Early conciliation scheme launches

Jo Pairman analyses the potential impact of a new scheme requiring Acas to be involved before claims can be issued in the employment tribunal

The Advisory, Conciliation and Arbitration Service (Acas) has provided free, voluntary pre-claim conciliation on issues such as unfair dismissal, discrimination and redundancy since 2009. In the year to 31 March 2011, such pre-claim conciliation was successful in 74% of cases, increasing to 78% the following year.

The Enterprise and Regulatory Reform Act 2013 (ERRA) builds on this existing procedure by introducing mandatory early conciliation from 6 May 2014. Acas must now be involved before a claim can be issued in the employment tribunal. There will be a transitional period from 6 April (when early conciliation becomes operational) to 5 May 2014, in preparation for the system becoming mandatory.

The main legislative framework is at ss7 to 9 and schedules 1 and 2 of the ERRA. Section 7 of the ERRA inserts new ss18A and 18B into the Employment Tribunals Act 1996 (ETA 1996), which establishes the new mandatory procedure. There are additional rules in the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. These clarify the circumstances when early conciliation will not apply and set out the procedure for it.

The procedure
To bring a claim, prospective claimants will have to submit an early conciliation form to Acas (online or by post) containing the names, addresses and contact details of themselves and the respondent. Alternatively, they can call Acas with these details and Acas will then populate the form on their behalf. It is not possible to submit the form by hand and forms that have not been correctly completed will not be accepted.

Surprisingly, there is no requirement to particularise the claim in the form. Neither is there an obligation to provide these details to the Acas conciliator or to the respondent directly. This potentially leaves the door open for claimants to introduce additional complaints at any stage of the process. The government explains that this is to avoid disadvantaging individuals who are unable to specify their potential claim at the outset.

This raises the question of whether a conciliator can effectively promote settlement without details of the claim. However, assuming that most claimants are likely to provide the necessary details during the process, this may not be a problem. Acas has also committed to call prospective claimants within one day of receiving their form. Its website says:

We will clarify any details on the application form, gather basic information on the dispute itself and give [the person making a claim] a fuller understanding of [early conciliation].

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The lack of detail may not, therefore, be significant in practice.

After the form is submitted, an early conciliation support officer (ECISO) will make initial contact with the prospective claimant. It is the claimant who decides whether to proceed with conciliation, and if so, the ECISO will pass their information to a conciliator. If the ECISO cannot contact the prospective claimant, having made reasonable attempts to do so, or the prospective claimant does not wish to conciliate, an early conciliation certificate (EC certificate) will be issued confirming that the claim can now be issued in the tribunal.

The conciliation officer will only attempt to contact the respondent if the claimant agrees. If the conciliation officer is unable to make contact, or if the respondent is unwilling to participate, the EC certificate will be issued at this point. If both parties wish to take part in the process, the conciliation officer will have one month in which to promote settlement. The conciliation officer can extend this period by up to two weeks if the parties are still working towards settlement. If a settlement cannot be reached before the conciliation period expires, or if either party refuses to take part in the process, again an EC certificate will be issued. Each certificate will have a unique code, which must be referenced on the ETI form.

‘Situations when an EC certificate will be issued’ below lists the events that trigger the issue of an EC certificate.

**Relevant proceedings**

Early conciliation only applies to the list of ‘relevant proceedings’ at s18 of the ETA 1996, which covers the majority of statutory claims (unfair dismissal, discrimination, equal pay and so on). A small number of claims appear to be exempt, although there is no official list of these. Examples include claims for guarantee payments, claims for certain breaches of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and claims related to health and safety.

There are also certain situations in which early conciliation will not apply, even if there are ‘relevant proceedings’ (see ‘Exemptions from early conciliation’ on p4). These include proceedings where the prospective claimant is part of a group action where the cases arise out of the same facts. In addition, an unfair dismissal claim accompanied by an application for interim relief is exempt due to the tight timeframe in which an application must be made.

These exemptions have arisen due to a mixture of public policy and practicality reasons. Another example, not expressly exempt but excluded from the list of relevant proceedings, is a claim for a protective award. This type of claim is aimed at penalising employers for bypassing certain collective employee rights; it would therefore be inappropriate to promote settlement in such situations.

**Time limits**

Schedule 2 of the ERRA allows the time limit for presenting certain claims to be extended to take account of the conciliation period. The applicable limitation period will pause as soon as the prospective claimant submits the early conciliation form and will not start running again until they receive the EC certificate.

This is fairly straightforward, but the situation may become more complicated where an individual raises a new claim arising out of the same facts during or after the initial early conciliation period.

Since the first early conciliation process may have ended, or be close to ending, the claimant will have to submit a second form to Acas, which would pause the limitation period for the second claim. The

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**Situations when an EC certificate will be issued**

- The conciliator is unable to contact either the prospective claimant or prospective respondent.
- The prospective claimant or the prospective respondent tells the ECSO that they are unwilling to conciliate.
- The parties agree to conciliate but during the one-month conciliation period one party withdraws.
- The conciliator considers there is no reasonable prospect of achieving settlement.
- The conciliator considers making a protective award.
- The conciliator considers the claim to be a collective one.

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who may find that their claim is then out of time. In reality, however, this may only rarely cause an issue, since Acas should be contacting the individual to explain that early conciliation does not apply.

Inevitably, there will be teething troubles around time limits. We saw with the now repealed statutory disciplinary and grievance procedures that extending time limits can give rise to technical arguments, resulting in satellite litigation. This could lessen any positive impact that took place following the introduction of early conciliation.

Tactical considerations
Following the submission of the early conciliation form, the conciliation officer may only contact the prospective respondent if the prospective claimant consents. A claimant may opt to withhold consent for tactical reasons. For example, they may not want to provide full details in the hope that the respondent will be more likely to settle. It will also be interesting to see what effect the new tribunal fees will have on early conciliation. Respondents may well refuse to settle if the prospective claimant consents. Conversely, a prospective claimant may be contact the employer to disclose details to the employee on ‘equitable terms’ where possible (s18A(9) ETA 1996). If, however, the claimant rejects these forms of resolution, or they are impractical, the conciliation officer can promote settlement by way of compensation. It is worth noting that tribunals very rarely order reinstatement or reengagement, since they are not required to promote reinstatement or reengagement of the employee.

Unfair dismissal
If the dispute is over an unfair dismissal, the conciliation officer is required to promote reinstatement or reengagement of the employee on ‘equitable terms’ where possible (s18A(9) ETA 1996). If, however, the claimant rejects these forms of resolution, or they are impractical, the conciliation officer can promote settlement by way of compensation. It is worth noting that tribunals very rarely order reinstatement or reengagement, since they are not required to promote reinstatement or reengagement of the employee.

Exemptions from early conciliation

- The prospective claim is not a ‘relevant proceeding’ or there are multiple prospective claims and at least one is not a ‘relevant proceeding’.
- Another person has already submitted an early conciliation form in relation to the same dispute, and the prospective claimant wants to institute proceedings on the same claim form.
- The prospective claimant is able to show that the prospective respondent has contacted Acas in relation to a dispute, Acas has not received information from the claimant about that dispute, and the proceedings on the claim form relate to that dispute.
- A claim for unfair dismissal is accompanied by an application for interim relief.
- The prospective proceedings are against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.

Without the force of tribunal proceedings behind them, some claimants may fear that showing willingness to conciliate will make their claim appear weak.

The claimant is sufficiently serious about litigating to pay the fee.

Verdict
Proponents of early conciliation believe the advantages will outweigh any perceived disadvantages. Parties can avoid the time, expense, risk and stress of going to a hearing, and reach a resolution on mutually agreeable terms before positions become too entrenched. The service is free and may reduce tribunal litigation, which will free up limited resources. Moreover, the success rate of pre-claim conciliation in avoiding claims has been high and there is evidence to show that claims issued after pre-claim conciliation are more likely to settle than those that have not been through the process. However, a concern raised by many during the consultation preceding the changes was whether Acas will have the resources to cope with the increased workload. It appears that this worry has been eased, at least in the short term, with a Labour Research report dated January 2014 noting that:

- Acas has secured £3 million to fund IT systems, staff training and recruitment.
- Provision for longer-term funding is less clear, although the government has claimed that the scheme’s running costs should be able to be met:

... through the savings that will accrue... as a result of fewer cases requiring determination in the employment tribunal.

Another concern is that without any incentive to conciliate or penalty for refusing to do so, early conciliation may be no more than a rubber-stamping exercise, simply enabling claimants to extend the time limit for lodging claims. Also, in those cases where the parties are willing to conciliate, the short timeframe available may not be sufficient to settle more complex cases and thereby avoid litigation.

The final verdict on the effectiveness of early conciliation will have to wait. The jury is out and watching.