

79% and rising? The ACAS Early Conciliation Scheme

Background

1. Since the introduction of a fee regime, employment claims have reduced by around 79%. Whether, from the perspective of those interested in justice, the reduction represents a success (spurious, meritless claims no longer brought) or a failure (restricted access to justice) remains to be seen. The Early Conciliation Scheme ("the scheme") is another attempt to reduce the number of claims.
2. On 6 April 2014, the scheme comes into force. Claimants submitting claims on or after 6 May 2014 must have complied with the process: in short, by providing certain information to ACAS; and if conciliation fails, providing the Tribunal with prescribed proof of conciliation.
3. ACAS list the benefits of the scheme as:
 - a. *Using Early Conciliation will save people the time, cost and anxiety of facing an Employment Tribunal.*
 - b. *Conciliators will help you understand the strengths and weaknesses of your case, and ways of resolving it.*
 - c. *Independent research has found that the average cost to an employer of resolving a case through Pre Claim Conciliation (a current similar service) is just £475, with employers spending on average one day on a claim, compared to an average of £3700 and four days for an Employment Tribunal.*
 - d. *Early Conciliation gives both parties up to a calendar month initially in which to explore resolving their dispute using the services of an Acas conciliator. It can be shorter, or up to 14 days longer according to need.*
 - e. *When Early Conciliation has finished you will have at least one calendar month in which to submit a tribunal claim.*
 - f. *It's confidential - nothing you tell us will be passed on to anyone else unless you agree. Most tribunal proceedings are public.*

- g. *It's voluntary - both parties must agree to take part before the process can start, and either can change their mind at any time.*
- h. *It's not an "either/or" option - if you can't reach an agreed outcome you are still free to go to a tribunal, and Acas will be able to offer support to find a resolution until the Tribunal hearing itself.*
- i. *It's independent - Acas doesn't represent either employers or employees nor are we part of the Tribunal. Our expert conciliators don't take sides or make judgements. Our role is simply to help people find a solution.*
- j. *It's professional - Acas are the experts in helping people deal with problems at work.*
- k. *It's free.*

6 April to 5 May 2014

- 4. Claimants lodging claims during this period *may* request conciliation and if they do request conciliation, they will need a certificate from ACAS before lodging their claim. Therefore any request for conciliation during this period would fall within the scheme. If there is more than one respondent, then some recent rule changes must be considered (see paragraph 8 below).

Does the scheme applied to all claims?

- 5. The scheme applies to "relevant proceedings" as defined within section 18(1) of the Employment Tribunals Act 1996 ("ETA"). Almost all Employment Tribunal claims fall within the definition. However, there are some exceptions set out in regulation 3 of 2014/254: *The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014* (hereby "the procedural regulations"):

(1) A person ("A") may institute relevant proceedings without complying with the requirement for early conciliation where—

(a) another person ("B") has complied with that requirement in relation to the same dispute and A wishes to institute proceedings on the same claim form as B;

(b) A institutes those relevant proceedings on the same claim form as proceedings which are not relevant proceedings;

(c) A is able to show that the respondent has contacted ACAS in relation to a dispute, ACAS has not received information from A under section 18A(1) of the Employment Tribunals Act in relation to that dispute, and the proceedings on the claim form relate to that dispute;

(d) the proceedings are proceedings under Part X of the Employment Rights Act 1996(c) and the application to institute those proceedings is accompanied by an application under section 128 of that Act(d) or section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992(e); or

(e) A is instituting proceedings against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.

The procedure

6. The “Early Conciliation Rules of Procedure” are set out as a Schedule to the procedural regulations:

Prospective claimant notifies ACAS

7. There is no need to provide any details of the potential claim to ACAS. However, the potential claimant must either:

- a. Rule 2: present a completed early conciliation form to ACAS. This form may be submitted online using the form on the ACAS website or sent by post to the ACAS address set out on the early conciliation form. The early conciliation form must contain the name and address of both the prospective claimant and the prospective respondents. If the relevant information is not provided, ACAS may reject the form and if it does so, it must return the form to the prospective claimant. Or:
- b. Rule 3: notify ACAS by telephone, using the number set out on the early conciliation form. The prospective claimant must provide ACAS with the prospective claimant’s and the prospective respondent’s name and address. (ACAS must insert this information onto an early conciliation form).

8. There has already been one important amendment under Statutory Instrument SI 2014/847: *The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations* in that when there is more than one potential respondent, the potential claimant must name all of them. This amendment only comes into force on 20 April, so if a prospective chooses early conciliation between 6 and 20 April 2014, then it only need name one prospective respondent.

ACAS contacts the parties (Rule 5)

9. An ACAS early conciliation support officer must make reasonable attempts to contact the prospective claimant. If contact is made, the ACAS officer will require length of service; date of the incident or dismissal; preferred method of contact and availability; and establish whether the potential respondent is still trading. ACAS will provide a framework of the issues likely to be considered by the Tribunal although ACAS will not provide advice on the merits of any potential claim. If the potential claimant is represented, then the officer will liaise with the representative. If the prospective claimant consents, then an ACAS conciliation officer must make reasonable attempts to contact the prospective respondent.
10. If ACAS is unable to contact either (or both) party, then it must conclude that settlement is not possible (see termination of conciliation below).

Conciliation period (Rule 6)

11. The conciliation period is one calendar month starting from the date ACAS receives the properly completed early conciliation form or the date the prospective claimant telephones ACAS and provides the necessary information. Due to the certainty of the date a telephone call was made (as opposed to when a form is received), one envisages prospective claimants preferring the telephone route. Hopefully, ACAS will be adequately resourced to respond to these calls.
12. Upon notification of the prospective claim, the ACAS conciliation officer has a duty to promote settlement between the parties. The period for early conciliation may be extended by the conciliation officer provided that both parties consent to the extension and the conciliation officer considers there to be a reasonable prospect of achieving a settlement before the expiry of the extended period. Such an extension may only occur once and may only be for up to a maximum of 14 days. There is scope for uncertainty as to if and when an extension was agreed.

Termination of conciliation (Rules 7 - 9)

13. If settlement is reached, ACAS will draft a COT3, which binds the parties to the terms of the agreement.
14. If either party refuses to enter into conciliation; or the conciliation officer concludes that a settlement of the dispute, or part of it, is not otherwise possible; or when settlement is not reached within the calendar month conciliation period or any extension to that period, then ACAS must issue an early conciliation certificate to the prospective claimant (and if there has been contact, to the prospective respondent).
15. The early conciliation certificate must contain the name and address of the parties; the date ACAS were notified by the prospective claimant; the unique reference number given by ACAS to the early conciliation certificate; and the date of issue of the certificate being the date the certificate was sent by ACAS (including a statement indicating the method by which the certificate was sent).
16. The certificates must be sent by email if a party has provided an email address, otherwise it must be sent by post.
17. The certificate will be deemed received on the day an email was sent; or if sent by post, on the day on which it would be delivered in the ordinary course of the post. This deemed date leaves scope for injustice if post is delayed, although one would expect a Tribunal to exercise its discretion if delay to post is proven. Although "ordinary course of post" is not as definitive as the service rules set out in the Civil Procedure Rules, it is a phrase familiar to employment lawyers and appears (albeit undefined) at rule 90 of the ET Rules. Ordinary course of post has been held to be effective on the second day after posting in relation to first class mail¹ (excluding Sundays, Bank Holidays, Christmas Day and Good Friday).

Limitation

¹ *Initial Electronic Security Systems Ltd v Avdic* [2005] I.C.R. 1598 Burton J following approach of Court of Appeal in *Consignia (formerly The Post Office) plc v Sealy* [2002] ICR 1193; see also *St Basil's Centre Ltd v Mccrossan* [1992] ICR 140 EAT.

18. It is intended that time limits to bring a claim will be paused during conciliation. Calculating that period may not be straightforward.

19. Section 207B of the Employment Rights Act 1996 (and similarly worded in TULR(C)A and the Equality Act) states that when calculating time limits, the day after *Day A* and ending with *Day B* are not to be counted. Day A is the day on which the complainant or applicant complies with the requirements of s18A of the Employment Tribunals Act, which state:

(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

20. This is inconsistent with the wording of the procedural regulations and may cause difficulties. As set out above, the period for early conciliation is for one month starting *on* the date ACAS *receives* a form (online or by post) or *receives* the phone call. When calculating time limits, the start date (Day A) is the day *after* the phone call or email. It is less clear when the start date applies if the form is posted to ACAS as "provide" is open to interpretation. One interpretation is that the information is provided when it is posted; another is to imply delivered in the "ordinary course of posting"; but the safest interpretation is the date that the form is received by ACAS.

21. Day B is the day in which the complainant or applicant receives or, if earlier, is treated as receiving the early conciliation certificate. The reference to treated as received relates to rule 9(3) of the procedure which, as set out at paragraph 17 above, deems receipt as the date an email was sent or if sent by post, the day on which it would be delivered in the ordinary course of the post.

22. Therefore the period discounted for bringing a claim does not mirror the early conciliation period.

23. If the time limit for bringing a claim would have expired between Day A and one month after Day B, then the time limit is extended to the end of that period. Therefore, once the early conciliation certificate has been received (or deemed received if earlier), the prospective claimant has one month to put in a claim even if the time limit would ordinarily have expired. In some cases, this will allow a prospective claimant an extension to the statutory time limit for bringing a claim.

Bringing a claim

24. When bringing a claim after 9 May 2014, the claimant must provide the unique early conciliation reference number (or confirmation that the early conciliation procedure does not apply). If the reference number is not provided, or if the parties' names on the certificate do not reflect the names on the claim, a judge will reject the claim (by way of amendment to rule 10(1) of the ET rules).

Conclusion

25. There are likely to be problems calculating the time limits for bringing a claim. Parties should look closely at the legislation and prospective claimants should err on the side of safety.

26. Given the scheme provides a free service, prospective claimants may seek to explore resolution where they might otherwise have not considered bringing a claim. Respondents may sit it through and see if the claimant comes up with a hearing fee. The risk to the employer is if the claimant is successful, then in addition to compensation, it may end up paying the tribunal fee (*Dr Vladimir Portnykh v Nomura International plc (Costs)* UKEAT/0448/13). Both parties have an opportunity to avoid the expense of litigation and with a good understanding of the merits and value of their case, conciliation may provide a just settlement.

27. There is significant responsibility on ACAS. If conciliation is unsuccessful, then ACAS continues to provide its services up until the final hearing.

Mukhtiar Singh



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Useful links

ACAS podcast and information: <http://m.acas.org.uk/index.aspx?articleid=4028>

SI 2014/254 http://www.legislation.gov.uk/uksi/2014/254/pdfs/uksi_20140254_en.pdf

SI 2014/846 http://www.legislation.gov.uk/uksi/2014/847/pdfs/uksi_20140847_en.pdf

Chambers of Stephen Hockman QC: <http://www.6pumpcourt.co.uk/>