

PRACTICE NOTE No. 17A

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28 March 2024

INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

PRACTICE NOTE NO. 17A

Issued pursuant to s 185A of the *Industrial Relations Act 1996* and s 15 of the *Civil Procedure Act 2005*

APPLICATIONS PURSUANT TO SECTION 84 OF THE *INDUSTRIAL RELATIONS ACT 1996* (UNFAIR DISMISSALS)

1. The purpose of this Practice Note is to facilitate the resolution of unfair dismissal matters in a just, quick and cost-effective manner and to ensure that practitioners and others who appear before the Commission do all they can to facilitate such an outcome.
2. This Practice Note has effect from the date of issue, and amendments have effect from the date of re-issue.
3. **Allocation of Listing Date**

When an application under s 84 of the *Industrial Relations Act 1996* ('Act') is filed, the matter will be listed for conciliation by a Commissioner. As a general rule, the conciliation will be listed not more than 21 days after the application is filed.
4. **Conciliation**
 - a. Parties, legal practitioners, industrial agents and others who appear before the Commission should do all they can to facilitate the fair and prompt disposal of matters before the Commission.
 - b. In order to ensure there is a genuine opportunity to resolve matters at the conciliation, applicants are expected to attend the conciliation in person, and respondents, including those who are legally represented, must ensure that there is a person in attendance at the conciliation with the power to make decisions to enable the resolution of the matter.
 - c. A response in accordance with cl 4.5(2) of the *Industrial Relations Rules 2022* must be no more than 30 pages without leave of the Commission. Any request for leave must be made at least two working days prior to the date on which the response is due to be filed with the Commission and must contain reasons as to why the additional pages are required.
 - d. Parties and their representatives should:

- i. identify the real issues in dispute prior to the conciliation;
 - ii. establish parameters in which they are willing to resolve the matter at the conciliation. Such parameters do not need to be divulged nor maintained at the conciliation but will assist the Commission in assisting the parties to resolve the matter;
 - iii. make contact with the opposing party prior to the conciliation to attempt to narrow the issues in dispute and to explore the basis on which the matter might be resolved; and
 - iv. both before and during the conciliation, use their best endeavours to resolve the issues in dispute, including by ensuring the participation in the conciliation by individuals with authority to settle proceedings.
- e. Ordinarily there should be only one conciliation, however, a Commissioner may permit further conciliation conferences at their discretion.
 - f. If an applicant fails to appear at a conciliation conference and has not provided a clear and compelling reason for non-attendance, this may result in the matter being dismissed.

5. Preliminary Issues

- a. If a preliminary issue such as a jurisdictional challenge is raised at or before the conciliation, the Commissioner to whom the matter is allocated in order to undertake the conciliation will determine whether the issue will be heard as a threshold issue or will be dealt with after conciliation.
- b. If the Commissioner determines that the issue should be heard before conciliation, then the Commissioner may make appropriate directions for the arbitration of the issue and determine the question or issue in advance of any conciliation.
- c. In cases where the Commissioner conducts a conciliation before the hearing of the preliminary issue, and the conciliation fails, the Commissioner may make directions for the hearing of the preliminary issue.

6. Directions for Arbitration where No Preliminary Issue Raised

- a. When a conciliation is unsuccessful, the Commissioner will make directions for the arbitration of the matter. The Commissioner may make such directions as it considers appropriate for the just resolution of the issues between the parties. The Commission has issued "Usual Directions" which, in the ordinary course, will be made by the Commission. These can be found on the Commission's website.
- b. The Commissioner who conducted the conciliation will ascertain an estimate of the number of days required for arbitration. Arbitration date(s) will usually form part of the directions made by the Commissioner following the unsuccessful conciliation.
- c. To assist in the timely and efficient allocation of arbitration date(s), parties are encouraged to consider at an early stage whether they intend to exercise their rights under s 173 of the Act and, if so, to do so expeditiously.

7. **Further Conciliation**

- a. Parties are encouraged to continue their attempts to resolve matters once the matter is listed for arbitration and particularly prior to the time for compliance with directions in order to minimise the costs. Even after compliance with directions, further timely attempts by the parties to resolve matters are encouraged.
- b. To assist the parties in circumstances where such settlement attempts are positive but inconclusive, a further conciliation conference with the same Commissioner who conducted the first conciliation may be requested, preferably not less than seven days prior to the arbitration. A party may make such an application for a further conciliation conference only by consent of the other party and by writing to the Industrial Registrar.
- c. Nothing in this Practice Note prevents the Commission from undertaking further conciliation at the arbitration of the matter.
- d. Any further conciliation process does not excuse the parties from complying with directions made in the proceedings unless an order is made by the Commission to that effect.

8. **Compliance with Directions**

Parties **must** comply with any directions made by the Commission unless the Commission determines to vary the directions. An application to vary the directions must be made prior to the date for compliance. Such an application must be in writing and contain full supporting grounds and the other party's view of the request for variation.

9. **Adjournments**

- a. In accordance with the Commission's function to provide a forum for the resolution of unfair dismissal matters in a fair and prompt manner, as a general rule, an adjournment of the date that is allocated for conciliation will not be granted unless there are clear and compelling reasons for the adjournment to occur. Consent of the opposing parties does not guarantee an adjournment will be granted by the Commission, although it will be a factor taken into account in the determination of such application.
- b. The day (or days) in which the application will be dealt with by arbitration is definite. Any application for an adjournment of an unfair dismissal matter fixed for arbitration must be made in a timely way, following consultation with the other party, be in writing and contain full grounds including the other party's view of the request for adjournment. Applications will be considered and determined by the Commissioner allocated the arbitration of the unfair dismissal application and will be granted only on clear and compelling grounds, supported by evidence.
- c. In the event that a party fails to attend the arbitration, the matter may, in appropriate circumstances, be heard and determined in the absence of that party.

N J Constant
Chief Commissioner
28 March 2024