

## Senate Standing Committee on Education and Employment

### QUESTIONS ON NOTICE Supplementary Budget Estimates 2015 - 2016

**Agency - Fair Work Commission**

**Department of Employment Question No. EMSQ15-000452**

**Senator McKenzie provided in writing.**

#### **Question**

#### **FWC - Conciliation process – General Protections and Unfair Dismissal - advice**

Is there a requirement for conciliators to advise parties that they do not have reasonable prospects of success?

- a) If so, does this apply both unfair dismissals and general protection conciliations?
- b) Does that obligation apply to both commission members and staff?

#### **Answer**

##### *Unfair dismissals*

Administrative conciliation of unfair dismissal applications involves a model where conciliators play an activist and evaluative role in assisting the parties to resolve an unfair dismissal application, including reality testing a party's position against relevant case law or against a proposed remedy available under Part 3-2 of the *Fair Work Act 2009* (the Act).

Participation by parties in this process is voluntary and the conciliators do not have a determinative role. If a matter cannot be resolved during conciliation, Part 3-2 of the Act gives the Fair Work Commission (the Commission) powers to determine the matter and these powers and functions are conducted by Members of the Commission.

The administrative model follows a six step process:

- opening statement of conciliator
- opening statement of both parties
- identification and exploration of major issue(s)
- private session with conciliator
- negotiation; and
- agreement and/or close.

During private sessions, the conciliator speaks separately with each party to canvass issues that party would prefer not to explore in the joint session, reality test and explore options to resolve the matter. These sessions are confidential. In these sessions the conciliator explains issues that they may encounter during a determinative process, the risk of costs orders and options for resolution regarding prospects for both parties in relation to any objections and discuss any relevant sections of the Act and the case law.

##### *General protections*

The Commission has a more limited role under the Act in resolving disputes about general protections involving dismissal. This role is limited to assisting the parties to resolve the

dispute via mediation or conciliation, or by making a recommendation or expressing an opinion. If the Commission is satisfied that all reasonable attempts to resolve the dispute have been or are unlikely to be successful, then Act requires the Commission to issue a certificate to this effect under subsection 368(3).

A dispute can only be dealt with in the Commission by arbitration after the issuing of this certificate and with the consent of both parties.

Staff conciliators follow a similar model as explained for unfair dismissal applications, however, the model differs slightly given the limited nature of the Commission's powers to deal with disputes and the requirement to issue a certificate under subsection 368(3) of the Act.

The President of the Commission has delegated a limited part of the Commission's functions to specified staff conciliators to deal with disputes under section 368(1) of the Act but has not delegated the function of issuing the certificate under subsection 368(3). This function remains with Members of the Commission.

If a matter cannot be resolved by conciliation, and the staff Conciliator forms the view that the application has no reasonable prospects of success, the staff Conciliator informs the parties that this is the case and that this information will be included in a report to a Member. This is usually done at the commencement of the final joint session of the conference.

The President has issued Directions to conciliators pursuant to subsection 625(4) of the Act that requires the conciliator, in performing or exercising powers under this delegation to

- comply with the Staff Conciliators and General Protections Administrative Procedures Manual and
- after each conference concludes, submit a written report on the conference in the manner specified in the manual

Where a dispute is not resolved via staff conciliation, the written report is forwarded to a Member of the Commission who considers the further exercise of the Commission's powers and functions, including the issuing and content of a certificate under section 368(3) of the Act.