ARBITRATION PRACTICE NOTE

Interlocutory applications, procedures and consultation

Introduction

1. The Arbitration Service issues this Practice Note to indicate how the Registrar and Arbitrators will treat the interlocutory application process, in particular, the consultation requirement of that process.

2. Amendments to the *Workers' Compensation and Injury Management Arbitration Rules 2011* ("the Rules") took effect on 1 July 2015. Amendments include changes to Rules 37 and 48.

3. Rule 37 requires a party to consult with the other parties prior to lodging interlocutory applications, except in exceptional circumstances.

4. Rule 37 also requires a notice to be lodged and served consenting to or opposing an interlocutory application, and sets out the consequences of failure to lodge and serve such a notice.

5. Rule 48 requires an interlocutory application to be lodged for orders to produce documents.

Obligation and standard of consultation

6. Rule 3 defines an "interlocutory application" as an application or request for an order in a proceeding, other than an order that finally determines a dispute between parties. Rule 37 governs how interlocutory applications must be made before the Arbitration Service.

7. Rule 37(2) requires a party who brings an interlocutory application to:

   (a) consult with each other party affected by the application with a view to resolving the matters giving rise to the application; and

   (b) sign a statement stating that consultation has taken place.

8. The view of the Arbitration Service is that consultation is intended to ensure:

   (a) parties resolve issues between themselves so far as possible;

   (b) only those matters which are really in dispute are referred to the Arbitration Service; and

   (c) on occasions when interlocutory applications are to be determined by the Arbitration Service, all parties appreciate what the real issues in dispute are.

9. The Arbitration Service expects parties to consult in a manner that meaningfully achieves the purposes of consultation (above) and not merely complies with the formalities of r 37(2). The Arbitration Service considers that this requires oral consultation, ideally in person, but at a minimum via telephone.

10. Consultation is required no matter how unlikely it is that the parties will reach agreement or narrow the issues between them and requires an exchange of views for the purpose of trying to resolve the matters in issue.

11. The Arbitration Service does not consider that notice of an intention to make an interlocutory application or an exchange of correspondence constitutes consultation. While an exchange of correspondence may be part of the consultation process, it will only be where oral consultation is not feasible that reliance upon an exchange of correspondence is justified. In such a case, r 37(3) requires a party to identify exceptional circumstances justifying an interlocutory application being lodged without consultation.

Evidence of consultation

12. Whilst all parties affected by an interlocutory application have an obligation to meaningfully engage in the consultation process, the party making the interlocutory application is required to initiate the consultation process with every other affected party (to the proceedings) and provide evidence that this has occurred (r 37(2)).

13. "Section C" of the Arbitration Service Interlocutory Application form (Form 156) provides a section to outline briefly the facts relied upon as evidence of consultation.

14. In the view of the Arbitration Service, bald statements that consultation has occurred and that the parties are unable to agree, do not constitute evidence of consultation. The party making the interlocutory application must identify details such as who took part in the consultation, when and how it took place, the issues canvassed, and the outcome of that consultation.

15. In the event that the parties are unable to resolve the matters in dispute between themselves, the Arbitration Service expects consultation as to the suitability of determining the matter on the papers or whether an oral hearing is required (Form 156, "Section D"). Where an oral hearing is required, the party making the application should provide a joint list of unavailable dates to assist the Arbitration Service with listing the matter for hearing.

16. Where the party making an interlocutory application has been unable to consult with another party, Form 156, "Section C" provides space to record specific reasons explaining what attempts were made to consult, why consultation was not possible and why exceptional circumstances exist to justify lodging the application in the absence of consultation.

Resolution of interlocutory applications by consent

17. In the event consultation serves to resolve an interlocutory application by consent, the parties should file a Memorandum of Consent Order (Form 157). The memorandum should set out the specific orders agreed by the parties, to be approved by an Arbitrator or the Registrar (r 38).

18. Memoranda of consent orders should set out the orders sought by the parties in an executable form. Any explanation of the reasons for the orders sought should be contained in a covering letter to the consent orders, not in the orders themselves.

19. To assist the parties in the formulation of consent orders, a set of **Standard Orders** will be published contemporaneously with this Practice Note.

Consequences of inadequate consultation

20. A failure to properly consult, identify the outcome of consultation, or justify why the requirement to consult ought to be waived, may result in the Registrar or Arbitrator:

    (a) rejecting an interlocutory application at the time of filing (r 13); or

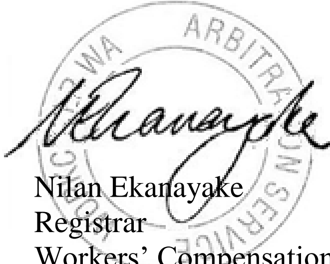
    (b) making an adverse costs orders against those parties or practitioners who are at fault (pursuant to ss 264 and 265 of the *Workers' Compensation and Injury Management Act 1981*).

Rule 37(5) – Notice consenting to or opposing an interlocutory application

21. Except as otherwise ordered by an arbitrator, a party served with an interlocutory application must no later 2 working days before the time fixed for the hearing of that application lodge and serve a notice either consenting to or opposing the application and in the latter case, stating the grounds on which the application is opposed.

22. Failure to lodge and serve such a notice may result in the interlocutory application being determined as if that party did not oppose any part of the application – refer rule 37(6).

23. In addition, failure to lodge such a notice may result in the making of adverse costs orders.



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