



## Early conciliation (part two): the tricky bits

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*My article last month provided an overview of the new Acas early conciliation regime. The scheme should be simple but there are many complexities which could lead to confusion, particularly around time limits. This article covers practical points, clarified by Acas during recent discussions, along with two sets of amending regulations correcting previous drafting.*

### **Amendment regulations**

The first amendment regulations correct a significant ambiguity in the original rules. SI 2014/254, Schedule 1, para 4 stated that 'If there is more than one prospective respondent, the prospective claimant may provide the name of only one prospective respondent on an early conciliation form'. This had been interpreted by many as meaning that a claimant intending to bring a claim against more than one respondent only had to submit one EC form naming one respondent and could nevertheless lodge a claim against additional respondents without submitting additional EC forms.

It appears that this was not the Government's intention. It also conflicted with amended ET rule 12, which provides that a claim will be rejected 'if the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate' (save for minor errors). SI 2014/847 now amends the earlier SI to make clear that 'if there is more than one prospective respondent, the prospective claimant must present a separate early conciliation form ... in respect of each respondent'. This is likely to be particularly relevant in TUPE and discrimination cases. It does mean that different limitation periods could apply against each respondent depending on when and what early conciliation takes place.

This amendment came into force on 20 April 2014, leaving scope for argument over the drafting where early conciliation has occurred between 6 and 19 April.

The second set of amending regulations relates to claims under TUPE for the failure to notify employee liability information (Reg 12 TUPE) and the failure to inform and

consult (Reg 15 TUPE). The EC regime was applied to these claims by SI 2014/386, amending TUPE to apply the new ss.18A–C ETA to these claims (although not actually defining them as 'relevant provisions' in s.18 ETA). However, originally no amendments were made to apply the stop-the-clock extension of time aspect of the regime. This is now done by SI 2014/853, with effect from 20 April 2014.

One possible wrinkle remains: the stop-the-clock provisions provide for an extension of time where 'a worker' has complied with the requirement to submit an EC form; in practice, employee liability information claims will be brought by a transferee, and many information and consultation claims will be brought by union or employee representatives – hopefully 'worker' can be construed as including these claimants, otherwise a further set of amending regulations will be needed.

It has been suggested that there is another omission from the list of 'relevant proceedings', namely claims of breach of the right to be accompanied at a disciplinary or grievance hearing (under ss.10–13 EReIA). Although this is not expressly listed in the amended s.18(1) ETA list of 'relevant proceedings', Part V of the ERA is included in that list and s.14(b) EReIA provides that ss.10–13 are to be treated as if they were in Part V ERA for the purposes of s.18(1) ETA. Likewise, the stop-the-clock provisions apply by virtue of the amendments to s.11 EReIA made by ERRA, Schedule 2. Cold flannel, anyone?

### **Transitional provisions**

Since 6 April prospective claimants can file an EC form with Acas and enter a conciliation period of up to a month (with a possible 14-day extension), during which the limitation clock is

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There has been some uncertainty about whether claimants who choose to use EC before 6 May will get the full advantage of the time limit extensions. It is now clear that they do. Article 3 of the transitional provisions (SI 2014/253) provides that s.8 ERRA (extension of limitation periods to allow for conciliation as set out in Schedule 2) came into force on 6 April 2014.

Article 4 of the transitional order provides that if a claimant chooses to go to Acas and presents a tribunal claim on or before 5 May, they must have an EC certificate and put the unique number on the ET1 (SI 2014/253). Article 4 is not concerned with time limit extensions. Of course, as from 6 May, when EC becomes mandatory, all claim forms must include the unique number or they will be rejected.

### Calculating time limits

Acas stresses the simple point that claimants will have at least a month at the end of the conciliation period (Day B) to lodge a claim providing the EC form is filed before the expiry of the original time limit.

This is correct. However, there are two ways in which the limitation period may be extended: first, through the clock pausing from the day after Day A (which is the date of filing the EC form) to Day B (end of conciliation period), and if this extension does not leave the claimant with a full month from Day B, time will be extended to give them a month under the second provision. For example, see the box above right.

S.207B(4) ERA provides that where the original time limit expires during the period beginning with Day A and ending one month after Day B, the new time limit expires instead at the end of the period. This means that the claimant can file the EC form on the date their time limit expires. If they do so, they will not benefit from the clock pausing under s.207B(3) (as this pauses the clock the day after Day A) but they will get the extra month under s.207B(4).

Acas may suggest to a claimant that they are out of time or do not have sufficient qualifying service to make an unfair dismissal claim, but have no power to reject their EC form. So, a form may be filed after the original time limit has expired, and Acas must accept it. Time then pauses for the duration of the conciliation period so their situation does not deteriorate. However, the claimant will not get the benefit of an extra month from Day B, as their time limit would not expire between Day A and Day B plus one month.

Note that although the conciliation period is one month, as is the period after Day B, it will be necessary to count the stop-the-clock period in days.

### EARLY CONCILIATION: TIME LIMITS

Dismissal	8 April	8 April
Original time limit expiry	7 July	7 July
EC form filed (Day A)	<b>7 May</b>	<b>6 July</b>
Time pauses	8 May	7 July
Acas emails EC certificate (Day B)	<b>14 May</b>	<b>13 July</b>
Clock has paused	7 days (count 8 and 14 May)	7 days (count 7 and 13 July)
New time limit	<b>14 July*</b>	<b>13 August**</b>

\*date is extended by 7 days; as this is 2 months after Day B, no further extension

\*\* stopping the clock brings the time limit to 14 July, leaving less than a month after Day B – so time is extended to end of period Day B + 1 month

### Time limits in multiple claims

Where a claimant is part of a multiple claim and piggy backs on the lead individual by instituting proceedings on the same ET1 and relying on the lead individual's submission of an EC form (by virtue of the exemption in SI 2014/254 rule 3), the claimant will benefit from the same period of extension on their own limitation period as the lead individual receives on theirs (even if the limitation periods are not aligned).

If the claimant files a separate ET1 form, then they will need to have submitted their own EC form and their own particular circumstances will determine their time limit.

### Relevant, non-relevant and exempt proceedings

Where there is an exemption, the claimant is not obliged to file an EC form but can choose to do so in order to get the extension of time. One of the exemptions is where a claimant institutes relevant proceedings on the same claim form as non-relevant proceedings. If the claimant chooses to file an EC form, the EC regime will only apply to the 'relevant proceedings' part of the claim; the time limit extensions and other EC provisions will not apply to the non-relevant proceedings.

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This means that the time limit will be different for the relevant and non-relevant part of the proceedings and as claimants will only want to lodge one claim for both, they may be forced to end conciliation earlier than they would like in order to lodge the non-relevant proceedings in time.

### **Does the ET1 need to cover the same issues/claims as discussed during EC?**

Some lawyers have suggested that the ET1 must be about the same 'matter' as discussed during the conciliation period. However, it is clear that all that is required of the claimant is to file an EC form providing the parties' names and addresses. If the claimant does not want to conciliate, neither their employer nor Acas will be aware of the nature of the dispute. The tribunal's power to reject a claim under the EC regime applies where the unique number is not on the ET1. In addition, all discussions with Acas are confidential unless the party providing the information agrees to disclosure. S.18(7) ETA provides that 'anything communicated to a conciliation officer in connection with the performance of his functions under this section shall not be admissible in evidence in any proceedings before an employment tribunal except with the consent of the person who communicated it to that officer'.

It is not clear whether matters arising after the issue of the EC certificate can be included in the ET1 because they postdate the certificate. Arguably they can, as all that is required is 'an EC certificate' or confirmation that there is an exemption. This is Acas's view, although the position will not be clear until considered by the tribunals. Claimants should file another EC form to be on the safe side. The problem is that the clock will still be ticking in relation to the earlier matters, the certificate having been issued. Claimants will only want to lodge one claim because of the fees.

### **Some practical points**

- The only legal requirement is for the prospective claimant to notify Acas of their intention to lodge a claim. Neither party is obliged to engage with conciliation.
- Only the prospective claimant can complete the EC form, not a representative. Once the form has been filed Acas will liaise with representatives if requested to do so.
- The claimant can telephone Acas with the required details in which case the ECSO will take down the claimant's details at the same time and ask if they want to conciliate. If the claimant does not want to conciliate it is possible that

the EC certificate could be issued the same day.

- The original Acas EC form required the claimant to confirm telephone details, despite this not being one of the legislative requirements. This has now been corrected, making the information optional.
- The Acas EC website is at <https://ec.acas.org.uk/>; the EC form cannot be amended once submitted.
- The online system operates 24/7. If it breaks down Acas says it will keep a record and provide this to tribunals.

### **Conclusion**

There are still a number of wrinkles, which will hopefully be ironed out once we see the EC scheme working in practice. It should be treated as an opportunity for claimants and respondents to resolve workplace disputes, not as an obstacle or a way of scoring points thereby increasing costs, but only time will tell. Some lawyers predict we will be back in the days of dispute resolution confusion. Let's hope not.

### **KEY:**

SI 2014/254	The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014
SI 2014/847	The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2014
ET rules	Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 Schedule 1
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246
ETA	Employment Tribunals Act 1996
SI 2014/853	The Enterprise and Regulatory Reform Act 2013 (Consequential Amendments) (Employment) (No.2) Order 2014
ERelA	Employment Relations Act 1999
ERRA	Enterprise and Regulatory Reform Act 2013
ERA	Employment Rights Act 1996
SI 2014/253	The Enterprise and Regulatory Reform Act 2013 (Commencement No.5, Transitional Provisions and Savings) Order 2014