

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

**CITATION** : 2020 WAIRC 00057

**CORAM** : COMMISSIONER D J MATTHEWS

**HEARD** : THURSDAY, 16 JANUARY 2020

**DELIVERED** : THURSDAY, 30 JANUARY 2020

**FILE NO.** : U 150 OF 2019

**BETWEEN** : NICOLA NATHAN  
Applicant

AND

THE STATE OF WESTERN AUSTRALIA DEPARTMENT OF  
EDUCATION  
Respondent

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**CatchWords** : Industrial law (WA) - Unfair dismissal application - Respondent raises jurisdictional objection on basis that applicant resigned - Applicant claims constructive dismissal - Taking applicant's case at its highest there was no dismissal - No jurisdiction for application to be determined by Western Australian Industrial Relations Commission as there was no dismissal

**Legislation** : *Industrial Relations Act 1979* s23A(1)  
*Workers' Compensation and Injury Management Act 1981*

**Result** : Application dismissed

**Representation:**

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

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*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 In her “Unfair Dismissal Application”, Ms Nicola Nathan wrote that she lodged an application under the *Workers’ Compensation and Injury Management Act 1981* in early 2019 and that “since June 2019, the [respondent] has repeatedly offered a lump sum settlement of \$70,000 payment in exchange for my resignation”.
- 4 Ms Nathan wrote that, by October 2019 she was in very serious financial trouble and that, as a result of the conduct of the respondent’s agents, both while working and in relation to the claim under the *Workers’ Compensation and Injury Management Act 1981*, her “mental health, feelings of little self-worth have detrimentally worsened”.
- 5 Ms Nathan wrote that because of the above, the respondent “left me no other choice than to resign, circumstantially giving rise to constructive dismissal”.
- 6 In the “Employer Response to Unfair Dismissal Application”, the respondent wrote that Ms Nathan was not dismissed and that, rather, she voluntarily resigned as part of a settlement of her workers’ compensation claim. The respondent wrote that Ms Nathan was represented by an experienced “workers’ compensation legal practitioner” in those settlement negotiations.
- 7 The respondent wrote:

“In the circumstances, it is clear that the applicant had a choice whether or not to resign. She was offered a settlement which included the payment of a sum of money to her, in exchange for her resignation and the settlement of her workers’ compensation claim. She did not have to accept that offer, however, with the benefit of legal representation and advice, she accepted the offer. This was a real choice with the benefit of legal advice.”
- 8 A hearing on the matter of jurisdiction was held on 16 January 2020.
- 9 Ms Nathan gave evidence about problems at Clarkson Community High School which she said led to her putting in a claim under the *Workers’ Compensation and Injury Management Act 1981*. The problems centred on the alleged conduct of the school principal, Mr John Young, toward her. I do not need to decide where the truth lies in relation to Ms Nathan’s allegations against Mr Young.
- 10 Ms Nathan gave evidence that at the first conciliation conference in relation to her claim under the *Workers’ Compensation and Injury Management Act 1981*, she was represented by a lawyer allocated to her by the State School Teachers’ Union. Ms Nathan gave evidence she received an offer at the conference but rejected it. Ms Nathan also gave evidence that she broke ties with “the SSTU lawyer” and “sought legal advice from an independent lawyer” after the conference.
- 11 Ms Nathan went on to give evidence that eventually she accepted an offer of \$70,000 to compromise her claim under the *Workers’ Compensation and Injury Management Act 1981*, with a condition of settlement being she resign from her employment with the respondent.
- 12 She gave evidence that her reasons for accepting the offer were as follows:

“I received a foreclosure notice from Keystart Home Loans, my, um, mortgage lender at the end of September which frightened me very much. I have a teenage daughter and myself and built the house two years earlier on my own and I was frightened to lose that and because of the economy my house value had actually dropped so I couldn’t sell the property for the amount that I’d paid for it which really frightened me. And by getting that lump sum payout I’ve been able to extend my, you know, living accommodation.”

- 13 Ms Nathan gave evidence she received a draft letter of resignation from the respondent, but she refused to sign it and ended up signing a version she amended which she felt better served her interests.
- 14 Ms Nathan gave evidence she believed her problems could have been solved by the respondent if the respondent had transferred her to another school, but accepted she understood by signing the letter of resignation she was resigning from her employment with the respondent.
- 15 Ms Nathan, as a matter of common sense causation, resigned from her employment to achieve the payment to her of a sum of money in circumstances where her financial situation had become very bad.
- 16 Ms Nathan did not resign, as a matter of common sense causation, because of anything that happened to her at Clarkson Community High School. What happened at the school led to the claim under the *Workers’ Compensation and Injury Management Act*, but as a matter of common sense causation, it did not lead to her resignation. There were other factors at play by this stage. That is why I do not need to turn my mind to the allegations against Mr Young.
- 17 The question is whether the resignation, in the circumstances described by Ms Nathan, can possibly be said to be a constructive dismissal.
- 18 If it is possible it could be a constructive dismissal, I must allow the matter to proceed to a substantive hearing. However, if there cannot possibly be a constructive dismissal, taking Ms Nathan’s case at its highest, I must decline to hear and determine the matter on the basis that I have no jurisdiction to do so.
- 19 The legal meaning of “dismissal” in section 23A(1) *Industrial Relations Act 1979* is an act on the part of the employer which brings the employment to an end. A resignation may still be a dismissal if the employer has acted to leave the employee with no effective or real choice but to resign.
- 20 In this case, Ms Nathan does not seriously allege that she had no choice but to resign. She gave evidence that “I had two choices, to keep fighting in arbitration or take the lump sum with resignation”.
- 21 Ms Nathan gave evidence that to pursue the first option would have caused her serious financial difficulties. However, those difficulties did not deprive her of a choice and to the extent she felt they did, Ms Nathan has failed to make any case that raises even a suggestion that those difficulties were the fault of the respondent, or that the respondent “acted” to leave Ms Nathan with no real choice.
- 22 Ms Nathan had a choice. It may not have seemed like much of a choice at the time, but she clearly had one. To the extent her choices were limited, or one choice was better than another in all of the circumstances, this was not a result of actions of the respondent.
- 23 Evidence that Ms Nathan knew she had a choice, in the sense that her will was not overborne, is found in her not signing the draft letter of resignation until it was amended in what she considered to be her own best interests.

- 24 Clearly the amendment was in Ms Nathan's best interests and, accordingly, it is good evidence of presence of mind at a crucial time. Ms Nathan appears to have been thinking straight, if I can put it that way.
- 25 Ms Nathan's will was not overborne. She had a real choice and was aware she had a real choice. She may not now resile from that choice.
- 26 I find that there cannot possibly have been a dismissal in this matter and consequentially find that I do not have jurisdiction to hear and determine the appeal. It will be dismissed by order.