

PRACTICE NOTE No.23A

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INDUSTRIAL RELATIONS COMMISSION OF NEW SOUTH WALES

PRACTICE NOTE NO. 23A

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

PROCEDURES: PUBLIC SECTOR DISCIPLINARY APPEALS

1. This Practice Note applies to proceedings before the Commission under Part 7, Chapter 2 of the *Industrial Relations Act 1996* ("Act").
2. This Practice Note has effect from the date of issue, and amendments have effect from the date of re-issue.
3. The purpose of this Practice Note is to facilitate the resolution of public sector disciplinary appeals by ensuring that such proceedings are conducted in a just, quick and efficient manner and that all those who appear before the Commission do all they can to facilitate the just, quick and cost-effective disposal of proceedings before the Commission.
4. **Procedure generally**
 - a. A public sector employee who wishes to appeal a decision of the kind listed in s 97(1) of the Act made by their employer must complete and file in the Office of the Industrial Registrar an Application for Public Sector Disciplinary Appeal within 28 days after the employee is notified of the decision. The Commission has no power to hear appeals which are filed outside this timeframe and no discretion to extend the timeframe.
 - b. An Application for Public Sector Disciplinary Appeal may be filed via the Online Registry, in person at the Registry or by post.
 - c. Within 7 days of being served with a Notice of Appeal the employer must complete and file in the Office of the Industrial Registrar an Employer's Response to a Public Sector Disciplinary Appeal
 - d. In relation to the production of documents or the attendance of witnesses before the Commission, the provisions of s 165 of the Act and Part 33 of the *Uniform Civil Procedure Rules 2005* apply.
 - e. In accordance with s 100G(2) of the Act the employer's case is to be presented first.

5. **Allocation of Listing Date**

When a disciplinary appeal is filed, the matter will be listed for conciliation. As a general rule, the conciliation will be listed not more than 21 days after the appeal is filed.

6. **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 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. 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.
- d. Ordinarily, there should be one conciliation, however, a Commissioner may permit further conciliation conferences at their discretion (see section 9 below).
- e. If a party fails to appear at a conciliation conference and does not provide a clear and compelling reason for non-attendance, this may result in the appeal being determined in their absence.

7. **Preliminary Issues**

- a. If a preliminary issue such as a jurisdictional challenge is raised at or before the conciliation, the Commissioner conciliating will determine whether the matter will be heard as a threshold issue or 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 hearing 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.

8. Objections pursuant to s 100E(2)

- a. To assist in the allocation of hearing date(s), any objection to the Commissioner who conducted a conciliation hearing the appeal made pursuant to s 100E(2) of the Act, should be lodged within seven days of the date of such conciliation.
- b. For the purposes of s 100E(2) of the Act, a Commissioner is not taken to have attempted conciliation merely because:
 - i. the Commissioner attempted conciliation after commencing the hearing; or
 - ii. the Commissioner arranged or gave directions for a conference of the parties involved in the matter, or their representatives, to be presided over by the Commissioner, but the conference did not take place or was not presided over by the Commissioner; or
 - iii. the Commissioner arranged or gave directions for the parties or their representatives to confer among themselves at a conference at which the Commissioner was not present.
- c. If a party exercises its rights under s 100E(2) of the Act the Commissioner will forward the file to the Industrial Registrar for reallocation by the Chief Commissioner.

9. Further Conciliation

- a. Parties are encouraged to continue their attempts to resolve matters once the matter is listed for hearing and particularly prior to the time for compliance with directions, in order to minimise 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 hearing of the appeal. 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 hearing of the matter.
- d. Any further conciliation does not excuse the parties from complying with directions made in the proceedings unless an order is made by the Commission to that effect.

10. Listed for Hearing of the Appeal

- a. When conciliation before the Commission is unsuccessful, the Commission will make directions for the hearing of the appeal. The Commission 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, adjusted so that the employer’s case is presented first. The “Usual Directions” can be found on the Commission’s website.

- b. Parties should attend the conciliation and/or any subsequent directions hearing with a reasonable estimate of the time required for the hearing of the appeal and available dates for the hearing, as the setting of arbitration date(s) will usually form part of the directions made by the Commissioner following the unsuccessful conciliation.

11. 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.

12. Adjournments

- a. In accordance with the Commission’s function to provide a forum for the resolution of appeal matters in a fair and prompt manner, as a general rule, an adjournment of the date that is allocated for a conciliation or hearing will not be granted unless there are clear and compelling reasons for the adjournment to occur. Any applications for adjournment 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 hearing the appeal. Consent of the other party does not guarantee that an adjournment will be granted by the Commission, although it may be a factor taken into account in the determination of such an application.
- b. In the event that a party fails to attend at an appeal hearing, the appeal may, in appropriate circumstances, be heard and determined in the absence of that party.

**Nichola Constant
Chief Commissioner**

18 December 2023