PROFESSIONAL CONCILIATION IN COLLECTIVE LABOUR DISPUTES

A Practical Guide

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ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe
Foreword

The Guide

In times of drastic changes in work organization, overhaul reforms of labour legislations and persistent economic crisis and job deficits, labour disputes are a common feature of workplace relations. Prevention and settlement of such disputes in a peaceful, fast, fair and cost-effective manner, which is likely to avoid social unrest and to preserve harmonious relations in the workplace has increasingly been attracting the attention of national and international policy makers and community of practice in the area of industrial relations and disputes resolution.

In recent years, there has been an increasing demand by governments and social partners for the ILO’s technical support to institutional and capacity building of newly created bodies for peaceful settlement of labour disputes, as well as to assisting and facilitating collective bargaining processes through developing and strengthening labour conciliation/mediation mechanisms.

This Guide was developed as a sub-regional tool to support the ILO’s technical assistance in the areas of dispute prevention and resolution in Central and Eastern European countries, in collaboration with the Irish Workplace Relations Commission (WRC). It is the fruit of the partnership between the ILO and the WRC under a Memorandum of Understanding, as well as a collaborative effort between the ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe (DWT-CO Budapest), the Governance and Tripartism Department (GOVERNANCE) of the ILO, and the International Training Centre of the ILO (ITC) in Turin.

The Guide was prepared as a revision of the ILO Practical Guide on Conciliation in Industrial Disputes, which was first developed in 1973 and updated in 1988. Kevin Foley and Maedhbh Cronin authored this revision so as to update the contents in order to take account of environmental, economic, practice and other changes which have taken place in the field of conciliation/mediation in more recent decades. The Guide also contains case studies from a number of European dispute resolution agencies so as to illustrate how conciliation/mediation actually works to assist collective bargaining and settle collective labour disputes. It is intended for use as a training tool in the ITC Certification Course on Conciliation/Mediation and in the sub-region, and will subsequently be published as a global tool with case studies from other regions.

The draft was piloted in Montenegro and Romania and validated in Montenegro in April 2015 with conciliators/mediators and directors of dispute resolution agencies from Bosnia and Herzegovina, Bulgaria, the Former Yugoslav Republic of Macedonia, Montenegro, Romania and Serbia.

The very positive feedback concerning the practical and immediate impact of the Guide encourages us to believe that the information and advice provided in are not only extremely rich and useful, but also able to make a significant difference in the practice of labour conciliation/mediation in the sub-region.

We wish to thank the authors Kevin Foley, former director of Conciliation, Mediation and Early Resolution Services in the Labour Relations Commission and currently Deputy Chairman of the Labour Court of Ireland, whose over thirty year experience in the arena of labour dispute resolution, ideas and enthusiasm proved instrumental for the success of the project,
and Maedhbh Cronin, former Senior Conciliator in Conciliation Service in the Labour Relations Commission and currently Assistant Principal, SME and Entrepreneurship Policy, Department of Jobs, Enterprise and Innovation, Ireland.

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## CONTENTS

- Foreword ................................................................................................................................. 1
- Introduction ............................................................................................................................... 7
  - The Aim of the Guide ............................................................................................................. 7
  - Target Users .......................................................................................................................... 7
  - How the Guide can be used .................................................................................................. 7
  - Structure of the Guide .......................................................................................................... 7
- Methodology ............................................................................................................................. 8
- Important Definitions and their Sources .................................................................................. 9

### Chapter 1: An Overview of Conciliation ................................................................. 12
- Types of Labour Disputes ....................................................................................................... 12
- Collective Interest Disputes ................................................................................................... 12
- Collective Rights Disputes ................................................................................................. 12
- The ADR Spectrum and where Conciliation Fits in .............................................................. 13
- The Vocabulary ..................................................................................................................... 13
- Space for Conciliation ........................................................................................................... 14
- Conciliation and Collective Bargaining .................................................................................. 14
- Conciliation in Individual Labour Disputes .......................................................................... 15
- Arbitration .............................................................................................................................. 16
- Voluntarism and Compulsion - the Ideal Environment for Conciliation .............................. 17
- The Heart of the Conciliation Process ................................................................................... 18
- Selection of Conciliators ........................................................................................................ 18

### Chapter 2 – Qualities, Qualifications, Training and Certification .............................. 22
- Personal Qualities .................................................................................................................. 22
- People – Personalities, Background and Baggage ................................................................. 22
- Problem – Including The External Environment ................................................................. 24
- Process – Limits and Scope .................................................................................................... 25
- Self – Awareness and Skills ................................................................................................... 26
- Training and Development .................................................................................................. 27
- Professional Qualifications .................................................................................................. 28
- Accreditation .......................................................................................................................... 28

### Chapter 3 – Preparations for Conciliator ................................................................. 32
- General / Environmental Preparations .................................................................................... 32
- Case specific Preparations ..................................................................................................... 34
- People .................................................................................................................................... 34
- Problem .................................................................................................................................. 35
<table>
<thead>
<tr>
<th>Chapter 4 – The Conciliator’s Entry Into a Dispute</th>
<th>42</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Problem: Detecting a Dispute</td>
<td>42</td>
</tr>
<tr>
<td>The Process: Timing</td>
<td>43</td>
</tr>
<tr>
<td>The People: The Basis for Conciliators’ Relationships with the Parties</td>
<td>44</td>
</tr>
<tr>
<td>Respect for and Understanding of the Parties</td>
<td>44</td>
</tr>
<tr>
<td>Self: Orientation</td>
<td>45</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 5 – Types of Meetings and Preparation</th>
<th>48</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Joint Meeting</td>
<td>48</td>
</tr>
<tr>
<td>The Separate or Caucus Meeting</td>
<td>49</td>
</tr>
<tr>
<td>Private Meetings</td>
<td>50</td>
</tr>
<tr>
<td>The Smaller Group/Split Group Meeting</td>
<td>51</td>
</tr>
<tr>
<td>Telephone Delivered Conciliation</td>
<td>51</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 6 – Conduct of Meetings and Common Problems</th>
<th>58</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Joint Meeting</td>
<td>58</td>
</tr>
<tr>
<td>The Separate Meeting (Caucus)</td>
<td>60</td>
</tr>
<tr>
<td>Adjournment</td>
<td>63</td>
</tr>
<tr>
<td>Dealing with the Media in Conciliation</td>
<td>64</td>
</tr>
<tr>
<td>Social Media</td>
<td>65</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 7 – The Pattern of Conciliation</th>
<th>68</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Phases of Conciliation</td>
<td>68</td>
</tr>
<tr>
<td>Initial/Exploration Phase</td>
<td>68</td>
</tr>
<tr>
<td>Relationship-Building Phase</td>
<td>70</td>
</tr>
<tr>
<td>Reality-Testing Phase</td>
<td>70</td>
</tr>
<tr>
<td>Problem-Solving Phase</td>
<td>72</td>
</tr>
<tr>
<td>Solution Phase</td>
<td>73</td>
</tr>
<tr>
<td>Capturing Agreement Phase</td>
<td>75</td>
</tr>
<tr>
<td>Concluding Phase</td>
<td>76</td>
</tr>
<tr>
<td>A Focus on Some Challenges in the Conciliation Process</td>
<td>76</td>
</tr>
<tr>
<td>Conciliation of Intra-party Differences</td>
<td>76</td>
</tr>
<tr>
<td>Dealing with Difficult Cases: The ‘Scope for Conciliation’</td>
<td>76</td>
</tr>
<tr>
<td>Fact Based Disputes and Pressures on the Conciliator to Adopt Roles</td>
<td>77</td>
</tr>
<tr>
<td>Strikes and Lockouts</td>
<td>78</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 8 – Conciliation Techniques and Styles</th>
<th>82</th>
</tr>
</thead>
<tbody>
<tr>
<td>Techniques and Roles</td>
<td>82</td>
</tr>
<tr>
<td>People</td>
<td>82</td>
</tr>
<tr>
<td>Problem</td>
<td>82</td>
</tr>
</tbody>
</table>
Introduction

The Aim of the Guide

The Guide aims to help develop and improve the practical knowledge and skills of conciliators who provide third-party assistance to the disputing parties in reaching agreement over disputes arising from collective bargaining. The broader goal of this Guide is thus to promote collective bargaining and sound industrial relations.

The Guide provides a framework for the conciliators to reflect on their role in assisting the parties engaged in collective bargaining. It primarily discusses forms of behaviour, approaches, techniques and attitudes that will enable conciliators to carry out their functions effectively and efficiently, aiming to stimulate active thinking by conciliators about their behaviour and their approach to their work in assisting parties to resolve their differences in disputes.

The key challenge for the conciliator is to make a difference to the parties’ disagreement such that the potential for agreement is enhanced. This Guide sets out to articulate the key factors that make the conciliator’s involvement valuable in the resolution of disagreements and disputes.

The fundamental requirement of the conciliators, at the outset, is that they fully understand their role and the parameters of their mandate as an independent and impartial third party. This Guide aims to provide the conciliator with a clear framework of understanding which enables an almost instinctive response to the many and varied pressures which will be placed upon them in an active dispute situation.

This guide is intended to support reflective practice and sets out to raise for consideration a range of topics and subjects, through which the active conciliator might address their reflections throughout their career.

Target Users

This Guide is intended to be of use to conciliators who are working or newly recruited in different countries under different national conditions. This Guide does not aim to discuss the various national legal and institutional frameworks for settlement of collective labour disputes. While it is designed to be used as teaching material for training newly appointed conciliators, it is also intended to be a useful tool for existing conciliators in examining and reflecting on their roles. This Guide does not set out to describe a perfect style of conciliation. Every conciliator will have a style which is reflective of their personality and their culture. This Guide provides a roadmap to the conciliator to develop their own effective style through structured reflection on the role. Although the main focus of the Guide is on collective interest disputes arising from collective bargaining, information provided in some chapters might be of interest for conciliation of individual labour disputes.

How the Guide can be used

The Guide can be used either as a stand-alone reference point for current and long-practising conciliators or as part of a training programme for newly appointed conciliators.

The Chapters are set out in such a way as to enable a conciliator to reflect on only one aspect of their role, but equally covers all aspects of conciliation from the conceptual to the very practical.

Structure of the Guide

This Guide does not work on the basis that ‘conciliators are born and not made’. Conciliation is not some form of magic - it is the application of techniques and structures to a dialogue between parties who are in dispute.

The Guide is structured in such a way as to bring the reader gradually through an understanding of the process of conciliation. In different countries the process of conciliation, as set out here, may be called differently or the term conciliation may refer to a different process.

1 There is a clear distinction between the terms “conciliation” and “mediation” in some countries, while in others these terms are interchangeably used. In this Guide, the term “conciliation” is used throughout, to refer to a process in which a third party assist the disputing parties in reaching a mutually acceptable agreement.
From setting the context and identifying what is meant by conciliation, the Guide then takes the reader through the personal qualities, qualifications and preparations required to be an effective conciliator. These are the conciliator’s tools of the trade.

It moves to look at the practicalities involved in the process and the application of the identified tools to the process of conciliation, from initial contact with the parties through to the process itself.

The Guide then looks at the pattern of conciliation and the techniques that may be applied when in conciliation.

Because all of the aspects of personal qualities, practical application, phases and techniques are linked, there is some repetition of themes throughout the Guide – the need to understand your role and mandate as a conciliator and develop the necessary skills to be effective; the need to develop and maintain good relationships; the fundamental importance of impartiality, confidentiality and commitment; and the need for self-reflection, are all repeated themes in this Guide.

Appendix 1 contains case studies to illuminate some of the points being made and to describe examples of the range of labour disputes which commonly benefit from the work of conciliators. These case studies can also stand alone as material for reflection by the conciliator on how they may have approached the case in question and may provide a good basis for a training discussion.

Finally, the Guide looks at how conciliators can contribute to dispute prevention.

Fundamentally, this Guide is concerned with exploring and reflecting on what a conciliator can do to assist disputing parties to find a mutually acceptable solution, without reflecting on the national circumstances which lead them to the process of conciliation.

The effective conciliator is a professional who is committed to reflective practice, constantly evaluating and considering their own performance.

**Methodology**

The Guide was developed as a subregional tool to support the ILO’s technical assistance in the areas of dispute prevention and resolution in the Central and Eastern European countries, in collaboration with the Irish Labour Relations Commission (LRC, now known as the Workplace Relations Commission). It is the fruit of the partnership between the ILO and the LRC under a Memorandum of Understanding, as well as a collaborative effort between the ILO Decent Work Technical Support Team and Country Office for Central and Eastern Europe (DWT-CO Budapest), the Governance and Tripartism Department (GOVERNANCE) of the ILO, and the International Training Centre of the ILO in Turin. It was validated in Montenegro in April 2015 with conciliators/mediators within labour administrations and those representing dispute resolution agencies from Bosnia and Herzegovina, Bulgaria, the Former Yugoslav Republic of Macedonia, Montenegro, Romania and Serbia. The Guide is intended for use in the subregion, and will subsequently be published as a global tool with case studies in other regions.

The Guide was prepared as a revision of the ILO Practical Guide on Conciliation in Industrial Disputes, which was first developed in 1973 and updated in 1988. Kevin Foley and Maedhbh Cronin authored this revision so as to update the contents and remove or reframe any outdated references. The authors sought to revise both the language and the practice information contained in the Guide in order to take account of environmental, economic, practice and other changes which have taken place in the field of conciliation in more recent decades. This revision also aims to modernise the language used in the text itself and to provide models and case studies which may stimulate conciliators in different ways to reflect on their role and their own style of conciliation. The new Guide also includes various practical models developed and used by the LRC and other dispute resolution agencies to bring clarity to practice/techniques where relevant -- these models are credited to the originators where relevant. The Guide also contains case studies from a number of dispute resolution agencies which provide conciliation services (Appendix 1). Various websites and internet searches also provided additional information.

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2 Kevin Foley, BBS, formerly Director of Conciliation, Mediation and Early Resolution Services in the Labour Relations Commission and currently Deputy Chairman of the Labour Court, Ireland.

3 Maedhbh Cronin, B.Comm, MBS, Assistant Principal, SME and Entrepreneurship Policy, Department of Jobs, Enterprise and Innovation, Ireland.
Important Definitions and their Sources

For the purposes of this Guide the terms conciliation and mediation are synonymous and the term conciliation will be used to represent both.4

Conciliation is defined for the purposes of this Guide as “a process whereby an independent third party assists the disputing parties to reach a mutually acceptable agreement to resolve their dispute”.5 (see the Vocabulary, Chapter 1 on an Overview of Conciliation, for more details.)

A collective labour dispute is defined in this Guide as “one which arises during the negotiation of agreements or one which arises in connection with the interpretation and application of agreements”6, though the Guide focuses more on disputes over interests.

Disputes which arise in the course of collective bargaining over terms and conditions of employment are categorized as “disputes over interests”. On the other hand, disputes which arise in the interpretation and application of the terms and conditions of employment contained in existing agreements, violation of which may be alleged, or in current laws and regulations are categorized as “disputes over rights”.7

It is important to establish separate procedures for the settlement of rights and interests disputes. While it is possible to bring in conciliation as a process of settlement of rights disputes, the parties should be able to have recourse to the courts when it fails.

Collective bargaining “extends to all negotiations which take place between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more workers’ organisations (thereafter, trade union(s)), on the other, for:

(a) determining working conditions and terms of employment; and/or
(b) regulating relations between employers and workers; and/or
(c) regulating relations between employers or their organisations and a workers’ organisation or workers’ organisations.”8

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4 In some countries there is no distinction between conciliation and mediation, in law or in practice, while in others the difference is established by the degree of intervention and timing in the process.
5 Labour Dispute Resolution Systems: Guideline for Improved Performance, ILO, 2013
7 According to the Committee of Experts on the Application of Conventions and Recommendations (CEACR), “a dispute can arise in the course of determining terms and conditions of employment if the parties claim new rights or seek to establish new obligations (dispute over interest) or in the interpretation and application of the terms and conditions of employment contained in existing agreements, violation of which may be alleged, or in current laws and regulations (dispute over interests).” Collective bargaining in the public service: A way forward – General Survey concerning labour relations and collective bargaining in the public service, ILO, Geneva, 2013.
Chapter 1 - An Overview of Conciliation

(Starting the Journey)
Chapter 1: An Overview of Conciliation

“Purpose of Conciliation is to convert a two dimensional fight into a three dimensional exploration leading to the design of an outcome” (Edward de Bono, 1986).

The purpose of this chapter is to set out the meaning and context of various aspects of conciliation in labour disputes. The first part of the chapter seeks to outline dispute types and their relevance to the conciliator; to set the vocabulary around what we mean by conciliation; to distinguish between collective and individual disputes and how that impacts on the conciliator’s work; and to identify where conciliation fits on the spectrum of alternative dispute resolution mechanisms.

The second part of the chapter looks at the ideal environment for conciliation in collective disputes, and its key function, as well as at the selection of conciliators.

Types of Labour Disputes

Labour disputes can broadly be categorised in two ways - collective and individual labour disputes. Furthermore, collective labour disputes can be: a) interest disputes (about new entitlements) or b) rights disputes (about existing entitlements).

Collective Interest Disputes

Collective interest disputes are those disagreements where negotiating parties disagree over the determination of terms and conditions of employment to be set out by a new collective agreement or over the modification of those already laid down by the existing collective agreement. Commonly disputes in this category will arise in the context of collective bargaining during the negotiation or renegotiation of agreements. Examples of the issues arising in such disputes can include the attempt of the parties to agree pay rates to apply in the enterprise, working arrangements to apply or levels of productivity or output to be expected in the enterprise. Negotiations in such matters are generally a matter of ‘give and take’ – of haggling or bargaining. The practice prevailing in the economy generally, or in other sectors of the economy, may give some guidance as to possible resolution or means of finding agreement.

In essence, the issues in ‘interest disputes’ are negotiable and often compromisable or at least subject to design and customisation by the parties to the disagreement.

Collective Rights Disputes

This second type of collective dispute can arise in relation to the terms and conditions of work set out under law or in a collective agreement where that agreement carries the force of law. Such disputes commonly relate to situations which appear during the application of a collective agreement or when interpretation of an existing collective agreement is challenged by one of the parties. Common issues giving rise to such disputes include non-payment of wages, unilateral modification of working hours, non-observance of agreed rates of pay or holidays, anti-union practices or any of the broad range of existing rights and obligations set out in applicable collective agreements which have the force of law.

Collective disputes over rights can be around different interpretations by the parties to a collective agreement of whether a set of circumstances constitutes the infringement of a right or entitlement or they can be around the question of remedy for a proven or alleged contravention of the law or of the collective agreement.

A feature of the conciliation process is that it may provide an opportunity for the parties to test their assessment of the allegation of an alleged breach of a law or entitlement against known sources of information including case law and precedent. That process of ‘reality testing’ can, of itself, promote the possibility of agreement and voluntary settlement. In that process, while the conciliator does not provide an interpretation of the law or the collective agreement, they present as an individual familiar with the case law and capable of guiding the parties to available information and relevant sources. However, while it is possible to bring in conciliation in rights disputes, either of the disputing parties should be able to have recourse to the independent judicial authorities or quasi-adjudicative bodies, if the dispute remains unresolved.

The key issue for the conciliator in assisting the parties’ dialogue in interest or rights disputes is to find the available grounds for agreement. In an interest dispute, generally speaking, the parties are free to settle on any outcome, unhindered by legal factors. In a rights dispute, clearly certain parameters are already in place limiting the scope for the parties to find their own agreement.

This Guide is focused on the challenge for the conciliator in terms of isolating out that which can be agreed by the parties themselves through dialogue, such that the disagreement no longer exists.

The ADR Spectrum and where Conciliation Fits in

Alternative dispute resolution (ADR) mechanisms include any process for resolving disputes before resorting to industrial action or adjudication. Some of these processes, and their usefulness in relation to labour disputes, need to take into account the priority given to the maintenance of a continuing relationship between the parties in dispute.

It is clear that efforts to resolve disputes by agreement between the parties as distinct from resolution by order or opinion of a third party are more supportive of continuing relationships between the parties. An emphasis on dialogue, supported if necessary by conciliation, is most likely to facilitate the maintenance of a continuing relationship, based on mutual understanding and respect, and the resolution of the dispute in a manner which is understood and accepted by both parties. Such a situation of understanding and voluntary acceptance is more likely to be a constructive support to ongoing relationships.

The Vocabulary

The resolution of labour disputes is generally achieved through a limited range of mechanisms – by dialogue between the parties, by dialogue carried out with the assistance of third parties or through recommendations for the parties’ acceptance and agreement, or through adjudication by a judicial or quasi-judicial authority in the form of awards, binding determinations, rulings or decisions.

This Guide is based on that concept of assisted dialogue focused on labour dispute/disagreement resolution which is called “conciliation” or “mediation”, depending on the national context.

Conciliation is fundamentally a practice of peace-making. The terms “conciliation” and “mediation” are legally defined differently in some countries, but in others legal definitions or distinctions do not exist. Even where both terms are legally defined, different interpretations and practices exist.

For the purpose of this Guide “conciliation” and “mediation” are regarded as equivalent terms referring to essentially the same kind of third-party assistance to the parties in reaching a mutually acceptable solution by themselves.

Regarding disputes over interests (industrial disputes), the ILO Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92) provides that voluntary conciliation procedures “should be free of charge and expeditious” and that “provision should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute or ex officio by the voluntary conciliation authority”. Recommendation No. 92 further states that “if a dispute has been submitted to conciliation procedure...
with the consent of all the parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation is in progress”. Conciliation is thus a process that can be initiated at the request of one of the parties to the dispute, with the other party then being required to join the process. Conciliation is conducted by a neutral and independent third individual – the conciliator. A conciliator is placed in a position whereby he/she is sitting in front of two parties who have not succeeded in resolving their disagreement by themselves. This Guide sets out to discuss what that person – referred to in this document as the conciliator – can do to assist the parties.

For the purposes of this Guide a **disagreement** between an employer, a group or employers or one or more employers’ organizations, on one hand, and one or more workers’ organizations (trade unions) on the other, is described as a **dispute**.

Disputes are most effectively resolved at a point closest to their point of origin, and that proposition leads in some countries to a dynamic effort to encourage and support engagement well in advance of calling a strike or other form of industrial action.

This Guide will not focus on how the parties get to conciliation but will focus on the actual activity/events which occur in that ‘space for conciliation’ whenever it emerges.

**Space for Conciliation**

When we talk about “space for conciliation” we mean the place where two parties have the capacity to reach an agreement to resolve a disagreement. That is to say, where the legal and industrial relations infrastructure in the country allows the parties to resolve the matter under discussion by agreement between them. That space for conciliation is the conciliator’s territory.

The space for conciliation emerges in different contexts across the globe. The process engaged with in this guide is an activity by an independent and neutral third party to help parties to find an agreement between them on a matter which is in dispute. The practice is necessarily adaptable to the context of particular disputes and the behaviour of the conciliator also adapts to circumstance. The key question for the conciliator is to identify and understand the behaviours and activities which they can employ to make a contribution to the resolution of disputes and this Guide is intended to explore and illuminate this issue.

In the process of conciliation certain fundamentals apply for the conciliator:

- The conciliator has no powers to make a determination, judgement or imposition within the process.
- The conciliator crucially has no role in instructing the parties as to what they should agree to.
- The conciliator has no function in giving legal advice or legal interpretations.

The key concept in the process is that the parties ‘own’ their dispute at the outset and will ‘own’ the outcome of the process – whether that outcome is an agreement, a narrowed difference of opinion or continuing outright disagreement.

Conciliation may thus be described as a process whereby an independent third party is allowed by disputing parties to manage their discussions. The conciliator can be expected to create a safe environment for engagement and to manage discussions to produce a rational and orderly consideration of the issues which give rise to disagreement. The process is focused on allowing all parties to consider all available options for mutual acceptance of an outcome.

**Conciliation and Collective Bargaining**

The ILO Collective Bargaining Convention, 1981 (No. 154) provides that bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining. Conciliation can be part of the collective bargaining process. The ILO Collective Bargaining Recommendation,

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1981 (No. 163) further provides that measures should be taken to create procedures to assist the parties in finding solutions themselves to disputes relating to negotiation, interpretation and application of agreements. The ILO Labour Relations (Public Service) Convention, 1978 (No. 151) also enshrines the principle that settlement of disputes related to determination of terms and conditions of employment should be sought through independent and impartial machinery, such as conciliation, mediation and arbitration, that ensures the confidence of the parties involved.

Where the conciliation process is entered as part of a collective bargaining process the persons with whom the conciliator will engage are persons acting in the interest of themselves and others. The objective of the trade union negotiators is to reach a position which will then be considered collectively by a wider group. Similarly, employers in many circumstances present to a bargaining process on a collective basis. For example, a particular sector or industry may have arrangements to bargain on certain matters on an industry or sector-wide basis. Such arrangements produce a dynamic on the employer side which places delegated negotiators at the bargaining table with the objective of reaching a position for consideration by a wider group.

A key challenge for the conciliator is to understand the nature of the environment within which the disputing parties operate. In collective engagements, the people at the bargaining table are representing others. The conciliator, in order to be effective, must work to understand the pressures under which both negotiating teams in the collective environment are operating and indeed to understand the ultimate decision making arrangements of both sides. Understanding these aspects will allow the conciliator, as the manager of the process, to address the ‘constituency management’ challenges arising for the delegated negotiators including managing external perceptions of the conciliation process itself whether through media or other communication processes.

The key understanding for the conciliator is that the bargaining table in the collective environment is generally not the ultimate decision making forum. The bargaining table is the forum where the shape of matters, to be decided later, is built by the negotiators.

In most countries, the framework for intervention by a conciliator in a labour dispute is set by the law itself or legal protocols. However, it is useful to reflect on the question of intervention timing from a pure dispute-resolution standpoint. Where negotiations are taking place in the collective context, there can often be an evolution of mood and openness to assistance taking place. Often, in the earlier phases of engagement, the negotiators are sending messages of strength and credibility to their own constituency or indeed are sending messages of intent and resolve to each other. For the conciliator, the challenge is to understand the ‘chemistry’ of the dispute at all times, such that a judgement can be made around the timing of intervention, whether that should be as early as possible - perhaps when parties have genuinely engaged directly and now need assistance; perhaps after direct talks have actually ‘broken down’; perhaps just before coercive action (e.g. strike or lock-out) takes place; or perhaps after such coercive action has commenced. Each labour dispute is different in its ‘chemistry’ and the conciliator, to be effective, must spend time and effort to understand the nature of a dispute and to decide when an intervention by way of support for dialogue through conciliation will be most effective. In the collective environment, the conciliator must make these judgements while understanding the nature of the relationship between all key actors within and without the negotiating arena, e.g. the relationship between employer’s organisation and employer, the relationship between trade union and workers.

**Conciliation in Individual Labour Disputes**

This Guide does not address conciliation in individual disputes. It only refers to it in order to highlight differences and commonalities as compared to conciliation in collective disputes.

In the individual dispute environment, the dynamics of the engagement are significantly different to the collective environment. Generally, where a dispute arises which affects a single individual, the process of engagement or bargaining will include the presence of the affected individual. Therefore, the conciliator can understand that the emotional attachment of the negotiator to the issue under discussion is likely to be high. The bargaining table is also likely to be the decision making forum, insofar as the affected individual will commonly be the decision maker in terms of reaching a final agreement on the matter or not.
The challenge for the conciliator in the individual dispute is almost exclusively centred on the
detail of the issue in dispute, in a framework where the decision making is taking place in an
immediate and dynamic process.

Unlike collective environments the conciliator is not burdened with the challenge of external perceptions of
the process and ‘constituency management’ in the same way as arises in a situation where the negotiators are, in
essence, delegated by others.

Arbitration

This Guide does not set out to discuss arbitration as a process or to offer support for those engaged in
arbitration. It refers to the process here only to facilitate conciliators’ understanding of the difference between
conciliation and arbitration, as well as of the environment of dispute resolution generally.

Arbitration is a process whereby an impartial third-party arbitrator adjudicates a dispute by issuing an
arbitration award. There are two types of arbitration. Voluntary arbitration is a procedure in which the parties
voluntarily agree to submit their disputes to arbitration and accept being bound by the decision of the arbitrator.
On the contrary, compulsory arbitration is a procedure in which the use of arbitration is imposed either directly
under the law, or administrative decision or at the initiative of one of the parties, without both parties’ consent,
but the final awards are binding on the parties. In respect of collective interest disputes, requirement of prior
exhaustion of arbitration procedure is an acceptable condition to the exercise of the right to strike only when
both parties voluntarily agree to submit the disputes to arbitration. However, any dispute resolution machinery
including conciliation, mediation, and voluntary arbitration must genuinely facilitate bargaining, and should not
be so complex or slow that it would make lawful strike impossible. Compulsory arbitration for collective interest
disputes is acceptable in certain specific circumstances where the right to strike can legitimately be restricted.
The ILO’s Guide on Collective Bargaining provides in depth the ILO standards and principles in this regard.

Arbitration, therefore, is fundamentally different to that of conciliation. In the conciliation process the
parties retain the responsibility for devising and shaping an outcome which they can both find acceptable. In
an arbitration process the parties hand over that responsibility to a third party - the arbitrator. The parties’ role
is to clearly outline their position and their views to the arbitrator and to describe the outcome they believe
is appropriate from their perspective. The arbitrator’s challenge is to facilitate all parties in setting out their
position and to manage a process which illuminates all relevant facts and views in a manner which preserves
natural justice. Ultimately, the arbitrator has the responsibility to make decisions on all matters in dispute and
to set out a resolution of such matters.

In many jurisdictions where arbitration is a feature of the legal framework, the decision of the arbitrator is
final and binding with an appeal possible only on a point of law, e.g. a contention that the arbitrator erred in law,
an allegation of duress, etc. A conciliator occupies a role where no decision is ever required of them as to the
appropriate outcome to a given dispute. The conciliator certainly has a role in helping the parties to assess the
strength or value of their position, claim or demand but they have no role in setting out an opinion in that regard.
An arbitrator, however, occupies a role where a decision is always required.

In essence, while a conciliator will engage with the parties and facilitate dialogue between them
so that they can reach an agreement by themselves, the conciliator cannot make a determination
or judgement over a dispute. The arbitrator is always required to make a finding/decision which
sets out their view of the matters in dispute.

11 ILO Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92).
13 Natural Justice refers to the rule against bias and the right to a fair hearing. In this context it refers to the right of both parties to have
an unbiased arbitrator who will give both parties equal opportunity to express their views/present their positions and equal opportunity
to respond to the views/positions of others.
Voluntarism and Compulsion - the Ideal Environment for Conciliation

If we can understand that conciliation is an effort to assist disputing parties to find agreement with each other, we can identify the dynamics created as result of how the parties arrive at conciliation. It is possible, and this is the case in some countries, to require parties to participate in a conciliation process, as long as it is a means of assisting the parties in voluntarily reaching an agreement. That compulsory recourse to conciliation is normally provided by law or in a binding collective agreement. It is not possible, however, to compel parties to agree with each other.

Therefore, when we talk about voluntary or compulsory conciliation we are talking about the basis for parties’ participation in the process and not about what happens in the process itself or its outcome.

In practice however, where both parties are voluntarily participating in a process designed to assist them in reaching an agreement by themselves, they are more likely to be willing to actively explore all possibilities to find agreement. Similarly, where the parties participate because they are required to do so, it is more likely that their commitment to the process is not as great as it might otherwise be and, consequently, the challenge of assisting the parties to find agreement is greater.

That is not to say that the conciliator has no effective role in a situation where parties are required to engage in the process. But, in such cases, the conciliator may have to spend time proving the worth of the process to the parties.

Where there is no tradition, in a country, of parties participating in conciliation to resolve labour and industrial relations disputes, such a requirement may create, over time, an environment where parties come to understand the process and, in due course, to value it as a means to resolve disputes. Similarly, where a culture of collective bargaining is underdeveloped, conciliators can also play a proactive role through a process of conciliation in providing information on collective bargaining procedures and the value of negotiations, which help parties to understand and voluntarily engage in collective bargaining.

Whenever parties engage in the process because they are required to do so, apart from attempting to assist the parties to find agreement, the conciliator has the opportunity to develop the parties’ understanding of the value of not only conciliation as a settlement process but also as assisted negotiations.

In the ideal environment, the process of conciliation takes place at the request of the parties. Ideally, that request emerges from their joint acceptance that, despite their best efforts in direct engagement, progress will require the assistance of an independent and skilled third party. In such situations, the conciliator can be confident that the parties are committed to the idea of finding agreement through dialogue and are committed to the process of conciliation itself as a means to achieve that agreement.

It is rare to find the ideal environment for the conciliation process. It should be understood that, even in countries where voluntary access to conciliation is the norm, parties participating in the process can feel that their participation is, in reality, obligatory. For example, where a country has a tradition of engagement at conciliation to resolve collective interest disputes, a party may feel that public perception of a refusal to engage in the process by the employer(s) or the union(s) would be a perception of unreasonableness, whatever the underlying merits of the party’s position in the dispute. Therefore, a party may feel obliged by the ‘court of public opinion’ to participate in the process of conciliation.

The conciliator, as already stated, has the constant challenge of understanding the context of the dispute in which they are engaged and this includes understanding the motivations of all parties and the pressures they operate under. In the first instance, therefore, the conciliator should understand the parties’ commitment to the process of conciliation itself.

Where conciliation takes place in a voluntary environment, the process itself must be effective and of value in the practical challenge of assisting parties to find agreement. Parties will only continue to participate in a process of conciliation on a voluntary basis for as long as they believe that the process is effective in achieving its objective.
The Heart of the Conciliation Process

The process of conciliation, in mechanical terms, carried out in a series of engagements between the conciliator and the parties. In particular the conciliator will sometimes act as the Chairperson of a meeting between the parties. On other occasions in the same process the conciliator will meet directly and privately with one party or the other. It is this added dimension of the conciliator's private meetings with the parties separately which makes the process different to direct negotiation and bargaining between the parties themselves. The mechanics of such meetings is dealt with in more detail in Chapters 7 and 8.

The true value of conciliation arises when the parties trust the conciliator completely to the degree that they honestly and openly share their thinking, strategy and ultimate objectives in the dispute. This places the onus on the conciliator to behave in a manner which engenders trust, to be openly impartial, to be ethical and reliably capable of preserving confidentiality.

This Guide is essentially an exploration of the means to effectively generate trust and engagement between the conciliator and parties in order to allow comprehensive exploration of the possibility for agreement to be reached.

When the conciliation process is working at its best, the conciliator becomes more knowledgeable about the dynamics of the dispute than the parties themselves because both parties have confidentially shared with the conciliator information and knowledge which they have not shared with each other.

The conciliator has been given insight into the real positions and objectives of the disputing parties and uniquely holds that knowledge of both parties to the dispute. The conciliator knows where the potential for agreement lies and their challenge, then, is to manage the process in a way which facilitates the emergence of that agreement.

Selection of Conciliators

The issue of how a person becomes involved as a conciliator in a labour dispute is significant and worthy of discussion. In general terms, the central requirement of independence and impartiality can be enhanced where tripartite or bipartite settings are in place. Where the State takes responsibility to provide conciliation services, it is for the State to put in place mechanisms for the appointment of individual conciliators to particular disputes. This can happen by means of the State itself employing specialist conciliators who enjoy the trust of disputing parties or alternatively the State can operate a panel or licensing system whereby a range of identified individuals are available with State approval to function as conciliators. The means for State provision of conciliation varies from country to country and can include a diverse range of models including provision within the State labour administration, public-funded independent agencies (often constituted or governed on a tripartite basis) and independent administration commissions.

When conciliation machinery is constituted on a joint basis, it should include equal representation of employers and workers (ILO Recommendation No. 92). In such bipartite settings, which are generally put in place through collective agreements, it is critical that the selection / appointment of a conciliator is a joint and agreed process where both sides are satisfied as to the independence and impartiality of the conciliator.

Alternative models of conciliation service provision include commercially accessible individuals prepared to act as conciliators in dispute situations, on a fee basis. Such models are a feature in many countries.

The challenge, in all instances, is for the conciliator to deliver on the requirements of independence, confidentiality, neutrality and impartiality. The process of effective conciliation requires the belief on the part of both disputing parties, that the conciliator will favour neither party and is worthy of absolute trust.

In pursuing this goal, an environment where conciliation carries a charge or fee is less desirable than the environment where the State makes the process freely available. According to the ILO Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92), voluntary conciliation procedures should be free of charge and expeditious. Where a fee is charged in order to avail of the service, as would be the case where private practitioners deliver the service independently of the State, the dynamics of the situation may change to the

14 ILO Voluntary Conciliation and Arbitration Recommendation, 1951 (No.92)
degree that the conciliator may be perceived to have a liability to one side or the other as a result of their commercial relationship. Indeed the very existence of a fee may inhibit many parties from being in a position to access the process in the first place.

A freely available and public-funded conciliation service carries the benefits of perceived independence from the parties, impartiality in the context of the issues in dispute as well as accessibility of the service, without inhibition, to all parties.\(^{15}\)

Conciliation is a specialised activity because the labour relations infrastructure and the dynamics of industrial relations in a country are unique in the economy. The significant participants in the industrial and labour relations sphere in a country are generally specialists and practitioners in that field, whether they are trade unions or employer’s representatives, industrial relations experts or labour lawyers. The active conciliator should understand the labour and industrial relations systems and dynamics at a very deep level in order to be capable of achieving credibility with the parties to labour disputes. Insofar as the individual conciliator must have personal credibility, they must demonstrate comfort in the language, politics, infrastructure and dynamics of the labour and industrial relations environment. Where the conciliator is a specialist in the labour and industrial relations arena they should develop and maintain familiarity with the environment to retain their credibility with parties. This is dealt with in more detail in the next chapter.

The Model below seeks to identify the key features of conciliation as drawn out in this Chapter and will be developed further throughout this guide.

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\(^{15}\) The involvement of a State provided conciliation service in public sector disputes where the State is the employer and thus a disputing party, presents particular challenges in terms of securing belief in the conciliator’s impartiality. The perception of impartiality, in such cases, relies on the Service’s track record as in the case of the Irish Public Service pay and reform negotiations, conciliated by the Irish State Conciliation Service – the Labour Relations Commission - in 2009, 2013 and again in 2015.
Chapter 2 – Qualities, Qualifications, Training and Certification

(Building an Effective Conciliator)
Chapter 2 – Qualities, Qualifications, Training and Certification

Personal Qualities

The preceding chapter has described the process we are talking about when we speak of conciliation and about its context. We now explore what qualities, qualifications, training and certification a conciliator needs to possess to be truly effective in conciliation. As a conciliator you will be required to be many things to many people and will need to use your skills and abilities (innate or learned) for many purposes. The actual techniques or ‘tricks of the trade’ used by conciliators in the conciliation process are discussed elsewhere in this Guide; here we are more concerned with establishing the foundations upon which these techniques/’tricks’ can be built.

A conciliator needs to walk out of each conciliation process knowing that he/she has done everything possible to bring the parties to an agreement, and to walk into each conciliation process, knowing that they bring with them the skills and abilities to do so.

There are many sides to conciliation, including external forces, but, fundamentally, there are three main dimensions – the people (the parties to a dispute), the problem (what they disagree over) and the process of conciliation itself. A fourth, and slightly separate dimension, is the conciliator, who steers that process.

As the process moves, a broad pattern can be observed in most cases – at the start of the process the people (and sometimes strong emotions) are front and centre, then as engagement moves forward, the problem becomes more central, as the focus now is on problem solving; finally, as the parties engage, the process itself takes control, with the conciliator steering it to a conclusion.

People – Personalities, Background and Baggage

The cornerstone of being an effective conciliator is to be an excellent communicator. An excellent communicator in conciliation takes in messages and information and communicates messages and information very well. At the heart of many labour disputes may be issues of ineffective communication between employer and workers and therefore the responsibility falls on the conciliator to deliver effective communication between the parties.

The phases of conciliation, which are outlined in Chapter 7, can be a good guide to the appropriate use of the many aspects of communication, and that Chapter will talk about the usefulness of some issues highlighted below.

Communication, in this context, involves neutral listening, active listening, reframing/clarifying what people have said, problem-solving and bringing the parties back to a point where aspects of agreement can be captured and summarised.

A conciliator needs to listen, and be seen to be listening, with neutral but attentive body language. Care needs to be taken here as, for example, nodding to show you understand, in joint session, can be misinterpreted as you being in agreement with the party who is speaking. In meetings where both parties are present, neutral listening is very important.

Active listening is a gear up, in terms of the listening and communication process, and involves appropriate eye contact and body language as well as verbal and non-verbal cues such as nodding and asking prompting questions. It is most appropriate in separate (caucus) meetings (i.e. a meeting with only one party). Eye contact with the parties and appropriate body language are very important - it shows that you are listening and when deliberately practiced can actually improve your listening skills.

To show understanding a conciliator must be able to state clearly what they think people are saying and reflect it back in a neutral fashion. They can do this by reframing\textsuperscript{16} what someone has said in order to ensure they have captured the essence of that person's statement or point of view. They must be able to show empathy as well as maintain impartiality and neutrality. In communicating between the parties and conveying messages and information from one party to the other, the conciliator must be able to launder language\textsuperscript{17} so as to ensure the communication is clear and neutral.

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\textsuperscript{16} Reframing means restating what someone has said in a different way.

\textsuperscript{17} Language laundering means taking what has been said and neutralizing it of emotion or bias in order to be able to reflect to the other party what has been said such that the receiving party is facilitated to focus on the content of the message and not the language used to convey it.
message is delivered, but to also ensure that it is delivered in a neutral way. A conciliator must be able to take emotion out of messages where that emotion only serves to aggravate.

A conciliator also needs to avoid prejudicial comment and seek to show respect for the parties at all times even when the attitudes and immovability of the parties can be very frustrating. By consciously showing respect to the parties, a conciliator gains and maintains the confidence of the parties in both the process and the conciliator.

| Being aware of, and deliberately practicing, elements of communication such as neutral listening, active listening, questioning, reframing, clarifying and summarising will make a conciliator a better communicator and will assist the conciliator in gaining the trust of the parties as well as assisting them in understanding the problem at hand and possible ways forward. |

Emotional intelligence (EI) is described as the ability to identify, assess and control the emotions of oneself, of others and of groups. There has been some discussion of EI in terms of whether it is scientifically measurable, whether it is innate or can be learned – but whatever the basis for measurement, its value to a conciliator is to give them the ability to visualise what is demanded of them, in terms of emotions, during what is sometimes a very emotional process, and also to understand the emotions of others and the perceptions others may have of the conciliator’s own behaviour.

The ability to recognise and use one’s own emotions and the emotions of others to achieve a goal is an important concept for the conciliator to reflect on.

All of the emotional competencies set out in the model below are highly useful to a conciliator. In a similar way to practicing good listening skills, where a conciliator wishes to improve their emotional intelligence, they need to deliberately pay attention to their emotions and reactions and to focus on recognising the emotions of others (the parties) through observing their verbal and body language. By constantly looking for, and reflecting on, the various cues (overt and subtle) provided by the parties the conciliator can improve their ability to recognise and use the emotions of others to manage relationships, empathise and move the process forward.

<table>
<thead>
<tr>
<th>Goleman’s Emotional Intelligence Model</th>
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<tbody>
<tr>
<td>This model puts forward a set of emotional competencies within each construct of EI.</td>
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<tr>
<td>1. Self-awareness – the ability to know one’s emotions, strengths, weaknesses, drives, values and goals and recognise their impact on others, while using feelings to guide decisions.</td>
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<tr>
<td>2. Self-regulation – involves controlling or redirecting one’s disruptive emotions and impulses and adapting to changing circumstances.</td>
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<tr>
<td>3. Social skills – managing relationships to move people in the desired direction.</td>
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<tr>
<td>4. Empathy – considering other people’s feelings especially when making decisions.</td>
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<tr>
<td>5. Motivation – being driven to achieve for the sake of achievement.</td>
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In dealing with the parties to the process of conciliation, the conciliator needs to understand the nature of both inter- and intra- group conflict. The conciliator needs to try to see where there is underlying conflict which may affect the ability of the parties to move forward; the conciliator needs to be aware of possible conflict within the parties themselves and the strength of certain people’s influences within their groups. For example, within an employer/management team there may be differing priorities for the HR and the operations manager. Within a union negotiating team the lead negotiator may not only be concerned with the workers in this organisation but may have a broader agenda in terms of setting or avoiding sectoral precedents outside of the organisation being engaged with.

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18 Prejudicial comment means where a conciliator makes an evaluative comment on something a party has said.
A conciliator must be able to read people's readiness to move and, where movement isn't happening, a conciliator needs to be able to establish influence over the group or individual in order to persuade them to consider acceptable ways forward.

Influence, often related to power, plays a very important role in labour and industrial relations as well as in the process of conciliation; it can derive from personal power (the power of persuasion), positional power (based on a person's position in an organisation or indeed a conciliator's power within their role) or the power of possession (where, in negotiation, one party has possession of something which the other party wants). It is important for a conciliator to understand the role of influence and power and to recognise it in others as well as strive for it themselves.

A conciliator needs to be alert for indications of mood changes. Changes in mood can indicate that one party is no longer willing to stay in the process; they may indicate that certain issues when raised are not negotiable; they may indicate a willingness to explore options in relation to a particular issue.

When dealing with an individual, rather than collective groups, in conciliation it is important to recognise that, in many cases, the conflict may be personal and somewhat emotional for at least one party. In these cases a conciliator must be cognisant of feelings of vulnerability and helplessness which may exist and to ensure that they fully gain the trust of the parties.

Problem – Including The External Environment

In looking at the problem in dispute, the conciliator must be able to quickly absorb and assess information; to show understanding of the problem; and must never be afraid to ask questions in order to develop their own understanding. In many cases, through appropriate and effective questioning, the core problem and the real differences between the parties can be established.

**Effective Questioning**

The field of study on effective questioning is vast but it is always useful to reflect on the kind of information you want to elicit to inform the types of questions you intend to ask.

**Open questions** are used to allow the speaker to expand on what they are saying in a non-leading manner. Using questions like “talk me through what happened...” or “what do you see as the core problem here...” are examples of open and non-leading questions.

**Closed questions** are used to establish fact and generally require brief, in some cases monosyllabic answers. A question like “did you go to the meeting?” is an example of a closed question and such questions can help to clarify issues in a case where all the facts are not known.

Where you want to gather further information and explore the issue more deeply, **probing questions** are useful, questions such as “going back to what you said about...” or “what exactly happened...”. The use of words like ‘exactly’ or ‘specifically’, can ensure focus on the particular aspect of the issue/problem that you want to flesh out. Probing questions can draw information from people and gain clarification for the questioner, as well as indicating that they are listening.

An important probing question in conciliation is “why do you think the other party is saying/claiming......?”, which helps the conciliator to gain an insight into what one side may feel about the other’s position – it also may force one side to consider what exactly is being said by the other party, in the neutral setting of the separate/caucus meetings (bilateral meeting between one party and the conciliator).

**Funnel/drilling questioning**, which involves starting with general questions and getting more specific as you move forward, can also be useful, but really only where clarification on a certain point is required.

**Circular questioning** involves the use of what, when, where and how questions on the same issue and can be used to get a fully rounded view of the issue.

**Hypothetical questioning** involves asking the person to make a prediction of future events such as “what do you think will happen if agreement is not reached?”; “what is the likely reaction of the other party to this proposal?”.
A conciliator needs to be mindful of the context of the problem including relevant external influences, and may need to uncover some of this during the process, as well as during the preparation phase discussed in Chapter 4. Notwithstanding the importance of understanding such outside influences, the conciliator, when engaged in a dispute, retains a relationship only with the parties involved. It is not for the conciliator to discuss the dispute with any outside party or to share information or comment with any party other than the parties involved.

As a conciliator, you must hone and develop the ability to see paths through a point of conflict. You must be able to see problems from all angles and steer the parties to look at the problem from different angles. You must have the energy to keep seeking different ways of looking at the problem and you need to be able to convince the parties to create and assess alternatives while problem-solving.

A conciliator needs to be patient when dealing with the problem/source of dispute. The average person speaks at a rate of about 125 to 130 words per minute but our thinking and comprehension speed is about 500-600 words per minute and, consequently, we are continually jumping ahead of what is being said. In exploring and questioning it is important to ensure that you give people time to respond. People are very different in the way they process information and speed of response varies for each individual.

A conciliator should be able to quickly capture and summarise what is being said where they feel some progress has been made or where a marker needs to be placed to indicate a point of mutual clarity or understanding between the parties. This is dealt with further in Chapter 8.

**Process – Limits and Scope**

As a conciliator, you need to create confidence and trust in the process of conciliation itself by making sure that the parties are clear about the process and its value to them in seeking to reach an agreement. The parties need to be clear on the scope, as well as the limitations, of the process. They need to be clear that it is not the role of the conciliator to come up with a solution but that the process is designed to help generate solutions, or paths to solutions, that the parties may want to consider in coming to a mutually acceptable agreement.

In some cases, parties may seek the conciliator's opinion in relation to a possible outcome and ask such questions as “should I accept the proposal?” or “do you think this is the best option for me?”. The conciliator must understand the consequences of answering such questions directly - to do so would prejudice their position in relation to both parties. For one party they would be effectively making the decision for them and taking a responsibility for a party’s decision making; for the other party they would be breaching a confidence by implying or suggesting that their 'bottom line' had been reached. Consider the possible outcome of a situation where you advised or told one party to accept an offer and they were to later discover that they could have achieved more – the loss of reputation and trust for the conciliator may not be recoverable. The best way to approach such a scenario is to ask questions back to the party to help and encourage them to examine the proposal and to see if it is one which addresses their needs – in other words to help them answer their own question.

The process of conciliation is based around seeking to create some consensus between the parties by trying to create greater understanding between them and looking to close, or narrow, the gap that exists between them.

Confidentiality is central to the conciliation process and the conciliator must remember to maintain that confidentiality, before, during and after the process.

Within the process you must be able to achieve clarity and display total impartiality. This is key to gaining and maintaining trust in the process.

You should be totally committed and have a pride in, and understanding of, your job and of what is expected of you in the process. You need to possess and to generate energy around problem-solving. And, while you need to be mindful of the pace of the parties, you must also keep momentum going within the process. You can only do all of this if you are clear about your role and totally committed to the case.

As a conciliator you are trying to help the parties find a solution, in some cases a solution they haven’t considered. The parties, prior to coming to conciliation, will have worked through a familiar path of discussion and argument; the conciliator’s job is to try to beat out a new path, or paths, for them to consider travelling and to see if the gap between them can be closed.
A conciliator may have to persuade the parties to travel down many paths over a long period of time, so endurance and persistence are very important qualities in a conciliator. You need to be prepared to be the last person standing when all options have been explored and maintain and generate energy throughout the process.

**BATNA and WATNA**

BATNA is the 'Best Alternative to a Negotiated Agreement' and WATNA is the 'Worst Alternative to a Negotiated Agreement'. Discussion or reflection with the parties around the best and worst possible outcomes, where agreement cannot be negotiated, may be most relevant where the parties are considering withdrawing from the process. Reality checking around proposals is different as you are asking the parties to reflect on matters arising during the negotiation process and assess their possible acceptability to the other party. In some cases, however, where parties are frustrated and considering withdrawing from the process then BATNA and WATNA analysis becomes relevant.

By discussing the parties' BATNA and WATNA, the conciliator can ensure that they are not overestimating their own strengths and underestimating those of the other party, as can often be the case.

Where ‘road blocks’ are encountered the conciliator must also be assertive and be prepared to reality check the positions of the parties. In order to be effective in reality checking party's positions, the conciliator needs to be aware of the context of the dispute and also needs to have listened closely to what the parties have said. Where there isn't necessarily a clear outcome (such as being able to point to similar cases and outcomes in a more formal forum) the conciliator can consider asking the parties to travel further down the road of their current position, e.g. “so what do you think might be the outcome of sticking with this position...?" or “and do you think the other side will ever accept this position?" Reality checking can help manage unrealistic expectations where the consequences of a failure to find agreement (e.g. strike, lock out, loss of employment, loss of commercial opportunity, etc.) need to be seriously considered.

**Self – Awareness and Skills**

As the driver of the process, the conciliator needs to be aware of their skills and their limitations. As a conciliator, you are often acting totally alone in a dynamic situation requiring constant decision making and strategic evaluation. This can be a very pressured position to be in and can give rise to moments of flagging self-belief and frustration as the process drags on with no obvious sign of ‘success'. Self-awareness and knowledge of your role and abilities is very important.

A lot of the qualities identified above are the benchmarks against which you need to be able to measure yourself. As a communicator, you need to know your strengths and those areas which require further development or deliberate attention during the process. No two conciliators are the same and no conciliator is perfect.

Some skills can be developed through training, while others can only be continually worked on by the conciliator through changing behaviours within the process. If you are someone who tends to deliver an analysis of the situation too quickly, you may need to deliberately focus on that aspect during conciliation by setting a time limit before which you will not allow yourself to ‘jump in’. If you have trouble listening effectively you may decide to seek training to develop your listening skills.

Above all, a conciliator needs to constantly engage in reflective practice - to look back on each case and identify what went well, what didn't, what technique worked and why - all the time seeking to learn from the experiences of each case and to examine the need for self-development.

Patience and endurance are important personal skills demanded of a conciliator as much as, if not more than, of the parties to the dispute. Skills can be improved and honed, especially when the conciliator has the right attitude. Seeking advice and feedback from colleagues or trusted parties within the field can be useful, but only where those giving feedback can be fully trusted to be honest, constructive and (ideally) understanding of the role and objectives of a conciliator.

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Good judgement throughout the process, in dealing with the people and the problem is very important – it feeds decisions around timing, the suggestions being made to parties and informs all communication. This comes with time, learning from mistakes and patience.

A conciliator needs to be fully aware of the importance of their reputation among practitioners in the field of industrial and employment relations. Failing to be seen as impartial, not ensuring confidentiality and not being seen to be committed to the process can significantly and, in some cases, irrevocably damage a conciliator’s reputation and consequently their ability to facilitate parties to find agreements.

A conciliator’s success cannot be only measured by the number of times conciliation ends in a mutually acceptable agreement. It is measured by the reputation the conciliator has for being truly effective in his/her role, committed to the process and exhausting all possibilities for agreement. Conciliators can only achieve success by knowing their level of skills and abilities and by constantly reflecting on their own performance.

Conciliators’ reputation and ability to build relationships are very important aspects of their role. In the next chapter we discuss preparations for conciliation and the need for building relationships becomes clear at this stage of the process. Reputation and relationships build on each other and are central to the conciliator’s effectiveness.

**Training and Development**

Conciliation, by its nature (different people, different problems), is not a consistent experience. Sound training in communications, people management, influencing skills, persuasion and all of the various skills mentioned in this chapter will be very useful to a conciliator, especially when reflecting on cases and seeking to establish what their well-developed and underdeveloped skills/competencies are. The real learning, in terms of developing a personal style (in keeping with the standards expected in the role), is achieved through experience.

The practice of learning through shadowing colleagues in their work or “sitting by Nellie” is a common and important mechanism for new conciliators to learn and understand their role and its dynamics. The process facilitates real and effective learning from the experience of others.

Reading, learning and training in self-analysis and reflective practice is essential to any profession where one is mainly working alone. It is a skill which, even if one possesses it, can always benefit from learning new and structured approaches. The effective conciliator must maintain a thirst for knowledge and development even in relation to areas of practice and skill which the conciliator believes they are proficient and expert.

Peer review processes and mechanisms can be another useful training and development tool. Such a mechanism is available where a group of conciliators operate a service together, but can be more challenging to implement when the infrastructure creates an environment where no centralised group or service exists. Peer reviews involve a colleague accompanying you to a case and reflecting back their views on your performance during conciliation in a number of pre-agreed (between the reviewer and the conciliator) areas or dimensions of the process. It is important to ensure that the peer accompanying you is someone you trust to be totally honest with you and to ensure that the parties are comfortable with the presence of a colleague. The feedback given by the reviewer and any dialogue is confidential to the reviewer and reviewee.

There is an onus on the conciliator to constantly stay abreast of news and developments in the world of work, particularly in the field of labour law and industrial relations in the country. Being familiar with the current state of dialogue or events in industrial relations allows the conciliator to have essential knowledge of their area of work and also facilitates building and maintaining relationships with parties on the basis that they perceive the conciliator to be interested and knowledgeable. More will be said on this in the Chapter on practical preparation for conciliation.

On-going training will vary from country to country and from individual to individual. However, given the isolated nature of the job, regular gathering together of peer conciliators to talk about challenges and successes in cases can be a very fruitful training and development experience. Structured interactions between practicing conciliators offer an opportunity to learn from shared experience and also enable conciliators, who are usually sole operators in practice, to secure validation and re-assurance from respected peers.
The key for effective performance as a conciliator is an understanding of the role of the conciliator and the process of conciliation. The conciliator is additionally required to be an expert in the conduct of industrial relations and the characteristics and operations of the parties to industrial relations in the country. The conciliator will have to understand the national, regional and global legal infrastructure (laws, regulations etc.) that affects industrial relations in the country. The conciliator is required to be familiar with the economy of the country and global economic trends and issues insofar as they can affect political and economic life in the country. In addition, the conciliator is required to understand how organisations function and to be a ‘people’ expert with real skills in terms of relating to people and understanding the factors which affect or influence the behaviours of people. Structured programmes can and, where possible, should be undertaken in conciliation skills. Learning should be undertaken in all of the areas associated with understanding people and organisations. In essence, the conciliator must be a person who is interested in the issues which impinge on the world of employment, the economy and organisational and human behaviour. The conciliator therefore will be a constant student of the world of work and people and will undertake programmes where possible, will read available literature and maintain a thirst for knowledge in the areas which affect the work they do.

Professional Qualifications

A conciliator is a professional, which is, performing “a job that requires special education, training, or skill”\(^\text{20}\). Whether that job requires a person to have additional legal or other qualifications may depend on the legal and institutional context and the industrial relations climate. In many countries there is no academic qualification required for the role, with key qualifications being seen to relate to experience in the field of industrial or employment relations. In other countries a reliance on, for example, legal qualifications are a desired background of prospective conciliators.

In general, a conciliator is expected to have many of the skills outlined above, as well as sound knowledge of the laws and regulations relating to industrial relations (IR) within their country. They are expected to have knowledge of the IR systems within their country, union structures, management structures, IR dispute settlement structure, and IR history and dispute patterns. Such knowledge has particular value as a background to involvement in collective labour disputes, but is important as a foundation for involvement in the field of industrial relations generally.

They are expected to maintain their own learning and research in the fields of negotiating, bargaining, psychology - especially as that relates to managing and influencing people - communications and many other topics relevant to their practice of conciliation.

Crucially, a conciliator is required to adhere to a written, or understood, code of practice requiring confidentiality, impartiality and commitment to using the process of conciliation to seek to bring the parties in dispute to a mutually acceptable agreement.

Accreditation

In looking at the whole area of accreditation for conciliators who are provided/assigned by government, the cultural, institutional and industrial relations context needs to be considered.

One the one hand, some would argue, if the State is providing a service through an employee, the State is standing over that employee's ability to perform that job and that is their accreditation. Moreover, and so it should be, the State is taking responsibility to provide the training, access to current knowledge and assessment of that individual on a regular basis in order to ensure that they are in fact able to perform that role. Those with this view would say that the only accreditation required is the knowledge that this person is trusted to perform their role by their employer – the State.

However, in many countries where ‘competition’ exists in the private sector, perhaps due to the State provided conciliation service being more recently established or to the presence of a developing group of private practitioners, a practice of accreditation or ‘licensing’ of conciliators may be in place. In others, perhaps for cultural and historic reasons, the practice of independent accreditation of conciliators may be a feature of the environment. In all circumstances, the conciliator must be viewed by the parties as competent and capable of providing the service. Culturally, or for reasons of custom, the level of perceived competence may require

endorsement by the State as the provider of the Service or by some form of independent accreditation. Any such independent accreditation must be by a body competent to provide a credible and accepted benchmark of professional competence similar for example to the manner of certification/accreditation of professional accountants, architects, etc. by appropriately competent bodies.

At the end of the day, it is likely that individual conciliators will be in demand or perceived as competent and acceptable to the parties on the basis of the reputation they personally develop in the community of practitioners and not on the basis of their accreditation.

Summary of Key Conciliator’s Skills
Chapter 3 – Preparations for Conciliator

(Getting Fit for Purpose)
Chapter 3 – Preparations

A conciliator’s preparations fall into two broad categories - general/environmental preparations and those that are specific to the case. Where a conciliator keeps abreast of developments in the field of industrial, employment and labour relations, as well as the economic and business environment in the country, they will be in a much more comfortable position going into every case. It is important to stress, however, that the conciliator does not present themselves to the parties as an expert in relation to the issues in dispute. It is for the parties to describe the dispute and to be the subject matter experts.

The conciliator’s preparation is intended to create a level of comfort and knowledge for the conciliator which allows them to be seen as a credible interested individual capable of understanding the issues presented by the parties. The parties are entitled to expect the conciliator to be a process expert and an industrial / labour relations expert. A conciliator who is viewed as an expert in relation to the specific subject in dispute may be perceived by the parties as having a personal interest in the outcome rather than as a manager of the conciliation process.

In all preparations, conciliators need to keep in mind that, as soon as they become aware of the dispute or the need for conciliation, the process has started and the guiding pillars of confidentiality, impartiality and commitment apply immediately.

General / Environmental Preparations

A challenge for a conciliator is to secure access to affordable resources and information. This challenge is eased when the conciliator is operating as part of a state-provided conciliation service or a wider organisation with the capacities and resources to equip the conciliator in the optimal manner. In such cases, the challenge of securing access to information becomes an objective of the organisation in terms of facilitating conciliators to perform effectively in their role.

In the course of their job, a conciliator should have access to all relevant international, regional, national and industry journals, e-newsletters, newsfeeds etc., in the field of industrial relations, labour relations, economics, conciliation and the broad area of human resources/personnel management. They should have access to the websites, publications, research and annual reports of trades unions, worker bodies and employer bodies as well as relevant professional bodies. Access to research publications from bodies such as universities, international organisations, conciliation services both within and without labour administration across the globe and the ILO etc., should also be available to conciliators.

Conciliators should ideally have access to wages and salary surveys and information generally on wage patterns in the country (where such information is generated in a country), information on legislative developments, administrative regulations, collective agreements, wage orders, awards, court decisions and any other country-specific relevant information.

Where the conciliator is operating as part of a wider service, organisation or national infrastructure a well maintained record system is vital. Whether these records are held on paper files or electronically can depend on many factors, including technical resources. In terms of record maintenance, it is important that conciliators are aware of their responsibility to contribute to the maintenance of good records and that their training emphasises the importance of their role in this area.

Where a conciliator is not part of a wider service, record keeping is still an important aspect of their job, for personal reference purposes and to ensure a responsible attitude to all confidential information (Chapter 6 talks more about note taking in conciliation).
Case Management Systems in Conciliation

A Case Management System (CMS) is an often electronic/digital method of gathering and maintaining current information on cases using similar parameters for each case, e.g., name of company (entity), union (worker body), industry, sector, dispute type, settlement etc. The purpose of such a system is to facilitate reporting on activity, trends and events in the industrial relations environment and also to facilitate management and oversight of the ‘live’ caseload of the conciliator and organisation / service. Crucially an effective CMS maintains current records on active cases such that the system can be interrogated to give information on the current position in relation to any dispute recorded on the system. Such a ‘live’ system requires constant input from case-responsible conciliators.

While some highly developed services have very sophisticated CMS’s, which may be interrogated to produce fine detail on cases, even a basic and well-kept paper based filing system, matched with a simple spreadsheet or database can be invaluable to a conciliator seeking background information on cases and to a service requiring to understand the current position as regards disputes on hand.

Some advanced CMS’s can provide interrogation capacities for the analysis of trends by industry or type of employment, patterns of disputes and dispute settlements which is useful to the conciliator and also to the service itself and may even inform policy development in the area of industrial relations.

Conciliators should keep themselves up to date with global and national economic and political news which may have an external influence on disputes and set the context for positions taken by parties in conciliation. Regular checking of websites, reports, research publications, awards, court decisions and all other information to which conciliators have access is an important part of the conciliator’s role.

The ILO Collective Bargaining Recommendation, 1981 (No. 163) provides that “measures adapted to national conditions should be taken, if necessary, so that parties have access to the information required for meaningful negotiations”. These measures include the role of the public authorities in making available “such information on the economic and social situation of the negotiating unit and the undertaking as a whole, as is necessary for meaningful negotiations21; as well as “such information as is necessary on the overall economic and social situation of the country and the branch of activity concerned, to the extent to which the disclosure of this information is not prejudicial to the national interest”. Although a clear distinction should be made between the function of labour inspectors and that of conciliators, effective co-operation between them can contribute to prevention of labour disputes.

Where a conciliator works for a service that has administrative/support staff, it is important to maintain and develop an excellent working relationship with those staff and ensure open lines of communication. The administrative/support staff may well be the first point of contact for disputing parties and so it is important that they understand their important role and maintain good customer service values.

Sources of information in general preparations

<table>
<thead>
<tr>
<th>Journals</th>
<th>Newspapers</th>
<th>Television news</th>
<th>Internet – websites of relevant organisations and associations, groups etc.</th>
<th>Newsfeeds</th>
<th>E-newsletters and web bulletins, specialist web based networks</th>
</tr>
</thead>
</table>

Public Information and data

| Social media platforms | Dialogue and relationships with colleagues and actors in labour and industrial relations | Published research, surveys etc. |

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21 R163 further provides that “where the disclosure of some of this information could be prejudicial to the undertaking, its communication may be made conditional upon a commitment that it would be regarded as confidential to the extent required; the information to made available may be agreed upon between the parties to collective bargaining”.
**Case specific Preparations**

Some preparations are specific to the case in hand and can be looked at using our themes of people, problem, process and self.

In case-specific preparations it is important for conciliators not to develop views or let their impartiality be affected, or be seen to be affected, through their research or contacts with the parties.

**People**

Industrial and labour relations are ‘people businesses’ and all of the events and occurrences in industrial and labour relations are the result of the decisions or actions of people. The industrial relations community (i.e. the people who engage in activities associated with the conduct of labour and industrial relations) is generally reasonably distinct and identifiable. The conciliator is part of that community and consideration has to be given as to how the conciliator is visible or accessible to the entire community.

For the conciliator, the benefits of information and knowledge in terms of maintaining active relationships with the industrial relations community cannot be overstated. In particular the conciliator, who is known to the community and whose role is understood, is likely to have a very effective ‘early warning’ network which places the conciliator in an ideal position to manage their entry into a dispute. In the ideal environment, the industrial relations community (worker representatives, employer representatives, trade union officials, human resource managers, etc.) know who the conciliator is, how they can assist when a disagreement occurs and how to contact them easily. In order to achieve this level of interaction with the industrial relations community the conciliator has to personally interact with parties outside dispute situations through arranging information meetings, speaking at conferences and seminars and engaging personally with key practitioners. The conciliator has to be willing to use modern technology (where available) such as mobile / cell phone numbers and e-mail to make themselves available to practitioners generally. Many conciliators acknowledge that ensuring that key practitioners know how to contact the conciliator directly is a key underpinning requirement for effective performance in the role.

Knowing who you will be dealing with, in terms of lead negotiators or negotiating teams, can be very beneficial in specific cases. It is not always possible to know this information but, where it is possible, a conciliator can use relationships they have built, where appropriate, to make contacts with both parties prior to conciliation in order to get a ‘feel’ for the dispute and any underlying issues that may be present, including outside of the specific problem at hand. In some cases the conciliator may decide to arrange bilateral meetings with both sides before the process formally commences. In such cases the conciliator should normally try to make such arrangements in a manner which is known to all parties.

How and when should the conciliator inform the parties of the contacts made before the formal start of the process? The simple answer to this question is that it depends on the conciliator’s relationship with the parties and the parties’ understanding of the process of conciliation. Ideally, on first contact, the conciliator will indicate, when contacting the party, that they intend to also contact the other (or that they have already contacted the other party). Where people are familiar with the conciliator and the process this will not come as a surprise. Where they are not familiar with the conciliator or the process the conciliator may choose to make contact by letter outlining the arrangements to avoid any perception of partiality (e.g. where one or both parties may feel that the other has been in a position to ‘state their case’ first). Alternatively, where administrative support is available to the conciliator, they may ask an administrator to contact the parties and arrange a joint meeting.

Occasionally, but rarely, the conciliator may agree to a confidential ‘pre-meeting’ with a trusted practitioner in order to be advised of particular circumstances or factors surrounding the dispute. Where the conciliator agrees to such a meeting it is critical that the practitioner concerned understands that the conciliator’s agreement to the meeting will not affect their impartiality. It is also critical that any such meeting only takes place where real trust exists between the conciliator and the practitioner and where the occurrence of the meeting remains personally confidential to both individuals involved. Usually such meetings only take place where the dynamics of the dispute or surrounding circumstances are such that a trusted practitioner feels that the conciliator should be aware of relevant matters which will never be revealed in the conciliation process itself, e.g. the view of a key stakeholder (e.g. the government, the owner, etc.), a related but separate set of events (e.g. a separate civil
In some cases a lot of ‘baggage’ is brought to the dispute – e.g. the issue or problem which is the subject of the particular dispute may be that of a refusal by workers to cooperate with the implementation of a changed work practice or an innovation in the workplace. However the reality may be that other pre-existing and unresolved issues are the real driver for the workers’ attitude to proposals from the employer.

Any resolution of the apparent matter in dispute will, in such circumstances, require some engagement around these underlying issues in the relationship. Effective ongoing relationships maintained by the conciliator with key practitioners create the possibility of the relevant representative taking the opportunity to inform the conciliator of the real context of the dispute before the process formally commences. Possession of such information places the conciliator in a much stronger position to assist the parties in finding a resolution to their dispute.

Similarly, a conciliator who maintains trusting and effective relationships with key practitioners is more likely to be informed of any intra- or inter-group conflicts or dynamics which are present, and this knowledge may assist the conciliator in deciding how they will approach / manage the process, as well as in understanding what is happening as the process proceeds.

When operating within a wider service, an effective Case Management System will facilitate the conciliator in identifying colleagues with knowledge, from prior dealings, of parties to particular disputes. The knowledge held by fellow conciliators is a key resource for conciliators and it is important that, where conciliators operate under the umbrella of a single organisation, the organisation creates a culture of information seeking and sharing among the conciliators.

Good and effective relationships will facilitate the conciliator in developing insight to the mind-set of key people in relation to particular disputes. A trusting relationship will create the opportunity for the conciliator to understand the true disposition of key strategic decision makers as regards, for example, willingness to support industrial action or even strike in a dispute. The key influencers in industrial disputes are engaged in dispute planning and management at a strategic level as the dispute evolves and it is important for the conciliator to have an ongoing insight to the thinking of these people as it evolves.

Sources of information

Colleagues
Contacts – relationships
CMS or paper files

Keeping up to date with the economic and political pressures within a particular industry or sector, or researching such matters on being appointed to a dispute, can be very valuable to a conciliator in terms of enterprise context. Familiarity with relevant context assists the conciliator in many ways and importantly it helps the conciliator to be viewed as informed and interested in the parties’ dispute. Comprehension of context helps the conciliator to understand the factors affecting the parties’ disposition. Knowledge of enterprise specific context helps the conciliator to understand the problem at hand, and also equips the conciliator with knowledge that may assist in the ‘reality-checking’ phase of the conciliation process (See Chapter 7). Understanding that parties may sometimes have reservations about the conciliator as well as the conciliation process itself, a conciliator
who is perceived as knowledgeable and appreciative of context gives the parties confidence in the conciliator’s ability to assist them, as well as presenting a professional and committed appearance to the parties.

Some areas of focus for possible pre-conciliation research might be:

- Is the issue in dispute a common problem in this industry or sector? Is it an industry-wide problem? Have colleagues dealt with similar cases?
- Are there old or new patterns of settlement of this type of issue in this industry? (Albeit that “one size doesn’t fit all”, familiarity with such patterns helps the conciliator in seeing ways forward).
- Is this problem being influenced by a particular economic or political context such as global downturn, industry downturn, and financial problems for the particular organisation or significant technological change within an industry?
- A conciliator should consider the type of problem (issue in dispute) that is being presented - is it an interest-based or rights-based dispute? If it is a rights-based dispute – what is the case law on this issue?
- When conciliating disputes regarding terms and conditions in an enterprise a conciliator can prepare by looking at what the ‘norms’ are in the industry or indeed the country generally – are there existing parameters or historical parities with other workers within the organisation or outside of it?
- For complex matters, a conciliator, who has kept up to date with cases in their own, and other jurisdictions, may consider reminding themselves of imaginative outcomes in disputes previously conciliated by a colleague.

**Sources of information**

- Internet
- CMS
- Newspapers/television news
- In-house reference sources
- Colleagues including colleagues in other jurisdictions
- Court Records, etc.

**Process**

The process of conciliation has a practical as well as a conceptual dimension. In preparing for the conciliation process, there are very practical things a conciliator must do. Ensuring they have access to the relevant file and information is just as important as any of the other preparations. It reinforces a conciliator’s professional presentation and lays the ground work for a smooth running meeting or set of meetings.

A conciliator should be in a position to know what level of time commitment they can give to the process and be broadly aware of the demands each case will bring. This can be achieved through contact with the parties prior to conciliation.

It is important, going into conciliation, to know your future availability in order to assign dates for resumption, when necessary.

The conciliator must satisfy themselves as to adequacy of the proposed venue for a conciliation conference and the physical arrangements in place to meet the needs of the parties. Parties may be influenced to stay or leave where the physical arrangements provide a sufficient/insufficient level of privacy and comfort in keeping with the process. It is not unknown for a party to use a perceived or alleged inadequacy in physical arrangements as a basis for concluding the process of conciliation.

Are there sufficient rooms? Is there sufficient privacy to facilitate bilateral meetings with the parties? Conciliation is conducted on a dynamic basis meaning that a session could involve a series of meetings between the conciliator and the parties in various configurations (See Chapter 5). The conciliator therefore must ensure
that the venue is adequately resourced to support everyone’s needs while attending extended meetings across extended periods of time.

A checklist of practical preparations is provided at the end of this chapter.

**Sources of information**

- CMS
- Internal files
- Previous cases
- Colleagues
- Parties to conciliation
- Diary management

**Self**

The conciliator is the central influence on the conduct of the conciliation process. Recognising their role and influence, the conciliator should focus on believing in themselves and the process and should project that belief through their mood and behaviour. A conciliator who projects a positive, energetic and confident mood is much more likely to instil confidence and to positively influence the moods/dispositions of the parties.

Conciliators should prepare themselves mentally for the case by consciously reflecting on areas that need attention and focus in the process. The conciliator should actively reflect on their requirement/ability to:

- Listen actively
- Use neutral language
- Communicate effectively
- Use neutral body language.

If you have had experience of one or both of the parties before, you may want to reflect on your previous dealings with them and to reflect on your experience in terms of effectiveness in relationship building and the behaviours which were most useful. Taking time in advance of the conciliation session to mentally consider the key behavioural requirements of the role of conciliator will prepare the conciliator.

For a high profile or difficult conciliation, a conciliator may want, in preparation for the case, to have an experienced and trusted colleague standing by as a sounding board, should unforeseen challenges arise.

In high profile cases a conciliator should be prepared for external pressures from political or interest groups and for media interest. A lot of high profile cases can involve interest groups and politicians voicing opinions in traditional media and social media. Dealing with traditional and social media will be dealt with in Chapter 6 and it is very important for conciliators to be aware of these influences in their preparations.

**Sources of information**

- Self-awareness
- Colleagues
- Media
- Regular team meetings

Above all a conciliator should prepare to approach each case with optimism and confidence in the process of conciliation.
Practical Preparations for Meetings

Preparation for conciliation and meetings in the process can be affected by a range of factors, e.g. there may be timelines set out by agreement or regulations that create urgency around the process, or strike or lockout deadlines that will also require speedy response. In general, the following preparations can be a checklist for conciliators as they approach each case.

✓ Meeting Location

The location of meetings should be in a neutral venue - preferably the offices of the conciliator where such offices can accommodate a meeting. If not, then another possibility would be to use a hotel or other hired meeting room. It may be important to ensure that either the hotel is paid for by the conciliator / conciliation service or by both parties equally, to ensure lack of perception of bias. Where this is not possible, the employer or Trade Union may offer premises; in such cases it is important that no perception of bias or partiality of process arises from venue selection. In any event a pre-meeting contact with the parties to be assured that both parties are satisfied with the planned venue is often a wise precaution.

✓ Meeting Accommodation

Wherever the location, the space required for conciliation should be adequate. There should be a meeting room large enough for a Joint Meeting and at least one smaller room for the process to break into Separate Meetings; if there are more than two parties, accommodation needs will extend beyond this.

✓ Invitation to attend

While this has been covered in Chapter 4, ‘Entry into a Dispute’, it is important to have it on your checklist that the administrative process ensures that all parties have been invited to attend the process at the same time and transparently. The conciliator should also consider whether the invitation process creates an opportunity for relationship building either by making informal contact with the parties directly or by ensuring that any organisational / administrative contact with the parties emphasises the nature of the process in terms of confidentiality and lack of prejudice.

✓ Documentation

Some countries may require that documentation is furnished to a conciliator prior to conciliation. Where this is the case a conciliator should encourage compliance on a voluntary basis initially. Where it is common practice to do so, but not required, a conciliator should be careful about asking for something which is not likely to be given as this may affect their relationship with that party before conciliation meetings even begin. In any event the conciliator should only accept documentation that can be shared with the other party(ies).

A risk in seeking documentation prior to conciliation is that the parties may perceive the conciliator to be behaving in a manner more commonly associated with an arbitrator. Where documentation is required, the conciliator must make it clear that it is for information purposes and reiterate the purpose of conciliation and the conciliator’s role. Any documentation supplied to the Conciliator must be copied to all parties.

✓ Case file

Most commonly a conciliator will have generated a case file prior to their first engagement with the parties. This file will commonly contain the background administrative detail of the initiation of the conciliation process as well as any documentation gathered in the course of setting up the first meeting. The conciliator’s case file should be in order; they should review the file, no matter how familiar they are with the parties, prior to conciliation. This will facilitate an impression of professionalism and commitment to the case. Reviewing the file can give the conciliator an understanding of the issues and the rationale behind each parties position, and may help the conciliator to think about ways of assisting the parties to generate alternatives.

It is vital that the conciliator ensure that all files and documentation in relation to the dispute are kept safely and treated with absolute confidentiality.
Summary of Preparation
Needs for a Conciliator

People
- Colleagues
- Contacts - relationships
- CMS or paper files

Self
- Self-awareness
- Colleagues
- Media

Problem
- Internet
- CMS
- Newspapers
- Televisions news
- In-house reference sources
- Colleagues
- Colleagues in other jurisdictions

Process
- CMS
- Internal files
- Previous cases
- Colleagues
- Parties to conciliation
- Diary management

Self

People

Problem

Process

Summary of Preparation
Needs for a Conciliator
Chapter 4 – The Conciliator’s Entry into a Dispute

(Getting off to a Good Start)
Chapter 4: The Conciliator’s Entry Into a Dispute

Conciliators can regard their function as involving a series of phases culminating with conducting meetings and facilitating dialogue between the parties.

The conciliator has a range of means available to them in order to detect the existence of a dispute and, once detected, a range of options available to assist in progress towards resolution of the dispute.

In some circumstances, the conciliator’s first knowledge of the parties to a dispute may happen when a dispute is contemplated or is occurring.

It is important for the conciliator to develop and maintain relationships across the industrial/labour relations community so that interactions in dispute situations have as their backdrop pre-existing trusting relationships with key people who understand fully the motivations and objectives of the conciliator.

The effectiveness of the conciliator’s actions in a particular dispute can be heavily influenced by the degree to which his/her involvement in that dispute occurs against the background of pre-existing trusting relationships with the parties.

The Problem: Detecting a Dispute

The practical preparation for conciliation is discussed elsewhere in this guide. At its best, conciliation in labour related disputes involves specialised dedication to the field of labour and industrial relations itself and the players involved. For example trade union officials are dedicated professionals with a focus for their professional practice – industrial and labour relations. The conciliator with good relationships across a network of practitioners in the field of industrial relations is equipped to understand, at an early stage, the existence of dispute in a workplace or the likely emergence of dispute. In essence a conciliator dedicated to practice in industrial and labour relations becomes a person with current live knowledge of the state of relationships across a range of workplaces in the economy.

A conciliator will become aware of a dispute either as a result of a formal notification or referral or as a result of informal communications and information gathering with key practitioners. The involvement of the conciliator begins with that first indication of the existence, or likely existence, of a labour dispute. The conciliator needs to decide how to proceed once the dispute is detected. In the situation where a formal notification or referral has been made often the timing of the initiation of conciliation is dictated by legislative or other strictures. In the situation where a conciliator has become aware of a dispute, or likely dispute, in an informal way the conciliator must decide:

- whether to initiate conciliation, if that is permitted by the national law,
- whether to engage in informal contacts with both sides,
- whether, through informal dialogue with the parties, to encourage a formal referral,
- when, if ever, to take any form of action in relation to the dispute.

The conciliator bases their entire practice, their trustworthiness and the transparency of their concern in relation to any dispute. The conciliator’s concern must always be with the facilitation of agreement between the parties.

It is critical that any contact between the conciliator and the parties cannot be interpreted as wanting to influence developments in the interest of one party or the other, whether consciously or unconsciously.

With this focus, the conciliator can make initial confidential contact with the key people in a dispute to determine their disposition and strategy and, armed with that information, to develop an approach to the conciliator’s involvement in the dispute.
Sometimes that involvement can be limited to an informal process of bilateral dialogue with both parties in an attempt to help the disputing parties to understand each other in a manner which diminishes the conflict between them. Sometimes the contact can be directed towards engineering or exploring some strategic direction or road map for the dispute including, in some cases, encouraging a formal referral or notification of the dispute by the parties to the conciliation service.

The conciliator, if they are contemplating a public or visible initiative in a dispute, should prepare the ground for that initiative through informal contact with key people on both sides in order that neither party is surprised by or prejudiced by the actions of the conciliator. In a voluntarist system for example which allows the conciliator to intervene in a perceived dispute by inviting the parties to meet with them, it is critical that no such invitation is issued until the conciliator is sure that the parties will respond positively to the invitation. It is likely that any party who feels it necessary to refuse an invitation from a conciliator will feel that the invitation itself prejudiced their position in the dispute.

**The Process: Timing**

In a system where the conciliator's involvement can only be initiated by the parties themselves the question of timing is largely a function of the legal or agreed framework for such a referral or notification. Therefore the question of timing as a tool, in terms of resolution of disputes, is a diminished factor for the conciliator. The conciliator is a responsive rather than active agent in that regard. Notwithstanding that, a conciliator with good underlying relationships can, through informal contacts, seek to encourage the parties to initiate the conciliation process at a particular moment in the evolution of the dispute and thereby seek to optimise timing as a positive influence on the outcome of conciliation.

In many systems, however, the conciliator has the option of initiating the process themselves, either mandatorily or by the issuing of an invitation to the parties. This prerogative places a burden on the conciliator to manage the timing of events, at this entry stage, in a manner most conducive to achieving an overall settlement.

Parties’ perspectives regarding their own positions change in the face of events and developments over the lifetime of a dispute. In a case where the worker side has made a claim on an employer it is likely, at that moment where the ‘claim’ or proposition is made, that both sides will feel somewhat uncertain as to what course any consequent engagement or dialogue will take. Where the parties have actually met directly and arrived at the point of disagreement, the parties are likely to be in a strategy formulation phase with some level of openness to consideration of the direction they will follow.

Where a trade union, for example, has secured a mandate from its membership in the workplace to undertake industrial action, the union is likely to feel quite strong and determined in the dispute. Where notice of industrial action has been served, the union is likely to feel strong, but possibly slightly anxious, while the employer is likely to be either very anxious or increasingly determined around their own position. These emotional dispositions are likely to fluctuate as the date of the strike or industrial action approaches. Indeed, once the strike has actually commenced, the disposition of the parties is likely to continue to fluctuate in the face of events, pressures and the costs being incurred by both sides.

The conciliator, in a system which allows the conciliator to judge when an intervention might take place, must be in constant informal contact with the key negotiators throughout, not just in order to remain informed as to developments in the dispute, but also to make judgements as to the optimal timing of intervention based on the state of mind of the parties and the conciliator’s understanding of the ‘beat and rhythm’ of the dispute as it evolves. Successful conciliation occurs where both parties can see the value in agreement. Equally, at certain stages in a dispute it is likely that one party or the other may feel that they can ‘win’ the dispute and so conditions for conciliation are not optimal.

Timing of action by the conciliator is a tool which must be used wisely. In order for conciliators to be equipped to make sound judgements on timing, they must position themselves in such a way as to have trusting relationships with key practitioners.

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22 One to one contact between the conciliator and each party separately.
Such trust is ideally the product of reputation and personal contact maintained by the conciliation service and the conciliator over time and not just in the context of an existing or likely dispute.

**The People: The Basis for Conciliators’ Relationships with the Parties**

A significant issue for the conciliator is the parties' perceptions of the service, the process of conciliation and the individual conciliator in their country. It is difficult for the conciliator to affect that perception in an environment where the conciliator is not committed to an ongoing relationship with key practitioners. In the collective bargaining environment there is a cohort of persons, on both sides, who are key to the conduct of industrial relationships and in dispute situations in particular. Those persons are likely to include trade union officials, Human Resource managers, staff of employers’ organisations as well as professional advisers in the field of industrial and labour relations. It is necessary for the conciliator to understand the importance of the perceptions of those persons and their willingness to utilise conciliation to resolve disputes as they arise.

Perceptions can be created by ignorance of the process. A challenge for the conciliator, in an environment where the process is not well known, is to engage in awareness raising among the industrial/labour relations community. In such environments, every contact in a dispute situation is an opportunity to raise awareness and develop trust. In such circumstances, constant reiteration of the key messages of impartiality, trust and confidentiality is required.

The challenge of creating understanding of the process among users and potential users is real and requires a strategy appropriate to the country concerned and the nature of the ‘audience’. The conciliator (or the service / Ministry) should be prepared to communicate through media, ‘new media’ and publications the key characteristics of the service. Initiatives such as printed and e-based brochures / catalogues and explanatory documents are amenable to wide distribution and ‘FAQ – Frequently Asked Questions’ type material is often instructive and valuable as an information dissemination tool.

In more developed environments, the knowledge of the process and its value creates the challenge for the conciliator to maintain relationships in a manner which secures the continuing reliance of key participants on the conciliation process as a dispute resolution tool. The conciliator must focus on assuring parties at all stages that contact with the conciliator or engagement in conciliation will not prejudice the parties’ position in any way. The fact that the conciliation process represents an opportunity to explore resolution of differences in a safe environment must constantly be brought home to the parties.

An important point to stress in this context is that the conciliator must always be careful to manage all parties’ perceptions of the conciliator’s behaviour in terms of interacting with one party or the other. For example, a conciliator who is perceived to have a stronger relationship with one party than the other, risks as being seen biased or partial. The conciliator must always be concerned with the parties’ perception and must carefully weigh all of their interactions in that context. This places a responsibility on the conciliator to manage their interactions with parties including, for example, considering carefully all invitations to engage publicly with one party or the other, whether such invitations relate to conferences, social or other events.

As a general rule, it is best for the conciliator to ensure that their interactions with any party are not hidden and are set in a context which can be seen to be impartial. For example a conciliator who agrees to speak at a Trade Union event to create understanding of the process could wisely consider contacting employers’ organisations offering to do the same at an employer conference or training course. A conciliator can often be asked to attend social events by one party or the other. It can be very difficult for a conciliator to retain a perception of impartiality and lack of bias where it is the practice of the conciliator to engage socially with one party. The best advice to the conciliator in the event of such invitations is to decline, if necessary explaining why. Clearly explaining the need for impartiality can give all parties confidence in the conciliator’s professionalism. Social events attended by both parties together are a different situation.

**Respect for and Understanding of the Parties**

The conciliator, whatever their personal or private assessment of the capacity of individuals involved or indeed of the position of either party to a dispute, must always create a confidence among parties that their position and the individuals are respected. Respect for a party’s position or point of view does not signify...

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23 Social media and other platforms.
agreement or acceptance. A conciliator who conveys anything other than respect is likely to find it difficult to form trusting and valued relationships with the parties. The conciliator’s key weapon is the quality of their relationship with individuals and worthwhile relationships are founded on mutual respect.

The conciliator must accept that the disputing parties have different priorities and objectives to those of the conciliator. For instance a trade union official or other worker representative clearly has the primary objective of advancing the interest of their members and protecting their members’ employment situation. Sometimes that objective may not be consistent, in the trade union official’s mind, with the idea of resolving disputes through conciliation, which simply reflects the raison d’etre of a representative’s work and role in negotiations. Equally, an employer or their representative has objectives associated with organisational performance or stakeholder expectations and such objectives may not coincide at a given moment with the idea of peaceful resolution of labour disputes. Such a reality does not make either representative any less competent or wise.

The conciliator must always focus on the peaceful resolution of labour disputes and, therefore, can sometimes become frustrated with parties who do not co-operate with the strategy the conciliator believes is best in a given dispute, at a given time.

It is the quality of the conciliator’s relationship with the parties and the conciliator’s understanding of their context and strategy that facilitates the conciliator’s truly understanding of the dynamic of a dispute as well as maintaining a respect for the individuals involved.

The conciliator should have a clear focus on relationship building in order to maximise their ability to influence disputing parties towards finding agreement. The conciliator therefore must always seek to develop their self-awareness and emotional intelligence such that they are capable of achieving a respectful relationship with representatives on both sides, regardless of their occupation or position in the organisation. It is fair to say that a likely ingredient in many labour disputes is a failure of the parties to communicate effectively with each other. This was dealt with in more detail in previous chapters.

**Self: Orientation**

The conciliator’s entry into a dispute can be judged to occur at the stage when the conciliator becomes aware of the dispute or its likely occurrence. The conciliator must have an understanding of their mandate and objective as a basis for their behaviours. That mandate is exclusively focussed on facilitating parties to find agreement with each other. The conciliator must understand this so as to make it an instinctive part of their behaviour.

The conciliator therefore must actively plan and execute their actions while firmly understanding their role. Such a foundation helps the conciliator to continually create the perception of a professional who is impartial, transparent and consistently mindful of the need to avoid any prejudicial effect of contact with the conciliator or the process.

This chapter has dealt with entry into a dispute, from the perspective of the conduct and behaviour of the conciliator, rather than focusing on country-specific systems.

The basis for effective and constructive behaviour from the point of first knowledge of a dispute is ongoing relationship-building and transparent impartiality and reliability. The focus of the conciliator is always on dispute resolution and that forms the basis for their actions both within and outside dispute situations.
Summary of the Conciliator’s Entry into a Dispute

People
Continually building relationships
Respect and trust

Self
Understand your own role and mandate

Problem
Understand context and sensitivities prior to entering dispute

Process
Timing and the requirement for intervention
Chapter 5 – Types of Meetings

(The Physical Dynamics)
Chapter 5 – Types of Meetings and Preparation

This Chapter outlines the types of meetings used in the conciliation process, their features and the opportunities and challenges presented by each. All cases are different but some general approaches can be applied, with adjustments made to suit each case. The application and use of these meetings will be expanded in Chapter 7, when looking at the conduct of the meeting types.

What happens when an unstoppable force meets an immovable object?

An endless transfer of energy between the two, since the force has infinite momentum (energy) and the object has infinite inertia (resistance to change in momentum)

OR

They both annihilate each other, leaving particulate dust in their wake.

One role for the conciliator is to help the unstoppable force and the immovable object by, in the first instance, allowing them to observe each other's respective ‘unstoppability’ and ‘immovability’ and appreciate the situation at which they have arrived and by trying to harness that energy to explore solutions and avoid annihilation.

The process of conciliation is carried out via personal contact between the conciliator and the parties and direct contact between the parties. It is important for the conciliator to understand and ensure that they are the manager of the process. It is the conciliator who manages the dynamics of the meeting process by directing the type of engagement (meeting) to occur at any given stage of the dispute. The conciliator must understand the role of the different type of meetings and actively decide the nature and shape of meetings as the process develops. Generally, the process of conciliation involves a range of Joint Meetings chaired by the conciliator or Separate Meetings (Caucus) meetings between the conciliator and each party separately.

The Joint Meeting

The Joint Meeting involves a meeting of the full negotiating teams of both parties, with the conciliator acting as Chairperson. This meeting, in standard cases, marks the beginning of the conciliation process.

In some cases - depending on the dispute as well as the nature, culture and personalities of the parties - the conciliator might not commence the process with a joint meeting. For example, a conciliator might decide that if the parties are forced to state their positions in each other's presence, at the outset, that they might find it difficult - for reasons associated with factors such as fear of 'loss of face', loss of dignity or the need to uphold honour - to depart from that position as the conciliation evolves. As the conciliation proceeds the conciliator might convene many joint meetings in order to tease out matters of detail, especially technical detail, and occasionally to assist each party to be clear as to the disposition of the other party, at a given point in time.

A Joint Meeting, which is usually convened at the start of the process, facilitates the presentation of both sides' positions in the presence and hearing of each other. In this meeting exaggerated positions - even including factual inaccuracies - may be put forward which may be challenged by the other party. Such a meeting creates an opportunity for 'venting' or emotional outbursts by members of the negotiating teams, which may become personalised. It is important for the conciliator to manage this 'venting' process and that can be a challenge. Where it is clear to the conciliator that members of the negotiating teams are anxious to express strong feelings and views the conciliator should try to facilitate that, while at the same time ensuring that it does not go too far, damaging relationships further and damaging the possibility of progress in conciliation.

The Joint Meeting also provides an opportunity for the conciliator to clearly set out 'rules' for the process. In particular, the conciliator may have to set out boundaries in terms of offensive language or character attack within which the conciliation process will be conducted. It is certainly easier for the conciliator to set parameters of behaviour before rather than after a challenging event has occurred.

The Joint Meeting is often used by lead negotiators to influence and impress their fellow negotiating team members. The key negotiator will often recognise the Joint Meeting as an opportunity to establish or enhance their position within the group and to emphasise their commitment to their own side's position. In essence, the
Joint Meeting is a key opportunity for negotiators, by sounding strong and committed before the other side and the conciliator, to manage their own constituency. The conciliator must be conscious of this dynamic and indeed may choose to facilitate constructive negotiators’ objective by allowing, as chair of the meeting, latitude and time to achieve their intent.

A Joint Meeting also allows the parties to jointly share an identification of what lies unresolved between them, which fundamentally sets the agenda for conciliation and helps to avoid surprises later in the process. Central to the conciliator’s objective in an initial joint meeting is to achieve a reasonable understanding of the parties’ perspectives on the matter(s) in dispute. The initial joint meeting also provides the conciliator with an opportunity to observe the interaction of the parties, the personality issues, if any, and for the conciliator to establish control of the process.

At certain stages during the evolving process of conciliation, the conciliators may find themselves in Caucus Meetings attempting to describe to one party the attitude of the other party to an issue or element of the matter in dispute. The conciliator will often, rather than appearing to take ownership of a party’s attitude, convene a Joint Meeting so that each party can gather knowledge of each other’s attitude directly. However the conciliator will often decide that the parties lack the capacity to clearly communicate with each other and so the caucus meeting will be the venue where the conciliator seeks to make up for that inability to communicate.

At other moments in the conciliation process, matters of fact or technical detail will arise for discussion. It is beyond the capacity of the conciliation process to facilitate the parties’ negotiations on matters of fact. Facts are facts. When discussions of matters of fact arise it is often appropriate for the conciliator to convene joint meetings of the full negotiating teams or of technical experts of each team in order that facts can be established rather than fruitlessly debated.

The conciliator must conduct Joint Meetings in a manner which does not suggest favouritism or disproportionate allocation of speaking time for either party. The conciliator must manage the technical challenge of chairing an often fractious discussion in order to avoid any resentment or feelings of inability to express a view. The conciliator will employ effective questioning as a means of developing an understanding of the parties’ positions, interests and feelings in a joint meeting. The conciliator should have clear objectives when convening a Joint Meeting. The conciliator should seek to conclude such meetings when those objectives have been achieved. The conciliator should also be alert for the point in the discussion where repetition and restatement of position occurs and should seek to bring a conclusion to the debate when dialogue reaches this stage.

**The Separate or Caucus Meeting**

The Separate Meeting is an engagement between the conciliator and one party to the dispute. The Separate Meeting is often described as the meeting where the ‘heart’ of the conciliation process lies. The key to the process is the degree to which trust can be built in separate meetings between the conciliator and the parties to the dispute. Where absolute levels of trust are achieved the conciliator can guide the parties towards a resolution because each party has trusted the conciliator enough to share their private and ‘real’ positions in relation to the issues in dispute. Such trust allows the conciliator to form real understandings of the pathways to agreement and to make effective judgements as to where movement is possible, and where it is not, for both parties. That ingredient of trust and dialogue in a trusting environment between the conciliator and each party separately is the ‘heart’ of the conciliation process.

Separate or Caucus Meetings are meetings where the conciliator is engaged in a process of relationship building, while at the same time ‘digging’ deeper into the positions of each party. In a separate meeting the conciliator, and the party involved, are freer to discuss aspects of the dispute in a non-prejudicial manner insofar as questions can be asked and issues examined in total confidentiality.

The conciliator must communicate to the party involved that all discussion in a Separate Meeting is confidential and will not be disclosed outside the room where the meeting is taking place. The conciliator must, at the outset, establish this dynamic in the mind of the party they are meeting.

Where parties understand that the discussion is confidential, the conciliator attempts to follow a reasonably structured agenda in that Separate Meeting:

- The conciliator seeks to establish the party’s understanding of the other party’s position on the matter. Where the conciliator believes that there may be a level of misunderstanding the conciliator must seek
to clarify positions and satisfy themselves that the party understands the other party. That process may involve rechecking the conciliator’s own understanding of what the other party is saying. It may involve reconvening of joint meetings to engage on the matter.

- The conciliator seeks to establish real clarity as to the position of the party with whom they are meeting. In a Separate Meeting it is expected that the party concerned will feel free to set out their view with clarity and in confidence.
- The conciliator seeks to have the party concerned discuss the potential for the other party to accept their position and to assess the prospects for the achievement of overall resolution in that context.
- The conciliator seeks to develop trust with the party they are meeting such that, at some point, the party feels confident in sharing their own ‘bottom line’ on the matter in dispute.
- The conciliator seeks to engage with the party they are meeting to work through the consequences of a failure to find agreement through assessing their positions and options for agreement.

These meetings are the core of the conciliation process and allow the conciliator to practice the full range of their communication skills. The Separate or Caucus meeting is much more informal than the Joint Meeting and the conciliator is not the chair of this meeting. This is where the conciliator gets the opportunity to really ‘dig deep’ into the dispute and the rationale of the parties. It is where the conciliator has an opportunity to question, advise and challenge the parties in order to get an understanding of the group dynamic, establishing who, outside of the spokesperson, may have the power/influence within the group. Any intra-group conflict will become apparent here.

As manager of the process, the conciliator will convene the meetings during the process and decide when Separate Meetings or any other form of engagement are convened, while consulting the parties around actual timing.

In some cases Separate Meetings may take place where the parties cannot physically manage to get together at the same location within a necessary time frame or indeed where, as occasionally happens, the parties refuse to be in the same room as each other, but are willing to talk to the conciliator separately. The conciliator, in any such situation, must be particularly conscious of the need to manage perceptions of their behaviour and ensure transparency at all times in the process.

The most important thing for a conciliator to remember, in the separate meeting part of the process, is to emphasise and have understood that everything said in these meetings is confidential and, unless otherwise agreed with the parties, will remain that way.

The conciliator needs to be mindful of time spent with each party in Separate Meetings in order to avoid a perception of bias if they spend too much time with one party. Where a lengthy engagement with one party is unavoidable the conciliator should ensure that they communicate this to the other party and address any perception of bias arising – simply saying that you are trying to get a better understanding of the other party’s position may be sufficient but good judgement is called for in these situations.

Private Meetings

Occasionally the conciliator will arrive at a point in discussion where they need clarity on lead negotiators’ views as to the path the discussion should follow. The conciliator may need to understand, in a confidential way, the view of solution-focussed lead negotiators as to the state of the discussions. This guide has emphasised the value to the conciliator of maintaining trusting relationships with key practitioners in the field of labour and industrial relations. Conciliators who undertake that task will, over time, find themselves in conciliation with persons with whom they have a trusting professional relationship. Where a conciliator is confident of the reliability of key negotiators in a dispute, they may initiate a confidential bilateral discussion seeking guidance and a sharing of perspective. Indeed, where trusted and reliable lead negotiators are present on both sides the conciliator may initiate occasional private trilateral engagements with lead negotiators on both sides.

It is important that the bargaining teams on both sides are agreeable to such meetings taking place and often such agreement is not forthcoming, making the holding of small private meetings impossible.
Such meetings, although potentially very valuable to the process of finding agreement, carry risks for the conciliator and the lead negotiators alike. Such meetings therefore should only be undertaken where there is trust between the conciliator and the participants and a confidence that the purpose is understood as the ethical pursuit of a means to secure voluntary agreement.

The Private Meeting is conducted with the smallest number of people from each side and usually just the lead negotiator. Where the conciliator has identified someone other than the lead negotiator as influential on a team, they may wish to arrange a situation where they include this person and their equivalent from the other side. In any such situation the same caution around trust and reliability applies.

The objective of such meetings is to deepen mutual understanding of the obstacles to agreement and to deepen the level of mutual understanding of why a party is being inflexible or rigid in relation to certain resolution options.

This type of meeting should be exceptional and is often reserved for situations where there is a stalemate and where the conciliator believes that such a meeting may shift that stalemate.

**The Smaller Group/Split Group Meeting**

The process of bargaining in labour and industrial relations can often encompass subject areas which are technical in nature, e.g. discussions related to shift pattern design in shift working employments. Where such matters are under discussion it can often be appropriate for the conciliator to generate smaller meetings of subject-matter experts from both sides. Such an initiative can often remove the issue in contention from a pure bargaining environment and position the discussion is an environment of technical examination and option generation based on non-contentious joint technical analysis. This type of meeting is often used in complex, multidimensional disputes where a wide range of issues exist and where it is possible to identify and isolate out such issues.

It is rare for negotiating teams to delegate a negotiating mandate to Smaller or Split Group meetings. Usually the negotiating team delegates to such meetings the task of simplifying the scope for bargaining by, in a non-contentious environment, isolating the facts and technical parameters of issues and generating options for discussion by negotiating teams.

A challenge to securing agreement to convene meetings of this nature is the degree to which negotiating teams have sufficient internal trust to delegate members to conduct separate meetings and the degree to which the delegates are given authority to explore options in these meetings.

In choosing a meeting type within the process, it is key that the conciliator understands the people and the problem and chooses the meeting type to suit the dynamic within the dispute. Some meetings are used to gain an understanding of the people and the problem, while others are chosen on the basis of understanding these two dimensions, and in an effort to use the process to move towards a resolution. Effective conciliation often involves the use of all meeting types at different stages as the conciliation process evolves and the dialogue develops.

**Telephone Delivered Conciliation**

In certain circumstances the conciliator may seek to deliver the process of conciliation by telephone. Conciliation by telephone is increasingly developing as a methodology for service delivery in cases affecting individuals rather than groups of individuals where a single person is in dispute with their employer and thus where the decision makers are directly involved in the telephone contacts. Indeed the delivery of conciliation by telephone may often be the only means available where distance and/or weather conditions mean that ‘face to face’ engagements are impossible.

Where the dispute is a rights-based dispute the conciliation process is usually triggered by a request from an individual or their representative to have a right at work vindicated. The conciliator’s first contact with the claimant and the respondent is, as in all conciliation processes where participation is voluntary, to seek their agreement to participate in the process.

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24 This process, in some countries, is referred to as early conciliation or early resolution services.
Where such a service is provided, the conciliator generally sets out basic but very important parameters for the process at the point of first contact with the parties. This involves clarifying that the process will take place over a series of telephone calls over a specified number of weeks (e.g. six weeks) and during which time the conciliator will devote a specified amount of time to the process (e.g. three hours).

Often the delivery of conciliation in this manner is focussed on disputes of right where a clear unambiguous understanding of legislation/case law on both sides can assist significantly in finding agreement as to an outcome and where the process of securing agreement therefore can involve a level of research of case law and precedent by the parties.

The process offers a non-intrusive and flexible mode of engagement with the conciliator at pre-set agreed times. The space between engagements via telephone calls facilitates the parties in assessing their position, studying case law and reflecting on the potential for compromise and agreement. Examples of the types of cases dealt with/resolved through telephone conciliation are individual claims relating to unpaid wages, unfair dismissals, discrimination, and access to annual leave/holiday pay [where there are legal or contracted minima in place] and other claims under various pieces of legislation or arising from contracted rights or entitlements.

<table>
<thead>
<tr>
<th>Pros and Cons of Conciliation by Telephone</th>
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</thead>
<tbody>
<tr>
<td>Some benefits of Telephone Conciliation are that it can create an opportunity for the disputing parties to reflect on all aspects of their own and the other party’s position and /or allow the parties time, often under the guidance of the conciliator, to research case law or other relevant information helping them to form realistic assessments of their own position. It can provide a solution within a time bound process at less cost for the parties both in terms of travel and time away from work or home. The process can also reduce the stress caused to some people by having to attend a meeting.</td>
</tr>
<tr>
<td>Disadvantages include the lack of ‘face-to-face’ contact with the conciliator which creates challenges in the areas of trust and relationship building.</td>
</tr>
<tr>
<td>It is a process which is often considered to be better suited to individual grievances or complaints than complex cases or cases involving a lot of people.</td>
</tr>
<tr>
<td>Where the conciliator is using telephone conciliation, all of the same undertakings of impartiality, confidentiality and trust building apply. Normally a conciliation process conducted by phone takes place as part of system/case assignment design in the country and is not a matter for individual decision making by the conciliator on a case by case basis.</td>
</tr>
</tbody>
</table>
Table 2: Summary of Meeting Types, Features etc.

<table>
<thead>
<tr>
<th>Type of Meeting and Brief Description</th>
<th>Features</th>
<th>Opportunities</th>
<th>Challenges</th>
<th>Factors Influencing Need for, Duration and Success</th>
</tr>
</thead>
<tbody>
<tr>
<td>Joint Meeting (JM):</td>
<td>Formal;</td>
<td>For conciliator to understand the issues in dispute;</td>
<td>The venting and hostility may become damaging and so needs to be managed;</td>
<td>Relationships between the parties;</td>
</tr>
<tr>
<td></td>
<td>Usually one spokesperson for each team;</td>
<td>For parties to vent;</td>
<td>No deep exploration of positions;</td>
<td>Levels of hostility;</td>
</tr>
<tr>
<td></td>
<td>Presentation of unity on both sides;</td>
<td>For parties to set out positions;</td>
<td>Formality;</td>
<td>Complexity of issue(s).</td>
</tr>
<tr>
<td></td>
<td>Strong, firm positions presented;</td>
<td>For Conciliator to see interaction between parties:</td>
<td>To ensure both sides are heard and respond in equal measure.</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Some venting/hostility;</td>
<td>For Conciliator to see personality issues between parties;</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>KEY: SETS OUT UNRESOLVED ISSUES AND THE AGENDA FOR CONCILIATION. CONCILIATOR OBJECTIVE IS TO GAIN UNDERSTANDING OF DISPUTE, THE PARTIES, ETC.</td>
<td>For parties to be reminded of each other’s entrenched positions;</td>
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<td></td>
<td></td>
<td>For conciliator to lay down process ‘rules’</td>
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<tr>
<td></td>
<td></td>
<td>For Conciliator to establish control of the process.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Type of Meeting and Brief Description</strong></td>
<td><strong>Features</strong></td>
<td><strong>Opportunities</strong></td>
<td><strong>Challenges</strong></td>
<td><strong>Factors Influencing Need for, Duration and Success</strong></td>
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<td>----------------------------------------</td>
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<tr>
<td>Separate Meeting (SM):</td>
<td>Conciliator not the chair; More informal; Conciliator can question, advise and challenge the parties; KEY: TOTALLY CONFIDENTIAL</td>
<td>For Conciliator to gain a deeper understanding; For Conciliator to gain full trust of the parties; For the Conciliator to secure mutual understanding between the parties; For the Conciliator to see the intra-group dynamic; For the Conciliator to see who has the power in the group; To develop the relationship between the Conciliator and the team.</td>
<td>For the Conciliator to be seen to be impartial at all times; One group may be more time-consuming than the other; Groups become suspicious of meetings between the Conciliator and the other side; Internal group conflicts need to be managed as they can delay progress and frustrate the process.</td>
<td>Where the agenda is clearly set; Where the parties in JM have repeated their positions several times in JM; Levels of hostility in JM unproductive; Where the conciliator is ready to move beyond 'formality' of JM; Where there is a need to get and keep momentum going.</td>
</tr>
<tr>
<td>Private Meeting (PM):</td>
<td>Smallest no. from each side; Like a summit; JM or SM; Agreement from both lead negotiators; Where stalemate has emerged; Usually confidential to all KEY: EXCEPTIONAL</td>
<td>For the Conciliator to be frank with the spokespersons; For the spokespersons to be open about some possibility of change without commitment; To see if movement can be achieved.</td>
<td>Can leave the wider teams uncertain and suspicious and thus damage the conciliation process.</td>
<td>Possibility of direction / movement with only spokesperson; Lead negotiator holds influence – true leader; Relationships between lead negotiators; Realism of lead negotiators.</td>
</tr>
</tbody>
</table>

**Separate Meeting (SM):**
- Where one or both full teams meet separately with the Conciliator; occurs at discretion of Conciliator; often arises out of JM; may arise in other circumstances, including where parties cannot sit together.

**Private Meeting (PM):**
- Where the lead negotiators or a small group from each team meets with the Conciliator, either together or separately.
<table>
<thead>
<tr>
<th>Type of Meeting and Brief Description</th>
<th>Features</th>
<th>Opportunities</th>
<th>Challenges</th>
<th>Factors Influencing Need for, Duration and Success</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Smaller Group/Split Group:</strong></td>
<td>Where the full teams are split into smaller groups to deal with definably separate issues</td>
<td>Definable separate issues; Smaller groups closely familiar with the problem/issue; For technical engagement KEY: ABILITY TO BREAK DISPUTE INTO PARTS.</td>
<td>Willingness of teams to form smaller groups; For conciliator to ‘keep up’ with progress in each smaller group; Keeping momentum going.</td>
<td>The size of the negotiation teams; The complexity of the issues and whether they can be broken up; The intra-team trust levels.</td>
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<tr>
<td></td>
<td></td>
<td>To break down a complex set of negotiations into manageable portions; To clarify factual and technical details; To keep everyone in a large group occupied; To move contentious issues in an arena of joint fact finding and option generation.</td>
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<tr>
<td><strong>Telephone Delivered Conciliation:</strong></td>
<td>Where the Conciliator seeks to resolve differences by telephone with the parties or their spokespersons</td>
<td>Generally individual disputes; All by telephone; No face-to-face contact; Generally Rights Based; KEY: ISSUE SHOULD NOT BE COMPLEX OR INVOLVE TOO MANY PEOPLE.</td>
<td>Lack of ‘face-to-face’ is challenging for conciliator; Conciliator cannot use all of their communication skills; Gaining trust by telephone.</td>
<td>Complexity of case; Trust of parties.</td>
</tr>
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</table>
Chapter 6 – Conduct of Meetings

(The Process Dynamics)
Chapter 6 – Conduct of Meetings and Common Problems

The previous chapter described the range of meeting types usually employed in the process of conciliation. This chapter sets out to deepen the discussion by helping the conciliator to reflect on how to use the various meeting types to advance the objective of conciliation and to understand their application and usefulness in different circumstances.

Ultimately, the personal style of the conciliator, and their relationship with the parties will influence the types of meetings that take place; but always the decision as regards meeting types should be based on what is most appropriate in seeking to assist the parties to move towards agreement or resolution.

The initial meeting (usually a Joint Meeting) is the first opportunity for the parties to meet the conciliator and it is important for the conciliator to create a good ‘first impression’. In creating a good ‘first impression’, a conciliator should be seen to be engaged, appreciative of the parties’ concerns and understanding of their position and description of the issues they present (the conciliator’s responsibility for ‘mood’ in the process, and how effective mood management requires active reflection by the conciliator is discussed elsewhere in this Guide). Equally, basic features of a professional approach to meeting participation, such as being prompt and ensuring that you remember the names of at least the lead negotiators, displays respect for the parties and the process itself. Ensuring that you have arranged appropriate accommodation shows the parties that you are prepared and committed to the process.

Where a party seeks a separate meeting with the conciliator at the outset, or a delay in the scheduled commencement time to allow an internal meeting by themselves, the conciliator should ensure transparency around this development and that the other party is always kept informed, including regarding any delays that may arise.

The duration of the conciliation process, and the various meetings which occur during the process, will vary according to many factors, including the people involved and the complexity of the problem they are dealing with. The conciliator, and the parties, should be prepared for the fact that adjournment to return another day, or many other days, is a possibility during the process of conciliation. The conciliator should actively discuss logistics and meeting arrangements with both parties as the process evolves so that all parties feel a part of the process.

The conciliator should be prepared to endure long meetings and protracted negotiation: time lapses between meetings, which are often a feature of the negotiating process, do not necessarily mean lack of interest. In the same vein, a conciliator should be able to tell when an agreement is within reach and remain with the parties late into the night if required.

Appearance of Fairness

Albeit that the conciliator is not in a decision making role in the conciliation process it is useful to be very aware of, and apply wherever possible, the principles of Natural Justice. That is, the right for both parties to be heard without bias and their right to a fair hearing. In terms of conciliation this means an equal opportunity for the parties to present their positions and views and the importance of the right of response by either side to any positions, accusations or claims from the other side.

The Joint Meeting

The opening of a joint meeting should involve brief introductions, where necessary, and a brief opening statement by the conciliator. The conciliator should welcome the parties and outline the process, including its confidentiality and the mechanics of engagement, and the objective of conciliation, which is to assist the parties to find agreement with each other. The conciliator may wish to reassure the parties that the process offers the opportunity to explore, without prejudice, the possibilities around a mutually agreeable solution.

It is important that the conciliator does not appear to ‘lecture the parties’ and that the conciliator’s comments are brief. This is really a time for the conciliator to listen carefully to what people are saying and to avoid any language or body language which may allow either party to question their impartiality.
The conciliator may, depending on the disposition of the parties or the nature of engagements in initial meetings, feel it necessary to set basic rules for the process around use of language, personal comments and respectful behaviour. In any such case, the conciliator must ensure that such rule setting is delivered in a manner which is not interpreted as a criticism of one party or the other.

A key opportunity for the conciliator in an initial Joint or Separate Meeting is to establish mood for the process by appearing positive, engaged and optimistic themselves and appearing focussed on the matter at hand.

<table>
<thead>
<tr>
<th>Joint Meeting – DOs and DON'Ts</th>
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<tbody>
<tr>
<td><strong>DO</strong></td>
</tr>
<tr>
<td>Provide equal opportunities to speak and respond</td>
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<tr>
<td>Keep the discussion on track</td>
</tr>
<tr>
<td>Manage your own mood</td>
</tr>
<tr>
<td>Watch your body language</td>
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</table>

In general, the party who has raised the issue, initiated a request for conciliation or who has made a claim (sometimes called the ‘moving’ party) will be asked by the conciliator to speak first at an initial Joint Meeting. The conciliator should make it clear why one side is being asked to speak first. The order of initial presentation of position can often be a point of concern for the parties. The conciliator must therefore:

- Explain the rationale for the order of speaking
- Remind the parties that the Joint Meeting is focussed on the conciliator learning about the dispute
- Clarify that the order of speaking carries no significance because both sides will have a full opportunity to set out their perspective.

It is important, at the outset, that both parties are given an opportunity to present their positions and to respond to each other. Even where heated debate arises, the conciliator needs to be mindful of giving each party a fair and even opportunity to speak and respond.

A key purpose of the initial Joint Meeting is to allow the conciliator to develop an understanding of the issues in dispute and to clarify the agenda for the conciliation process. How the parties choose to set out their concerns and issues of contention is not important - what is important is that all issues which need to be discussed or explored are set out during this Joint Meeting. As much as possible, the parties should avoid raising new issues after this meeting.

Where documents are offered to the conciliator during a Joint Meeting, in accordance with the principle of fairness, copies of those documents should also be provided to the other side. Otherwise the party which has not had sight of the documents will probably be suspicious of the development. Where the party offering documentation is not prepared to share it with the other party, the conciliator generally should decide not to accept the documentation on the grounds that they would have access to detail not available to the other party. It should be noted that, in the environment of a Separate or Caucus Meeting, the conciliator will be more prepared to examine any information offered, but to accept material in a Joint Meeting which is not shared can create a perception of bias.

As the Chair of the Joint Meeting, the conciliator needs to balance the need for the parties to express their views and emotions against the need to ensure that the tone and nature of the meeting does not develop to a stage where the objectives of the conciliation process are damaged.

Conciliation cannot take place without the participation of both parties. Therefore, where a conciliator feels that venting of emotions, personal attacks or aggression may lead to one party leaving the process, it is time for the conciliator to call for calm and / or seek an adjournment to separate meetings.
Every dispute is different, as are the personalities involved. The degree to which parties can withstand hostility and aggression will depend on many factors, including cultural influences, the behaviour which is acceptable locally and the relationships between the parties. In some cases it is important for the lead negotiators to “perform” in front of those they represent and equally important for the conciliator to allow them that opportunity.

The size of the group will also influence the amount of debate that takes place in the initial Joint Meeting. In a large group, while it is usual for the lead negotiator to speak on behalf of the group, other individuals will often seek to intervene or make a point. The conciliator should, where possible, facilitate these interventions as a means of gaining deeper understandings as to the dynamics of the group.

In the case of an individual dispute, where the worker is represented (by, for example, a trade union official), their representative may speak on their behalf during the Joint Meeting. The conciliator should invite the individual to add anything if they wish but shouldn’t pursue this where the individual is not willing to do so (the Separate Meeting may be used to draw out the individual). In such cases the conciliator should, however, look for indications of the relationship between the worker and their representative and also between the worker and their employer through body language and other cues.

The conciliator will use the Joint Meeting to send messages to the parties about the control of the process. The conciliator should focus on effective meeting management and control as part of their effort to establish their own overall control of the process.

As Chair of the Joint Meeting, for example, the conciliator will ensure that the parties stick to the discussion of the issue or issues at hand and will steer the parties back to that discussion if they stray too far.

Recording of proceedings should not be permitted. The essence of conciliation is an exchange of views and a dialogue which is, as far as possible, open and frank. Parties are assured by the conciliator that the proceedings and exchanges are confidential to the process. Where people are aware that their contributions are being recorded they will tend to be circumspect in what they say and will assume that what they say will be relayed verbatim outside the process. This feeling of exposure to external scrutiny will inhibit participation in the process, militate against the successful conduct of conciliation and may give rise to concerns around the confidentiality of process.

This may be a challenge for the conciliator, in this era of widespread technology including technology which facilitates discreet recording. The conciliator must set out clear protocols around the use of technology during the process and require the parties’ commitment to such protocols. The conciliator, as a neutral tactic and without prejudice to any party, may decide, at the outset of the process, to propose a ground rule which requires all participants to store cell phones and similar devices outside of the rooms where conciliation is taking place.

It should be made clear and understood that the conciliator will need to take private notes as the conciliation proceeds, especially in complicated cases, but the conciliator should ensure that the parties know that these notes are for the conciliator’s use only as a confidential personal aide-memoire and not as a record of proceedings.

Above all else, the conciliator needs to be (and be seen to be) absolutely impartial during the Joint Meeting and to provide balance and control, while listening and confining their own comment on the matters in discussion to requests for clarification and illumination.

The Separate Meeting (Caucus)

The conciliator will convene a Separate Meeting as a step in the process designed to allow them to develop their relationship with the parties and their understanding of the positions being adopted by the parties. In general, the conciliator’s Separate Meetings with the parties will flow from the conclusion by the conciliator of a Joint Meeting. The decision and timing around a separate meeting flowing from Joint Meeting can be a smooth transition, where the parties have exhausted what they want to say to each other; or the conciliator may have heard something they wish to explore in more detail with one party; or it may be forced by the conciliator where hostilities and emotions are high.

All are good reasons to adjourn a Joint Meeting and for Separate Meetings to take place. Transparency is required here, with the conciliator making clear which party they wish to talk to first and indicating that they will then talk to the other side. It is essential that any process of Separate Meetings involves the conciliator meeting with both parties in series.
The conciliator will decide the order of Separate Meetings and should deal with any challenges to that order dispassionately and authoritatively. Where the order of Separate Meetings is challenged by one party the conciliator will often accede to a request for a change rather than allow the issue to become significant.

Where, after a short time with one party in a Separate Meeting, it becomes clear to the conciliator that the separate meeting may take some time, it is wise for the conciliator to go to the waiting party and indicate that they may be some time and suggest that they take a break (e.g. for coffee) and return after a specified period. This can reduce the frustration of the waiting party and remove some concerns over bias which might fester if the conciliator’s absence was unexplained.

As already mentioned, the separate meeting is an opportunity for the conciliator to really open up the discussion and get a better understanding of a party’s position and disposition, including any underlying tensions or reasons for dispute, apart from those outlined in the Joint Meeting. There may, for example, be historical or unresolved issues which have affected trust between the parties and block any consideration of movement; the conciliator needs to be aware of any such issues in order to be in a position to effectively assist the parties in their efforts to find resolution.

In these meetings the conciliator is no longer the Chair and needs to place themselves physically and mentally in the role of problem-solver as part of each group, albeit as a neutral participant. Seating position for example will be different to the position in a Joint Meeting. Usually in a Joint Meeting the conciliator will sit at the head of a table separated from both parties while in a Separate Meeting the conciliator will sit amongst those they are meeting. The separate meeting will challenge the conciliator to draw on the range of effective questioning skills and active listening skills discussed in Chapter 2.

The key in Separate Meetings is for the party to understand that discussions in these meetings are absolutely confidential and without prejudice to the party's position. Where a party knows that consideration of an option is not a commitment to it, they are much more likely to be open to discussing all alternatives. A party's willingness to discuss the matter frankly and openly will depend on their trust in the conciliator and the process and the conciliator must focus on the Separate Meeting as an opportunity to establish and develop trust.

In Separate Meetings the conciliator is trying to push past the fixed positions articulated in the Joint Meeting and explore parties' interests, wants and needs as part of the effort to encourage examination of alternatives. It is important in Separate Meetings that the conciliator continues to maintain and be seen to maintain impartiality.

The conciliator must always resist the temptation to join in criticism of the other party in Separate Meetings. Parties will often use statements like “You know what they’re like...you’ve met them before in conciliation...you know what I’m talking about don’t you?” “Seriously, you have to agree, that person is stupid”...and so on.

It can be a quite powerful assertion of impartiality for the conciliator to state directly that they will never, in any forum, comment negatively on the other party and equally will not comment negatively on the party they are meeting at that moment.

Additionally, it can be useful for the conciliator to equip themselves with phrases or tactics to avoid comment and maintain impartiality such as:

Moving to an issue and asking for clarification...“actually, I was wondering if you could help me with that point, when he said x what was he talking about.....?”

Or

“I was wondering if you could help me understand what happened when...?”

Or

“whatever you think of individuals on the other side the issue will not be resolved unless we concentrate on the matters we are discussing and not relate it to individuals.”

As a side point, the conciliator should reflect on the impact on the bargaining process of negative personal comment. Parties who concentrate on individuals as being the basis for the problem will often have failed to meet the standard of objective analysis. If a party has identified an individual's allegedly irrational behaviour as being the base problem in a dispute, it is likely that the party making that assessment has failed to analyse the situation effectively.
Similarly, a conciliator can often come under pressure in a Separate Meeting to reveal the dynamics at play in the separate meeting they has had with the other party. Again, it can be a quite powerful assertion of the conciliator’s commitment to the confidentiality of Separate Meetings for the conciliator to decline comment on the grounds of the guarantee of confidentiality they have given to both parties.

If a conciliator can develop deep understandings of the parties' real positions using the tool of Separate Meetings then they are equipping themselves with solid information which allows them to form their own assessment of the task before them. The conciliator, through their engagement in Separate Meetings, seeks to identify the potential for resolution of the issue by agreement. If both parties reach a stage of engagement in Separate Meetings with the conciliator where they are sharing their analyses and assessment of their own ‘bottom line’ then the conciliator has created the trust necessary to scope out the real opportunity for potential settlement. Specifically, the conciliator will have achieved true clarity in the process, in terms of issues and positions to be addressed, or maybe has realised that resolution of the matter by agreement is not possible.

Through this process of separate trusting engagement the conciliator has become the most knowledgeable person in the process insofar as they have a deeper understanding of the real positions of both parties than anybody else.

<table>
<thead>
<tr>
<th>Separate Meeting – DOs and DON'Ts</th>
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<tbody>
<tr>
<td><strong>DO</strong></td>
</tr>
<tr>
<td>Remove any formality</td>
</tr>
<tr>
<td>Maintain confidentiality</td>
</tr>
<tr>
<td>Become an active listener</td>
</tr>
<tr>
<td>Question and suggest ways forward</td>
</tr>
<tr>
<td>Reassure the party of confidentiality</td>
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One of the features of the separate meeting phase of conciliation is that of the conciliator shuttling between the parties and often bringing messages between the parties. As mentioned elsewhere in this Guide, the conciliator needs to understand how to launder language and to neutralise the language of the message without neutralising the message itself. This is a very delicate part of the conciliation process and requires the conciliator to truly understand the parties and what it is they want to say to the other side. The conciliator needs to be fully aware of their commitment to confidentiality and only reveal what has been agreed to be passed on for consideration.

Imagine a situation where negotiations are taking place, through conciliation, on proposed cost reductions in a company. The employer has revealed to you confidentially that this is only the first ‘round’ in what is likely to be a number of ‘rounds’ of cost reduction negotiations over the coming months. The company does not want to reveal the likelihood of further cost-reduction negotiations to the trade union but does want, in these negotiations, to establish, for strategic reasons, some precedents for the future. Negotiations are long drawn out and you try, without success, to convince the employer side to be open about their intentions so as to maintain a good future negotiating relationship with the other party. While with the worker’s representatives you seek to encourage them to move in the negotiations and accidentally reveal that this set of negotiations is likely to be the first of many.

As a conciliator you have, at one level, breached the crucial tenet of confidentiality and it is important that you deal with that.

Specifically the conciliator should, in such a circumstance, report what has happened to the employer so that the employer can decide how the situation should be managed. It is clear that the conciliator has erred and that a difficult situation now exists which threatens the relationship between the employer and trade union but also the relationship between employer and conciliator.
The conciliator needs to be prepared, in some cases, not to take the reactions of the parties personally, where a message is not well received and to ensure that, at all times, the message they bring is not mistaken for their own view. The conciliator may regularly have to introduce a position in a separate meeting by clarifying that what they are conveying is their understanding of the other party’s position.

This phase of conciliation can be slow and the conciliator needs to be patient and encourage patience in others throughout this phase. The conciliator needs, at the same time, to keep momentum in the process, to find the right balance with respect to pace and to ensure that the demands being made, in terms of time spent with one party within this phase, are not affecting the perception of their apparent impartiality.

**Adjournment**

During the process of conciliation there will be some movement between these meetings – adjournment from Joint to Separate Meetings and Even to Private or Split Group Meetings – but there may also be a need to adjourn and return on a different day.

In adjourning to resume at a later date some general guidelines apply. Unless there is a strong animosity between the parties the adjournment should be made during a Joint Meeting, where progress can be identified and the agenda for the future meeting set. It may be appropriate for the parties to also provide a brief summary of where they feel discussions are at this point. Agreeing an exact date is important as it provides assurance to the parties that they will be returning, but it also reduces any need to chase up the parties and agree a further date. It may be an opportunity to identify situations where one or both parties need to provide further information to each other on matters of fact in the interim.

The conciliator should try to be as positive as possible in adjourning and to use the opportunity to focus the parties on progress, where it has been made, and to encourage them to reflect on what has been said or clarified during the process.

Where an adjournment arises from partial agreement being reached, a Joint Meeting should be called to capture that agreement before the adjournment takes place. Unless the agreement is very complex and requires significant drafting, every effort should be made to document what has been agreed. It is usual for the conciliator to draft the text which captures the level of agreement which has been reached and, having cleared the text in Separate Meetings, the conciliator presents the text formally at the concluding Joint Meeting.

An essential quality of a conciliator is the ability to capture, in words, agreement between parties, to neutralise language while capturing the essence of agreement. In some cases, the language developed by the conciliator is what can move the parties to agreement, because that language is not owned by either party, but belongs to the conciliator, albeit the agreement is owned by the parties.

The conciliator should end this meeting on a positive note and thank the parties for their engagement, as part of building relationships with the parties as well as building confidence in the conciliation process.

**Dealing with the Media in Conciliation**

In the ideal circumstances the process of conciliation would take place in a closed environment with no contact with the outside world. In such circumstances the parties would be more likely to feel totally safe in exploring options for resolution and no external pressures would impact on behaviours. However, conciliation does not take place in a closed environment. In particular, where a dispute has a potential impact on the public or external parties, the matter is likely to be considered by the media as ‘newsworthy’. Interest by the media creates a dimension to the process which the conciliator must try to manage or control to ensure that any commentary in public media does not impact on the likelihood of agreement being reached.

A challenge for the conciliator will be the disposition of the parties to media interest in a dispute which is evolving. Clearly the parties will want to appear reasonable to outside observers and may privately have a strategy of communication with the media which is focussed on their own image. The conciliator should consider addressing this matter directly in the context of their role as manager of the process. Where the conciliator believes that the dispute concerned is likely to attract media interest a discussion should be held with at least the principals on both sides to understand their approach to media comment or information dissemination.
The conciliator must be prepared to work through with the parties the impact of their media strategy on the
dynamics of the dispute, seeking the parties’ co-operation with an approach to engagement with the media
which is at least constructive in terms of dispute resolution.

A key building block of the conciliation process is confidentiality. The conciliator must insist that, whatever
the external interest in a dispute, the actual proceedings and events of the process of conciliation must not be
shared externally or described. A failure by a party to maintain such confidentiality as regards the conciliation
process itself is a fundamental challenge to the entire engagement. The conciliator must ensure that the parties
understand the risks they take in all their communications with the media and try to agree a path forward in
effectively handling the various forms of media. In any case, the conciliator should never react to any published
version of a dispute, either publicly or in conciliation meetings.

The conciliator, as an industrial and labour relations professional, should give consideration to his/her
own policy as regards interaction with media. Often conciliators will identify the specialist journalists and
commentators in the area of labour disputes and seek to develop a professional relationship with such journalists.
That relationship is focussed in the first instance on ensuring that such journalists and commentators understand
the nature of the process of conciliation and the role of the conciliator. Indeed it is often useful to develop the
understanding of journalists and commentators to the extent that they accept the limits of available comment
by the parties in relation to a ‘live’ dispute. Actual practice with regard to contact with the media will of course
be in accordance with the policy / practice of the dispute resolution agency for which the conciliator works.

In addition to this, it is often useful for the conciliator to be able to communicate the facts of a dispute in
situations where there is public inaccurate commentary on a dispute, which is impacting on the dispute itself. All
such information sharing must be carried out while upholding the conciliator’s commitments of impartiality and
confidentiality. Therefore the conciliator can only share information that is broadly in the public domain and is
not prejudicial to one party or the other.

A conciliator must remember that, in the same way as the dispute and the solution for that
dispute belongs to the parties, so too does the story. As such, a conciliator’s involvement with
the media should only be the same as their involvement with the dispute – with full respect
for confidentiality, impartiality and commitment to achieving a mutually acceptable agreement
between the parties.
Social Media

The world of industrial and labour relations, as a field of human interaction, is deeply affected by the increasing availability of immediate and wide ranging communications fora via the constantly evolving range of social media platforms globally available. Such communication channels offer the opportunity for ongoing commentary in relation to the developments in a bargaining process as it takes place and indeed in relation to a dispute as it evolves.

Similarly, social media platforms have the potential to impact severely the conduct of the conciliation process as it takes place. In particular the availability of convenient technologies offers opportunities to parties to breach the confidentiality of meetings which take place during conciliation, either by recording the events for immediate broadcast or by ‘live’ commenting on the process of conciliation. Such commentary or sharing of confidential information will impact directly on the negotiators on both sides. The risk of public sharing of the comments they make or opinions they express as part of the process may threaten their credibility among their constituents. In addition, the willingness of the parties to explore matters confidentially, particularly in Joint Meetings, but sometimes also in the Separate Meetings will be hugely diminished.

For these reasons the conciliator must address the question of process confidentiality openly with both negotiating teams at an early stage in the process. It is essential that all agree that the rules of confidentiality continue to apply. It is not possible to conceive of an effective process of conciliation where the participants believe that they are free to communicate the detail of the interactions and events of the process of conciliation as it is taking place.

The conciliator’s interest in this matter is solely concerned with preserving the integrity of the conciliation process and the parties have a responsibility to recognise the legitimacy of that objective and to co-operate with the conciliator in that regard.

Ultimately, conciliators cannot control the parties or the media; they can only control the process of conciliation. Conciliators should, however, be aware of the potential effects of media involvement and use of social media by the parties and flag those effects assertively to the parties at the outset.

Where the parties refuse to co-operate with the conciliator in terms of managing media commentary constructively the conciliator will understand that the parties’ underlying commitment to finding agreement through the conciliation process is less than optimal. It is not unusual for a conciliator who encounters wilful breach of the confidentiality of the conciliation process to terminate the process as a result.

Apart from the challenge posed by instant communication to the process of conciliation itself there are other aspects to consider in this area. The conciliator must, for example, be in a position to monitor social media content as a dispute evolves and the process of conciliation takes place. Awareness of comment and information being shared through these channels gives the conciliator a deeper understanding of the chemistry of the dispute and indeed the pressures bearing down on the negotiators.

Occasionally the conciliator will utilise social (and other) media to themselves communicate certain process facts. For example where conciliation is adjourned a negative description could be of a ‘break down’ in conciliation. The conciliator may decide, in consultation with the parties and in order to avoid negative ‘spinning’, to issue a factual statement via social and other media to the effect that the process has adjourned for a period.
Chapter 7 – The Pattern of Conciliation

(Following the Flow)

Exploration Phase
Relationship Building Phase
Reality Testing Phase
Problem-Solving Phase
Solution gathering Phase
Capturing Agreement Phase
Concluding Phase
Chapter 7 – The Pattern of Conciliation

The process of conciliation provides assistance to parties in finding agreement with each other through engagement and dialogue. The process is, in many ways, an extension of direct bargaining and is effectively a process of assisted negotiation. The conciliator is required to be able to understand the patterns of negotiation behaviour and the evolution of the negotiation process throughout the process. Indeed the process of conciliation, from the conciliator’s perspective as manager and influencer, has distinct phases where the focus of conciliator activity changes.

During the negotiation process it possible to discern an evolution of behaviour and mind-set which creates different dynamics as the negotiation evolves.

Conciliators must be able to discern the ‘beat and rhythm’ of the dispute so they can tailor their own behaviour to accommodate and respond to the parties’ disposition.

At the outset of a negotiation, it is likely that the parties are adamant in upholding their respective positions. Sooner or later a second phase begins with a softening of attitudes and a developing willingness to explore alternative analyses. This phase can be initiated when one party adopts a more conciliatory tone which may be reciprocated by the other party. Whatever the cause, the parties could be described as having entered a more accommodating phase of negotiation. Generally the third phase of the process is associated with that stage where the parties are openly searching for possible compromise or accommodation and are ‘in the mood for settlement’.

The attitudes and behaviour of the parties differ as a negotiation evolves and the conciliator must evolve their own behaviour and attitude in tune with the evolution of the dispute itself. However, the phases of negotiation do not necessarily follow each other in a neatly observable pattern or necessarily in a logical order. There is rarely a precise point where one phase of negotiation passes on to the next but the challenge for the conciliator remains to understand the dynamic at play at a given moment in the process. Understanding the nature of negotiation itself is critical for the conciliator in order to understand the behaviour of the parties and to understand the dynamics at play as the dispute evolves.

The conciliator, to be in control of the process, and to be in a position to manage the dynamics effectively, must be familiar with all of those dynamics and interplay as the process develops. This chapter, therefore, seeks to discuss the evolution of the process of conciliation which overlays and assists the negotiation process. It is important to recognise that negotiation is a human interaction and therefore capable of moving backwards and forwards across the range of phases in a manner which does not correspond to a logical progression.

This first part of this chapter discusses the phases of conciliation and also highlights in discussion boxes certain aspects of behaviour and purpose associated with the process of negotiation and conciliation.

The key for conciliators is to understand as far as possible what is actually happening in the engagement at all times so that they can make key decisions regarding their own behaviour and their goals at all stages and sub-stages of the process.

The conciliator’s challenge is to move the process along a pathway, which offers potential for resolution against a background of a process of negotiation, which is constantly evolving.

The Phases of Conciliation

Ideally, at the outset of conciliation, the parties have previously spent some time and effort in an attempt to find agreement through direct engagement with each other. The fact of the parties being present at conciliation is a confirmation that they have not been capable of finding agreement without assistance.

Initial/Exploration Phase

The purpose of the initial phase, generally in the form of a Joint Meeting chaired by the conciliator, is to inform the conciliator about the dispute. This initial exploratory phase is one where the conciliator asks both
parties to describe the matter in dispute from their perspective. The interaction between the negotiating teams, and within the negotiating teams, is an important source of information for the conciliator as to where the loci of power are in the dispute, as well as the state of relationships generally. In addition, this exploratory phase is used by the conciliator to learn the positions and interests of the parties which highlight the basic causes of the dispute and the factors which inhibit the parties from finding agreement with each other.

It is common for the parties to imagine that the initial phase of conciliation is an opportunity to argue and negotiate on the matter in dispute. That first Joint Meeting is indeed an opportunity for the parties to speak to each other and attempt to persuade each other of the need to change view or position. The conciliator, however, realises that any change in the parties’ positions is unlikely to emerge, at this stage, but it may suit the conciliator to allow the parties to continue their argumentation for a period. The initial phase concludes when the conciliator thinks that they have learned as much as they can learn about the dispute and the interpersonal dynamics at play in the situation and where both parties have had a clear opportunity to express themselves. It is the conciliator who decides when that first meeting concludes and, the very act of the conciliator taking control in this manner, is an early opportunity to establish the conciliator as ‘manager’ of the conciliation process.

‘Hard Posture’

A hard posture, which parties often assume in the initial stages of negotiation, may be shown in a number of ways – inflexibility, adamant defence of positions, efforts to discredit the other side, out of hand rejection of opposing views and pointing to extreme examples of potential consequences of the other side’s position. During this phase of behaviour each party may appear to believe that it is fully right and the other party is fully wrong. There may even be antagonism or, indeed, outright hostility being displayed by the sides.

This hard posture is not always displayed in a blatant or flamboyant manner. Instead of verbal assaults or expressive gestures there may just be a studied coolness or stiffness in one party’s behaviour and body language. The challenge for the conciliator, in such circumstances, is to find a way of developing a trusting relationship leading to an exploration of paths forward other than a repeated assertion of rightness. A risk for the conciliator is the potential to concentrate so directly on developing trust that they could be interpreted as validating the position of the party with whom they are engaging.

There is no value for the conciliator to pursue courses of action which the parties are not in the mood to respond to. A period of hard posture is often a time where the conciliator plays a relatively passive role focussed mainly on listening, observing and gathering information on the issues and the negotiators themselves.

If there are heated arguments the conciliator’s primary interest is to keep the parties talking without reaching the point of the negotiations breaking down. The parties may be in a combative mood and the conciliator may, as chair of the engagements, focus broadly on the issues, to try to diffuse the situation and bring reason to the bargaining table. There is a danger that the conciliator may become a target for criticism by the parties in this type of engagement and the conciliator may occasionally decide that allowing the parties to focus their attention on the conciliator rather than each other is a positive step in the process.

As already mentioned in Chapters 6 and 7, this initial uncompromising phase can be a valuable phase for the conciliator in terms of the overall objective of assisting the parties to find agreement with each other. From the parties’ declarations and the exchanges between them, as well as the conciliator’s own engagements, they can obtain a fuller sense of the situation as a whole, of the parties’ positions and of the issues which separate them.

Even during a period of ‘hard posture’ the conciliator begins efforts, particularly during Separate Meetings, to find out the parties’ real attitudes on the issues. It is important for the conciliator to remain focussed on the issues rather than engaging with some of the theatrics or exaggerated behaviours commonly visible in a phase of negotiation where a party, or both, are anxious to display a hard posture. The conciliator is conveying a message that the process of finding solutions is about a focus on the issues rather than imagery and drama.
The duration of a period of ‘hard posture’ depends on the circumstances of the case and the personalities. It may be relatively long, as in cases in which several important or complicated issues are involved, and particularly so where the dispute has a high profile within the workplace or publicly. Where the negotiators’ own investment of reputation in an issue is heightened, the ‘optics’ of developing flexibility in a negotiating position are a key concern for them.

In many cases, during a ‘hard posture’ phase, the differences between the parties may seem irreconcilable. The conciliator persistently works throughout this phase to develop dialogue with the parties in order to understand the direction the discussions might take and the possible alternatives and options other than the parties’ stated positions.

The objective for the conciliator is to induce a mood of readiness for accommodation and flexibility of attitudes and to encourage the parties to move closer towards each other. The conciliator, in a ‘hard posture’ phase, is concerned with preventing the discussions from developing into stalemate and rigidity. The conciliator therefore, through active management of the process, is constantly protecting the parties from adopting positions which will be impossible to retreat from.

**Relationship-Building Phase**

The conciliator, during the initial stages of conciliation, attempts to move the process into a phase of deeper engagement and trust-building. Often, in an effort to move the process along a constructive pathway, the conciliator finds it useful to meet separately with both parties in a process of confidential dialogue. The purpose of this is twofold. In the first instance, the conciliator hopes to begin to learn the true or real negotiating target of each side. Secondly, the conciliator is attempting to develop trust between themselves and the parties. This is a phase where the conciliator attempts to engage at a personal level with the parties in an informal interaction.

It is critical for the conciliator to remain focussed on building trust in this phase. The conciliator must convince the parties that he / she understands the matters under discussion and most crucially understands the perspective of each party.

**Search for Accommodation/Softening**

The move away from a ‘hard posture’ to a more constructive engagement is the conciliator’s objective and finding a pathway towards a search for alternatives can be assisted by a focus on two areas of discussion. The conciliator, in an entirely neutral and non-judgemental manner, assists the parties to assess their own positions against the likelihood of agreement being reached and moves from there to work with the parties to develop alternatives and options for consideration.

In certain cases, in order to make progress and facilitate constructive engagement, the conciliator may have to engage with internal or intra party differences within one party’s negotiating team. Internal frictions or distrust can inhibit parties from moving away from a ‘hard posture’ and towards more flexible discussion and engagement. This is dealt with in more detail further in this chapter. Generally, the conciliator will rely almost exclusively on the model of Separate or Caucus Meetings as discussions move away from hard position-taking to a more solution-focussed phase.

**Reality-Testing Phase**

The conciliation process evolves from the relationship-building phase to one where the conciliator is attempting to assist the parties to assess the likelihood of their position being acceptable to the other side. In essence, the conciliator is assisting the parties in reality-testing, where their perspective is being assessed by themselves against the tests of reasonableness and potential acceptability to the other side. The conciliator is drawing on their knowledge of the industrial relations environment in the country and the trends of settlement which occur, as well as their knowledge of the positions being taken by the other party.

It is vital for the conciliator in this phase to use neutral language and to adopt an approach which facilitates the parties themselves to work through the process of pragmatically assessing their own positions.
The parties do not participate in conciliation in order for the conciliator to tell them what is wrong with their negotiating position but they should expect to be helped to understand the likelihood of being able to achieve their objectives, taking account of the prevailing environment and the disposition of the other party.

This phase of conciliation is a sensitive one and challenging for the conciliator. The conciliator is attempting to challenge the parties to consider afresh their own assessment of their position and the likelihood of an agreement being reached. The conciliator is at the same time challenged to demonstrate understanding of why and how the parties have adopted the position they hold and to empathise with the path they have followed to arrive at this point. It is useful for the conciliator to plan for this phase of conciliation by having available appropriate language to employ in their interactions with the parties. Phrases such as ‘I understand why you say that but …..’, and ‘That is understandable but have you considered……?’, ‘I hear what you are saying but what is your assessment of the likelihood of the other side agreeing with you ?’ can be useful introductions into a challenging discussion.

‘Reality testing’

The conciliator, in attempting to assist the parties to assess the reality of their own position, should try to bring home to each party that its position is not actually as right or as perfect as it is claimed to be, while at the same time letting each party see that there is some merit in the other party’s position; the aim is to encourage mutual appreciation by the parties of each other’s point of view or at least of the reasons each other holds that point of view. This process of developing real understanding of each other’s positions and reasoning can be an important platform for persuading the parties along the road towards a position which might be a distance away from where they currently stand, but which might be capable of finding acceptability with both.

This can be a very sensitive stage in the sense that the parties may misinterpret the conciliator’s approach as challenging and biased rather than constructive and neutral. In effect, the conciliator is challenging the parties’ positions and indeed attempting to encourage the parties themselves to re-assess their own positions. The conciliator will often advance this process initially through a series of planned questions. By starting with questions, the conciliator avoids a direct and possibly hostile encounter with the parties. The manner of asking questions should show a desire to have more information, an interest in gaining more insight into the problem and an intention to help.

In seeking to obtain changes in the parties’ attitudes and positions, the conciliator also wants them to start thinking in a more rational way; questions can be alternated with short statements that raise questions indirectly. Closed questions are particularly helpful to learn about such matters as past disputes, working conditions, occupational and organisation structure and the tasks in a job role for example. Open questions can be used to raise doubt in the mind of the listener including doubt concerning the accuracy or comprehensiveness of their information or analysis; it can also suggest a possible flaw in reasoning, an aspect of the matter which had not been considered or the points of strength on the other side.

As also mentioned in Chapter 6, the conciliator must remain conscious that that the parties may seek favourable endorsements by the conciliator of their respective ‘stands’ on an issue. The conciliator can generally avoid being pressed to express an evaluative opinion in a Joint Meeting with both parties present. It is in the Separate Meetings that more insistent attempts to obtain the conciliator’s endorsement can often be made. It will appear reasonable, particularly to less experienced users of the conciliation process, that the conciliator should be required to express their view on a position of one party or the other. The conciliator should at all costs resist such attempts and avoid being unwittingly drawn into making such endorsements. The least sign on the conciliator’s part of a favourable view of a party’s stand can cause that party to refuse to depart from that position as a result. The conciliator can help the parties to understand that, assuming that an agreement is the objective of all parties and recognising that the parties are the decision makers, the opinion of the conciliator as to the merits of a party’s position is not relevant.

It can become necessary throughout the conciliation process for the conciliator to repeatedly remind the parties of the nature of the process, its objective and in particular the role of the conciliator.
It is not often that both parties will alter their positions simultaneously. The conciliator may aim to prevail upon one party to make the first move; this party will be the one that has shown a more softened attitude. If the conciliator succeeds in influencing one party to change its position, the conciliator will be in a better position to press for a reciprocal move by the other.

Each side weighs a different set of risks in remaining at deadlock. The conciliator must draw attention to the specific dangers of taking inflexible positions. The parties must be shown that accepting less than their original goals may be preferable to not reaching any agreement whatever.

Edging the parties toward the realisation that their demands and counter-demands are not going to be met, in the form and manner desired, calls for availability of alternatives.

**Problem-Solving Phase**

Moving from the reality-testing phase the conciliator is working with the parties to explore the range of options that can be identified as potential solutions to the matter. Some of the options identified will be acceptable to neither party and some will be acceptable to only one party but the search is for those options which might be acceptable to both parties. In this phase, it is the conciliator who comes to learn more about the dispute than any other party present. Where the conciliator has succeeded in developing trust with each party to the degree that the parties honestly work with the conciliator to explore potential options for solution, the conciliator learns more and more about the orientation and flexibility of both sides.

Ultimately the conciliator, armed with this level of deep understanding based on confidentially held information, must find ways to explore, in a non-prejudicial manner, solutions with each side, which the conciliator knows are likely to be acceptable to both.

**Presentation of Alternatives**

The conciliator seeks to put forward suggestions that may be wholly or partly acceptable to the parties. The conciliator should at this point be functioning essentially as an expert in relation to the issues in dispute, having engaged with the parties in a manner which shows a thorough grasp of the issues and problems.

When the conciliator is encouraging a new train of thought, it may be helpful to present an analysis of the negotiations and the dispute. Such an analysis should attempt to cover the causes of the problem, a brief digest of where the parties stand, possible consequences of maintaining such positions, and a suggestion of what the conciliator may feel to be movement toward a viable alternative.

The intense nature of bargaining often prevents the adversaries from stepping back from the heat of the discussion to pause for a detached view. The capacity of the conciliator to provide that opportunity for reflection and a ‘step back’ marks the conciliation process out as different from the process of direct negotiation. The conciliator, arising from their familiarity with the dispute at this stage, and from their position as manager of the process, is in a position to create that reflective dynamic through the analysis mentioned above.

At any stage of the negotiations, when the conciliator finds it useful to put forward a summary of events to date and an analysis of the ‘state of play’ the conciliator must site the intervention in a constructive context, setting out potential paths to follow in order to make progress. The conciliator has no role in making evaluations of the parties’ positions other than as a feature of the process of assessing the ‘state of play’ while transparently pursuing the objective of securing agreement from all parties on some ultimate position.
The purpose of a conciliator’s intervention to evaluate the ‘state of play’ of the process will be to demonstrate what each side may have already gained up to that point or to show that very little progress is being made and that the parties should make more serious efforts. Such an evaluation of the process will also highlight the consequences of a failure to make progress as a mechanism to indicate or suggest a new approach.

The conciliator may consider trying to reduce the relative importance attached to certain demands. Lessening the value put on a demand may cause some loosening of the attachment to it. This is a very delicate matter. Negotiators who are just on the point of ‘backing down’ on a point must be convinced that their personal values are not threatened. This is most often the case with less experienced negotiators, who tend to equate a reduction or easing of their demands with a betrayal of their principles, not to mention concerns regarding the reactions of their constituents.

The conciliator may begin to face serious challenge as the role moves from the passive role of listening and questioning to this more active role. The parties will be willing to change positions only when realistic alternative solutions are advanced; at the same time, no leadership wants to abdicate responsibility. This is a period full of potential pitfalls. The conciliator’s challenges should be fresh, timely and not a repetition of arguments made before.

In the course of separate meetings, the conciliator will, with their agreement, relay the position of one party to the other. When the conciliator presents the views of the other side the challenge is to ensure that the conciliator understands all the ramifications of an issue, and that they express this in a clear and well thought through manner. This transmission of positions from one party to the other by the conciliator is a key opportunity for the conciliator to establish credibility and respect for their abilities. This respect for the conciliator’s capacities is a key building block in the relationship the conciliator has with the parties, and their faith in the effectiveness of the process itself.

It is important to remember here that a common feature of many dispute situations is an inability on the part of the parties to communicate effectively with each other, i.e. an inability to articulate a perspective in a manner which allows the other party to unambiguously understand the point being made – often the parties relationship is such that sub-messages of hostility or irrelevant references can complicate the communication. Therefore, the conciliator is challenged in this mode of engagement to be able to understand the essence of the message being transmitted from one party to the other and to be able to re-frame or re-frame that message in a manner which is effective in terms of creating understanding. This opportunity to ‘launder’ the language of the parties is a key opportunity for the conciliator to advance the potential for resolution of the dispute.

When the conciliator is engaging with the parties to encourage fresh thinking on a matter, or indeed consideration of a fresh direction, the conciliator must make opportunities at all stages for parties to state their objections or support. In this way, the conciliator can avoid over committing to a course of action or a position, and thus minimise the risk of being in a situation of having encouraged a direction from which the conciliator cannot credibly withdraw. The conciliator should note the reaction of the group being addressed: the substance of any objections will indicate what impression is being made, as well as the acceptability of the direction being suggested.

It is important for the conciliator to remain focussed on finding solutions based on the parties’ willingness to agree with each other and a position, or potential direction, is of interest to the conciliator only when it is possible that the parties might agree to it.

**Solution Phase**

As the conciliator moves towards the final phase of conciliation they are prompting the parties to suggest realistic potential solutions or the conciliator is making informed suggestions to both sides and seeking approval to share with both sides ideas for final resolution of the issue.
A common strategy to execute this phase of conciliation involves the conciliator indicating separately to both parties that the conciliator would be willing to outline, confidentially and without prejudice to either party, a settlement proposal / suggestion for confidential and private consideration by both parties. Both parties are then invited to respond confidentially to the conciliator.

The conciliator confirms separately to both parties that they will hold the response of both parties confidentially unless both parties confirm a willingness to resolve the matter along the lines suggested.

In such a circumstance the conciliator will confidentially make a suggestion for settlement of the matter.

In the event of either or both party rejecting the conciliator’s suggestion the conciliator will never reveal the responses he or she confidentially received to the suggestion made.

This device allows the conciliator, in a manner informed by all their earlier interactions and building on the trust they have established, to tease out potential solutions and to create a safe environment for both parties to consider options for settlement without prejudice.

This device should only be used when the conciliator begins to believe that he/she understands the shape of a solution which both parties might accept.

The conciliator is trying to arrive at a point where a solution has been articulated which both sides have indicated confidentially will be acceptable. In general terms, the conciliator is extremely active at this phase of conciliation, finding ways to illuminate to both parties various concrete solutions to the issues in dispute and securing reactions and responses from both sides confidentially. Through this often extended and iterative process the conciliator is refining and developing all possibilities for resolution and, finally, will be in a position to identify to the parties if agreement is possible and, if so, what that agreement looks like. Similarly, the conciliator will be able to identify to both parties where agreement is not possible and the fundamental reasons why this is so. The fact of setting out clearly to parties why agreement is not possible creates a pressure on the parties to reflect on their positions.

‘Mood for Settlement’
A major phase of the negotiation process is the emergence of an appropriate mood for settlement. The conciliator should look for indications of this mood emerging.

An indicator that areas of agreement are within reach may be when one side acknowledges that it understands the views expressed by the opposite side. This does not necessarily mean that agreement is imminent, but it is a sign of recognition, and may precede an announced modification of previous positions. The conciliator, as a general rule, is continually sensitive to the mood and body language of the parties and should always be sensitive to changes in the disposition of the parties. The conciliator, whenever the possibility of settlement or agreement emerges, must focus on turning that indication into a reality.

Another indication of a closing of the gap between the parties may be a partial acceptance of a proposal. Negotiators often seek to avoid appearing too eager to settle, but at the same time may not want to do anything which might discourage flexibility on the other side. They sometimes seek refuge in a partial acceptance of a suggested solution.

The conciliator can assist the parties through this phase by securing a conditional response when the first move is ready to be made. A conditional response is an affirmative reply by one party to a suggestion by the conciliator, which is contingent upon the other party making a similar response or a corresponding movement. By arranging such a prior commitment the conciliator can assure the negotiators on one side that by taking the first step they will not be weakening their position on some other point. The conciliator can assure the party concerned that their conditional response will remain confidential to the conciliator until the condition is met. The conciliator thereby creates a confidential environment where parties can indicate movement on matters without in any way prejudicing their position.
This is one of the key tools of the conciliator and, while it is an essential tool in exploring solutions with the parties, it is also important in reaffirming that these explorations are without prejudice to parties’ positions and always confidential.

At this stage, attention should be concentrated on the search for possible terms of compromise. Distractions from the main issues should now be dealt with quickly and with as much finality as possible. Such ‘distractions’ might include attempts to revive issues that have been disposed of or to raise new or secondary subjects that do not help to clarify the issues.

If possible, the discussions, in joint or separate sessions, should be continued until final settlement is reached. If any postponement is allowed there is a danger that the ‘mood for settlement’ may fade away either as a product of timing or because the parties may face negative external pressures before the entire picture of an agreement has been drawn.

The conciliator encourages and assists the parties to develop their own proposed solutions – by amending proposals and counter proposals that can provide the basis for a compromise. The conciliator may, privately and confidentially (as part of the process of Separate Meetings), discuss with a party’s negotiating committee which of the various possible solutions put forward shall be put forward to the other side.

Ultimately, it may be necessary to resort to a ‘conciliator’s proposal’. This, in effect, is a ‘one shot’ effort by the conciliator to put forward a final package deal which will resolve the dispute either in its entirety or resolve a particular issue which has not been amenable to resolution.

A ‘conciliator’s proposal’ cannot be a set of terms or a package unilaterally developed by the conciliator. The conciliator, before tabling proposals, must undertake the preparatory work of engaging with the parties to explore the potential content of such proposals. Generally speaking, the conciliator must not table proposals if there is the potential for those proposals to be rejected by one negotiating team or the other. In order to develop an understanding of likely responses to a ‘conciliator’s proposal’ the conciliator must work with the parties in order to outline the possible content to them privately in advance. The conciliator must engage in argument and discussion with each negotiating team separately in order to achieve an understanding that both negotiating teams will support the ‘conciliator’s proposal’.

No advantage is gained by the conciliator tabling proposals which are not acceptable to one side or the other. In fact, tabling a proposal which one negotiating team feels obliged to reject can be damaging to the search for an agreement, as the effect of this rejection can be to re-inforce feelings of justification on the part of the accepting party. The conciliator, by tabling such a proposal without support from both parties, has in effect committed a prejudicial act and most likely damaged their own credibility and effectiveness in the process.

In many ways the ‘conciliator’s proposal’ is a form of industrial relations illusion. It may suit the negotiating teams for a particular position to emerge as a ‘conciliator’s proposal’ rather than as a proposition of one side or the other. This may be the case where one or both parties are managing stakeholder and constituency perceptions outside of the negotiating room and so the conciliator’s proposal may be the means to protect one party’s credibility or position in the conciliation.

Separately as discussed above, the conciliator has issues at stake for themselves when tabling proposals. The conciliator has only one reason to be present in the dispute and that is to assist the parties to find agreement with each other. That objective will not be served by the conciliator issuing proposals which are rejected by the parties.

**Capturing Agreement Phase**

The main purpose of conciliation is to get to a point in the process where proposals for solutions are possible. While so much else goes on in conciliation, this is fundamentally your desired destination and developing the necessary skills and techniques to manage this aspect of conciliation is vital. The ability of a conciliator to capture what the parties agree, or might agree, on paper, in neutral language is critical. Having listened to the parties
throughout the process, the conciliator will know what language and terms are acceptable or not to either side. There are occasions when the language used is the only barrier and the ability of the conciliator to draft, on behalf of the parties, an agreement, that is acceptable to both sides and is written in language both understand is often critical.

**Concluding Phase**

The concluding phase of conciliation should always be to bring the parties together to articulate, in the presence of both parties, the nature of agreement reached or progress made or agreed next steps. Even where agreement is not reached, it can be important to conclude the process in a Joint Meeting, where the conciliator describes in neutral language a broad outline of the obstacles to finding agreement identified during the process. The conciliator, where agreement has not been reached, should always remind the parties of the willingness of the conciliator to re-convene, if at any stage in the future either, or both parties would consider that to be worthwhile.

**A Focus on Some Challenges in the Conciliation Process**

During the conciliation process, the conciliator may face some particular challenges and need to consider strategies to tackle them.

**Conciliation of Intra-party Differences**

Intra-party differences can come to light on one side or the other, especially where multi-representative organisations or multi-stakeholder teams are present. Where bargaining takes place at the single enterprise level there will generally be a unity of purpose, and little dissension, in negotiation or in conciliation on the management side. It is often the case in multi-representative structures, on the worker side, that conflicting priorities will be present. In multi-employer negotiations a similar lack of homogeneity, of ambition and priority, may also be present.

As the conciliator attempts to obtain changes in a party’s position (e.g. withdrawal or downgrading of issues and modification of others) the negotiating team is vulnerable to the development of factions, for and against such changes. Such a ‘split’ may establish a number of factions or be limited to two major sides within the one negotiating team. Whatever occurs, the conciliator becomes focussed on the interplay within the negotiating team, insofar as negative developments within the group may be a significant obstacle to the achievement of an agreement between the parties overall. In brief, it is a conciliation case within a conciliation case.

The conciliator’s awareness of the ‘push and pull’ of internal or intra-party differences should make them especially careful and methodical in dealing with that party. The conciliator, when identifying a fracture of direction within a negotiating team, must attempt to develop clarity as to the nature of factional support, or lack thereof, for those courses of action which are most likely to produce an agreement with the other side. Where minority factions within a negotiating team are opposed to directions which have the potential to resolve a dispute the conciliator must engage with those factions in an attempt to create clarity and to encourage all stakeholders to assess the challenge of finding a single position within the negotiating team.

This focus places a pressure on the group to resolve internal differences in order to advance engagements in the overall dispute.

**Dealing with Difficult Cases: The ‘Scope for Conciliation’**

It is important for the conciliator to understand that, often, the process of conciliation is taking place in an environment where one party, or both, have no clear commitment to finding an agreement. This chapter has already discussed behavioural patterns of the parties at various stages of the conciliation process. Sometimes, however, the conciliator will be faced with parties who have adopted a position, and are committed to that position, regardless of the consequences because of their belief in the rightness or morality of their position.

25 A multiple representative organization, in this case, refers to an organization such as a trade union which may, for example, represent different categories of workers at a negotiation.
A common example of such position-taking can be rights-based disputes where the issue at stake has its root in the implementation of rights set out in law or a collective agreement or in the interpretation of legal provisions or clauses of a collective agreement. The application of the law or of the existing collective agreement is not an area for bargaining and so the first challenge for the conciliator, in such a case, is to identify the scope for conciliation. Bearing in mind that the conciliator has the function only of assisting the parties to reach agreement with each other, the scope for conciliation is that area of engagement which, if resulting in agreement, will resolve the conflict. It is unlikely that, in a matter based on established rights, a party will accept voluntarily a prejudicial agreement. The process of conciliation therefore is focussed on the practical possibilities for settlement. Conciliation is not the forum through which the parties are entitled to expect vindication under the law. Such outcomes are normally the preserve of labour or civil courts.

The conciliator therefore, particularly in rights-based disputes, is sometimes challenged to assist the parties to channel their dialogue to another forum which is appropriate to address a matter, which is not amenable to agreement between them. If one party, or both, feel fully committed to a position derived from their interpretation of the law or a collective agreement, and seek the other party’s acceptance of that interpretation, it is likely that the dispute will require determination under the law or arbitration in order to be finalised. The conciliator’s role may be confined to assisting the parties to find a means of preserving ‘peace’ or the ‘status quo’ in the period until a judicial hearing and determination or arbitration can take place.

The key for the conciliator is to understand, at all times, the disposition of the parties and to constantly assess the scope and role of conciliation in the dispute. The conciliator can suggest areas for agreement and the potential consequences of a failure to find agreement, on the issue at stake but ultimately, it is necessary for the parties to perceive a value in finding agreement in order for conciliation to be of assistance in resolving the issue. The conciliator is not a Labour Inspector or a Judge and should always remain focussed on the role of conciliator which is to assist parties to find agreement between themselves. There will be opportunities for the conciliator to assist the parties to consider the value of finding agreement as an alternative to the dispute being adjudicated by a civil or labour court and the conciliator is always focussed on identifying that opportunity.

**Fact Based Disputes and Pressures on the Conciliator to Adopt Roles**

Disputes can often arise in situations where the parties disagree on the underlying facts of a situation. For example, the parties may disagree on the capacity of the business to sustain a pay increase sought by the workers, with the employer holding that the company/business is loss making and not in a position to pay increased wages. This is the employment relations equivalent of arguing as to whether the sun comes up in the morning. The matter can be discussed and even agreed between the parties and, notwithstanding the parties’ agreement, the sun will continue to rise in the morning. Similarly, an argument based on the facts of the profitability of a business is a redundant exercise because the question of profitability is a matter of fact.

In such circumstances, the conciliator may be tempted to place themselves in the position of assessor or evaluator of the facts. This is a significant decision for the conciliator to take. If the conciliator is confident that the matter will be resolved without rancour on the basis of a validation or verification of matters of fact, then there may be little consequence for the conciliator taking up this role. If, however, establishment of facts is likely to lead to further dialogue and discussion, the conciliator may consider encouraging the parties to secure independent verification of facts and restricting negotiation and bargaining to that which is truly negotiable or compromisable. In such circumstances, and in the example given, independent verification of the financial position of the business can be secured by engaging a financial expert to make an objective and independent assessment of the facts of the company’s profitability. Such an approach preserves in every respect the conciliator’s role as a facilitator of agreement rather than an arbiter of the facts.

Conciliators will often find themselves dealing with disputes where the parties’ positions are informed by differing understandings of matters of fact. For example, where a trade union seeks recognition for bargaining purposes by the employer, the employer may not accept contentions as to membership strength made by the trade union. In such a case a trade union may not, for a variety of reasons, wish to make known to the employer the detail of the individual members of the trade union. The conciliator may consider adopting the role of confidential assessor of the union’s membership records in order to advance the possibility of the parties finding agreement on the central matter of whether the employer will ‘recognise’ the union for the purposes of negotiating and bargaining on behalf of the workers. This is a significant decision for the conciliator and the deciding factor may
often be whether the employer is prepared to undertake that, if a level of membership is established, the dispute will be resolved. On balance, the conciliator may wish to confine their role to that of facilitator of dialogue and to assist the parties to understand the importance of independent verification of disputed facts. Where both parties accept the value of independent verification of facts, the conciliator may of course assist the parties in identifying a person or body to provide that verification.

It is common, in disputes arising from grievances raised by individual workers, for the parties to understand the facts of the matter (which are generally historical) differently. That difference of understanding is often the key reason for the grievance developing to the point of dispute. It may therefore be necessary to find a basis to establish the historical facts in a credible and objective manner as a precursor to resolution of the dispute. Again, the conciliator should consider fully the risks associated with their adopting the role of verifier of facts. Often the conciliator runs the risk of succeeding as verifier of facts but, in the process, becoming unviable as an impartial conciliator of the dispute. The wiser course may often be for the conciliator to assist the parties to find a means of verifying facts, utilising a third party if necessary, but preserving the conciliator as a viable and accepted facilitator of engagement, dialogue and negotiation.

Similarly, in particularly intractable disputes, the parties may press upon the conciliator to adopt the role of mediator-arbitrator. This role calls on the conciliator to attempt to facilitate an agreement between the parties but, failing the achievement of agreement, to issue an arbitration setting out the solution to the matter in dispute. This process does offer a secure means of resolving the issue in dispute via an arbitration process in finality. However the risk for the conciliator is that one party may be dissatisfied with the content of the arbitration finding and may resent the conciliator acting as an arbitrator. Any situation where the possibility of a conciliator taking up the role of mediator-arbitrator in a ‘med-arb’ process should be considered carefully in terms of the potential damage that may be caused to the perception of fairness and impartiality of the conciliator. Indeed, if the parties believe that they are participating in an engagement which could become one of arbitration by the conciliator, they are likely to be cautious about their openness to the conciliator. In most cases, parties outline their position to an arbitrator in a very different manner to their confidential dialogue with a conciliator. The process of conciliation itself can be consequently damaged by the caution of the parties. In general, conciliators will so highly value the perception of their impartiality as a professional asset that they will not agree to adopt roles which tend towards decision making or arbitration.

**Strikes and Lockouts**

In a strike or lockout situation the laws and administrative arrangements of a country will have a bearing in relation to the identification of opportunities for the conciliator to become involved in a dispute. In some countries the law will specify the scope for conciliation involvement in strike or lockout situations, including dictating the timing of such involvement. In other countries, timing, even in such situations, remains a matter for the judgement of the conciliator or dictated by the timing of a voluntary referral by the parties.

The conciliator must always consider how their behaviour is perceived by the parties and the parties’ constituents. In that regard, where a strike or lockout is in progress, or contemplated, it is likely that the dispute in question carries a heightened level of attention from the persons involved and therefore all steps taken by the conciliator need to be considered both in terms of their effectiveness in relation to the matters in dispute, and in terms of perceptions of all involved.

The fact of a strike or lockout being in prospect, or in place, changes the dynamics of a dispute insofar as one or both parties have indicated that they are prepared to invest significantly in advancing their positions. In the case of workers, the investment can involve loss of wages and in the case of an employer the investment generally involves loss of production, profits or service continuity. The conciliator must understand the changing dynamic in a strike or lockout situation. The conciliator must achieve an informal dialogue with the principals in dispute situations in order to maintain a constant and current understanding of the mood of the parties. It is only through this type of insight that the conciliator can seek to influence the timing of an attempt to find agreement through conciliation. Such an attempt will normally arise either at the request of the parties or in response to an intervention by the conciliator inviting parties to attend at conciliation where that is permitted by the law of the country. In either event the conciliator should ideally be in such close contact with key people at an informal level that no development takes place in a manner or at a time which is unexpected.
The fact of a threatened, or actual, strike or lockout does not affect the fundamental objective of the conciliator, which is to facilitate the parties in finding agreement with each other. The best environment for achieving of agreement is where the parties see a value in finding agreement through dialogue.

The challenge for the conciliator in a situation of heightened conflict is to remain sufficiently engaged with all parties so that, when the opportunity arises for progress to be made through dialogue, conciliation can be co-ordinated.

The conciliator’s judgements are informed by the disposition of the parties as the strike or lockout situation evolves. In a strike situation for example, the conciliator is likely to observe mood evolution on the part of both parties along a cycle from the mind-set before a decision to engage in industrial action; through the decision making process; through the period of countdown to the strike / lockout; through the initiation of the strike / lockout and throughout the period of strike / lockout. As that cycle of events unfolds the mood and disposition of the parties is likely to change and the conciliator should be focussed on identifying that moment when both parties are optimally disposed to engage in conciliation.
Chapter 8 – Conciliation Techniques and Styles

(Putting the Pieces Together)
Chapter 8 – Conciliation Techniques and Styles

This chapter brings together a lot of what has been discussed in previous chapters. Here we are looking at how to gather together the skills and qualities of the conciliator, along with the tools of the process, to deal with the people and the problems that arrive in conciliation. It should be clear, however, that the delivery of conciliation reflects the personality and characteristics of the individual conciliator involved. A conciliator develops their own personal style of conciliation. There is no ‘right’ style for a conciliator but there are key aspects of the role which are associated with the disciplines of impartiality, confidentiality and commitment, which are not adaptable on the basis of style or personality.

Learning from those with more experience can be a very important factor in a conciliator’s development, but conciliators must understand that their own personality will be the basis of their approach to conciliation.

Techniques and Roles

People

As a conciliator you will need to develop techniques to deal with the people involved in the process – you need to bring them to the table and keep them there, you will need to manage attitudes and difficult people and convince them of the value of the process. The conciliator uses his/her communication and relationship building skills, as well as the process of conciliation, to gain the trust of and to understand the people at conciliation.

The communications skills discussed in elsewhere in this Guide and their application are key to dealing with the parties. Whether the parties participate in conciliation voluntarily or by compulsory arrangement, their attitude to the conciliator will be strongly influenced by the conciliator’s attitude and behaviour during conciliation. It will also be influenced by the conciliator’s personal reputation and the parties’ past dealings with that conciliator and the conciliation service generally.

Problem

The conciliator has to find ways of understanding and dealing with sometimes complex problems and uses the process to clearly identify those problems or issues at the outset. He/she has to break them up into manageable parts if necessary/possible; and then expand out discussion around the problem in order to identify and examine alternatives and possible solutions, as well as seeking to understand any underlying issues. As a conciliator, you are involved in assisting the parties in making decisions, where there is a choice among alternatives, and one purpose of conciliation is to help generate these alternatives.

Process

The conciliator controls and manages the process of conciliation as the vehicle through which they can motivate the parties to explore the possibility of a solution, through identifying and looking at options and new perspectives. Key aspects of the management of the process relate to timing and good judgement on the part of the conciliator and an absolute awareness of the need for impartiality, objectivity and confidentiality.

The main factors influencing the parties during conciliation are the personal, social, political and economic pressures they face. The conciliator will need to be aware of and use these influences to exert pressure on the parties at various times during the conciliation process – this represents the personal pressure that the conciliator can bring to bear and is essential to the process of conciliation.

The social and political pressures are those pressures from the external sources such as the political environment (including politicians as well as employer and union body organisations) and public perception (particularly in cases where essential services are affected).

Economic pressures relate to the bargaining power of the parties; how the parties’ powers compare in relative strength terms can have a strong influence on the outcome and on the ability of the conciliator to put personal pressure on one party compared to another.
As a conciliator, some of the pressure you exert may require you to be forthright in delivery, but at all times with the objective of creating room for consideration of alternatives, moving towards possible agreement between the parties.

**Self**

As a conciliator, you have many roles and functions:

**Manager of discussions** – as a conciliator you will need to manage the discussions between the parties and keep them on track. Keeping the parties focussed can be a challenging job in an emotional environment.

**Provider of a safety valve for the parties** – where parties want to blow off steam or direct their frustrations at someone you may well be the target and this can help manage and remove emotions from the discussion.

**A communication link between the parties** – this is a very important aspect of the conciliator’s job and requires excellent communication skills, as identified in earlier chapters of this Guide. In using Separate Meetings and laundering language you can help keep the parties focused on the problem rather than the people.

**Persuader** – using your influence with the parties, and the trust and confidence you have developed, to persuade them to look at things from a particular point of view or to take a course of action.

**Questioner/prober** – you can test the parties’ reactions to suggestions, without prejudice, and provide a safe environment for them to explore possible solutions without committing to anything.

**Provider of information and ideas** – you can provide information to the parties on, for example, previous cases which went on to arbitration or current practices within a particular industry. You can provide ideas for problem solving and a new perspective on the problem.

**Sounding board/a reality checker** – you can help the parties to ‘reality check’ their position or allow them to sound out ideas they may have for a solution without letting the other party know what they are considering.

**Protector/safe pair of hands** – you can allow the parties to let you know their bottom line without revealing it to the other party – this can give an indication to you as to how far apart the parties are and whether or not they are too far apart to come to an agreement. Because this happens in confidence the parties can be open with the conciliator – but it can only take place where trust exists.

**Stimulator of change in opinion/position/perspective** – a conciliator can help parties move by finding a way to articulate or firm-up some ideas they may have around alternatives. Sometimes the ideas are there but the parties aren’t confident or experienced enough to put shape on them and a conciliator can assist them in this.

**Empathiser** – sometimes the parties need an empathetic ear for their frustrations – this can not only help in building trust, it can also help them move closer to considering alternatives once they feel they have been listened to.

**Wordsmith** – one of the most important skills/roles of the conciliator is the ability to capture the agreement of the parties with clarity, and in language which will appeal to all parties and their constituents. To be able to capture the fundamentals and remove any bias or emotion from the language in use is an essential skill and the conciliator’s role in this regard can move the process in ways many other roles cannot.

**Evaluator/assessor/guide** – a conciliator can help the parties evaluate their positions through questioning and to assess possible alternatives through problem-solving with them. They can provide guidance, sometimes based on outcomes in previous cases, but also based on how the conciliator might feel the other party will react to certain suggestions. Maintaining confidentiality and impartiality is particularly important in this role.

**Advocate for solutions** – one of the challenges for a conciliator is to know when one party or both have reached a point where they are not going to go any further on a particular issue. Here the conciliator will need to be able to communicate this to the other side and help them to examine the merits of this final position versus moving on to a different forum. A conciliator may, when the situation arises, have to be assertive in ensuring that one party understands that the other side is making its final offer and that this is the best offer available.

**Face saver for the parties** – sometimes in conciliation one or both parties don’t want to lose face and/or to be seen to give in / concede too easily. The conciliator can try to find ways to address that either through helping the parties find language for the agreement that creates a better impression of balance or by presenting a proposal of their own so that the parties are not seen to be giving in or conceding themselves.
Coach – the conciliator may be a coach for those less used to the process or unconvinced of its merit, guiding one or both of the parties, step by step, through the process.

You are not all of these things all of the time but, across your career, you will have to adapt to these roles from time to time and switch between them as the situation calls for it.

The troubleshooting table at the end of this chapter suggests some ways of dealing with particular problems which may arise. That said, the imagination and innovation of the conciliator should always be at play and the suggestions here are meant to stimulate the conciliator to think around problems rather than produce a finite list of solutions.

Dealing with Difficult People

One of the main people challenges a conciliator will face is dealing with difficult people, and maybe there is no such thing as difficult people, just a poorly prepared conciliator. The best way for conciliators to arm themselves is to seek to understand what might lie behind a difficult attitude and personality; to grasp what motivates people and what might frustrate them in negotiations or any social dealings.

This guide could not attempt to encapsulate even a fraction of the thinking and research in this area, but the authors point to two areas of research and commentary in the area of negotiation style and learning style. An understanding of negotiation style helps you to deal with the people you deal with in conciliation, while a knowledge of learning styles can help a conciliator understand how to approach different people in the area of problem-solving.

Dealing with People

<table>
<thead>
<tr>
<th>The Four Personality Types/Social Types</th>
</tr>
</thead>
<tbody>
<tr>
<td>In 1984, psychologists David Merrill and Roger Reid published “Personal Styles and Effective Performance.” In the book, they argue that there are four social styles that affect the way that people interact with each other. Behavioural styles are influenced by two dimensions; assertiveness, or the degree of forcefulness in behaviour, and responsiveness, or the degree to which behaviour is emotionally expressive.</td>
</tr>
<tr>
<td><strong>The Driver/the Director</strong> – this personality type is assertive and not responsive, they are impatient, like control and are inflexible and poor listeners. The use of facts and logic are best for this person and personal guarantees and testimonials are not effective.</td>
</tr>
<tr>
<td><strong>The Expressive/The Socialiser</strong> – this type is both assertive and responsive and is flexible, they place more importance on relationships than tasks. They have a short attention span an so regular summarising is useful.</td>
</tr>
<tr>
<td><strong>The Amiable/The Supporter</strong> – this type of person is not assertive but is responsive; they are team oriented rather than goal oriented and respond well to personal assurances.</td>
</tr>
<tr>
<td><strong>The Analytical/The Clinician</strong> – this personality type is neither assertive nor responsive, but is considered rational and co-operative, and, as such are more open to logic and facts and written detail.</td>
</tr>
</tbody>
</table>

**Usefulness to a conciliator:** having some idea of the personality type can be useful. For example, the driver will respond well to facts and logic and the conciliator will need to be assertive with this type of person. Others in the group may respond better to the development of personal relationships and assurances. The importance for the conciliator is recognising what drives people and what may work for one member of the group may not work for others in terms of delivering movement towards settlement or even a discussion about settlement or alternatives.
Problem-Solving with People

The Four Learning Types


From their model, Honey and Mumford suggested that there were four types of learner based on where people’s natural preferences were on the four stages. Honey and Mumford called them Activist, Reflector, Theorist and Pragmatist and defined them as follows:

Activists: those who like to immerse themselves fully in new experiences and who act first and consider consequences later.

Reflectors: those who like to stand back and observe and who tend to be cautious until they have all the facts.

Theorists: those who like to think through problems in a logical manner; keen on basic assumptions, principles, theories, models and systems thinking.

Pragmatists: those who like to put theories into practice and who are impatient with long-winded discussion.

Usefulness to a conciliator: People have different ways of absorbing and taking on new arguments and perspectives – some negotiators are more open to new ideas, some need to reflect on suggestions and can’t be rushed, some need to work through any suggestion to see where it goes and some want to see if it will work before they accept it. From a conciliator’s perspective in problem-solving with negotiators and groups, they need to be aware that there are possibly different types of learners in the group, or an imbalance which may require more emphasis on fact or logic in applying a perspective than may be necessary for others and vice versa. Where there is a bias toward pragmatists in the group the conciliator may want to resort to anecdotes showing where such a solution has worked before.
Conciliation Styles

Having looked at many of the various techniques/roles which can be used in conciliation, we now consider some of the styles of conciliation which have been identified in this field of work and their links to those techniques/roles.

It is important to note that conciliators use a variety of role and styles throughout the conciliation process and when we talk about a conciliator’s personal style we really refer to those range of roles and styles with which the conciliator is comfortable and able to convincingly project in conciliation.

Traditional classifications of third party intervention styles have identified three main categories:

**Facilitative**: where the third party (conciliator/mediator) manages a process to assist the parties in reaching a mutually agreeable solution, without providing recommendations, advice or predictions of consequences in an alternative forum. No expertise is required in the area of dispute.

**Evaluative**: where a third party (conciliator/mediator) assists the parties in reaching a resolution by pointing out the weaknesses of their cases, and predicting what an alternative forum of dispute resolution (civil or labour court) may decide. This requires some specific knowledge of labour and case law.

**Transformative**: where a third party (conciliator/mediator) empowers the parties and seeks to assist the parties to recognise the others' needs, interests and values at any point. The name as it suggests relies on the fact that the relationships and parties' understanding of each other may transform during the process.

In her study of the operating styles of conciliators, Dix identifies three broad roles for conciliators: 26

- **The Reflexive role** “is concerned with responding to the needs of parties and establishing a positive working relationship”.
- **The Informative role** “involves clarifying the details of a case and conveying factual information to parties”.
- **The Substantive involvement role** seeks “to narrow the gap in parties’ positions and precipitate a settlement”.

It is useful to see where the roles set in Section A fit into each of these three broad roles. Some roles can be assigned across more than one of the three, as the emphasis or weight the conciliator places on the use of these roles/techniques will depend on their personal style (see Table 3 below).

26 A recent study of a group of conciliators, involved in individual labour rights cases, was conducted for Acas (British Advisory, Conciliation and Arbitration Service) by Gill Dix. While this is a very specific study of a particular group of conciliators, the models are adaptable to be extended across the whole field of conciliation in order to reflect on the role and style of conciliators. This study is solely based on interviews with conciliators and their reflections on their roles, with inferences then being drawn by the author in relation to the models used.

Table 3: Putting the Sub-Roles in Context

<table>
<thead>
<tr>
<th>Role</th>
<th>Reflexive Role</th>
<th>Informative Role</th>
<th>Substantive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sub-roles</td>
<td>Manager of discussions;</td>
<td>Manager of discussions;</td>
<td>Manager of discussions;</td>
</tr>
<tr>
<td></td>
<td>Safety valve;</td>
<td>Communication link;</td>
<td>Persuader;</td>
</tr>
<tr>
<td></td>
<td>Protector/ safe pair of hands;</td>
<td>Persuader;</td>
<td>Questioner/prober;</td>
</tr>
<tr>
<td></td>
<td>Sympathiser;</td>
<td>Provider of information/ideas;</td>
<td>Sounding board/reality checker;</td>
</tr>
<tr>
<td></td>
<td>Face saver;</td>
<td>Sounding board/reality checker;</td>
<td>Stimulator of change;</td>
</tr>
<tr>
<td></td>
<td>Coach.</td>
<td>Stimulator of change;</td>
<td>Wordsmith;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Wordsmith;</td>
<td>Evaluator/assessor;</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Advocate for solutions.</td>
<td></td>
</tr>
</tbody>
</table>

These three broad styles are said to represent “a continuum between two extremes”.27

**Reactive-Proactive style** – this style is “a continuum describing the extent to which conciliators are active and persistent in initiating and responding to contact with parties”.

**Message Bearer-Influencer style** – this style “relates more closely to the goal of conciliation….some conciliators see their role as primarily a message bearer”.

**Passive-Forceful style** – which is related to the level of assertiveness a conciliator will apply in seeking to influence the parties in a dispute.

Some conciliators are more reactive than others and some more proactive. Some conciliators simply pass on information, while others seek to use that information (and other information) to influence the parties, in order to move them towards a resolution. Some conciliators will manage the process in such a way as to allow the parties to eventually find alternatives; others may seek to force the parties to reflect on their positions and the potential consequences of maintaining them.

And most conciliators travel along these continuums and straddle these styles even within the same case, because a conciliator has to adapt their style to the circumstances of the dispute which is dynamic and fluid and rarely certain.

Each case takes on a dynamic of its own where sometimes the focus is on the people, sometimes on the problem, sometimes on the process and sometimes on all three. Whichever way it works out, a conciliator needs to be armed with self-knowledge and adaptability within all the roles and styles they can convincingly deliver.

**Different Dispute Types, Different Styles?**

In looking at whether or not different styles would be used by a conciliator when dealing with the two types of labour disputes identified earlier in this Guide, (namely interest-based and rights-based) it is likely that the Evaluative/Informative Role and Message Bearer-Influencer Style would be most appropriate to rights-based disputes, but this does not rule out the need for the use of other roles and styles as appropriate to the case. Equally while the Facilitative/Reflexive and Transformative/Substantive Involvement Roles, and their corresponding styles, would be most appropriate to interest-based disputes, there is no way of assigning particular styles and roles to dispute types as all cases are different in some way. Sometimes problems are very similar and the people are not and vice versa, but ultimately the conciliator has to adapt their style accordingly.

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27 See footnote 26.
## Table 4: Troubleshooting for Conciliation

<table>
<thead>
<tr>
<th>Problem</th>
<th>Possible solution(s)</th>
<th>What to focus on</th>
<th>Role being played by Conciliator</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lack of movement by both parties</td>
<td>Reality check positions in Separate Meetings; Hold Private Meetings if confident of a result</td>
<td>People - attitudes; Problem – underlying issues</td>
<td>Manager of discussions; Reality checker; Questioner/prober; Stimator</td>
</tr>
<tr>
<td>Underlying mistrust over past or unresolved issues</td>
<td>Try to shift focus to current problem; Seek agreement to deal with issue at a later date</td>
<td>Problem</td>
<td>Manager of discussion; Persuader</td>
</tr>
<tr>
<td>Refusal to discuss anything until one matter is resolved</td>
<td>Encourage the parties to deal with the issue; Identify why the matter is so important</td>
<td>People – attitudes; Problem</td>
<td>Persuader; Questioner/prober</td>
</tr>
<tr>
<td>Spokespersons don’t appear to have the mandate to move</td>
<td>Adjourn and tell the party to come back with a mandate; See if the party can take a potential solution for consideration and approval</td>
<td>People - mandate</td>
<td>Manager of discussions</td>
</tr>
<tr>
<td>Intra - group problems</td>
<td>Private Meeting with one spokesperson; Direct engagement with the group</td>
<td>People – dealing with difficult people</td>
<td>Evaluator; Advocate for solutions</td>
</tr>
<tr>
<td>The process has gone as far as it can go</td>
<td>Capture what has been agreed so far and seek agreement for the remainder to go to arbitration or for some expert opinion or review</td>
<td>Problem – breaking it down</td>
<td>Persuader; Advisor; Wordsmith</td>
</tr>
<tr>
<td>One side wants to state final position too early</td>
<td>Explain the process and the consequences of raising the other party’s expectations</td>
<td>Process – procedures - timing</td>
<td>Advisor; Coach</td>
</tr>
<tr>
<td>Problem</td>
<td>Possible solution(s)</td>
<td>What to focus on</td>
<td>Role being played by Conciliator</td>
</tr>
<tr>
<td>------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------</td>
<td>--------------------------------------</td>
<td>-------------------------------------------------</td>
</tr>
<tr>
<td>One side or both present a vague idea that they may change in one area/on one issue</td>
<td>Try to capture clearly what they are talking about – on paper if possible; Talk the party through the possibilities, clearly, step by step</td>
<td>Problem – specific</td>
<td>Questioner/prober Wordsmith Reality checker Stimulator</td>
</tr>
<tr>
<td>Too many issues</td>
<td>Gain agreement of both sides to break the problem up; Break the groups up where practical/possible; Otherwise break up the issue</td>
<td>Problem – bite sized pieces that can be dealt with</td>
<td>Problem-solver Manager of discussions Questioner</td>
</tr>
<tr>
<td>One side very inexperienced</td>
<td>Need to assist them to understand the process</td>
<td>People Process</td>
<td>Coach</td>
</tr>
<tr>
<td>One party doesn’t want to be there</td>
<td>Need to convince of merits of the process: Maybe reflect on successful previous cases</td>
<td>People Process</td>
<td>Persuader Stimulator Manager of discussions</td>
</tr>
<tr>
<td>High levels of mistrust</td>
<td>Need to probe and uncover reasons; Focus on issues</td>
<td>People Problem</td>
<td>Manager of discussions Prober/questioner</td>
</tr>
<tr>
<td>One side is not convinced by the other’s factual argument</td>
<td>Seek agreement to appoint an independent expert to verify facts</td>
<td>Problem</td>
<td>Problem-solver Advisor Face-saver</td>
</tr>
<tr>
<td>Someone is not behaving constructively</td>
<td>Address the matter assertively but cautiously</td>
<td>People</td>
<td>Persuader Advisor</td>
</tr>
</tbody>
</table>
Chapter 9 – Contributing to Dispute Prevention

(How can conciliators contribute outside of a dispute situation?)
Chapter 9 – Contributing to Dispute Prevention

The delivery of conciliation is often likened to the provision of a ‘fire brigade’ service – generally only activated when something has gone wrong or there is a dispute in process or prospect. Increasingly, social partners and countries are developing responses to issues in industrial relations from a positive standpoint and attempting to deal with the causes of conflict and the factors leading to disputes in a pro-active positive way.

Conciliators and conciliation services, because of their privileged access to the inner workings of the negotiation processes in organisations, are particularly well placed to contribute to the development of positive strategies to support conflict prevention in the workplace.

Increasingly, State organisations which provide conciliation are developing robust mechanisms and services to impact directly on the conduct of relationships in workplaces. Activities in that regard generally fall under Advisory services, Workplace policies and Education / Information services.

Advisory Services

Often, persistent conflict in an organisation can point to an underlying issue in the conduct of relationships between the parties. There are times when conciliators are in a position to detect the nature of these relationship issues and may seek to initiate an activity or project to look to resolve the matter on a more long term basis than the process of conciliation may allow.

Usually, the conciliator will not be in a position to broaden the debate in a dispute situation to encompass a reflection by both parties on the nature of their relationship and its conduct and how the basic chemistry of the relationship may, of itself, be leading to conflict and an inability to resolve issues in an efficient manner. For the conciliator in a dispute situation, the priority is to deal with the issue in dispute and to assist the parties to find an agreement which restores equilibrium to the workplace.

However, the conciliator should realise that significant value is added to the delivery of service, and the achievement of lasting resolutions when an expert in the field engages with the parties to reflect on what has occurred and to examine the degree to which behaviours and actions of the parties contribute to the development of dispute situations.

For that reason, in many countries the idea of providing advisory and relationship support services is becoming an increasingly critical element of the State’s attempt to assist parties to prevent disputes before they cause disruption to the parties and the economy generally. Advisory services are often interlinked with State provided conciliation services (e.g. being housed in the same organisation) providing an expert and experienced resource to the parties to examine their own relationship and to devise actions and strategies to improve that relationship, thereby leading to more effective and constructive engagement between the parties generally and the better functioning of organisations as a result.

Common services in that regard provide for an expert to engage with the parties to facilitate a joint ‘post dispute’ reflection process. The key here is to encourage and support a process of joint discussion outside any immediate period of conflict which seeks to examine the relationship-based factors which might have led to disputes in the past and, by definition, if not addressed, carry the risk of negative impact in the future. The objective is to put in place structures and arrangements which will enhance the effectiveness of the relationship for both parties.

An initial step may be to secure an agreement by the parties to commission an independent ‘audit’ of their relationship, with a confidential report being made to both parties setting out findings and recommendations. In many jurisdictions the State will provide the personnel and resources to carry out that ‘audit’ or review.

Such ‘audit’ processes, if they are to be useful and valid, are potentially challenging for the parties in terms of the content of the final report. For that reason it may be wise, in the interest of preserving confidence in the conciliator among the parties and retaining the perception of conciliator impartiality that such exercises are carried out by advisory experts within the State service rather than directly by conciliators. A common strategy is to establish, as a feature of the State Service or organisation dealing with industrial/labour relations, an Advisory Unit staffed by experts in industrial relations and organisation behaviour whose job it is to conduct audits and to deliver support in this way. In such circumstances the conciliator’s role is usually confined to initiating the process of reflection by suggesting / advocating that the parties engage an advisory expert to assist them in examining and potentially improving their engagement with each other on a day-to-day basis.
A methodology often employed by advisory experts is to carry out a workplace ‘audit’, (see an example of the audit process in the box below).

### An Example of The Audit Process

The first step is to secure the agreement of both parties to the audit.

The expert/officer conducting the audit will, where possible, examine available evidence of dispute history in the organisation.

This is followed by engagement with the active participants in the negotiation or bargaining processes (e.g. the HR director and the trade union official) to gather an overview of where they view problems existing.

If the organisation is small enough, the expert/officer can proceed with confidential ‘one on one’ interviews with all members of management and staff for their views on relationships, practices and procedures within the organisation.

For larger organisations, the expert/officer may survey all members of management and staff for general views and then follow up with randomly chosen members of the workforce based on ensuring representation across age, gender, shift cycle and any other features of the working pattern or make up of the workforce.

The advisory expert/officer will then prepare a report (comprised mainly of findings and recommendations) reflecting the unattributed views of all parties who have expressed an opinion with regard to the relationship including the role played in its conduct by the Trade Union and the management of the organisation.

That report is accompanied by the identification of key areas (e.g. communication, joint problem solving) which require action (recommendations). Action would normally flow from the establishment of joint working parties whose role it is to develop action plans and initiatives focussed on areas identified by the report as requiring attention. In most cases, at least at the outset, the advisory expert/officer will attend joint working party meetings to ensure the parties get the support they need to build an effective working relationship.

The main focus of advisory activities of this nature is to assist and support parties to learn from their experience, including of dispute situations and problem solving generally, and to develop a culture and practice of problem solving and constructive and respectful engagement. The emphasis of a neutral third party is to encourage and support the parties as they themselves work to improve their relationship in their joint interest.

### Internal / Workplace level Policies and Procedures

Increasingly, the position of State-provided conciliation services, as a trusted and experienced neutral, is being used to assist in the drafting and development of standard policies across a range of areas impacting on the employment relationship in the enterprise / business. It is common for parties to jointly take the view that agreed policies on potentially divisive issues such as the handling of grievances, disagreements and disputes can make a real impact on the achievement of harmonious relationships. In such circumstances, the experience and knowledge of conciliators can be drawn on to work with parties to draw out the key elements of effective policies and procedures. As a consequence, conciliators may work with other experts to assist in the drafting and development of policies which both parties can use to deal with the conduct of the relationship in terms of these difficult and often challenging areas.

In many jurisdictions conciliators make themselves available to working groups of both parties to develop and draft policies across a range of areas such as those mentioned. In addition conciliators may make themselves available as a support to parties attempting to conclude agreements between themselves governing the fundamentals of their relationship, including what arrangements they will put in place to handle negotiations and dispute resolution etc. Given the level of knowledge and expertise conciliators have with respect to the way parties relate to each other in a range of settings it is logical that, in the interest of good employment relations, the conciliator can be viewed as a unique asset to parties attempting to improve the functioning of their relationship.
It is important to understand that, in most cases, where a conciliator agrees to assist the parties in this manner, the assistance is delivered jointly to both parties in order to preserve the perception of impartiality on the part of the conciliator.

**Education and Information**

State-provided conciliation services across the globe are increasingly developing their capacity to impart knowledge and understanding of the skills involved in the conduct of effective industrial relations and employment relationships. Many services have developed Education and Training divisions which make available expert staff, including conciliators, to deliver enterprise specific training focussed on particular aspects of labour relations in the enterprise. A common feature of poor labour relationships in the workplace, for example, is ineffective communication between the parties.

Training and support in this area can make a real impact on the functioning of industrial and labour relations and, therefore, can be seen to be an effective method of contributing to the prevention of labour disputes and the promotion of harmonious labour relations in the workplace.

Similarly, because of their neutral and trusted standpoint and the level of expertise residing in the organisation in the area of labour relationships, State-provided conciliation services are particularly well placed to commission relevant research, contribute to education programmes and seminars and to communicate widely on good industrial relations and employment practices.

A sample list of web sites of State conciliation services is provided at the end of this Chapter and the reader is encouraged to visit those sites to familiarise themselves with the nature of approaches taken across the globe to the challenge of contributing to improving industrial and employment relationships generally and to the evolving nature of State-provided conciliation services.

**Helplines**

Many State-provided conciliation services also provide helplines, which are available to employers and workers alike. These helplines have been designed to provide information to callers, not alone in relation to dispute resolution and settlement services, processes and techniques, but also on various aspects of employment legislation (including basic statutory entitlements, for example wages, holiday entitlements etc.) to encourage compliance and to prevent disputes which may arise over the application of such legislation. This information can be especially useful to small and medium enterprises without a dedicated HR/personnel function and to workers who are not members of a representative organisation, as well as to HR/personnel practitioners and trade union representatives.

Conciliators can contribute to this service through providing generic feedback on the types of issues which can lead to disputes and ensuring that the helpline service providers are aware of current issues in their field.
Selected Websites of National Conciliation and related services

Acas (UK) - www.acas.org.uk
FMCS (USA) - www.fmcs.gov
CIRB (Canada) - www.cirb-ccri.gc.ca/eic/site/047.nsf/eng/home
CCMA (South Africa) - www.ccma.org.za
Workplace Relations Commission (Ireland) - www.workplacerelations.ie
Labour Relations Agency (Northern Ireland) - www.lra.org.uk
Fair Work Commission (Australia) - www.fwc.gov.au
NICA (Bulgaria) – www.nipa.bg
Agency for Peaceful Settlement of Labour Disputes (Serbia) – www.ramrrs.gov.rs
Agency for Peaceful Settlement of Labour Disputes (Montenegro) – www.amrrs.gov.me
Agency for Peaceful Settlement of Labour Disputes (Republika Srpska-Bosnia and Herzegovina) - www.radnispor.net
Appendix 1

Case Studies
People Involved

This case study explores Acas' role in a collective conciliation between the National Union of Rail, Maritime and Transport Workers (RMT) and London Underground Limited (LUL) which arose prior to the London 2012 Olympic and Paralympic Games (Referred to from this point on as the Games).

Issue in Dispute

LUL employs approximately 19,000 staff, serves 270 stations and, in 2011/2012, 1.171 billion journeys were made on the London Underground. The RMT has around 77,000 members nationwide and is one of four recognised unions (RMT, ASLEF (Associated Society of Locomotive Engineers and Firemen), Unite and TSSA (Transport Salaried Staffs’ Association)) with whom LUL started negotiations to bring in temporary changes to existing working patterns and practices in preparation for the period of the Games. The daily timetable for the Games extended the normal working day, and in effect, created a third daily peak of late-night, passenger activity as well as more weekend traffic. For most LUL operational staff, this would mean changing their working practices in order to ensure the Underground was able to deal with the predicted extra passenger demand. LUL needed an agreement with all its trade unions to make this happen.

How the Conciliator became Involved

The company began talks with the unions seven months before the opening ceremony, but direct talks between the parties to deliver an agreement began to stall and Acas was asked to assist.

Acas began conducting negotiations from early March 2012, initially with all four unions involved. Agreement had been reached with ASLEF in respect of drivers working extended shifts. The new shift patterns breached agreed practices set out in the so-called Framework Agreement, and had the effect of making negotiations more difficult with the other three unions, TSSA, Unite and RMT. TSSA represented station staff and managers; Unite represented engineers; and RMT represented drivers, station staff, managers and engineers.

The talks were on a number of issues separating the three unions and LUL management.

Potential Impacts of the Disputes

Both the LUL and RMT representative stated that the most critical potential outcome of a failure to resolve the dispute was industrial action, including the possibility of strikes, during the Games period. Both representatives also identified the potentially negative impacts on both organisations’ reputations as a result of the disputes.

Industrial action on such a key part London’s public transport system creates wider economic and welfare costs beyond the disputing parties, such as the effects on workers and businesses in central London as well as the country’s public image.

An Outline of the Process

Acas were asked to help resolve the dispute regarding the Games reward and the first meeting took place on 1st March 2012, with the opening day of the Games barely five months away. A series of meetings took place over the next three months, with all four unions involved to begin with, but eventually this reduced to three. LUL management and RMT, in particular, were experiencing serious difficulties with aspects of how to achieve the temporary changes to working patterns that the logistics of the Games required; many employees would have to work longer hours and extend the beginning and end of their working day. Furthermore, this agreement had to be in place at least four weeks ahead of the Games for the actual Olympic rosters to be filled, so time was running out.

Both parties stressed the importance of having a non-judgemental but proactive third party, whose overriding objective is to help the parties get a deal.

28 Acas is an independent organization funded by the Government of the UK with a legal duty to offer free of charge conciliation in labour disputes.
In this dispute, to begin with, the conciliator placed the management team (numbering around ten people) and each of the four trade unions (varying from four to ten people) into separate rooms and visited each group for their perspective and priorities regarding the dispute. After the initial sessions, the format changed.

“I used a lot of caucus meetings -‘corridor meetings’ as they are better known - to change the dynamics and got one, two or three key players from each team to meet under my chairmanship to have a frank discussion to break the deadlocks we encountered. We made a lot of progress in these smaller meetings and they often ended up being brain-storming sessions.” (John Woods, Acas Deputy Chief Conciliator)

After many meetings, with parties having gone over several issues multiple times, a deal was finally reached.

Outcomes of the Conciliation

The main outcome of two months of Acas collective conciliation was that - with the Games opening ceremony seven weeks away - the deadlock between LUL and RMT was finally broken and arrangements for filling the new rosters for the Games could begin. It also enabled other agreements to be finalised with all operational staff. All four trade unions, ASLEF, RMT, TSSA and Unite, were now party to a deal for their members with LUL.
Case Study 2: “Dispute between national broadcaster and union” (intra-party issues, financial challenges for company, lock out, media campaigns, lack of trust, social media, casual employees)

People Involved and Issue in Dispute
Following a major restructuring that resulted in the merger of technical, clerical and on-air employees into a single bargaining unit, a national broadcaster and the union representing its employees entered into bargaining for the collective agreement that would apply to the newly created unit. Given the composition of the new bargaining unit, there were many disparate interests that needed to be reconciled on the union side of the bargaining table. For its part, the employer was facing a difficult financial situation and had numerous demands for concessions and operational flexibilities. Direct negotiations between the parties were lengthy and difficult and ultimately resulted in a lock out the members of the bargaining unit by the employer.

How the Conciliator became Involved
The situation became very acrimonious when representatives of each party resorted to media campaigns to seek public support for its position. When the labour dispute threatened to disrupt the broadcast of a major sporting event, the Minister of Labour summoned the senior representatives of the parties to a meeting. The employer was represented by the President of the corporation and the union by its National President. After stressing the public interest in the resolution of the dispute, the Minister indicated that the parties had one week to achieve a settlement, failing which the government would take steps to end the dispute. The government offered the assistance of two mediators in the period leading up to the deadline.

An Outline of the Process
At the bargaining table, the employer was represented by its senior vice-president of human resources and members of the management team. The union bargaining committee, composed of elected representatives of the various occupational groups, was led by an experienced staff negotiator.

Bargaining was characterized by a complete lack of trust between the two bargaining committees. Both parties made significant use of social media, both to keep their respective constituencies informed of developments and to attempt to influence government decision makers. When it became clear that no progress could be made with the members of the two bargaining committees in the same room, the mediators split them apart and spent time with each committee to explore the issues that each believed were critical to an overall settlement. After spending considerable time in this exercise, it became evident that there was one key issue that had to be resolved in order to make any progress on the other issues. The employer was concerned about the advent of new broadcasting technologies and was demanding the unfettered right to hire casual employees to take maximum advantage of those technologies. For its part, the union was concerned about the erosion of its bargaining unit and bargaining rights if the employer had the ability to rely on a casual workforce.

The mediators asked the parties to focus on resolving this issue, and allowed the parties to spend several days jointly and separately exploring options that would address both their own concerns and those of the other party. When the parties had exhausted themselves without finding a workable compromise, and with the deadline set by the government fast approaching, the mediators made a suggestion that, in their view, satisfied the needs that each party had expressed: the employer would be permitted to hire casuals, but at no time could the number of casuals exceed an agreed upon proportion of the bargaining unit. This satisfied the employer’s need for a flexible labour force, but ensured that if the employer laid off full-time employees, it also had to reduce the number of casual employees it was permitted to engage.

Outcomes of the Conciliation
Once the parties understood the concept, agreement on the maximum percentage of casual employees that would be permitted was quickly reached. The other issues then fell into place and the parties signed a new collective agreement shortly before the deadline set by the government had elapsed.
Case Study 3: “NICA and dispute owner- strike committee” (selection of conciliator by parties, strike threat, failed dialogue/communications, attempt of one party to transform conciliation into arbitration, lack of understanding of the conciliation process)

The collective labour dispute arose in a profitable private company working primarily for the foreign market and employing around 120 people, mostly women. There was one trade union in the company. At the time of the commencement of the conciliation procedure, the collective labour agreement had expired for several months. The employer owned another company with a similar object of activity where there was no trade union and no collective labour agreement was concluded.

People Involved

The employer and a Strike Committee were the disputing parties. The Strike Committee was supported by the company based trade union. In the negotiations held at the beginning of the dispute the employer was represented by the Human Resources director and the Production manager. The Chairman of the Strike Committee and experts from the branch trade union federation represented the employees’ side.

How the Conciliator became Involved

Both parties requested NICA\(^{29}\) to initiate a conciliation procedure and they mutually selected a conciliator. The conciliator was a well-known public person, an ex-minister of labour and social policy. Both the employer and the trade unions (at the company and branch levels) had had previous contacts with him related to other issues. The conciliator’s selection was a result of the personal qualities of the conciliator and the expectations that he would be the one able to solve the problem.

The Issue in Dispute

The collective labour dispute arose over the changes introduced unilaterally by the employer to the wage fixing system in the company, which led to decrease in net wages.

During the conciliation procedure, the conciliator determined that one reason for the collective labour dispute was the decrease by 10-15% of net wages through the introduction of the new pay system. The employer claimed that the changes were made as a sanction for production loss-making. On their side, the workers did not deny such liability but claimed it should be individual and not collective.

Another specific reason was the tension in the company due to the failed direct dialogue between the employees and the trade union that represented them, on one hand, and the employer (owner), on the other. The trade union had made efforts to restore direct dialogue with the owner with the support of the branch federation, but the owner mandated the Production managers and the Human Resources director to represent him in negotiations.

During the first meeting of the conciliator with the disputing parties, the representatives of the branch union federation tried to take over the conciliator’s role. On the one hand, these representatives wanted to negotiate on behalf of the Strike Committee and on the other, they tried to assimilate the role of the conciliator to that of an expert and at the same time to transform him into an arbitrator of the dispute. The qualities and the personality of the conciliator prevented that to happen.

An Outline of the Process

The procedure had some specifics that challenged the rules for conciliation established by NICA. Since the beginning it became clear that the disputing parties agreed to start negotiations with the participation of the conciliator one month after their application was registered with NICA and the procedure was put in motion.

In the first Joint Meeting with the conciliator, no agreement could be reached because the disputing parties did not want to listen to each other. Their expectations were for the conciliator to take the role of an arbitrator of the dispute and not to support them to bridge their positions and to reach an agreement. Neither the employers’ representatives, nor the trade union had clarity about the nature of the conciliation process.

The conciliator decided to use the technique of direct contact between the parties – everybody else, but the owner and the Strike Committee, left the room. After several hours, the employer and the Strike Committee expressed to the conciliator their readiness to conclude an agreement. Later the owner - employer told the

\(^{29}\) National Council for Conciliation and Arbitration of Bulgaria with the legal competency to provide conciliation and arbitration services.
conciliator that during the “tête-à-tête” meeting with the representatives of the employees they discussed a range of issues, not only the subject of the dispute. They discussed also problems and relationships in the enterprise the employer was not aware about until then.

Outcomes of the Conciliation

As a result of the conciliation the disputing parties signed an agreement, which covered in principle all disputing issues. After conciliation and until the signing of the agreement, the wage cut decreased from 10-15% to 2%. An important result was the fact that the employer agreed to negotiate a new collective labour agreement, which was signed few months later and, according to NICA records, has since then been renewed annually.
Case Study 4 “Dispute in foreign company” (discrimination between national and foreign employees, political involvement)

The dispute arose in an enterprise owned by a foreign company performing important infrastructure project with European funding in Bulgaria.

The People Involved
Disputing parties were multi-layered due to the hierarchical organization and the importance of the work performed by the company. A representative of employees took the initiative to set up an initiative committee, which included both representatives of workers and trade union officials and experts from regional and national level. The employer represented by the manager of the company was directly involved in the negotiations together with the Human Resources director and consultants. Negotiations were conducted in the presence of an interpreter.

How the Agency/Conciliator became Involved
The Initiative Committee requested conciliation, and the employer agreed with the procedure. The conciliator was nominated by the Initiative Committee of employees and the employer agreed to the proposal.

The Issue in Dispute
The dispute had arisen in relation to discriminatory working conditions and payment between Bulgarian and foreign employees in the company. The dispute referred to 1000-1200 people. The reason for the collective labour dispute was the discrepancy between the pay rate applied to Bulgarian and foreign workers. This was established after an inspection of the Executive Agency “General Labour Inspectorate”. The Initiative Committee of the employees insisted on wage bargaining according to qualifications, work experience and responsibilities of the job applicable to all workers, no matter if they were foreign or Bulgarian citizens, without discrimination. Before NICA initiated the procedure of conciliation, the issue in dispute was discussed at a special meeting between the Minister of Labour and Social Policy and two managers of the company representing the employer. As a result of the meeting, the employer signed a Memorandum of Understanding (MoU) and committed to introduce a wage fixing system based on workers’ qualification, work experience and job responsibilities.

An Outline of the Process and its Outcome
Following the signature of the MoU, several meetings between the disputing parties were held with the participation of the conciliator. During those meetings two partial agreements were signed. By an agreement between the parties, the duration of the conciliation procedure was extended in order to reach a definitive agreement. The parties agreed on basic wages for all jobs in the company and a collective labour agreement was eventually signed, which ended the dispute.
Case Study 5: “Dispute in private transport company” (compulsory conciliation, personal interest of representative, value of questioning, commitment to conciliation process)

The People Involved
A private transport company and one union representing approximately 150 workers.

How the Agency/Conciliator became Involved in the Dispute
The parties had a company-union agreement which required that any dispute not resolved following the decision of an internal tribunal would be referred by the conciliation service to the labour court at the request of the parties. In the jurisdiction in question, a conciliator can only refer a case to the labour court once they are satisfied that they have done everything they can through the process of conciliation to resolve the matter.

The company and union approached the conciliation service and requested a referral of the case to the labour court. The conciliator assigned to the case told the parties that they would have to attend conciliation and work in good faith within the process before any such referral could be made. The parties expressed their dissatisfaction and frustration with the situation but nonetheless agreed to attend.

The Issue in Dispute
The issue presented at conciliation was a dispute over proposed roster changes.

An Outline of the Process and its Outcome
Conciliation began with a brief Joint Meeting and then continued with Separate Meetings. During the Separate Meetings the conciliator discovered that the attitude to the change in rosters was being affected by concerns that the change was being put in place in order to reduce the number of supervisors. The shop steward representing the staff was a supervisor and outlined the concerns of his fellow supervisors in relation to the roster changes. It became clear through the meetings that management had not been aware of these concerns and that the workers had not previously voiced them. After the first day of conciliation the conciliator asked the parties to reflect on the new developments and return. At the next day of conciliation the parties reached an agreement on rosters and the company made a commitment that new rosters would not be used to reduce the number of supervisors.
Case Study 6: “The LRC and the Aer Lingus cabin crew dispute” (intra-party disagreement on cost-reduction plan, industrial action)\(^{30}\)

In 2009, Aer Lingus, Ireland’s former state-owned national airline, reported an operating loss of €81 million. In response to this, senior management announced that it would have to implement a radical cost reduction plan. After extensive discussions with all the relevant unions at the LRC (Labour Relations Commission – Ireland’s State conciliation service) in early 2010, a proposed plan known as Project Greenfield was developed. Project Greenfield was ambitious as it sought to reduce by €97 million the airline’s operating costs through a programme of voluntary redundancies, pay cuts, a three-year pay freeze, new rosters and new work practices. No doubt reluctantly, most of the trade unions at Aer Lingus voted to accept the plan. However, one group of staff, cabin crew, who were members of the IMPACT trade union, rejected the proposed agreement, arguing that the changes set out in the restructuring plan went too far. Cabin crew employees were particularly unhappy with proposed changes to rosters and work practices.

People Involved

Extensive conciliation talks under the stewardship of the LRC were held at which cabin crew employees received ‘deeper clarification in certain areas’. Cabin crew staff voted again on the plan, and supported its implementation with a vote of 93 per cent in favour. But virtually from the start the new rosters and work practices proved difficult to implement. Project Greenfield had finally been fully endorsed by early summer 2010.

Issue in Dispute

October of that year, IMPACT had started a limited, but escalating, campaign of industrial action on the roster issue. The matter reached a head in early 2011, when management unilaterally introduced new rosters and associated rules for cabin crew. In response, the cabin crew refused to operate the new rosters and as a result a full scale employment dispute erupted inside the organization.

Management countered the union action by removing over 170 cabin crew off the payroll for refusing to work the new schedules. In addition, it threatened to dismiss them if they did not sign an undertaking to work the rosters.

IMPACT responded by increasing its industrial action, including strike action, leading to flight cancellations and a blaze of bad publicity for the company at a time the company least needed it. Moreover, both sides were determined not to back down, thereby increasing the prospects of a highly damaging industrial relations stand-off, which neither side could afford.

How the Conciliator became Involved

To avert such a catastrophic outcome, the LRC on its own initiative intervened, urging both sides to begin talks under its stewardship to find a way out of the impasse.

An Outline of the Process

After much behind the scenes cajoling, both sides agreed to meet at the LRC offices. These were difficult, bruising negotiations to manage – at the start both sides refused to be in the same room each other. But slowly the LRC team established a rapport between the two sides and a set of proposals to be the basis of discussions on the way forward. After two weeks of protracted negotiations the LRC was able to guide the parties to an agreed settlement on 80 per cent of the grievances.

The other ‘20 per cent’ of the dispute was referred to the Aer Lingus’ industrial relations arbitrator, who was also the Chief Executive of the LRC. Before issuing his binding decision, he had extensive discussions with the Conciliation team at the LRC. Finally, when his binding arbitration was made management and unions agreed to accept it. This brought the dispute to an end.

Outcomes of the Conciliation

Without the work of the LRC, this dispute would mostly have escalated into prolonged, highly damaging strike action, which even could have threatened the survival of the company.

Case Study 7: “LRC and reforming pensions at the Bank of Ireland“ (parties stuck in their positions, strike threat, conciliation as follow up to labour court recommendation)31

The Bank of Ireland is the premier financial institution in the country. In October 2006, the Bank announced that it was going to introduce a new ‘hybrid’ pension scheme for new employees. Whereas its longstanding defined benefit (DB) pension scheme would remain for existing employees, the new scheme would combine the DB system with elements of what is known as a defined contribution (DC) scheme.

People Involved and Issue in Dispute

The main unions recognised at the Bank, the IBOA and UNITE, reacted with fury to this announcement. It argued that as one of the most successful and profitable companies in the country, the Bank could easily afford to retain its DB scheme for new staff. It also argued that the Bank’s unilateral decision was a breach of existing negotiation procedures and established collective agreements. The unions declared in response that it would ballot members for strike action.

How the Conciliator became Involved

In an effort to avert industrial action, the dispute was referred by the trade unions to the LRC.

An Outline of the Process

After two Conciliation Conferences, it was evident to LRC that the views of both sides were so entrenched that the only viable avenue open was to pass the case to the Labour Court, the country’s main arbitration and adjudication body. The Labour Court after a complex investigation and hearing issued a Recommendation which criticized the Bank for not using its established internal negotiating machinery to seek changes to its DB pension scheme. At the same time, the Recommendation acknowledged that management had legitimate concerns about the long term viability of DB pension scheme and that the unions had equally valid concerns about the future livelihoods of their members. The Court recommended that the parties get round the negotiating table to thrash out their differences.

Both parties accepted the Labour Court’s Recommendation. They also agreed to use the LRC as the third-party to oversee the negotiations. The Deputy Director of the Conciliation Division took responsibility for the case. Before starting negotiations proper between the parties, he spent considerable time with both parties not only to get familiar with their positions, but to get a sense of the reservation points of both sides – the point at which a party is unlikely to go. In addition, he networked widely to see how similar disputes about pensions were addressed in the financial services industries and closely related sectors.

This preliminary work was deemed essential by he for two reasons. One was that it allowed him to get an insight into key issues such as the desire on both sides to resolve the dispute amicably, whether a negotiated solution could be framed as a win-win settlement and whether the LRC would ultimately need the assistance of another dispute resolution body like the Labour Court to secure a settlement. In other words, he was able to develop a roadmap for the negotiations. The other reason was that it allowed him to set the agenda for the negotiations in a manner so that difficult, contentious matters were not discussed at the beginning.

Negotiations started and unsurprisingly proved difficult. But the LRC team worked continuously with each side to ensure that both remained committed to achieving a negotiated solution even though discussions on a particular did not fully go their way.

Outcome of Conciliation

Finally, a settlement was reached which involved the Bank agreeing to introduce a revised hybrid pension plan at a later date. The union was not fully happy having to give up the DB scheme for new entrants, but calculated that it would unable to negotiate a better deal in the circumstances.

Case Study 8: “LRC and the Irish Ferries dispute” (high-profile dispute, potential negative effect on national industrial relations) 32

People Involved and Issue in Dispute

Perhaps the most high profile and bitter industrial dispute in Ireland over the past two disputes involved Irish Ferries in 2005. The dispute began in September 2005 when Irish Ferries unilaterally proposed to make a third of its workforce, about 600 seafarers, redundant, replacing them with lower-paid workers from central and Eastern Europe. In addition, the company wanted to reflag its vessels to Cyprus at the same time. The company said it had to take such drastic action as its survival was at stake.

This decision by the company gained immediate national prominence as the company was seen as ruthlessly seeking to replace people working under Irish employment law with people working under no national employment law – a form of social dumping. Although representing ship officers only, a minority of the workforce, the trade union SIPTU, announced that it would strongly oppose the company’s plan. It referred the matter to the Labour Court, claiming that the company had breached a Registered Employment Agreement – a form of legally-binding collective agreement. The Labour Court found in favour of the union in a Recommendation that encouraged the company to enter into negotiations about the plan. But the company rejected the Recommendation and said it would not comply with it.

The dispute was dramatically escalated when with the use of security guards, the company brought agency crews aboard Irish Ferries vessels. SIPTU with the support of other unions ratcheted up its industrial action, which led to Irish Ferries vessels being moored up for three weeks in Irish and Welsh Ports. Meanwhile the exchanges between the company and the unions became increasing vitriolic. A national demonstration organized by the unions saw 40,000 people march opposing the company’s plan.

All the signs were that a prolonged, bitter dispute was in the making. Moreover, the escalation of the dispute happened just as talks had started on the conclusion of a new national social partnership agreement. The consensus view was that the dispute had the potential to derail the talks as it highlighted a number of critical issues for the future of industrial relations in Ireland such was the level of acrimony between the involved parties.

How the Conciliator became Involved

Thus finding a way to solve the deadlock became a manner of urgency for employers and trade unions at the national levels. The LRC was one of the first organizations to understand the large negative spillover effects of the dispute on the industrial relations environment. As a result, it invited the two sides to its offices for exploratory talks about how the dispute could be resolved through negotiations. Both sides were inclined to reject the invitation, but came under enormous behind-the-scenes pressure not to do so. Finally, the company and the union consented reluctantly to enter LRC-assisted talks.

An Outline of the Process

At the start of the talks, the union took the initiative and put forward an offer saying it would agree to a package of €2.4m savings on the loss-making Rosslare to Cherbourg route, which was at the centre of the dispute. This proposal infuriated the management team who were seeking savings of €15 million. As a result, the talks broke down with each side accusing the other of bad faith.

This clash set back the possibilities of a negotiated settlement to the dispute. But the LRC persisted with its contacts with both sides and persuaded them to return to the negotiating table. This time round the LRC adopted a proactive approach, having developed a tightly structured framework for the negotiations in advance.

Outcome of Conciliation

After 20 hours of continuous negotiations the two sides reached an agreement. The main thrust of the agreement was that Irish Ferries got the ‘green light’ to outsource crews and to reflag its vessels to Cyprus, which enabled the company to secure cost savings amounting to €11.5 million. For its part, the union secured Irish minimum wage standards for the new, predominantly Latvian workforce and an agreement that pay and conditions would be maintained for the existing seafarers, who choose to remain with the company. Other parts of the deal related to the level of redundancy pay received by seafarers leaving the company and to the creation of a procedure for unions to talk to the new workforce about benefits of membership. Both parties expressed satisfaction that an agreement had been reached and that the dispute was over.

This was a difficult agreement to broker given the very charged subject nature of the dispute. But the LRC stayed with this consistent approach of preparing meticulously for the negotiations to frame the agenda in a way that would encourage dialogue, working continually with both sides and above all ensuring that discussions remained calm and friendly. In steering the parties to an agreement, the LRC not only brought to an end a serious industrial relations dispute, but removed a serious blockage to the signing of a new national social partnership agreement.
Case Study 9: “Conflict Management and Prevention” (advisory services to managers and employees, preventing bullying, discrimination, potential collective disputes)\textsuperscript{33}

People Involved

In 2002, Bradford Metropolitan District Council introduced its Advisory and Mediation Service to help resolve situations, such as bullying, discrimination, harassment and victimisation which were affecting some of its employees. Building on this initiative, the District Council asked Acas for help in extending mediation to potential collective disputes, particularly with respect to the Council department responsible for vehicles, garbage collection and community transport (fleet services).

An Outline of the Process

Acas conducted joint working sessions with both managers and employee representatives. They began by exploring the perceptions about working relationships and started a discussion on more collaborative ways of working. Acas then introduced the parties to the theory and principles of partnership and highlighted examples of good practices established from experience in other organisations. Following this initial input, Acas continued to support the parties in their discussions, suggesting ways of moving the project forward and overcoming potential barriers.

The Council’s aim for its mediation initiative was to “facilitate a change in the organisation’s ethos so that a cooperative approach is used to handle all workplace difficulties.” As a result there has been a significant reduction in the number of individual complaints, disciplinary and employment tribunal cases. Giving people back some control over their working relationships and encouraging informal methods of dispute resolution improved employment relations over the long-term.

Outcome

Acas was instrumental in extending mediation to potential collective disputes by encouraging early and open communication and by helping the Council and its representatives move away from a confrontational relationship style. There is now a more positive dialogue within the Council’s established negotiating structures and greater participation in decision-making between management and employees.

Case Study 10: The Role of Danish Social Partners in Collective Dispute Resolution

In Danish labour law, there is a strong and longstanding tradition that the formation of legal rules is entrusted first and foremost to the social partners through the conclusion of collective agreements. This approach reflects a deep-rooted belief within Danish industrial culture in the primacy of freedom of association and collective bargaining, and the role of the social partners in managing their own affairs with minimal interference from government authorities. In this respect, it is interesting to note that while the vast majority of Danish workers are covered by collective agreement there is no general statute regulating the conclusion or content of such agreements.

This same tradition of social partner autonomy applies to the field of collective dispute resolution where the great majority of disputes are resolved through negotiation between the parties. For instance, Danish law does not provide for the resolution of collective interest disputes through arbitration.

Rather, the ruling principle is that interest disputes should be resolved by negotiation and bargaining between employers and workers. Where these efforts do not succeed, an interest dispute can then serve as a legitimate basis for industrial action. The Government may intervene in circumstances where the parties are unable to resolve their differences after a prolonged strike or lockout, but State intervention remains the exception, not the rule, with the social partners bearing most of the responsibility for ensuring the resolution of their proper disputes. There is in fact a legal obligation on the part of the social partners to engage with one another through each stage of negotiation – an obligation which can result in the imposition of fines by the Labour Court if it is breached.

Where the parties are covered by a collective agreement and have a dispute over its implementation or interpretation (rights dispute), a “peace obligation” normally applies requiring the parties to attempt as to resolve the conflict through negotiation at the local level. If this is unsuccessful, the next step involves workplace mediation. If a solution is still not reached, the dispute then passes to the social partner organizations themselves. The great majority of these disputes are settled at some point along this elaborate negotiation process. If, however, the dispute goes unresolved, most remaining cases are settled by either an industrial arbitration tribunal or through the Labour Court.

Another unique feature of industrial relations in Denmark is the prevalence of enterprise-based Cooperation Committees. These Committees are as common in the public sector as they are in the private sector and are based on agreements between worker and employer organizations for the purpose of improving cooperation between employees and management in order to enhance workplace communication and to improve business operations through consultation. The work of these Committees is designed to contribute to better workplace relations, which is believed to contribute to diminishing the number of collective disputes or, where such disputes arise, to reaching a mutually satisfactory and negotiated solution built on existing practices of enterprise-level dialogue.

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34 Taken from Collective Dispute Resolution through Conciliation, Mediation and Arbitration: European and ILO Perspectives, ILO, Geneva, 2007.
Appendix 2

Quick Advice to the Conciliator based on this Guide
This Guide has attempted to highlight thinking and guidance on various aspects of the role of conciliator. This appendix draws on the content of the Guide as well as the experience of conciliators to set out some fundamentals of the mind-set and behaviours of the professional conciliator. Many of the comments may seem self-evident but nevertheless must be stated and should be reflected upon by the conciliator.

**The People: Basic Attitude and Approach**

The conciliator should always maintain a strictly impartial and neutral attitude towards the parties. No word, sign or gesture should indicate or suggest favour towards one party over the other.

The conciliator must possess and display full independence of judgement and decision making. The conciliator cannot be swayed by any external pressure or influence either from the parties or any other quarter.

The parties may accept the conciliator’s entry into a dispute because the conciliator may make themselves available on behalf of the State or as part of an established infrastructure within the state. The conciliator cannot assume, however, that the parties automatically regard the conciliator as capable of assisting in the resolution of the dispute. So much of effective conciliation is the personal delivery of service by the conciliator. Therefore, the conciliator has to make the parties believe in the conciliator’s capacity and determination to assist in the resolution of the dispute. This establishment of credibility relies on the actions of the conciliator and the substance of what is said by the conciliator.

The conciliator must take the view that the matter in dispute constitutes an important problem for the parties and the conciliation process itself is an important event for the parties. The process requires the best efforts of the conciliator who should, on no account, deal with the matter as if it were ‘routine’.

The conciliator should make every effort to prepare effectively for the case, obtaining as full information as possible about the background and circumstances of the dispute and about any unfamiliar persons involved as negotiators, while ensuring impartiality.

**The Process: Meetings**

The conciliator is effectively a servant of the parties. In the logistics of arranging meetings etc. the conciliator must make every effort to meet the wishes of the parties.

The conciliator should not schedule a meeting unless they have a clear idea of what it is hoped to achieve by the meeting; failure to plan in this way runs the risk of generating frustration and loss of confidence in the process by the parties. The conciliator should deliberately select the type of meetings – joint or separate or a combination of both – that best suit the objectives of the process at a point in time. The conciliator should prepare well for every meeting, being particularly careful to read notes from previous meetings.

While expecting the parties to be punctual for meetings, the conciliator should endeavour to arrive before the parties.

The conciliator should, when meeting participants, extend greetings to all persons present rather than concentrating only on spokespersons or lead negotiators.

In a Joint Meeting the conciliator, as Chairperson, should encourage rational and constructive discussion while allowing the parties to contribute with as little interruption from the Chair as possible.

In a Joint Meeting the conciliator should never criticise one party in the presence of the other.

The golden rule for the conciliator in a Joint Meeting is to demonstrate impartiality by ensuring that they say nothing which strengthens the position of one party on a particular issue or matter.

If a conciliator has views on the merits of either party’s position on the issues or the correctness/adequacy of any information, such views should be held in reserve for a Separate Meeting with the party concerned. If the conciliator wishes to criticise ‘unreasonable’ behaviour, generally, that should only happen at a Separate Meeting with the party concerned and then only if the conciliator is clear that offence will not be caused or that the party’s reaction will not inhibit the achievement of resolution of the matter in dispute.

Where the conciliator does not understand a point being made, or is not clear regarding the meaning of a statement by a party, it is important to continue to seek clarification until the conciliator understands the
matter. Concern that the parties would regard the conciliator as lacking understanding is outweighed by the risk that the conciliator might actually misunderstand the point being made.

The conciliator should ensure that nothing in their behaviour conveys a pressure on the parties to hurry the process. The conciliator must always conduct the process with respect for the matter at hand and such respect includes provision of the opportunity and time for the process to unfold.

**The Problem: The Search for Agreement**

At the outset, the conciliator must obtain a clear idea of the parties’ positions and their interests and of the extent of the differences that separate them. If there are a number of issues, the conciliator should find out the parties’ real ‘stand’ on each of them (What are the relative priorities they attach to each issue? Which issues, if any, are only bargaining points or ‘throw away’ items?)

If the conciliator has to persuade either party to change their position, or to modify, reduce or withdraw a demand or counter proposal, that should be done at a Separate Meeting. Even in a Separate Meeting with one party, the conciliator should not be drawn into endorsing that party’s position.

The conciliator should not take any action, such as suggesting a possible solution, for as long as the parties are at the stage of justifying their respective positions. Before taking the initiative to suggest a solution, the conciliator must be sure that the parties are ‘in the mood’ to consider it. The conciliator continually seeks to create that mood.

The conciliator must seek to ensure that every aspect of each issue, including any possible underlying motives / drivers, are fully explored. The conciliator seeks to ensure that neither party has any misunderstanding as to the other party’s position on any matter.

The conciliator must ensure, as far as possible, that both parties understand the consequences of a failure to find agreement. The conciliator should work to encourage both parties to offer proposed solutions in the form of creative approaches, modified proposals and counter proposals.

The conciliator is not the judge of the parties but rather their assistant in reaching agreement.

The conciliator should be fully prepared to offer one or more possible solutions to each of the issues in dispute. The conciliator should carefully consider their timing in offering a possible alternative solution. When the conciliator decides to offer an alternative solution that should be done by way of exploration with either or both parties at Separate Meetings.

The conciliator should be patient with the process. The evolution of the parties’ positions can often be a slow and iterative process.

The conciliator should not make a proposal for settling the dispute as a whole until the process of securing a settlement on the basis of the parties’ own suggestions has been truly and genuinely exhausted.

If the dispute involves a number of issues the conciliator should seek to ensure that any proposal for settlement will be taken as a ‘package’ settlement that will answer all issues. The conciliator should not make their proposal for settlement at a Joint Meeting without having first obtained the agreement of each of the parties separately.

If, during the process, it is clear that it is not possible to achieve agreement on the issues the conciliator should concentrate on encouraging the parties to find some means (e.g. arbitration) of settling the issue peacefully. In the event of a failure to secure a procedural means of achieving a resolution the conciliator should ensure that, at the end of this particular effort to find agreement both parties depart with an awareness that the process of conciliation remains available should the opportunity emerge at a future point to explore afresh the possibility of agreement being reached.
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