in his Reasons and during the course of the hearing that what he thought was relevant was the Department's actions as the employer and their effect on Ms Colomb's state of mind in settling her claim and resigning, it is clear that there were other things affecting her state of mind. They included the advice she received and the documents Mr Spyker presented to her.

Waiver of privilege

67 The next issue is whether Ms Colomb impliedly waived legal professional privilege. A client of a lawyer impliedly waives the legal professional privilege that protects their communication with their lawyers where they "assert a state of mind as to the very matters upon which legal advice was being taken" (*Australian Reliance Group Pty Ltd v Coverforce Insurance Brokers Pty Ltd [No 3]* [2017] WASC 60 at [28] per Chaney J).

68 We have set out earlier the exchanges between the Commissioner and Ms Colomb, and between counsel for the Department and Ms Colomb, about Ms Colomb's discussion with Mr Spyker. The Commissioner expressly asked Ms Colomb to tell him about what went on between her and her lawyer and what her lawyer said to her (see ts 13 -14). This was about Mr Spyker producing the invoices or letters from Slater and Gordon and his own firm's account. It was also about what Mr Spyker told her about the terms of the "no win, no pay deal". He revisited that issue with Ms Colomb at page 15 of the transcript. At page 16, the Commissioner asked Ms Colomb about whether Mr Spyker talked to her about whether she wanted to continue with settlement negotiations, and what was the conversation.

69 Therefore, during the course of Ms Colomb answering questions about her communications with her lawyer, communications over which she was entitled to maintain privilege, she gave answers that disclosed those communications, in relation to the advice she received from her lawyer which at least contributed to her decision to enter into the agreement and resign.

70 Whether or not Ms Colomb recognised that what she was receiving from Mr Spyker was advice, we conclude without reservation that it was advice. Ms Colomb opened the issue of that advice to scrutiny by saying in evidence, in effect, that her lawyer told her that the offer was reasonable, that if she did not accept a reasonable offer she was liable for the fees incurred and that "I just signed because my lawyer said I had to."

71 In this way, Ms Colomb's evidence and submissions were inconsistent with her maintaining the legal professional privilege to which she is otherwise entitled.

72 We would uphold Ground 1.

Ground 2

73 As the Department points out, there is a conflict between what Ms Colomb said in her evidence about having the documents covered by item 2 of the summons and what she said at the summons hearing. The Commissioner relied on her saying she would discover them to the Department.

74 Were the Commission dealing with counsel stating from the bar table that they had possession of and would produce the documents, we would have no hesitation in accepting that undertaking. However, given that Ms Colomb is self-represented, is not familiar with the processes and there was some confusion and lack of clarity in her evidence and submissions, for the sake of expedition and certainty, we would require that the documents in item 2 of the summons be produced as part of the summons.

Disposition of appeal

75 We would dispose of appeal by ordering that the appeal be upheld, and that the decision at first instance be varied to reflect the terms of points 2 to 4 inclusive of the summons, within 14 days.

EMMANUEL C:

76 The Chief Commissioner and Senior Commissioner set out the background to this matter. I gratefully adopt it other than in relation to the last sentences of [16] and [43], for reasons I will go on to explain.

Is the decision a finding?

77 I agree that the decision is a finding for the reasons set out in [47] – [50] in the reasons of the majority.

Is it in the public interest for an appeal to lie?

78 The majority set out the principles to apply when considering whether a matter is of such importance that it is in the public interest for an appeal to lie from [52] - [54] and I respectfully adopt them.

79 I consider that the matter is of such importance that it is in the public interest for an appeal to lie for two reasons.

80 First, Spyker Legal Pty Ltd (**Spyker Legal**) will not be a party to any final decision made in relation to Ms Colomb's unfair dismissal claim. That means the Department could not challenge the decision appealed here at the same time as challenging any final decision on the unfair dismissal claim.

81 Second, if the grounds of appeal are made out, then refusing to allow the Department to appeal would deny the Department a fair opportunity to defend the unfair dismissal claim.

82 In the circumstances of this matter, it is in the public interest for an appeal to lie.

Ground one

83 I consider the learned Commissioner was correct to find that Ms Colomb did not impliedly waive privilege in the documents in items 3 and 4 of the summons issued in February 2020 (**Summons**).

84 In summary, I do not consider that Ms Colomb put in issue the content of privileged communications the subject of items 3 and 4 of the Summons or otherwise sought to deploy such privileged material so that it would be unfair to allow the maintenance of the privilege.

The law

85 In its submissions the Department sets out a summary of the relevant law of constructive dismissal. I do not consider it necessary to comment about those submissions except to note that I do not agree with the Department's contention that the approach of the Industrial Appeal Court in ***Durham v Western Australian Government Railways Commission trading as Westrail*** (1995) 75 WAIG 3163 at 3166 supports the premise that in a constructive dismissal case, 'it is necessary to consider matters such as whether the person received advice, if so, *what advice they received*…' (emphasis added)

86 The facts set out in the Industrial Appeal Court's reasons detailed open communications and negotiations between the parties and their lawyers over several months culminating in an agreement and the associated filing of court documents to conclude litigation. I consider that the Department's submission goes too far in suggesting that decision supports the proposition that it is 'necessary', in such a case, to know the contents of privileged advice. The Industrial Appeal Court (and the Commission before it) did not have the benefit of privileged communications or advice and the reasons do not record or suggest that there was any waiver of privilege in the conduct of the matter.

87 It is trite to say that legal professional privilege is fundamental to our justice system. Per Deane J in ***Attorney-General for the Northern Territory v Maurice and others*** (1986) 161 CLR 475 at 490:

> It is a substantive general principle of the common law and not a mere rule of evidence that, subject to defined qualifications and exceptions, a person is entitled to preserve the confidentiality of confidential statements and other materials which have been made or brought into existence for the sole purpose of his or her seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings: see generally, *Baker v. Campbell* (58). That general principle is of great importance to the protection and preservation of the rights, dignity and freedom of the ordinary citizen under the law and to the administration of justice and law in that it advances and safeguards the availability of full and unreserved communication between the citizen and his or her lawyer and in that it is a precondition of the informed and competent representation of the interests of the ordinary person before the courts and tribunals of the land. Its efficacy as a bulwark against tyranny and oppression depends upon the confidence of the community that it will in fact be enforced. That being so, it is not to be sacrificed even to promote the search for justice or truth in the individual case or matter and extends to protect the citizen from compulsory disclosure of protected communications or materials to any court or to any tribunal or person with authority to require the giving of information or the production of documents or other materials: see *Pearse v. Pearse* (59); *Baker v. Campbell* (60). The right of confidentiality which the principle enshrines has recently, and correctly, been described in the European Court of Justice as a "practical guarantee" and "a necessary corollary" of "fundamental, constitutional or human rights": see *A.M.&S. Europe Ltd. v. Commission of The European Communities* (61); *Baker v. Campbell* (62). Indeed, the plain basis of the decision of the majority of this court in *Baker v. Campbell* was the acceptance of the principle as a fundamental principle of our judicial system: see Murphy J. (63); Wilson J. (64); Deane J. (65); Dawson J. (66). Like other traditional common law rights, it is not to be abolished or cut down otherwise than by clear statutory provision. Nor should it be narrowly construed or artificially confined.

88 Also, as Kirby J observed in ***Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd and others*** [1996] HCA 15; (1996) 137 ALR 28 at 33:

> The law of legal professional privilege is an important branch of the law protecting the basic rights of persons in a society such as ours. Those rights include the right to approach lawyers without concern that matters disclosed, and advice received, in confidence will ordinarily enjoy the protection of the law. Increasingly, in recent years, this Court and other courts of high authority, have described such rights in the language of basic civil rights. They have also been explained as rights pertinent to the just operation of the adversarial system rather than, as they have sometimes been explained in older or other authorities, as rules of evidence or procedure. Within this Court, there have been divisions of opinion on this point. However, generally speaking, I consider that the trend of recent authority supports the submission that legal professional privilege constitutes an important civic right to be defended, as such, by the law.
>
> There is no doubt that legal professional privilege may be extinguished by clear statutory provision. It may also be waived by decision of the client.

89 In relation to waiver, Gleeson CJ and Gaudron, Gummow and Callinan JJ observed in ***Mann v Carnell*** [1999] HCA 66; (1999) 201 CLR 1 at [28]-[29]:

> At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context: ***Ross T Smyth & Co Ltd v T D Bailey, Son & Co*** [1940] 3 All ER 60 at 70; ***Larratt v Bankers and Traders Insurance Co Ltd*** (1941) 41 SR (NSW) 215 at 226; ***The Commonwealth v Verwayen*** (1990) 170 CLR 394 at 406, 422, 467, 472. Legal professional privilege exists to protect the confidentiality of communications

> between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege: *Cross on Evidence*, 5th Aust ed (1996), par 25005; ***Attorney-General (NT) v Maurice*** (1986) 161 CLR 475 at 497-498. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication (***Benecke v National Australia Bank*** (1993) 35 NSWLR 110), or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received (***Lillicrap v Nalder & Son (a firm)*** [1993] 1 WLR 94; [1993] 1 All ER 724).
>
> Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law" (eg ***Goldberg v Ng*** (1995) 185 CLR 83 at 95). This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in ***Benecke v National Australia Bank***, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.

90 As the Department submits, implied waiver turns on the inconsistency between the client's conduct and maintaining the privilege. It does not matter whether the client did not turn her mind to the question of whether her conduct would amount to a waiver of privilege: ***Mann v Carnell*** at [28]-[29].

91 The Department says two relevant propositions arise from the consideration by Chaney J of the application of the law regarding implied waiver in ***Australian Reliance Group Pty Ltd v Coverforce Insurance Brokers Victoria Pty Ltd [No 3]*** [2017] WASC 60 (**Coverforce**):

1. it is not sufficient to found a waiver of privilege that a pleading puts in issue the state of mind of the person claiming the privilege. What is necessary to found a waiver is conduct that directly or indirectly puts the content of the privileged communications in issue; and
2. it may be sufficient that the client is making assertions about their state of mind, in circumstances where there were confidential communications likely to have affected that state of mind.

92 While accepting the correctness of proposition 1., I consider that proposition 2. is better understood in the fuller context of the citation of Hodgson JA in ***Council of the New South Wales Bar Association v Archer*** [2008] NSWCA 164 [48] referred to by Chaney J in ***Coverforce*** at [26]. Specifically I refer to what Hodgson JA called the 'relevant unfairness'. His Honour observed:

> It is not enough to bring about a waiver of client legal privilege that the client is bringing proceedings in which the content of the privileged communications could, as a reasonable possibility, be relevant and of assistance to the other party. For the client to do this is not inconsistent with the maintenance of the privilege, and does not give rise to unfairness of the type in question. What would involve inconsistency and relevant unfairness is the making of express or implied assertions about the content

> of the privileged communications, while at the same time seeking to maintain the privilege. In this respect, it may be sufficient that the client is making assertions about the client's state of mind, in circumstances where there were confidential communications likely to have affected that state of mind.

93 The inclusion of the relevant element of unfairness lends a different character to proposition 2. above, including as it was applied in ***Coverforce***.

94 The requisite unfairness is picked up later in the Department's submissions which draw attention to the reasoning of the Full Court of the Federal Court in ***Commissioner of Taxation v Rio Tinto Ltd*** [2006] FCAFC 86; (2006) 151 FCR 341 (**Rio Tinto**) at [61]:

> Both before and after *Mann*, the governing principle required a fact-based inquiry as to whether, in effect, the privilege holder had directly or indirectly put the contents of an otherwise privileged communication in issue in litigation, either in making a claim or by way of defence. In *DSE* at [58], Allsop J put the matter somewhat more descriptively, saying waiver arises when:
>
> > the party entitled to the privilege makes an assertion (express or implied), or brings a case, which is either about the contents of the *confidential communication* or which necessarily lays open the confidential communication to scrutiny and, by such conduct, an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication. (original emphasis)

95 The Department says that ***Gough & Gilmour Holdings Pty Ltd v Caterpillar of Australia Limited (No 1)*** (2001) 106 IR 239 (**Gough**) is a useful illustration of the principles from ***Rio Tinto*** and I will return to that later in my reasons.

96 With respect to fairness in connection with express or implied assertions about the content of privileged communications I also note the observations, also cited by Flick J in ***BrisConnections Finance Pty Ltd (Receivers and Managers appointed) v Arup Pty Ltd*** [2016] FCA 438, of Gyles J (with whom Tamberlin J agreed) in ***Bennett v Chief Executive Officer of the Australian Customs Service*** [2004] FCAFC 237, (2004) 140 FCR 101 at [68] where, referring to the decision in ***Mann v Carnell*** his Honour concludes:

> The test looks to inconsistency between the disclosure that has been made by the client on the one hand and the purpose of the confidentiality that underpins legal professional privilege on the other. It is not a matter simply of applying general notions of fairness as assessed by the individual judge. The authorities to which I have referred show that it is well established that for a client to deploy the substance or effect of legal advice for forensic or commercial purposes is inconsistent with the maintenance of the confidentiality that attracts legal professional privilege.

97 The considerations of fairness in that context are an element in leading cases addressing waiver of privilege including ***Gough*** (see [47] – [49]) in which Bowland J adopts the approach of the majority in ***Telstra Corporation Ltd v BT Australasia Pty Ltd*** (1998) 85 FCR 152 (**Telstra**), a case with which the Full Court agreed in ***Perpetual Trustees (WA) Ltd v Equuscorp Pty Ltd*** [1999] FCA 925 (**Perpetual Trustees**), as follows:

> Where… a party pleads that he or she took certain action '*in reliance on*' a particular representation made by another, he or she opens up as an element of his or her cause of action, the issue of his or her state of mind at the time that he or she undertook such action. The court will be required to determine what was the factor, or what were the factors, which influenced the mind of the party so as to induce him or her to act in that way. That is, the party puts in issue in the proceeding a matter which cannot fairly be assessed without examination of relevant legal advice, if any, received by that party. In such circumstances, the party, by putting in contest the issue of his or her reliance, is to be taken as having consented to the use of the relevant privileged material, or to put it another way, to

have waived reliance on the privilege which such material would otherwise attract. (original emphasis) [46]

98 The authorities relied upon by the Department are helpful in setting out the relevant principles, however, I consider that the circumstances in this matter are distinguishable from cases such as ***Coverforce*** and ***Gough***. I note the observation of the High Court in ***Goldberg v Ng*** [1995] HCA 39; (1995) 185 CLR 83 (at 95): 'The circumstances in which a waiver of legal professional privilege will be imputed by operation of the law cannot be precisely defined in advance.'

Application to the evidence

99 The Department submitted at the hearing about jurisdiction on 16 January 2020 (**Jurisdiction Hearing**) that it is the Department's conduct that the Commission needs to consider. The learned Commissioner agreed. In my view the learned Commissioner was correct to find that where an employee claims constructive dismissal, it is that person's state of mind, insofar as it was created or influenced by the former employer, that is relevant.

100 Contrary to the Department's submissions, that finding does not mean that a claim for unfair dismissal, based on constructive dismissal, would be successful where the employer's conduct was, objectively speaking, sufficient to have forced a person to resign, regardless of whether as a matter of fact the employer's conduct did 'force' the person to resign. Nothing in his reasons for decision suggests that was the learned Commissioner's view. It is clear from his reasons for decision that the Commissioner considered that he would need to examine whether the Department's conduct in fact did 'force' Ms Colomb to resign.

101 Commissioner Matthews did not conclude that Ms Colomb did not rely on advice. At most he said she did not say that she relied on advice. After the following exchange with the Commissioner, the Department's representative withdrew his submission that Ms Colomb's decision to resign was made with the benefit of advice:

> **CARROLL, MR:** And importantly, this included a term of the settlement that she voluntarily resigned from her employment. And that is clause 3.1, paragraph C of the agreement. Of course, if this Commission were to find that Ms Colomb did not voluntarily resign, she would not have complied with the terms of the settlement. Ms Colomb was represented by a legal practitioner for the conclusion of the settlement negotiations. Her decision, therefore, was made with the benefit of legal advice.
> **MATTHEWS C:** She denied that. Whether you like it or not, the only evidence I have is Ms Colomb said, "I wouldn't call it advice".
>
> **CARROLL, MR:** Yes, sorry. I do withdraw that. She was represented by legal practitioner when the settlement negotiations were concluded.
>
> **MATTHEWS C:** You can't put it any higher than she had a lawyer.
>
> **CARROLL, MR:** She had a lawyer, yes, sorry.
>
> **MATTHEWS C:** She doesn't seem to have – so far as her uncontroverted evidence go - - -
>
> **CARROLL, MR:** Yes.
>
> **MATTHEWS C:** - - - seem to have got much from the lawyer
>
> **CARROLL, MR:** Yes.

> **MATTHEWS C:** - - - as far as she's concerned, in terms of guidance.
>
> **CARROLL, MR:** I accept that based on the evidence. And as a side note, before I conclude my submissions, of course, if Ms Colomb has an issue with that, her claims lie somewhere else against someone else.

102 The Department's representative agreed that at most Ms Colomb had a lawyer when settlement concluded and she did not seem to 'have got much from the lawyer … in terms of guidance.'

103 In this case the Department contends that by oral evidence given by Ms Colomb at the Jurisdiction Hearing, Ms Colomb put her state of mind in issue in the proceedings. Respectfully, somewhat differently to the way set out in [43] of the majority's reasons above, the Department characterised that 'state of mind' as raising the question as to why Ms Colomb accepted the offer to settle: 'Was it because her will was overborne, and therefore she was not acting voluntarily, or was it a consensual, and mutual agreement?'

104 The Department does not contend that a waiver arises merely by claiming constructive dismissal, rather it contends in this matter that evidence was given in pursuit of that claim and it is that evidence which constitutes conduct inconsistent with the maintenance of privilege.

105 Ms Colomb was not represented at that hearing. I accept that does not prevent a waiver arising and that a waiver could arise unintentionally, per ***Mann v Carnell*** [29].

106 Specifically, at [52] of its written submissions, the Department relies on the following particular statements given in evidence by Ms Colomb to have put her state of mind, and reasons for her state of mind, in issue such that she has deployed or 'laid open to scrutiny' privileged communications or advice.

107 The first is a reference by Ms Colomb, in an uncertain way, to some obligation in or about May 2019 to pay her previous solicitors, Slater and Gordon, $10,000 and that she felt that her 'no win, no fee' arrangement with Slater and Gordon placed pressure on her such that she was being 'forced to resign' [AB 47]. I cannot conclude that this exchange lays open to scrutiny any privileged communication of the kind set out in items 3 and 4 of the Summons given that part of the Summons relates to advice from different solicitors (Spyker Legal) about the WorkCover pre-arbitration conference on 19 August 2019 (**WorkCover Conference**) some three months later or about legal advice regarding whether Ms Colomb would owe to Spyker Legal (and not Slater and Gordon) any legal fees.

108 The Department next refers to Ms Colomb saying that she did not have a choice but to resign [AB 51.8]. This evidence does relate to the WorkCover Conference. Ms Colomb is responding to questions by the learned Commissioner to explain a sequence of events and Ms Colomb's understanding of her obligations, including to pay legal fees, and choices during the WorkCover Conference. The transcript of the examination of this topic continues for a number of pages including the following conclusions that the Department also contends were expressed by Ms Colomb: 'that her lawyer told her she was being forced to resign [AB52.5], she felt like she had no option but to settle [AB 55.4].'

109 On the evidence, I cannot find that Ms Colomb's statements put privileged communications in issue as identified in the Summons.

110 Ms Colomb repeatedly explained in her evidence that she had formed her own understanding, whether misguided or not, about what would trigger an obligation to pay fees to Slater and Gordon and Spyker Legal. Her evidence was that during the WorkCover Conference she was

shown by Spyker Legal their account for $5,500 and that she may also have been reminded about an amount that she may have owed Slater and Gordon, being $7,700. Critically, Ms Colomb's evidence is consistent that she had formed her own view about her obligation to pay both sets of lawyers even if she refused the Department's offer of settlement [AB 55.4]. Ms Colomb's evidence was that Mr Spyker did not provide her with advice or advise her on what would amount to a reasonable offer [AB 75.3 and AB 75.5].

111 Ms Colomb's observations that she felt did not have a choice but to resign, and she felt like she had no option but to settle were both clearly explained by Ms Colomb as arising from her belief, not informed by legal advice or having been advised, that the Department's offer to settle triggered an obligation for her to pay her solicitors in circumstances where she would not have had the means to do so without using settlement funds. This is consistent with the Department's own submission about Ms Colomb's reasons – see for example the Department's written submissions at [52(b)] referring to AB 53.5 and AB 75.5.

112 The Department includes as a matter that gives rise to the waiver that Ms Colomb contended that she did not have the funds to pay the legal fees unless she settled the claim. I cannot see how that statement about Ms Colomb's financial circumstances puts any privileged communication in issue.

113 Without forming any view about the reasonableness of her belief, Ms Colomb's evidence is consistent in explaining that she thought she had been 'tricked' by the Department into accruing legal costs in the arbitration process where she had not expected the Department to require her resignation as a non-negotiable component of the settlement of her workers' compensation claim. She assumed she would be liable to pay fees because of what she thought was in Slater and Gordon's fee agreement and her assumption that Mr Spyker's fee agreement would be similar. Her state of mind about being forced to resign centres entirely on her belief that the Department misrepresented the requirement to resign as part of settlement in order to 'trick her' to attend a pre-arbitration conference, thereby incurring legal fees she could only afford to pay by agreeing to settle. Ms Colomb does not rely on, or put in issue, any confidential communication from Mr Spyker to establish her state of mind.

114 A fair reading of the transcript shows that Ms Colomb's evidence was:

a. she agreed to attend the WorkCover Conference because the Department had said it would not require her resignation as part of the settlement of her workers' compensation claim;

b. Ms Colomb was required to be represented by a lawyer at the WorkCover Conference, something confirmed by WorkCover Arbitrator Sharp;

c. at the WorkCover Conference the Department said it would require her resignation as part of any settlement of her workers' compensation claim;

d. Ms Colomb incurred legal fees because of the Department's conduct;

e. based on Ms Colomb's reading of the Slater and Gordon fee agreement, her assumption that Mr Spyker's fee agreement was likely similar, and not on any legal advice, Ms Colomb understood that she would have to pay around $13,000 in legal fees, whether she accepted the Department's settlement offer or not, because:

    i. the Department made an offer of at least one dollar; or

ii. the Department's offer would be considered a reasonable offer and receiving such a settlement offer would be considered a 'win' for the purpose of Slater and Gordon and Mr Spyker's fee agreements.

115 To the extent that the Department argues that Ms Colomb saying that 'her lawyer told her she was being forced to resign' [AB 52.5] puts in issue legal advice or communications, I do not agree. Rather, it is clear from the transcript, and the Department's own submissions, that her resignation was required by the Department as part of its offer of settlement. Ms Colomb's statement is only evidence of Mr Spyker informing Ms Colomb of what the Department's position and settlement offer was. Specifically, Ms Colomb's evidence is that in response to saying she did not want to resign her lawyer told her, 'Well, you have to, there's – they've – you've heard what they've just said, they force you to resign.'

116 The Department also relies upon a later part of the transcript where Ms Colomb is explaining why the Commission should look past the deed she signed recording the settlement reached during the WorkCover Conference – namely she argues she was forced into a situation where her 'employer's actions denied [her her] free will', and it was 'not a voluntary resignation'. Again, here Ms Colomb contends her belief that she was tricked into accruing legal costs and her understanding, uninformed by any legal advice, that those costs would have to be paid because the offer to settle was made. In doing so she has not put any legal advice in issue.

117 When Ms Colomb said 'she felt like she had no other option but to settle' [AB 55.4], it is clear from the context of her evidence that it was because of her understanding of how the costs agreement works, which she said 'is why [she] settled.' Reference to her being denied her free will was Ms Colomb's evidence that she was forced into a situation where her 'employer's actions had denied [her her] free will.' [AB 57.2] The employer's actions are those set out in [114] of my reasons.

118 When Ms Colomb said 'I just signed because my lawyer said I had to', she was speaking about an event that occurred some weeks after the WorkCover Conference, when she signed a document confirming that she resigned after the WorkCover Conference and had her lawyer change the wording of the resignation document from 'I wish to resign' to 'I hereby resign'.

119 The Department says Ms Colomb divulged the content of privileged communications as to her state of mind when she was asked what would happen to Mr Spyker's invoice for $5,500 if she had refused to settle, because she replied 'he may well have said that settlement was a win.' I disagree. Ms Colomb was merely speculating, as she was asked to, about what Mr Spyker would have done if she had behaved other than she did, against the background of her rather unclear impression that Mr Spyker's costs agreement would be like Slater and Gordon's, and that Slater and Gordon's costs agreement 'probably' said refusing a settlement offer was still a win for costs purposes. Ms Colomb speculating about what Mr Spyker may have said about something that did not happen does not amount to evidence about, deploying or putting in issue legal advice. It cannot be said that Ms Colomb's answer divulged the content or laid open to scrutiny privileged communications.

120 The essential conclusion from an examination of the statements that the Department relies upon is that the reasons *why* Ms Colomb accepted the offer to settle, being her relevant state of mind, do not require the revelation, or laying open to scrutiny, any privileged communication or advice. To adopt a similar approach to the ultimate reasoning of Bowland J in ***Gough*** (see [48]), the question is whether it would be fair to the Department to allow Ms Colomb to maintain privilege over, in summary, any document touching upon what occurred at the WorkCover Conference or

any advice from Spyker Legal about the Department's offer to settle including whether Ms Colomb would owe Spyker Legal fees (items 3 and 4 of the Summons).

121 That question arises in circumstances which are not similar to those in ***Telstra***, ***Perpetual Trustees*** or ***Gough*** where the state of mind put in issue by a party was an understanding or belief arising from alleged representations by another party. And, in the circumstances of ***Gough*** at least, that case involved an attempt to rely on a representation inconsistent with an express commercial agreement entered into by that same party. Rather, the state of mind in this case arises, the Department submits, because Ms Colomb formed her own view that she had to pay legal fees and she did not have the funds to do so without accepting the settlement offer. I would add that Ms Colomb considered that she had been 'tricked' into incurring at least some of those legal fees.

122 The Department points to the application of the relevant principles (discussed in [91] – [93] of my reasons) to the case in ***Coverforce***, where at [28] Chaney J held:

> To assert a state of mind as to the very matters upon which legal advice was being taken, then to decline to reveal that legal advice is, in my view, to act inconsistently with the maintenance of the privilege. The plea indirectly put the contents of the otherwise privileged communication in issue. That is so notwithstanding that no specific reference to the legal advice was contained in the pleadings.

123 The analysis of the principles in ***Coverforce*** applied to the facts of that case. In particular, that case involved:

a. a pleaded defence that each of the defendants had a bona fide belief about the operation of provisions of a shareholder agreement in a dispute about the transfer of shares and that their state of mind as to those issues was reasonable and held in good faith by each defendant; and

b. evidence given about the scope of work by lawyers in advising particular parties and disclosures between parties about some aspects of those lawyers' work.

124 Leading to the application of the principles in ***Coverforce***, highlighted by the Department, Chaney J concluded at [28]: 'That [state of mind] was a central question upon which Minter Ellison must have provided advice having regard to the nature of the retainer as explained by [the defendants]' and '[the defendants] were guided by legal advice obtained by Coverforce.'

125 In ***Coverforce***, the state of mind put in issue and its inconsistency with, and unfairness of, maintaining privilege in communications on that subject is clear.

126 The facts in this case are quite different and do not support the same conclusion as in ***Coverforce***. This case did not proceed on pleadings and the placing in issue of Ms Colomb's state of mind arises from evidence given by an unrepresented party who does not in her evidence describe the nature of her retainer or scope of advice given, nor does she say or imply that any advice affected her state of mind. The role of Ms Colomb's lawyer cannot be put any higher than that she had a lawyer with her at the WorkCover Conference as required by WorkCover. Unlike ***Coverforce***, in this case there is no basis to conclude that Ms Colomb relevantly received or was guided by legal advice. The inference drawn by Chaney J in ***Coverforce*** cannot be drawn here. There is no conduct that directly or indirectly put the contents of the privileged communication sought in issue.

127 Ms Colomb's evidence indicates her belief about a financial obligation, namely, to pay the bills of two different law firms, an obligation she thought would arise if she did not accept an offer made in the WorkCover Conference.

128 On the evidence, Ms Colomb's belief about her obligation to pay around $13,000 in legal fees was not the result of anything Mr Spyker said to her. Rather, it was the result of her reading of Slater and Gordon's fee agreement and her assumption that Mr Spyker's fee agreement said broadly the same thing.

129 None of Ms Colomb's evidence or submissions disclosed or deployed any confidential communications in relation to any advice she received from Mr Spyker.

130 Ms Colomb did not say that her lawyer told her the settlement offer was reasonable, nor that he said that if she did not accept a reasonable offer she would be liable for the fees incurred.

131 In fact Ms Colomb's evidence was that Mr Spyker 'did not give advice per se'. She denied her lawyer 'discussed with [her] his professional opinion about the reasonableness of the offer being made.' Rather, Ms Colomb 'assumed it would be classified a reasonable offer.'

132 As set out in ***Gough*** at [48], what must be balanced against the Department's submission is the 'high status of professional privilege and the careful protection which the law affords it'. In circumstances where Ms Colomb has volunteered to provide to the Department, in summary, any fee agreement with Spyker Legal and any correspondence from Slater and Gordon to Ms Colomb or Spyker Legal in relation to fees owing to Slater and Gordon (items 1 and 2 of the Summons), I do not consider that it would be unfair to the Department to deny access to items 3 and 4 of the Summons. The Department does not explain how any such privileged material is needed in order for the fair resolution of this matter. The reasons offered by Ms Colomb as to why she held the state of mind argued by the Department are either consistent with usual retainer agreements for solicitors, and the substance of those agreements will be available to the Department, and do not require access to any further privileged advice in order for the Department to respond or, as outlined above, Ms Colomb's contention that she did not have funds to pay legal fees which, if contested, can be answered without access to privileged material.

133 Ms Colomb has not put the contents of an otherwise privileged communication in issue. She has not made an assertion or brought a case which is about the contents of any confidential communication or which necessarily lays open to scrutiny any confidential communication. Ms Colomb's conduct has not been inconsistent with the maintenance of confidentiality. Even if I am wrong about that, I do not consider that it would be unfair to allow Ms Colomb's claim to proceed without disclosing the confidential communications in items 3 and 4 of the Summons. The circumstances of this matter do not give rise to a waiver of privilege.

134 I would not uphold ground one.

Ground two

135 I do not consider the learned Commissioner made an error of fact when deciding that item 2 of the Summons fell away.

136 Ms Colomb gave evidence at the Jurisdiction Hearing in January:

> **MATTHEWS C:** You wouldn't have had to pay Slater and Gordon's bill, we know that, because Slater and Gordon said you wouldn't have to pay that bill unless it's settled. And did you have any understanding about the circumstances in - or what the implications would be, for Mr Spyker's bill, if you'd simply got up and walked out?---I would - I - I was under the impression that I would have to pay all 13,200 if I got up and walked out, regardless.

Okay. And tell me how you came to that impression?---Because the bills were both given to me, at the time.

Okay?---And - - -

Do you have them?---I - - -

Do you have what Mr Spyker - well, you say given, it might have been he just showed, I don't know what happened?---No.

Do you have them?---I went through my - I actually don't have the bills but I do have a trust account statement.

But the things that you were - - -?---A reference, a bill number, I went back through, he hasn't given me a bill.

Just on that day, you say that Mr Spyker produced, that was the word that you used, produced, pulled out and invoice and produced, did he give you copies of those to take away?---No.

Okay. Did he keep them himself? Did he retain them?---Yes.

137 Then months later in April at the hearing about the Summons (**Summons Hearing**) this was said:

SPYKER, Mr: But this whole question could avoid me completely, if they were just asked directly from Ms Colomb. And she has everything that I've given to her, in terms of cost agreement, written advice. Then there's correspondence from Slater and Gordon to Ms Colomb. Why is it being asked from me under point 2?

MATTHEWS C: (Indistinct) as in your hands, I think? But Ms Colomb's made her position pretty clear, she's not waiving privilege, hence coming to you?

CARROLL, MR: If I can talk to that point, Commissioner, as far as why it was issued to Spyker Legal? The Commission might recall that there was some significant question as to whether or not items 1 and 2 were within Ms Colomb's possession at the 16 January hearing. She certainly said she didn't have any document falling within item 2 or that particular document, as in the particular bill from Slater and Gordon.

It was unclear, from my recollection, as to whether or not she had a copy of the cost agreement with Spyker Legal. Of course, item 3 wouldn't be something that is in Ms Colomb's possession. Item 4 I can accept, if written advice was given, would be something that was in - would be within Ms Colomb's possession and is something that could probably be sought by discovery. But of course, the Commission would be aware there's a discovery application before the Commission as well.

COLOMB, MS: Can I speak on - - -

CARROLL, MR: Not today.

SPYKER, MR: Well, the - I mean, if I might just say - - -

MATTHEWS C: (Indistinct) - - -

COLOMB, MS: - - - (indistinct) - - -

MATTHEWS C: - - - before you go on, Ms Colomb hasn't been greedy in asking for much time, Mr Spyker, so I'll let her say something if she'd like to.

Yes, Ms Colomb?

COLOMB, MS: I didn't have the documents with me at the hearing on 16 January, but I had them - I know I had them on my email and I said I would bring them to the substantive hearing if it was to go through.

MATTHEWS C: Well, Mr Carroll - - -

COLOMB, MS: (Indistinct) - - -

MATTHEWS C: - - - wants them now, so you don't have any problems with providing the costs agreement to Mr Carroll?

COLOMB, MS: No, I - I - it was already stated at the jurisdiction hearing that I would supply them at the substantive hearing if it was required, I just didn't - didn't have them - - -

MATTHEWS C: If Mr - - -

COLOMB, MS: - - - with me.

MATTHEWS C: - - - Carroll wants them - I suppose, wants to see them before the substantive hearing.

Is that right, Mr Carroll?

CARROLL, MR: Yes, that's correct.

MATTHEWS C: Right. Well - - -

COLOMB, MS: Yes.

138 Item 1 is one document. At the summons hearing Ms Colomb agreed to provide documents, not a document. From the transcript it is clear that the Commissioner, Mr Spyker, the Department's representative and Ms Colomb were discussing the document in item 1 and the documents in item 2 of the Summons, and not just the document in item 1 of the Summons.

139 I do not consider that what Ms Colomb said at the summons hearing contradicted her evidence under oath, at least not in such a way as to mean that the Commissioner fell into error.

140 Ms Colomb's submission in April at the Summons Hearing was not inconsistent with the evidence she gave three months earlier at the Jurisdiction Hearing, where Ms Colomb gave evidence that she did not have the documents. As she explained at the Summons Hearing, she meant that she 'didn't have the documents at the hearing in January.' By the time of the Summons Hearing in April Ms Colomb had the documents. When Ms Colomb agreed to provide 'the documents', she was agreeing to provide the documents in items 1 and 2 of the Summons.

141 There was no error of fact. I would not uphold ground two.

142 For these reasons, I would dismiss the appeal.

CONCLUSION

143 For the reasons given by Scott CC and Kenner SC, the appeal is upheld.