

**UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00058

CORAM : COMMISSIONER D J MATTHEWS

HEARD : THURSDAY, 16 JANUARY 2020

DELIVERED : THURSDAY, 30 JANUARY 2020

FILE NO. : U 145 OF 2019

BETWEEN : SARAH COLOMB
Applicant

AND

DEPARTMENT OF EDUCATION WESTERN AUSTRALIA
Respondent

CatchWords : Industrial law (WA) - Unfair dismissal application - Respondent raises jurisdictional objection on basis that applicant resigned - Applicant claims constructive dismissal - Application filed out of time - Unable to decide questions - Jurisdiction and matter to accept out of time to be determined at substantive hearing

Legislation : *Industrial Relations Act 1979* s29(3)
Workers' Compensation and Injury Management Act 1981

Result : No decisions made; Matter to proceed to substantive hearing

Representation:

Applicant : In person
Respondent : Mr J Carroll (of counsel)

Reasons for Decision

- 1 Where, as here, the applicant in an unfair dismissal application resigned and alleges constructive dismissal, the circumstances may be such that the jurisdictional question, that is whether or not there was a dismissal, may conveniently be the subject of a discrete preliminary hearing.
- 2 On review of the filed documents, this appeared to be such a case.
- 3 By her “Unfair Dismissal Application”, Ms Colomb accepted that she had resigned as part of the settlement of a claim under the *Workers’ Compensation and Injury Management Act 1981* but said she was, in fact, “forced into resigning” in such a way as to make the ending of her employment a “constructive dismissal”.
- 4 By the “Employer’s Response to Unfair Dismissal Application”, the respondent said that the resignation was a “voluntary” one effected as part of the settlement of a workers’ compensation claim.
- 5 The respondent wrote that Ms Colomb had a lawyer and that, with the benefit of legal advice, she made a real choice to resign.
- 6 This matter was listed so that the issue of jurisdiction could be explored. If there is no possibility that there was a dismissal, it would be inappropriate to hear and determine the matter at a full hearing. However, if it was to emerge that there might have been a dismissal, or it could simply not be said one way or the other, the matter will have to be heard and determined at the substantive hearing.
- 7 Having heard evidence from Ms Colomb, I find myself unable to decide whether there was a dismissal in this case or not.
- 8 It is true that Ms Colomb resigned as part of a deal by which she received a significant sum of money and that the deal was reached at a time when she had a lawyer acting for her.
- 9 However, there are some unusual aspects to the matter about which Ms Colomb gave evidence that leave me in a position where I need to hear more before addressing the question of jurisdiction.
- 10 Ms Colomb gave evidence, among other things, that the following occurred:
 - (1) she initially engaged a law firm to represent her in relation to her claim under the *Workers’ Compensation and Injury Management Act 1981*;
 - (2) the law firm asked Ms Colomb if she would like to enter into settlement negotiations, which might result in her resigning to get a deal done, or, if not, to pay \$10,000 into its trust account to pay for work toward representation of her at an arbitration hearing;
 - (3) she rejected both options, making it clear to her lawyer that she would not accept any offer that included resignation and that she could not afford to pay \$10,000;
 - (4) she told the law firm she would represent herself;
 - (5) the respondent’s agents subsequently informed her that it would enter into negotiations to settle the *Workers’ Compensation and Injury Management Act 1981* claim on a basis that would not involve her resigning, but only if she engaged a lawyer to assist her in those negotiations;

- (6) based on the assurance that resignation was off the table, she engaged a lawyer and attended a settlement conference;
 - (7) just before the conference commenced, the respondent's lawyer informed her lawyer that he had received new instructions and that her resignation would be a condition of any settlement;
 - (8) she believed that if the respondent then made any reasonable offer she would have to pay the bill of the law firm she had originally engaged and her then lawyer (both of whom had been engaged on a 'no win, no fee' basis);
 - (9) she felt trapped in that she thought if she walked out of the conference at that stage, but did so in circumstances where a "reasonable offer" ended up being made, even one requiring her resignation, she would have to pay the legal bills and she could not afford to do so;
 - (10) her then lawyer did not give her full advice about what was happening;
 - (11) accordingly, she accepted an offer which maximised her financial return even though it came at the cost of her employment, which she did not want to end.
- 11 Ms Colomb's evidence was not shaken by cross-examination, although a new aspect was introduced being some concurrent negotiations being undertaken by the State School Teachers' Union on Ms Colomb's behalf.
- 12 Taking the evidence at its highest, it gives me pause for thought about the actions of the respondent and whether those actions may have, in a real sense, led to the end of Ms Colomb's employment.
- 13 I cannot close my mind, at this time, to the possibility that the respondent, by its conduct, orchestrated a situation in which Ms Colomb had no real choice but to resign. The issue of the concurrent negotiations being undertaken by the State School Teachers' Union and Ms Colomb's evidence about them did nothing to clarify matters one way or the other.
- 14 I do not decide the issue of jurisdiction at this time. I will decide that as part of the substantive hearing.
- 15 I note also that the application was filed out of time. The respondent did not wish to be heard at the preliminary hearing on whether or not I should act under section 29(3) *Industrial Relations Act 1979*.
- 16 I have not yet heard enough to make up my mind in relation to the section 29(3) *Industrial Relations Act* question and I will decide it also as part of the substantive hearing.