



Centre for Innovative Justice

Report for Fair Work Commission

Assessment of Cooling Off Period Pilot in Unfair Dismissals Conciliation Process

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Centre for Innovative Justice

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Executive Summary

Australia's national workplace relations tribunal, the Fair Work Commission ('the Commission') is responsible for hearing applications for remedies for Unfair Dismissal. Parties to such applications may participate in a voluntary conciliation, which is usually conducted by telephone to increase efficiency and flexibility.

As part of this process, the Commission recently piloted a new administrative procedure and made a 'cooling off period' of three days available to unrepresented parties following conclusion of their conciliation. The pilot ran for a period of approximately eight weeks and the cooling off period was available in 220 cases. In six of these cases the parties withdrew from the agreement originally reached at conciliation.

The procedure was introduced as a device to increase access to justice for unrepresented parties and to mitigate concerns expressed to the Commission about perceived pressure to settle at the time of conciliation. During the pilot two complaints about perceived pressure to settle were received by the Commission, a decrease on the eight complaints received in the comparable preceding period. Conciliators and parties who participated in the pilot were asked for their feedback at its conclusion. Feedback was largely neutral to positive, with the majority of concerns expressed centring on procedural or administrative matters.

RMIT's Centre for Innovative Justice ('the CIJ') was asked by the Commission to provide an assessment of the pilot. The CIJ examined the data provided by the Commission, as well as external literature, and concluded that a structured period for parties to consider conciliated agreements was, on the whole, a beneficial measure for unrepresented parties.

As a result, the CIJ has recommended that a formalised cooling off period continue to be made available to unrepresented parties in conciliations of applications for Unfair Dismissal remedies at the Commission, but that a number of issues, including the legal basis for the procedure as well as other administrative matters, be further considered and clarified. The CIJ has also recommended that the procedure continue to be monitored to ensure that it is achieving the Commission's objective of increasing access to justice.

Background

Legislative framework

The Fair Work Commission is Australia's national workplace relations tribunal. Commencing operation in its current form in 2009, and known until 1 January 2013 as Fair Work Australia, the Commission is independent from government and has a range of responsibilities relating to wages and employment conditions, industrial action and other workplace matters.

Amongst these functions the Commission deals with complaints by employees who feel they have been unfairly dismissed from their workplace. The power for this function lies under Part 3-2 (sections 379-405) of the *Fair Work Act* 2009, with Division 4 of this Part outlining the remedies that the Fair Work Commission can order. A person who believes that they have been unfairly dismissed from their employment may apply under Section 394 to the Commission for one of these remedies.

The object of the Unfair Dismissal jurisdiction is to provide a system that is quick, flexible and informal and meets the needs of employers and employees (section 381).

Conciliation process

As an initial step, the parties to an application for an Unfair Dismissal remedy may participate in a voluntary conciliation process. This process is not outlined in legislation, but is administrative in nature. Where parties do not elect to participate in conciliation, or where the matter is not resolved at conciliation, the application is referred to the Commission for arbitration.

Of the 14,027 applications for a remedy for alleged unfair dismissal made to the Commission in the 2011-2012 financial year, 81% (9064) were settled at conciliation.

Unlike many other conciliation processes conducted in courts and tribunals, the one offered by the Commission generally occurs by telephone, with conciliators usually conducting three conciliations, each averaging 1.5 hours, over the course of a day. The appeal of conciliations conducted over the telephone is that the process is more accessible, less time consuming and less intimidating for the parties. It is also a more efficient use of time by the Commission.

Conciliations are conducted in person if there are multiple applicants in a single matter, if one of the parties needs an interpreter or has a hearing-related disability, or if both parties request an in person conciliation and there are substantial reasons for proceeding in that manner.

The conciliation procedure adopted by the Commission has generally been as follows:

- Information regarding the conciliation process is sent out to the parties prior to the conciliation date. This information consists of a letter to each of the parties, an information sheet about the conciliation process, and the Commission's Guide to Unfair Dismissal
- At the commencement of the conciliation the conciliator makes an opening statement about the conciliation process to the parties
- The parties each make an opening statement

- A discussion then follows to identify and explore the major issues
- The conciliator speaks privately with each party about their expectations and concerns
- The parties engage in negotiations with the assistance of the conciliator
- If the parties reach agreement the conciliator sends a letter to each party, by email, containing the terms of the agreement. In some cases the terms of settlement are prepared by a party instead of by the conciliator. The conciliator then closes the file. It is the parties' responsibility to lodge a notice of discontinuance.
- If the conciliation concludes without the parties' having reached agreement, the conciliator arranges for the matter to proceed to the Commission's formal determination process.

Agreements reached during conciliations include financial and non-financial outcomes. Monetary outcomes involve compensation being paid by the employer to the employee, and sums range from under \$1,000 to over \$40,000, though the vast majority lie under \$15,000.

Non-financial outcomes include:

- Apologies
- Employment Separation Certificates
- Payment in kind
- Provision of information or undertakings
- Provision of references
- Dismissal withdrawn so that the employee can resign
- Return of property
- Provision of Statement of Service (most common non-financial remedy)
- Withdrawal of allegation(s)
- Withdrawal of application.

The Commission publishes a Procedures Manual, which, together with a Code of Conduct, governs the way in which conciliators conduct conciliations. These documents require conciliators to assist parties to achieve a resolution of their matters, and to remain impartial, fair and even handed. Conciliators must intervene to address any inequity between parties that might detract from a fair and impartial process, and must not impose settlements on the parties.

However, concerns have been expressed to the Commission by some parties who said that they had felt some pressure to settle from conciliators from time to time.

Cooling Off Period Pilot

The Commission was keen to mitigate these concerns, as well as to ensure access to justice for those parties unrepresented by paid agents, lawyers, unions or employer bodies. The CIJ understands that approximately half of the parties participating in conciliations are not represented by professional advocates. This is the case for applicants and respondents alike.

The Commission therefore initiated a trial of a short cooling off period of three days from the conclusion of the conciliation in which parties could consider their options or seek further advice. The cooling off period could only be invoked by those parties who had been unrepresented in the conciliation process, as it was intended to give these parties greater control over the process, and could be waived at that party's discretion.

The cooling off period was modelled on a similar procedure currently used at the Victorian Civil and Administrative Tribunal.¹ Nine conciliators participated on a voluntary basis across all states, with the exception of South Australia, and were asked for their feedback following the completion of the pilot period, as were the parties who had participated in the pilot.

The pilot was conducted between 3 October and 30 November 2012. Parties involved were advised orally at the beginning and end of their conciliation that a three day cooling off period applied from the conclusion of the conciliation, during which any unrepresented party could consider their options or seek further advice.

If the matter resolved at conciliation the conciliator would email the parties confirming the application of the three day cooling off period, and advising that unless the conciliator was contacted by the parties within that three day period to withdraw their agreement to the terms reached at conciliation, the conciliator would consider the matter resolved and close the file. The conciliator also explained that if both or either of the unrepresented parties advised that they wished to withdraw from the agreement reached, the matter would remain unresolved and would proceed to a formal determination in the usual manner.

Evaluation Process

The CIJ was asked by the Commission to conduct an assessment of the three day cooling off period pilot program.

In conducting this assessment, the CIJ examined a range of data provided by the Commission, including feedback from conciliators and parties to agreements. The CIJ also reviewed relevant research about the benefits and risks associated with the participation of unrepresented parties in ADR processes as context for its report.

Data from the Commission

During the pilot the cooling off period was available in 222 matters. In six of those matters (2.7% of the total) a party elected to withdraw from an agreement reached at the conciliation. Reasons given for departing from an agreement were:

- In two matters the respondent withdrew with no reason given;
- One matter was withdrawn but finalised subsequent to the three day cooling off period;
- One matter was withdrawn to allow the applicant to resign instead and the matter subsequently resolved;
- One matter involved intervention by an applicant's relative following the conciliation to negotiate an increased settlement, which was rejected by the respondent.

During the period of the pilot two complaints were received by the Commission that respondents felt pressure from the conciliator to settle. This was a decrease on the eight similar complaints received during the comparable preceding period (1 August – 30 September 2012).

¹ VCAT Practice Note PNVCAT4 Alternative Dispute Resolution (ADR), 15 March 2012.

This decrease suggests that the cooling off period offered an opportunity for unrepresented parties to address any concerns they may have had or any pressure to settle they may have felt at the time of conciliation.

Feedback from parties

The data provided by the Commission regarding feedback from parties was reasonably limited, but the CIJ is not aware of any particularly negative responses. Some conciliators reported that some parties had chosen to waive the cooling off period, as they did not wish to delay the process any further. Meanwhile, some represented parties told conciliators that they did not feel that it was fair to offer the cooling off period to unrepresented parties only.

On the whole, any concerns expressed seem to be procedural in nature, with one party representative expressly asking that the signing of a 'Deed of Agreement' by both parties automatically end the cooling off period so as to avoid any subsequent confusion. This same party, however, acknowledged the value of a cooling off period in general and its use for applicants in particular.

The feedback also included a comment from a legal practitioner who observed: 'as a practitioner who has on numerous occasions been contacted post conciliation by unrepresented applicants and have had to explain the effect of *Masters v Cameron*, I think the policy has merit'. This statement tends to suggest that some unrepresented parties can be unsure or confused about the enforceability of an agreement reached at conciliation, and that a cooling off period procedure that clarifies the status of a settlement agreement and the circumstances in which it can be withdrawn is to be supported.

Feedback from conciliators

Feedback from conciliators indicates a fairly neutral response to the pilot. Some did not notice a great deal of difference in the process, and one thought it unnecessary. One possible explanation for this is the Commission's past practice of advising parties that any agreement reached at conciliation did not become binding until written terms of settlement were executed by the parties which on one view provided parties with an opportunity to walk away from a settlement reached at conciliation.

No conciliators, however, objected to the pilot or had any serious complaints. Instead, concerns centred on procedural detail, one suggesting that it added to a conciliator's administrative burden and a number seeking clarification on the same question of whether the signing of a 'Deed of Agreement' would terminate the cooling off period. Some also made suggestions for refinement of the letter sent to parties at the conclusion of conciliations.

One conciliator suggested that there be discretion about which unrepresented parties have access to the cooling off period, given that large employers are often 'repeat players' and have access to a great deal of experience and advice prior to their attendance at conciliation. Another chose not to apply the cooling off period where a respondent's representative wanted time to prepare the Terms of Agreement themselves. Other administrative suggestions include that the offer of a three day period be clarified as three business days; while the observation was also made that three days was an insufficient period in which to seek legal advice.

Finally, it is worth noting one conciliator's observations that the expression 'cooling off period' had the potential to 'send parties a message that they should withdraw from the agreement' and that instead parties should just be allowed a period of 5 days to seek advice and that this period not be labelled with any particular terminology. Another conciliator noted that, in three matters, unrepresented parties had sought time to consider their position, came back and reached an agreement, and still expected the cooling off period to apply, the implication being that unrepresented parties were anticipating two opportunities to seek external advice.

Discussion and Findings

Policy context

The value of conciliation and other forms of alternative, or appropriate, dispute resolution (ADR) is well documented, with an increasing number of jurisdictions turning to these processes for the efficiency and flexibility they offer all concerned, as well as for the increased participation and sense of ownership they lend the parties. For unrepresented litigants, ADR processes can be particularly beneficial because they offer the opportunity to avoid the formality of the courtroom and the risk of adverse costs orders, to be heard directly by the other party and a third party (for example a mediator or conciliator) and to reach a compromise tailored to their own individual circumstances.

Despite these benefits, concerns are nevertheless raised about the potential for existing inequalities between the parties to be perpetuated or exacerbated if one or more of the parties do not have access to legal advice or representation during the ADR process. A specific concern is that vulnerable parties will be pressured into settlement on terms contrary to their interests. Some advocates therefore caution against embracing the increasing use of ADR processes by courts and tribunals in the absence of appropriate protections for unrepresented and other vulnerable parties.²

For this reason, measures such as increased access to information (both legal and other), legal advice and representation, and support are cited as essential in ensuring that parties who are involved in disputes with apparent power differentials are able to participate fairly and meaningfully in ADR processes.³

The Commission has noted that its individual dispute resolution jurisdiction (unfair dismissals and general protections matters) is increasing, and with it the number of unrepresented parties appearing before the tribunal. In its recent publication, *Future Directions for Australia's National Workplace Relations Tribunal: Our Plan for the Year Ahead*, the Commission has emphasised the importance of providing information and assistance to unrepresented applicants and respondent employers, many of whom are in contact with the tribunal for the first time. The Commission has undertaken to promote fairness and increase access to justice by implementing a suite of

² Noone, M A, 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance', (2011) 37 *Monash University Law Review* 57; Parliament of Victoria, Law Reform Committee, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (May 2009), 87; Federation of Community Legal Centres, *Activist ADR: community lawyers and the new civil justice* (October 2010), 15.

³ Noone, M A, 'ADR, Public Interest Law and Access to Justice: The Need for Vigilance', (2011) 37 *Monash University Law Review* 57, at 78, 80.

strategies to improve the information and assistance available to parties, including in multimedia formats, a 'virtual tour' of the tribunal on its website, simpler forms and the facilitation of pro bono legal advice. Although not mentioned specifically, the CIJ assumes these strategies will be directed not only to formal proceedings before the Commission, but also to its conciliation service.

The CIJ regards the availability of a cooling off period in ADR processes as a procedural device which can, in addition to the provision of the types of information, advice and support mentioned above, facilitate access to justice for unrepresented litigants.

Legal or other forms of representation bring with them not only knowledge and experience of the jurisdiction and substantive law, but also familiarity with the process, and therefore confidence in the reasonableness of the agreement reached. The cooling off period provides unrepresented parties with an opportunity to reflect on the reasonableness of any agreement reached at the conciliation, albeit after the event. Parties have three business days in which to consult legal advisers, their union or professional association, colleagues, friends or family members, and to consider the implications of proceeding with the settlement. They are entitled to withdraw from the agreement for any reason.

In this context, the availability of a cooling off period can be seen as:

- assisting to redress any power imbalance or inequality that might have influenced the terms of settlement
- curing any actual or perceived pressure on a party to settle a matter on terms that are unreasonable or unfair
- removing some of the barriers or stated objections to the participation of unrepresented parties in ADR processes, thereby facilitating access to justice.

Cooling off periods are available in ADR processes in various other jurisdictions. In some instances the cooling off period is provided for expressly in legislation,⁴ or in a practice note.⁵ Generally these cooling off periods rely on a binding agreement having been reached in the course of the ADR process. Alternatively, an ADR process may result in an agreement that is expressed to be subject to the parties' executing a written document, in which case the outcome negotiated by the parties leaves room for either of them to walk away from their agreement.

Assessment

Conclusion

The CIJ endorses the Commission's commitment to promoting access to justice for unrepresented parties by trialling a cooling off period. The drop in complaints concerning perceived pressure to settle during the pilot confirms that a structured period set aside for consideration can increase parties' confidence in the process. Equally, the sheer number of parties who are unrepresented during conciliations suggests that any mechanism which increases the effectiveness of the process is to be encouraged.

⁴ For example, *Administrative Appeals Tribunal Act 1975* (Cth) ss 34D, 42C; *Farm Debt Mediation Act 1994* (NSW) s 11A.

⁵ For example, VCAT Practice Note PNVCAT4 Alternative Dispute Resolution (ADR), 15 March 2012.

As evidenced by the data collected during the pilot, there was limited uptake of the entitlement to invoke the cooling off period, which indicates that its availability does not undermine the high rate of success of the conciliation process. The fact that 2.7% of settlement agreements were revoked during the pilot indicates, though, that a cooling off period does offer a small category of parties who may feel uncomfortable with the settlement reached at the conciliation a chance to avoid what they would consider to be an unfair agreement.

The CIJ therefore sees merit in continuing to provide a form of cooling off period to unrepresented parties who reach agreement during conciliation.

However, the CIJ has identified some underlying legal issues that require clarification before formalising the introduction of a cooling off period on an ongoing basis. It should be emphasised that these legal issues do not appear to have had an impact on the use or efficacy of the cooling off period during the pilot. Rather, they are raised as issues that require some consideration before the details of a more permanent cooling off period are finalised and implemented.

In response to the feedback received in response to the pilot, the CIJ has also recommended a number of clarifications to the details of the cooling off period.

Points of clarification

1. Legal basis for mandating a cooling off period

As the conciliation procedure is administrative in nature and not provided for in legislation, and participation in the process is entirely voluntary and not mandated by any order of the Commission, it is not clear on what basis the cooling off period was imposed on the parties during the course of the pilot.

Preliminary analysis would suggest that during the pilot the parties impliedly agreed to participate in the conciliation on the terms outlined by the conciliator at the outset of the conciliation (in addition to the standard terms outlined in the written materials provided to the parties before the conciliation), including on the basis that unrepresented parties would be entitled to withdraw from any negotiated settlement during the cooling off period.

Although participation in conciliation itself is entirely voluntary, as is the decision to settle a matter, the introduction of a cooling off period seeks to impose conditions on the parties. This point may be illustrated in the following case example. An agreement is reached at conciliation between an unrepresented applicant and a represented respondent in which the applicant agrees to withdraw the matter if the respondent provides a written apology about the circumstances of the dismissal. The applicant subsequently decides to withdraw from that agreement during the cooling off period and instead to proceed to seek a financial remedy through formal determination by the Commission. The respondent denies that it ever accepted that a cooling off period applied, and seeks to enforce the agreement reached at conciliation.

In order to avoid a dispute of this nature, it would be prudent for the Commission to identify and articulate the legal basis for mandating a cooling off period as part of an otherwise voluntary process, and to reflect that basis (in simple terms) in the written materials made available to the parties before the conciliation commences. The provision of information to the parties is discussed in further detail below.

2. Status of agreements reached at conciliation

During the pilot the cooling off period applied to agreements reached at conciliation, and the three day period commenced at the conclusion of the conciliation. Because the conciliations are conducted by telephone, at this point in time (pending the sending of the post-conciliation emails by the conciliator), the parties had not received any written evidence of the terms of agreement, nor had they executed any settlement agreement.

By contrast, in other circumstances where cooling off periods apply, there is generally a written document that is signed at the same time as the agreement is reached which becomes a binding agreement at the expiration of the cooling off period (if the parties do not exercise their rights of revocation).

Because the majority of the Commission's conciliations are conducted by telephone, there is generally no opportunity for the parties to execute written terms of settlement at the conciliation. For this reason, the application of a cooling off period in these circumstances potentially entails a level of uncertainty about the nature and status of any agreement from which the parties are entitled to cool off.

This point is significant for two reasons.

First, if the parties do not notify their intention to withdraw from the agreement within the three day cooling off period, but nor do they subsequently execute any written settlement agreement, then there is potentially some uncertainty about whether the agreement reached at the conciliation has become a binding agreement. If no binding agreement exists at that point, the cooling off period has not fulfilled any useful purpose.

Secondly, if parties do not have access to email and have to wait to receive written documentation about the settlement in the mail, there is a risk that the cooling off period will have expired before they have had the opportunity to review and consider the details of the settlement. This has the potential to be unfair to parties for whom a cooling off period is designed.

Based on these observations, the CIJ believes that the Commission has the following options for implementing a cooling off period for unrepresented parties on an ongoing basis:

<i>Option A: Cooling off period applies once agreement reached at conciliation</i>

Under this option, as was the case during the pilot, the cooling off period would apply to agreements reached at the conciliation. Unrepresented parties would be entitled to withdraw from the agreement within three days of the conciliation. If they did not withdraw from the agreement, there may be an expectation that the terms agreed at the conciliation would become a binding agreement at the conclusion of the three day period. Whether in fact a binding

agreement had been formed would be a matter to be determined on a case by case basis, should the need arise.

The advantage of this option is that it would reflect the usual intention of a cooling off period, namely the provision of an opportunity immediately after the reaching of an agreement for parties to reflect on and withdraw from the agreement.

On the other hand, however, a situation may arise where parties are unclear about the legal status of any agreement that is not ultimately signed by the parties.

In order to implement this option, consideration would need to be given to clarifying the nature and status of the agreement from which the parties are entitled to cool off, and whether parties could waive the cooling off period, and if so, how.

Option B: Cooling off period only applies once settlement agreement signed

Under this option, the cooling off period would only apply to agreements that had been signed by the parties. Unrepresented parties would be entitled to withdraw from the agreement within three days of having signed the terms of settlement, and this entitlement could be included in the terms of settlement.

The advantages of this option would be certainty about the precise terms of the agreement, and its status as a binding contract in the event it was not revoked during the cooling off period. On the other hand, however, it would mean settlements of matters involving unrepresented parties could not be finalised until both parties had signed the terms of settlement and the cooling off period had run its course. This may lead to some frustration on the part of parties who are keen to resolve their matters swiftly. Alternatively, the Commission could give consideration to whether an unrepresented party should be able to waive the cooling off period before it expires, and if so how that could be effected.

Option C: Recommend to parties that they do not sign terms of settlement until three days after the conciliation

Under this option, no formalised cooling off period would be implemented. Instead, parties would be advised that agreements reached at conciliation were not binding until executed by the parties. Unrepresented parties would be advised that they should not sign the agreement for three days upon receipt of the terms of settlement and should seek advice about the settlement before executing the terms of settlement.

This option would maintain the status quo prior to the cooling off period pilot, but would introduce a different form of protection for unrepresented parties.

The drawback of this option is that it might tend to undermine the Commission's commitment to the resolution of matters through ADR, by in effect discouraging parties from proceeding with agreements that have been negotiated through the skill and endeavours of the Commission's conciliators.

The CIJ has also identified the following issues that would also need to be clarified in the implementation of any future form of cooling off period:

3. Application of cooling off period to all unrepresented parties

As noted above, the feedback from conciliators revealed some mixed views about the eligibility of parties to invoke the cooling off period. While it was generally accepted that an unrepresented applicant should be able to withdraw from an agreement within the cooling off period, one observation was made that some respondents, although technically unrepresented, are large, well-resourced organisations with in-house lawyers and considerable experience and expertise in the Unfair Dismissal jurisdiction, and for this reason should not need time to reflect on the reasonableness of a settlement agreement. One conciliator suggested that there be a discretion about whether the cooling off period be made available to such parties.

On the other hand, however, much of the feedback indicated that most parties, including most unrepresented respondents, elected during the pilot not to invoke the cooling off period, and executed terms of settlement at the conciliation instead. The data provided about the rate of uptake of the cooling off period bears these observations out.

The CIJ acknowledges that entitling a sophisticated respondent to invoke a cooling off period that is intended to support more vulnerable parties appears counter-intuitive. However, on balance the CIJ sees merit in a consistent application of any cooling off policy to all unrepresented parties, in the interests of clarity and of giving effect to the requirement in section 381 of the Fair Work Act to provide a system that is quick, flexible and informal and meets the needs of employers and employees.

This said, if a cooling off period is implemented and is made available to all unrepresented parties, it is recommended that any uptake of the cooling off period by large, well-resourced respondents be monitored to ensure the availability of the procedure to such parties is not being abused.

4. Application of cooling off period settlements negotiated after a conciliation that does not result in resolution of the matter

The CIJ's view is that it would not be possible or appropriate to regulate the types of agreements reached between parties outside the context of a conciliation, and therefore there is no need to provide for any cooling off period in these circumstances. Of course, it would be open to the parties independently to negotiate some form of cooling off period between themselves.

5. Definition of 'three days'

One conciliator suggested that the information provided to parties clarify that the three days referred to in the cooling off period are business days. The CIJ agrees with this suggestion, in particular because a key purpose of the cooling off period is to enable a party to seek advice from a lawyer or other professional adviser. On balance, the CIJ believes a cooling off period of three business days is an adequate period of time, given the relative low degree of complexity likely to be involved in most settlements, and the desirability of encouraging finality in proceedings.

6. Simple statement explaining the application of the cooling off period

In response to several complaints by conciliators about the repetitive nature of the information given to parties before and at the conclusion of the conciliation, and in writing in the terms of settlement as well as correspondence sent to parties following the conciliation, and the administrative burden this places on them, it is recommended that all information relating to the application of the cooling off period (whatever form it might take) be streamlined and consolidated.

As discussed above, the provision of simple information to parties is also important for clarifying some of the underlying legal bases of the conciliation process.

The CIJ recommends that the Commission produce a simple document explaining to parties in clear terms how the cooling off period operates. The VCAT practice note governing the conduct of ADR processes in that jurisdiction, for example, contains a short, clear explanation of the application of the cooling off period in that jurisdiction. This information could be set out in a separate information sheet, or incorporated into the written materials provided to parties before and after the conciliation.

The CIJ also sees merit in the Commission articulating the purpose and rationale of the cooling off period in the materials provided to the parties. An explanation of this nature would serve several purposes. It would serve to instil confidence in the parties about the fairness of the conciliation process, and could be referred to in response to any comments from representatives that the availability of a cooling off period is unfair to their clients. It would also educate conciliators about the reason for introducing a procedural step which, according to the feedback provided in response to the pilot, several conciliators consider to be unnecessary.

Finally, the CIJ recommends that should the Commission implement a cooling off period on an ongoing basis, it should continue to monitor the process to ensure its effectiveness and to identify and resolve any unintended consequences.

Recommendations

1. That the Commission implements a formalised cooling off period in conciliations involving unrepresented parties who reach agreement during conciliation of Unfair Dismissal matters.
2. That the cooling off period be entitled to be exercised by any party who is not represented by a lawyer or paid agent at the conciliation.
3. That the uptake of the cooling off period by unrepresented parties with access to in-house legal and human resources advice be monitored to ensure that the process is not being abused.
4. That the three days referred to in the cooling off period be clarified as 3 business days.
5. That no provision be made for the cooling off period to apply to agreements negotiated outside the context of the conciliation process.
6. That the Commission provides clear, simple and streamlined information about the application of the cooling off period in written materials provided to parties before the conciliation and in the event of a successful resolution of a matter at conciliation.
7. That the purpose and rationale of the cooling off period be articulated in information provided to the parties and to conciliators.
8. That the Commission identifies and articulates the legal basis for mandating a cooling off period.
9. That the Commission give consideration to whether the cooling off period should apply to settlements reached at conciliation but not yet signed by the parties, to agreements that have been executed by the parties, or in some other form, and to whether unrepresented parties should be able to waive the cooling off period.
10. That the Commission continue to monitor any cooling off period implemented to ensure its effectiveness and to identify and resolve any unintended consequences.