

UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00218

CORAM : COMMISSIONER D J MATTHEWS

HEARD : THURSDAY, 16 APRIL 2020

DELIVERED : FRIDAY, 17 APRIL 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 - Summons to produce documents objected to - Documents subject to legal professional privilege - Order for production of some documents that are not subject to legal professional privilege made

Legislation : *Industrial Relations Act 1979* s 33(2)

Result : Order issued

Representation:

Applicant : In person

Respondent : Mr J Carroll (of counsel) and with him Ms S Bhar

Summons Recipient Applicant : Mr W Spyker (of counsel)

Reasons for Decision

(Given extemporaneously at the conclusion of proceedings – as edited by Commissioner Matthews)

- 1 The respondent seeks by way of summons, a summons directed to Spyker Legal Pty Ltd, four sets of documents:
 - (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 & Gordon to Ms Colomb or Spyker Legal relating to fees owed by Ms Colomb to Slater & Gordon in return to the Claim, and in what circumstances any such fees would fall due;
 - (3) what occurred during the conciliation conference held on Spyker file note from 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.
- 2 The respondent filed the summons after a preliminary hearing on the question of whether the Western Australian Industrial Relations Commission has jurisdiction to hear and determine Ms Colomb's unfair dismissal claim held on 16 January 2020. The preliminary hearing was held because it was clear on the papers that Ms Colomb had resigned her employment as part of the settlement of a workers' compensation claim.
- 3 Ms Colomb claimed she had been 'constructively dismissed'.
- 4 The hearing did not resolve the matter of whether Ms Colomb had been 'dismissed' as that term is used in the Industrial Relations Act 1979.
- 5 Spyker Legal Pty Ltd resists production of the documents on the basis that each and all are the subject of legal professional privilege. That privilege is, of course, in favour of Ms Colomb and Ms Colomb makes it clear that she wishes the privilege maintained.
- 6 The recipient of the summons thus acts, with respect, entirely responsibly and competently in resisting production on the basis it does.
- 7 The respondent argues that Ms Colomb, in the furtherance of her case, has deployed each of the documents sought and, accordingly, should be taken to have waived legal professional privilege.
- 8 Ms Colomb says she was constructively dismissed because of certain circumstances relating to a conciliation conference before WorkCover WA on 19 August 2019 at which, as part of the compromise of her workers' compensation claim, she agreed to resign her employment with the respondent.
- 9 The respondent seeks the documents outlined because she says they will show that the circumstances were not as Ms Colomb alleges. The respondent says that Ms Colomb has made a case that asks that I accept certain assertions and that those assertions may be undone by production of the documents. The respondent says it would be unfair to allow Ms Colomb to assert privilege over the documents where that is the case.

- 10 In relation to (1) and (2) Ms Colomb says that she has possession of the relevant documents and will discover them to the respondent. The summons directed to Spyker Legal Pty Ltd accordingly falls away.
- 11 In relation to (3), I find that what happened at the conciliation conference before WorkCover WA may be relevant to determination of this matter. Insofar as what happened was recorded by Ms Colomb's legal representatives, those documents are relevant and amenable to production under the summons. However, I do not consider that any note from the conference that is subject to legal professional privilege should be provided. For reasons which will follow, I find that legal professional privilege has not been relevantly waived in this case.
- 12 In relation to the documents at (4), the respondent seeks documents that clearly would be privileged and again, for reasons which will follow, I do not consider that legal professional privilege has been waived and so there will be no order in relation to these documents.
- 13 Ms Colomb's state of mind at the conference is relevant to her unfair dismissal claim as she says that her actions at the conference were unfairly induced by the respondent and that she did not freely bring her employment to an end.
- 14 In a case where someone's state of mind is relevant, it may be that the assertion of a certain state of mind directly or impliedly puts in issue a privileged communication. If someone says they relevantly believed "A" based on legal advice they received, it follows that that person has opened themselves up to a powerful argument that they may not resist production of the advice on the basis that it is privileged.
- 15 The respondent says that the fact that Ms Colomb had legal representation at the conference is relevant to her assertions going to the issue of constructive dismissal insofar as the fact she received legal advice must be seen as touching upon her state of mind.
- 16 However, in relation to this 'fact' Ms Colomb gave evidence on 16 January 2020 to effect that while she had a lawyer at the conference, she was not provided by him with "advice per se" about whether or not "to accept the offer put by the Department" (ts 36, hearing 16 January 2020).
- 17 It is by that evidence that the respondent says Ms Colomb tries to advance a case that is inconsistent with maintenance of legal professional privilege. The respondent says that it would be unfair to allow that assertion to be maintained without her being able to examine documents over which privilege is claimed which will, or may, reveal that Ms Colomb was in fact given legal advice.
- 18 While one can easily appreciate that there is force in the respondent's submission, on balance I do not consider that the factual background here is one where Ms Colomb impliedly waived privilege over whatever advice she was given. I do not consider that there is inconsistency between her case and the assertion of privilege and I do not consider it would be unfair to the respondent to meet Ms Colomb's case without the documents at (4) being produced.
- 19 Saying that one has not received "advice per se" cannot amount to waiver of privilege in relation to something, either expressly or impliedly.
- 20 In any event, and far more powerfully in my view, Ms Colomb's state of mind, as that state of mind was affected by advice or a lack of advice from her lawyers, 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.

- 21 In my opinion, what is relevant, where constructive dismissal is alleged, is Ms Colomb's state of mind insofar as that state of mind was created or influenced by the respondent, not her state of mind insofar as it was created or influenced by her own advisers.
- 22 Ultimate findings in relation to whether Ms Colomb was constructively dismissed may have regard to the fact she had competent counsel available to her, but Ms Colomb says nothing relevant to determination of the matter by saying she did not get "advice per se" from her lawyer. She has therefore not, either expressly or impliedly, furthered her case by reliance upon something to which privilege attaches.
- 23 For the sake of clarity, I note that this is the case even if Ms Colomb seriously seeks to argue that she received no advice at all from Mr Spyker and all the respondent seeks to show is that she did, in fact, receive advice.
- 24 What is important is whether anything Ms Colomb has said is inconsistent with a claim of privilege. That is, looking at Ms Colomb's case, whether it would be unfair for what Ms Colomb has said to stand, or to be relied upon further by her, without the respondent having an opportunity of inspecting related privileged documents.
- 25 In my view, 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.
- 26 Ms Colomb admits that she had legal representation. That will be relevant. To my mind what her agents did or did not do is not material.
- 27 There will be an order that the recipient of the of the summons provide documents in item (3) that are not subject to legal professional privilege.