Conference paper

Where have all the cases gone? Voluntary resolution of unfair dismissal claims

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Introduction

In the financial year 2009–10, the first year of the operation of Fair Work Australia, there were 11,116 applications for a remedy for alleged unfair dismissal made to Fair Work Australia under the Fair Work Act 2009 (Cth) (the Fair Work Act). Some 9,369 of these applications were finalised by Fair Work Australia during the financial year. However, only 87 (less than 1%) required determination by Fair Work Australia as to their merits. This is because the vast majority of the applications were finalised through Fair Work Australia’s new conciliation process. Some 84% of the more than 8,000 applications that went to conciliation were resolved there.

This paper details the new conciliation process Fair Work Australia has adopted to achieve such a high settlement of unfair dismissal applications without formal proceedings. It also reports on research into the views of employee applicants, employer respondents and their representatives about the process and on the findings from that research.

The new conciliation process

Unlike the Workplace Relations Act 1996 (Cth), the Fair Work Act does not require statutorily appointed members of the national workplace relations tribunal to conciliate unfair dismissal applications or, when the conciliation fails to settle the matter, issue a certificate that all reasonable attempts to settle the application are likely to be unsuccessful. Conciliation, however, has long been a successful method of resolving termination of employment matters.

As a result, Fair Work Australia decided to make conciliation of unfair dismissal applications by Fair Work Australia staff available to the parties to an application. To that end some 23 conciliators, experienced in dispute resolution and with a knowledge of workplace disputes, were employed as public servants by Fair Work Australia from 1 July 2009.

The conciliators are required to conduct up to three conciliations per day or 15 per week. About one and a half hours is allocated for each conciliation. Generally the conciliation takes place within 24 days of an unfair dismissal application being made to Fair Work Australia.

The conciliations are mostly conducted through a telephone conference involving the parties and the conciliator. In the first 12 months of Fair Work Australia’s operation, around 93% of the unfair dismissal application conciliations were conducted by telephone, about 7% were conducted in a face to face

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1 Workplace Relations Act 1996 (Cth), s.650(1).
2 Workplace Relations Act 1996 (Cth), s.650(2).
format with all involved in the one conference room and some were conducted using videoconferencing facilities. Parties may have a legal or other representative at the conciliation.

As the conciliations the Fair Work Australia staff conduct are voluntary, the parties to an application are at liberty to decide whether or not they want to participate in them. However, it is usually in the interests of a party to do so as it provides a quick, informal and efficient means of seeking to resolve an application in a timely manner. It is Fair Work Australia’s experience that nearly all parties are prepared to take part in the conciliation and most respondents are prepared to do so even if they have an unresolved jurisdictional objection to an unfair dismissal application. If a respondent seeks that their jurisdictional objection to an application be determined before conciliation, the application is allocated to a Fair Work Australia member to determine the objection.

In terms of process, once an unfair dismissal application is made to Fair Work Australia, the relevant respondent is notified in writing by Fair Work Australia of the fact an application has been made, provided with a copy of the application, a respondent response form and an information booklet on unfair dismissal claims and advised of the time and date for the conciliation of the application. The applicant is simultaneously advised by Fair Work Australia of the conciliation time and date. Professional interpreter services are also organised for the conciliation when required.

The conciliations generally proceed as follows:

- Opening statement of the conciliator,
- Opening statement by each party,
- Identification and exploration of major issues,
- Private sessions between a party and the conciliator,
- Negotiation, often shuttle negotiation, and
- Resolution and/or close.

The conciliators are trained to play a more activist role in the conciliation than would a “traditional” mediator. They are expected to have detailed knowledge of the Fair Work Act and to keep up to date with relevant decisions of courts and tribunals. Their activist role may extend to such matters as reality testing a party’s position against relevant case law, or reality testing their proposed remedy against remedies available under the Fair Work Act. The conciliators recognise the need to deal with power imbalances between the parties and to be persistent in searching for a resolution.

The resolution of an unfair dismissal application through the new conciliation process may take a variety of forms, from reinstatement of the applicant to their former position with the respondent through to the applicant withdrawing their application.

An unfair dismissal application that does not resolve at the conciliation is typically listed before a Fair Work Australia member for the determination of any outstanding jurisdictional objections within about four weeks of the conciliation and for merits’ determination within some 8-12 weeks of the conciliation. In all states, except Western Australia, the jurisdictional and/or merits’ proceedings are generally conducted during a specific period of each month. With the notice of listing for the determination of the application, written directions are given for the parties to file with Fair Work Australia by specified dates the material on which they intend to rely at the jurisdictional or merits’ proceeding. Non-compliance proceedings are conducted by a Fair Work Australia member where a party fails to comply with the directions.
Research into the new conciliation process

Earlier this year Fair Work Australia commissioned an external market research company to conduct independent qualitative and quantitative research into the new conciliation process. The research examined the experiences of applicants (represented and unrepresented) and respondents (represented and unrepresented) with Fair Work Australia’s administration of unfair dismissal applications from their lodgment with Fair Work Australia to the conclusion of the new conciliation process. The research also examined the experiences of applicant and respondent representatives (legal and other), including unions and employer associations. Participants in the research were sourced from the 5,423 parties and their representatives who had dealt with an unfair dismissal application between 1 February and 20 July 2010 and who consented to participating in the research. They included persons from metropolitan and regional areas across all states and territories of Australia.

The findings from the research will be used to review Fair Work Australia’s administration of unfair dismissal applications including the new conciliation process, to provide a method for gathering on-going feedback on their administration and to develop information resources for participants.

(a) Qualitative research methodology

The first component of the formal research involved in-depth qualitative telephone interviews of 29 parties and representatives involved in the processing of an unfair dismissal application in the first half of 2010. The 29 participants interviewed for the qualitative research consisted of 10 applicants, 10 respondents and 9 representatives, with a mixture of represented and unrepresented parties as well as a mixture of workplace sizes and locations across Australia. The participants were drawn from the sample of participants who consented to participate in the research. The qualitative interviews were conducted between 15 June and 10 August 2010 and each interview lasted about three-quarters of an hour.

The in-depth qualitative interviews encompassed the following key areas:

- Overall impressions of Fair Work Australia’s administration of unfair dismissal applications,
- Access to Fair Work Australia in making or responding to an unfair dismissal application and the useability of the application and response forms,
- Awareness and use of Fair Work Australia information and support,
- Preparing for the conciliation, and
- The new conciliation process and the conciliator.

The primary purpose of the qualitative interviews was to assist with the design and development of the quantitative survey questionnaire.

(b) Quantitative research methodology

The second component of the formal research consisted of a quantitative telephone survey of 1,100 parties and representatives involved in the processing of an unfair dismissal application in the first half of 2010. The quantitative survey comprised 500 interviews with applicants, 500 interviews with respondents and 100 interviews with representatives. The participants were drawn from the sample of participants who consented to participate in the research. The interviews were conducted between 10 August and 3 September 2010 and each interview lasted about a quarter of an hour. Computer-assisted telephone interviewing was employed for the interviews.

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iv Fair Work Australia Unfair Dismissal Conciliation Research Survey Results, TNS Social Research, November 2010.
Quotas were also utilized to ensure the research was representative of the parties and representatives involved in the processing of unfair dismissal applications. Quotas were set on the following variables:

- States/territories in which applications are lodged,
- Representation in conciliation,
- Metropolitan/regional location of applicant, and
- Business size.

The quantitative research has benchmarked current levels of satisfaction on all key aspects of Fair Work Australia’s administration of unfair dismissal applications from the lodgment of an application with Fair Work Australia until the conclusion of the new conciliation process.

The questionnaires used for each group (applicants, respondents and representatives) were very similar with minor differences relating to the type of participant. The questionnaires covered the following areas:

Background and experience regarding unfair dismissal applications,

- Initial access to Fair Work Australia and completing or responding to an unfair dismissal application,
- Information utilised by participants concerning the unfair dismissal application and the conciliation,
- The conciliation and the role of the conciliator,
- Overall service quality,
- Factors influencing the outcome reached at conciliation and satisfaction with the outcome reached,
- Expectations of the conciliation process, and
- Final thoughts and demographic details.

The questionnaires were piloted with a sample of applicants, respondents and representatives at the start of the quantitative research phase in order to check questionnaire logic and comprehension. Approval was then granted by the Australian Bureau of Statistics Statistical Clearing House for the quantitative research to proceed.

(c) Ability to provide feedback

Parties and representatives who agreed to participate in the research were sent correspondence via email or mail prior to the quantitative research commencing advising that if they were not interviewed by the external market research company they were able to make comments or submissions on the administration of unfair dismissal applications, including the new conciliation process, directly to Fair Work Australia. A small number of comments and submissions from parties and representatives were received.

Findings from the independent research

The key findings from the independent research can be conveniently considered under four broad headings:

- Overall satisfaction with Fair Work Australia’s administration of unfair dismissal applications.
- Access to and information on unfair dismissal applications.
- The new conciliation process.

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v Fair Work Australia Unfair Dismissal Conciliation Research Survey Results, TNS Social Research, November 2010.
- The Fair Work Australia conciliators.

(i) Overall satisfaction

The independent research suggests that overall satisfaction with Fair Work Australia’s administration of unfair dismissal applications is high with, as Figure 1 shows, 86% of applicants, 82% of respondents and 87% of representatives reporting that they were satisfied or extremely satisfied with the service provided by Fair Work Australia.

Figure 1: Overall satisfaction with the service provided by Fair Work Australia

(ii) Access and information

The access to and information on unfair dismissal applications is also regarded favourably. Some 82% of applicants said it was easy to find out what they had to do to make an unfair dismissal application. Almost 40% of the applicants learned about where to go to make an unfair dismissal application through internet searching. Other common avenues were a friend or family member (21%), a union representative (16%) and a lawyer (15%).

The unfair dismissal application form and the employer response form to the application were also seen as easy to complete by 80% of applicants and 81% of respondents.

Some 85% or more of the participants who spoke to Fair Work Australia staff prior to the conciliation of an unfair dismissal application agreed or strongly agreed the staff are professional and helpful and speak in a way which is clear and easy to understand.

In finding out about and preparing for the conciliation of an unfair dismissal application, the most commonly accessed information sources are written information from Fair Work Australia and the Fair Work Australia website. As Figure 2 shows, applicants (83%) and respondents (76%) were most likely to access written information from Fair Work Australia, while representatives (92%) were most likely to access the Fair Work Australia website.
Most participants said the information they accessed gave them a better understanding of the unfair dismissal process, helped them prepare for the conciliation and was consistent. Notwithstanding this, around a third of applicants and respondents indicated they would like more information, most commonly about the conciliation process, obligations and rights, sources of representation or external help, settlement options and outcomes, previous cases and the steps after conciliation.

(iii) The new conciliation process

The new conciliation process has been well received by most participants. Figure 3 shows that 78% of applicants, 81% of respondents and 58% of representatives agreed or strongly agreed the conciliation of an unfair dismissal application by telephone conference works well, with about 6% of participants in each category neither agreeing nor disagreeing that the telephone medium works well.

Further, some 86% of applicants and 88% of respondents considered having the conciliation over the telephone was convenient and cost effective. While 72% of applicants and 59% of respondents reported that having the conciliation over the telephone was more comfortable than being in the same room with the other party. The vast majority of participants said the conciliation allowed them to put their or their client’s point of view across.
Over 80% of participants also agreed or strongly agreed the length of the conciliation is about right.

(iv) The Fair Work Australia conciliators

The overall ratings for the conciliators are high with 86% of applicants, 89% of respondents and 92% of representatives being satisfied or extremely satisfied with the conciliator for the unfair dismissal application in which they were involved.

Figure 4 sets out the participants’ views about aspects of the role of the conciliators. The research shows that:

- Most participants (78% of applicants, 73% of respondents and 83% of representatives) agreed or strongly agreed the conciliator assisted them or their client by outlining the strengths and weaknesses of their case.
- In the large majority of cases (85% of applicants, 87% of respondents and 93% of representatives) there was agreement or strong agreement the conciliator explained the pros and cons of settling or not settling the unfair dismissal application.
- Around 75% of applicants and respondents agreed or strongly agreed the conciliator helped them think through their options and terms of settlement.

**Figure 4: Conciliators’ role**

Most participants agreed or strongly agreed the conciliator clearly outlined the purpose of the conciliation and the conciliation process, made them feel more comfortable by explaining the process and, at the conclusion of the conciliation, explained the outcome and what would happen next. Further, some 80% or more of the participants said the conciliators were even-handed, independent and impartial, were knowledgeable, offered appropriate guidance and information, and helped the parties to resolve the unfair dismissal application.

The communication skills of the conciliators, including speaking in a clear and simple manner, listening and understanding, and asking appropriate questions are also seen as strongly positive, with between 84% and 97% of the participants indicating the conciliators demonstrated these skills.
Conclusion

Over the last 16 months, Fair Work Australia has significantly altered its administration of unfair dismissal applications. The new conciliation process adopted by Fair Work Australia and conducted by its staff has had much success in resolving such applications in a timely, informal, effective and efficient manner. The results of the independent research conducted on the new conciliation process suggest the process, which largely involves a conciliator playing an activist role in a relatively short telephone conference between the parties, has the support of most participants. Nonetheless, Fair Work Australia is well aware the new conciliation process will require regular review to ensure it remains responsive to the needs of the parties and their representatives. The independent research will assist us in meeting that challenge.