



## Employment tribunals - early conciliation

Early conciliation of employment disputes via Acas became available on 6 April 2014 and, for nearly all types of employment tribunal claim, is mandatory from 6 May 2014. The aim of early conciliation is to encourage parties to seek to settle potential claims, before the employee is even permitted to issue their claim. What does this mean for employers facing potential litigation?

In short, the new early conciliation process requires a prospective claimant to contact Acas before they can submit a tribunal claim - the claimant will only be able to bring a claim if Acas has issued an early conciliation certificate with a unique reference number, which has to be provided in a tribunal claim form.

When a prospective claimant notifies Acas, the clock stops on the time limit for bringing a claim and the claimant will then have at least one month from when the early conciliation certificate is issued to bring a claim. The process is therefore likely to result in an extension of time to bring a claim in most cases.

It is important to note that, although the prospective claimant must notify Acas of an intention to bring a claim, neither party is obliged to engage in conciliation.

The early conciliation process is outlined in more detail in the flowchart below.

### The process

In simple terms, the process is:

A prospective claimant must provide specified information to Acas, either by filling in an early conciliation (EC) form online or by telephoning Acas. The information to be provided is very limited - the claimant only has to provide their name and address and the respondent's name and address.

An early conciliation support officer (ECSO) will then make "reasonable attempts" to contact the prospective claimant. The ECSO will explain the EC process, take some more details from the prospective claimant (e.g. length of employment, the date of dismissal or incident complained of, and details for further contact) and check whether the individual wishes to proceed with conciliation. If they do wish to proceed, relevant details will be sent to an Acas conciliation officer (CO).

The CO will then contact the prospective claimant to discuss their complaint, and confirm whether the prospective claimant agrees to the CO contacting the prospective respondent(s).

If the prospective claimant wishes to engage in conciliation, the CO will then make "reasonable attempts" to contact the prospective respondent, and ask whether they are willing to participate in conciliation. The respondent can simply refuse to engage in conciliation.

If both parties are willing to conciliate, the CO then has one calendar month (extendable by up to 14 days) from the date on which the prospective claimant made initial contact with Acas to facilitate a settlement.

If it is not possible to contact the parties, or if either the prospective claimant or respondent do not wish to participate in EC, or if no settlement is reached during the prescribed period, an EC certificate must be issued. The EC certificate then enables the prospective claimant to issue an employment tribunal claim, should they wish to do so.

Once the EC process has started, the clock stops on the time period for the prospective claimant to submit their claim. Time starts to run again once the EC certificate has been issued. If there is less than one month left on the time limit when the clock is re-started, the prospective claimant will have one month to submit the claim.

There are a number of complexities as to how the procedure will be applied in practice, such as: what will amount to “reasonable attempts” to contact the parties, what happens if a claim is submitted out of time because of a procedural mix-up in the conciliation process (e.g. the EC certificate gets lost in the post), or whether a further EC form is required where a new cause of action (e.g. victimisation) arises after the submission of an initial EC form. In addition, there are certain situations in which a prospective claimant is not required to go through the EC process.

However, putting those technicalities aside, we look below at what you can do to prepare yourself for early conciliation.

## Practical issues

- **Hello, Acas here...** Acas will often be relying on information from the prospective claimant as to who within your organisation to contact. The call from Acas could, therefore, come to any line manager, member of the HR team or even a board member. It may, therefore, help to allocate responsibility for dealing with pre-claim calls to a central resource point. To this end, Acas have set up a national contacts list to enable organisations to nominate a person to be contacted. You can send details of a nominated person for your organisation to: [ECcontactslist@acas.org.uk](mailto:ECcontactslist@acas.org.uk). However, it would also be prudent to ensure that other people in your organisation know who to direct calls from Acas to. This should also happen without delay, so as to take full advantage of the relatively short pre-claim conciliation period.
- **Conciliate or wait?** The temptation may be to wait and see whether an employee actually issues a claim before considering settlement. However, particularly now that fees are payable to issue employment tribunal claims, employers may find it harder and/or more costly to settle post-claim than pre-claim. Therefore, where you are likely to want to explore settlement, the early conciliation process may present a good opportunity to nip things in the bud. That said, there will still be occasions where, tactically, it makes more sense to force the employee to issue a claim before commencing negotiations.
- **Evidence locker** - It would be advisable to put in place processes and procedures to ensure that you can access relevant documents and witnesses quickly, so you can plan an informed strategic approach to conciliation if contacted by Acas.
- **Internal proceedings** - You may be in the midst of internal grievance or disciplinary hearings when the conciliation process commences. Depending on the circumstances, you may want to speed up or slow down the internal

processes while you try to conciliate. For example, delaying (within reason) a grievance or appeal outcome which is likely to expose weaknesses in your position may help to avoid giving the prospective claimant the upper hand in negotiations. Alternatively, avoiding a decision to dismiss may be of value to an employee keen to avoid a mark of gross misconduct on their CV. On the other hand, a robust dismissal or grievance outcome letter may help to set the tone and expectation of any negotiations.

- **No news is not, necessarily, good news** - If the prospective claimant tells Acas they are not interested in conciliation, that marks the end of the conciliation process - Acas will not contact the prospective respondent at all. There will, therefore, still be cases where the first you know of a claim is when a claim form from the tribunal lands on your desk.
- **Take the initiative** - If you are in dispute with an employee or ex-employee and think settlement is a good option, you need not wait until Acas contact you. Acas must seek to promote a settlement if it receives a request from a prospective respondent. The extension of time limits does not apply in such circumstances, unless the employee also then completes an EC form and starts the EC procedure.
- **Time limits** - It is normal, when tendering for an outsourcing contract or purchasing a business, to ask for information about recent leavers or grievances. Sometimes, the information provided may be limited to, for example, employees who have left the business in the previous three months. The conciliation process itself, together with the one month period allowed to issue a claim after conciliation, means that many claims will not now necessarily be issued within the three months post-termination or post-event complained of. You should, therefore, be seeking information covering a wide time period, together with the relevant warranty and, if appropriate, indemnity protection.

## Contact

If you would like more information, or specific advice on any of the changes please contact Adrian Martin, or get in touch with your usual Burges Salmon contact:



**Adrian Martin**  
Partner

+44 (0)117 939 2279  
[adrian.martin@burges-salmon.com](mailto:adrian.martin@burges-salmon.com)

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400  
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

[www.burges-salmon.com](http://www.burges-salmon.com)

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