

Briefing – Early Conciliation
March 2014

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Introduction

Early conciliation was first mooted in the Government's Consultation document 'Resolving Workplace Dispute' back in 2011. The statutory provisions to implement early conciliation are set out in sections 7 – 9 in Schedules 1 and 2 of the Enterprise and Regulatory Reform Act 2013.

Then, on the 13th February 2014, further legislation most notably amendments to the Employment Tribunal Rules and new Early Conciliation Rules of Procedure were laid before Parliament.

Since fees apply to Employment Tribunal claims from 29th July 2013, there is some scepticism as to the effect early conciliation will have. In particular, the Early Conciliation process requires all prospective claimants to contact ACAS and be issued with an Early Conciliation Certificate before an Employment Tribunal claim can be lodged. The focus on completing forms is a far cry from encouraging the parties to seek a resolution and there is no sanction against an employer who refuses to conciliate.

The process will also allow for the time limit for lodging an Employment Tribunal claim to be extended during the conciliation process. How much the time limit is extended depends on the period of conciliation and is not therefore a fixed period. The time limit will not be extended if a claim is already out of time.

Early Conciliation (referred to as EC in this briefing) presents both threats and opportunities for Unions. The key risks are that:

- Those who have a potential employment tribunal claim may contact ACAS direct and enter into settlement negotiations without the assistance of their union representative.
- Tribunal deadlines may also be missed if the extension is relied on.

In terms of opportunities it is clear that unrepresented Claimants are at risk of under settling their claims and missing time limits.

Certainly, Early Conciliation introduces another hurdle which workers have to comply with before they can bring an Employment Tribunal claim.

This briefing sets out the early conciliation procedure in brief and further guidance is awaited from ACAS. It does not replace the Unions legal schemes but sets out some points Unions may wish to consider when deciding how to approach early conciliation.

What is early conciliation?

Essentially, early conciliation is a mandatory requirement for individuals (referred to as prospective Claimants) who may have an Employment Tribunal claim, to contact ACAS before lodging any Employment Tribunal claim. Once the prospective claimant has contacted ACAS the voluntary EC process begins. At the end of voluntary early conciliation ACAS will issue an Early Conciliation Certificate, ("ECC"), which will have a unique reference number. It is a mandatory requirement that the ECC unique reference number is put on the Employment Tribunal Claim Form (ET1).

A failure to put the Early Conciliation Certificate's unique reference number on the ET1 may lead to the claim being rejected.

When does it come into force?

- Early conciliation applies to employment tribunal claims lodged on or after 6th May 2014.
- This means that ACAS will have to be contacted **before the 6th May 2014** because the prospective claimant will need to have been issued with an ECC so that the unique reference number can be put on the ET1.
- Transitional provisions provide that if ACAS is contacted in the period between 6 April 2014 and 5 May 2014 then the prospective claimant will need an ECC before they can lodge the ET1 even if this is before 6 May.
- They will also benefit from any extension to the time limits for lodging a claim (see time limits below)
- If, however an employment tribunal claim was lodged before the 6th May, i.e. by the 5th May, and ACAS was not contacted the ET1 can be lodged without an ECC.

What claims does early conciliation apply to?

Early conciliation applies to most employment tribunal claims including unfair dismissal, unlawful deduction from wages, discrimination claims, collective redundancies, TUPE, breach of contract, whistleblowing and most other claims brought in the employment tribunal.

Are there any claims which early conciliation does not apply to?

Yes, early conciliation does not apply to the following claims:

- Interim relief.
- Where a term in a collective agreement is void;
- Employer contract claims;
- Various other claims relating to appeals against improvement notices and training levy's as well as references in respect of payments out of the National Insurance fund; and
- Where the claim is against the Security Service, the Secret Intelligence Service or GCHQ.

Who starts the early conciliation process?

- Early conciliation begins by the person (the prospective claimant) who may have an Employment Tribunal claim, contacting ACAS.
- Employers can also contact ACAS if they wish to enter early conciliation.
- There are some exemptions. The following do not have to comply with early conciliation:
 - Those who are part of a multiple claim where at least one of the multiple has contacted ACAS, and been issued with an Early Conciliation Certificate (ECC);
 - Where the person is claiming a number of claims but one of them does not relate to claims that are covered by the early conciliation process, (for example, someone claiming interim relief and unfair dismissal);
 - The employer contacted ACAS and ACAS has not received an EC form.
- If in any doubt comply with EC by completing an EC Form.

How will early conciliation work in practice?

The procedure to be followed is set out in the Early Conciliation Rules of Procedure.

Essentially there are three steps:

- Step 1 Completing the EC form
- Step 2 The conciliation process
- Step 3 Conclusion of the conciliation process

Step 1 – Completing the EC Form

The process begins by the prospective claimant contacting ACAS. They can contact ACAS in three ways:

1. By completing an Early Conciliation Form online (a final version of the form was not available at the time of printing);
 2. Telephone ACAS (the number is on the EC form online), in which case the ACAS officer will record the information on an EC Form – this though is likely to be restricted to those who have a disability;
 3. By completing the EC Form and sending it by post or delivering it in person to a central address in Nottingham.
- The information which is to be provided is the prospective claimant's name, address, contact details and the employer's name, address and contact details.
 - If there is more than one employer, for example, in a case involving TUPE, only one employer's details need to be completed.
 - The EC form does not ask for a prospective claimant's representative's details.
 - The union representative's details (e.g name, email and telephone number) can be put in the appropriate section of the form where it asks how ACAS should contact the prospective claimant (e.g. at the relevant section on the EC form), where appropriate.
 - If the prospective claimant contacts ACAS by phone they can also inform ACAS to contact their Union representative, where appropriate.
 - There is scope for ACAS to reject an EC form if no information is put on the form where this is completed online or sent by post.
 - The early conciliation process is not a substitute for the normal grievance and disciplinary process and prospective claimants will still need to follow the disciplinary and grievance procedures.
 - Remember that a failure to comply with the ACAS code of practice on disciplinary and grievance procedures can result in a tribunal reducing any award where a claim is successful by up to 25%

Step 2 – The early conciliation process

- Where the Early Conciliation Form has been sent online, ACAS must make reasonable attempts to contact the person who may have a claim.
- The first contact will be by an Early Conciliation Support Officer ("ECSO") who will contact the prospective claimant by close of business the day after ACAS has received the EC form or telephone call.
- The ECSO will confirm basic details such as the contact details on the form and take other basic details such as if the company is insolvent.
- If the employer is insolvent the ECSO will refer the matter to the Insolvency team who will issue the ECC.
- It is important to ensure that, where appropriate, ACAS are told to contact the Union representative throughout the EC process.

- In cases where there are a number of potential claimants who may have the same employment tribunal claims ACAS may contact the Union representative, where appropriate.
- The ECSO will ask if the prospective claimant agrees that ACAS can contact their employer.
- Although there is no obligation on either the prospective claimant or the employer to enter into the early conciliation process, because this part of the process is voluntary, it may be useful to see if a settlement can be reached. Whether it is may depend on relations with the employer, the issue in dispute and whether a tribunal claim has prospects.
- The usual period of conciliation is one month but will be less where ACAS is unable to contact either party or either party does not wish to engage in early conciliation.
- The early conciliation process can be extended by a further two weeks ONLY IF both parties agree and ACAS considers there is a reasonable prospect of achieving a settlement before the end of the further two weeks.

Step 3 – Ending the conciliation process

Early conciliation will be brought to an end where:

1. ACAS is unable to contact the prospective claimant;
2. The prospective claimant has indicated they do not wish ACAS to contact their employer;
3. The prospective claimant has indicated that ACAS should contact the employer but ACAS has been unable to;
4. The prospective claimant has indicated that ACAS should contact the employer but the respondent has declined to enter into early conciliation;
5. The period for early conciliation (including the extended period) has ended with no settlement;
6. At any point during the process where ACAS concludes that settlement is not possible; and
7. Where a settlement has been reached but not all claims have been settled.

If a settlement is agreed, it will usually be settled by way of a COT3 agreement.

If the matter is not settled or only some of the claims are settled by way of a COT3 agreement, ACAS will issue an Early Conciliation Certificate. This will confirm:

1. The name and address of the prospective claimant;
2. The name and address of the prospective respondent;
3. The date of receipt by ACAS of the Early Conciliation Form;
4. The unique reference number given by ACAS;
5. The date of issue of the Certificate which will be the date the Certificate is sent by ACAS; and
6. A statement indicating the method by which the Certificate is to be sent, e.g. by email.

- The most important aspect of the process is obtaining the Early Conciliation Certificate and, more specifically, the unique reference number.
- Remember an ET1 cannot be lodged without the unique reference number.
- ACAS will issue the ECC to the prospective claimant.
- ACAS will also issue the ECC to the employer if there has been substantive contact.
- The ECC will be sent by email where an email address has been provided, otherwise it will be sent by post.
- The ECC is treated as received by the prospective claimant on the day it is sent if sent by email or the ordinary course of post if sent by post (i.e. two days after it has been sent by first class).
- The ECC is important as this is the key trigger date for time limits.

What about multiple claimants (group claims)?

- Where two or more members may have a claim relating to the same dispute, only one of them needs to complete the Early Conciliation Form. This is known as a group claim.
- In group claims, where appropriate, ensure that the Union representatives' details are given to ACAS.
- In most cases, ACAS are likely to contact the Union representative to confirm all the names and addresses of all those who would have a similar claim before an employment tribunal. The Union may need to identify a lead Claimant in these cases.
- It is important that the Union representative ensures, as far as possible, that all the potential claimant's details are obtained sooner rather than later. It may be difficult to add a further claimant once ACAS has issued the Early Conciliation Certificate.
- Where a settlement is reached it will be more important than ever that all those covered are named in the COT3.
- A separate list should be kept of any members whose claims are not settled or if there are outstanding claims not settled. This is because a separate ECC will need to be sent in respect of them in the event an employment tribunal claim is to be lodged.
- Further guidance is expected from ACAS as to how they will deal with multiple claims.

Time limits

- One of the most confusing aspects of the early conciliation process is the impact it will have on time limits.
- Those who enter into early conciliation may benefit from an extension to the time limit for lodging an ET1.
- During the period of early conciliation, the clock stops so that the period of early conciliation does not count towards the time limit.
- How much the time limit is extended depends on:
 - When the Early Conciliation Form was received by ACAS (or completed over the telephone);
 - When the Early Conciliation Certificate with the unique reference number was received; and
 - When normal limitation expires.

Some examples are attached as Appendix 1:

- It is safest to work on the basis of normal limitation which is usually 3 months less one day from the date of dismissal or act complained of.
- In a case of a redundancy payment, the time limit is 6 months less one day, and in the case of equal pay, 6 months less one day from the end of the contract.
- It is likely that the time limit will become the focus of satellite litigation and it is, therefore, important to ensure that legal advice is sought within the normal limitation periods in accordance with the Unions legal scheme as this both protects the member's rights and limits the risks of claims being brought against the Union because limitation has been missed.

Note that if the employer contacts ACAS to start early conciliation there is no extension to the time limits.

Issues for Unions to consider

1. How will you inform members about early conciliation whilst at the same time managing their expectations;
2. Who will be the first point of contact where early conciliation is entered into;
3. At what point will you advise members to enter into early conciliation, for example, at the point of grievance, at the point they complete the form for legal assistance or at the point when you have received legal advice that the potential claim has reasonable prospects of success;
4. Who will be the point of contact in multiple cases; and
5. How to deal with employers who see this as an opportunity to offer low value settlements.

Conclusion

It is clear that some employers may fail to engage in early conciliation on the basis that they would rather wait and see if the fee was paid.

However, employers who fail to grasp the nettle of early conciliation may well find themselves in a losing battle in the employment tribunal faced with increased costs, particularly as the High Court found in the case of *UNISON v The Lord Chancellor* that an order for payment of fees should be made where the claimant wins.

Furthermore from the 6th April 2014 an employment tribunal can levy a penalty on an employer who is found to have breached employment rights and the breach had one or more aggravating factors. The explanatory notes to the Enterprise and Regulatory Reform Act 2013 states that aggravating features will not be the same as applies in discrimination claims but may apply where, "the action was deliberate or committed with malice, the employer was an organisation with a dedicated human resources team, or where the employer had repeatedly breached the employment right concerned". The penalty is limited to 50% of the award (subject to the minimum and maximum amounts £100 and £5,000 respectively).

Given these risks sensible employers may see EC as an opportunity to negotiate a good settlement without having to incur fees.

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Appendix I

Example 1

Date of Act Complained of:	7 April 2014	
Normal Limitation:	6 July 2014	
Day A	14 April 2014	Day after Day A – 15 April 2014
Day B	12 May 2014	

In this case as normal limitation does not expire between day A and a month after Day B, the period between the day after Day A and Day B does not count and instead is added on to the normal limitation date. The limitation is therefore 3 August 2014. This is because the period of conciliation between 15 April and 12 May of 28 days is added onto the normal limitation period i.e. 6 July plus 28 days.

Example 2

Date of act complained of:	7 April 2014	
Normal limitation:	6 July 2014	
Day A	12 May 2014	Day after Day A – 13 May 2014
Day B	20 May 2014	

In this case limitation expires on the 13 July 2014. This is because the period beginning with the day after Day A and ending with Day B is only 7 days. Therefore, only 7 days is added onto the 6 July 2014.

Example 3

Date of Act Complained of:	7 April 2014
Normal Limitation:	6 July 2014
Day A	1 July 2014
Day B	1 August 2014

In this case because the normal limitation date expires between Day A and ending a month after Day B, a month is added on to Day B and because Day B is not counted then limitation is 1 September 2014.

NB: The examples given above are illustrative only and should not be relied on. Given the variable dates it is important that advice and assistance is sought within normal time limits.

Early conciliation will not extend the time limit if the claim is already out of time.