

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Supplementary Budget Estimates 2015 - 2016

Agency - Fair Work Commission

Department of Employment Question No. EMSQ15-000481

Senator McKenzie provided in writing.

Question

FWC - Delegations

In a presentation to the Australian Industry Group National PIR Group conference on 4 May 2015, President Ross stated that “staff conciliators conduct conferences under delegation – overseen by Deputy President Kovacic.”

1. Is the test under the Act for the issue of the certificate that, in the Commission’s view, “all reasonable attempts to resolve the dispute...have been, or are likely to be, unsuccessful”?

2. Is the purpose of this certificate under the Act that a complainant cannot take action in Court unless they have this certificate from the Commission?

3. What process applies where a staff conciliator does the conciliation – does a member of commission issue the certificate?

a) If the certificate is issued by a member of the Commission, how can they issue this certificate if they have not conducted the conciliation themselves?

b) If a certificate is issued by a staff member and not a member of the Commission, how many have been issued in this manner?

Answer

1. Section 365 of the *Fair Work Act 2009* (FW Act) provides for a person to apply to the Fair Work Commission (Commission or FWC) to deal with a dispute about a dismissal alleged to be in contravention of Part 3-1 of the FW Act (general protections dismissal dispute).

Section 368(3)(a) of the FW Act provides that:

If the FWC is satisfied that all reasonable attempts to resolve the [general protections dismissal] dispute (other than by arbitration) have been, or are likely to be, unsuccessful, then:

(a) the FWC must issue a certificate to that effect ...

2. Section 368(4) of the FW Act defines an application to court for orders in relation to a contravention of Part 3-1 of FW Act, as a “general protections court application”.

Section 370 of the FW Act provides that:

A person who is entitled to apply under s.365 for the FWC to deal with a [general protections dismissal] dispute must not make a general protections court application in relation to the dispute unless:

(a) both of the following apply:

- (i) the FWC has issued a certificate under paragraph 368(3)(a) in relation to the dispute;
 - (ii) the general protections court application is made within 14 days after the certificate is issued, or within such period as the court allows on an application made during or after those 14 days; or
 - (b) the general protections court application includes an application for an interim injunction.
3. Commission staff conciliators have been delegated powers to conduct conferences for general protections dismissal disputes, pursuant to FW Act paragraphs 625(1)(b) and 625(1)(c) (see further question on notice EMSQ15-000453). This delegation must be exercised in accordance with Directions issued by the President pursuant to FW Act s.625(4) (see further question on notice EMSQ15-000452).

Staff conciliators have no delegation to issue certificates under FW Act paragraph 368(3)(a). Such certificates are issued by Members of the Commission.

After attempting to resolve a general protections dismissal dispute through conciliation in a conference, the staff conciliator must produce a written report on the conference in a specified manner and form.

If the dispute is not resolved through staff conciliation, the conciliator's report must include, amongst other details:

- the sections of the FW Act relied on by the applicant during the conciliation;
- any jurisdictional objections raised by the respondent;
- matters that may be relevant to deciding whether or not all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful;
- the views of both the applicant and respondent as to whether or not all reasonable attempts to resolve the dispute (other than by arbitration) have been, or are likely to be, unsuccessful;
- confirmation that the applicant and respondent were informed that they could request a further conciliation conference, conducted by a Member of the Commission; and
- whether or not the applicant or the respondent requested a conciliation conference conducted by a Member of the Commission.

The unresolved dispute is then allocated a Member of the Commission, who considers the further exercise of the Commission's powers and functions, having regard to the conciliator's report. The Member may, for example, decide to attempt further dispute resolution by conducting another conference, or, if the Member is satisfied as to the requisite matter, the Member may decide to issue a certificate under FW Act paragraph 368(3)(a).