

Equality Matters

Newsletter for the Police Federation | Spring 2014

Slater &
Gordon
Lawyers



Welcome to the Spring 2014 edition of Equality Matters

In this edition we take a detailed look at the compulsory Early Conciliation process which is now in force. Its requirements are important to all members contemplating an employment tribunal claim as an Early Conciliation Certificate must now be obtained before an employment tribunal claim can be brought.

We also take a look at alternative ways to obtain information in discrimination cases, now that statutory questionnaires have been repealed. We also consider the latest developments in financial penalties and employment tribunal fees.

This update is aimed at Equality Representatives, but please feel free to circulate to any other Federation members. We would welcome any feedback or suggestions for subjects you would like to see covered in future editions. Please send any feedback to:

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Compulsory Early Conciliation

Early Conciliation ("EC") is compulsory from 6 May 2014. Members who wish to bring an employment tribunal claim will need to obtain an early conciliation certificate from Acas before they can bring an employment tribunal claim. This early conciliation certificate has a reference number on it that has to be inserted on to the ET1 form to lodge an employment tribunal claim. The claim will otherwise be rejected. The early conciliation process does apply to police officers and, as you will see below, some participation in the process is compulsory.

What does it involve?

EC is a 3 step procedure.

Step 1. Before bringing an employment tribunal claim the Claimant must make contact with Acas by filling in an EC form and sending it to Acas online or in the post. Alternatively the Claimant may telephone Acas. They have to give the following required information to Acas:

their own name and address and the name and address of the Respondent to the proposed claim. If there is more than one proposed Respondent, the Claimant will have to fill out separate EC forms for each Respondent.

Step 2. The EC form is passed to an Early Conciliation Support Officer who will try to contact the Claimant by telephone to take some basic details as to the nature of the complaint. Acas have to make reasonable attempts to contact the Claimant. If Acas are unable to make contact they will conclude that settlement is not possible. They will then issue an EC certificate to allow a tribunal claim to be brought. Alternatively if the Early Conciliation Support Officer does make contact with the Claimant and the Claimant wishes to proceed with conciliation, the process moves to step 3.

Step 3. The case is then passed to a Conciliation Officer who will attempt to promote settlement of the case. If the Claimant consents the Conciliation Officer will contact the Respondent to see if they are willing to participate in conciliation. Again Acas must make reasonable attempts to contact the Respondent. If Acas is unable to make contact with the Respondent or the Respondent does not wish to participate in conciliation, the process will be brought to an end and an EC certificate will be issued.

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If both parties wish to conciliate the Conciliation Officer will have 1 calendar month from the date the EC form was received by Acas/the first telephone call was made to Acas to try to settle the dispute. This EC period may be extended once by Acas for up to 14 days if agreed by all parties.

If at any point the Conciliation Officer decides that settlement is not possible, Acas will issue an EC certificate. Likewise if the EC period expires without a settlement being reached Acas will issue an EC certificate.

Acas state that step 1 and step 2 must be conducted by the Claimant themselves, and not by a representative (whether the Police Federation or a lawyer). Once step 3 is reached, if a representative is appointed, the Conciliation Officer will talk direct to the representative rather than the member.

What happens if settlement is achieved?

If settlement is achieved Acas will draw up a written agreement recording its terms. This is normally called a COT3. If it has only been possible to settle part of the dispute, Acas should issue an EC certificate to allow the remainder of the claim to proceed.

What happens if settlement is not achieved?

An EC certificate will have been issued and sent to the Claimant by email (or if that is not possible, by post).

If the Claimant wishes to bring an employment tribunal claim the reference number given by Acas on the EC certificate will need to be included on the ET1 claim form. If that EC number is not on the ET1 the claim will be rejected by the employment tribunal service.

A claim may also be rejected if the name of the Claimant on the ET1 is not the same as the name of the Claimant on the EC certificate or if the name of the Respondent on the ET1 is not the same name on the EC certificate. It is therefore important to fill both forms accurately.

What happens to employment tribunal time limits?

The normal time limit for most employment tribunal proceedings is 3 months less 1 day running from the event that is being complained about.

In some circumstances the EC process will extend these time limits. Unfortunately this works in a very complicated way. The key principles are:

- ▶ **Day A** is the day on which the Claimant first contacts Acas by phone or their EC form is received by Acas.
- ▶ **Day B** is the date on which the Claimant receives the EC certificate.
- ▶ The period starting with the day after Day A and ending with Day B is not counted when calculating when a time limit expires. The clock therefore effectively stops for the period of early conciliation.
- ▶ **However**, where a time limit would (if not extended by the EC provisions) expire during the period beginning with Day A and ending one month after Day B, the time limit will expire at the end of that period instead.



It is easiest to look at some worked examples.

Example 1

A flexible working application is rejected on 15 March 2014. The member is considering bringing an indirect sex discrimination claim to an employment tribunal. They submit an EC form to Acas online on 20 April 2014 (Day A). An EC certificate is issued on 20 May 2014 (Day B) as conciliation efforts failed.

Normally the time limit for lodging an employment tribunal claim would be 14 June 2014 (3 months less 1 day from 15 March 2014).

Here Day A is 20 April 2014. Day B is 20 May 2014. One month after Day B is 20 June. The normal limitation period (14 June 2014) does fall between the period beginning with Day A and ending 1 month after Day B. This means that the limitation date will now be 20 June 2014. 20 June is "one month after Day B".

Example 2

A disabled officer has a request for reasonable adjustments rejected on 2 May 2014. The member is considering bringing a disability discrimination claim. He telephones Acas who fill in an EC form for him on 16 May 2014 (Day A). An EC certificate is issued on 23 May 2014 (Day B) when negotiations break down.

Normally the time limit for bringing an employment tribunal claim would expire on 1 August 2014.

Here Day A is 16 May 2014. Day B is 23 May 2014. One month after Day B is 23 June. The normal limitation period (1 August) does not fall in the period beginning with Day A and ending 1 month after Day B.

Instead therefore the "stop the clock" provision for the period of the EC process will apply. The day after Day A is 17 May 2014. Day B is 23 May 2014. This is a period of 7 days. This means the limitation period is extended by 7 days. The new limitation period will be 8 August 2014.

These are very complicated rules and are likely to lead to disputes. It would be wise to ensure that an employment tribunal claim is presented well within the last date for submission.

Can an employer contact Acas to initiate the process?

If an employer thinks that a claim may be brought against them but the prospective claimant has not yet contacted Acas to trigger EC,

it can contact Acas itself and request the services of a Conciliation Officer. If it is an employer led process it does mean the Claimant will be exempt from having to follow EC and having to put an EC number on the ET1.

However, there will be **no** extension to the time limits. The extension to a time limit will only be triggered if the member then sends an EC form to Acas about the same dispute, to trigger for himself/herself the EC procedure. In an employer led conciliation process, it may be wise for the member himself to contact Acas to trigger the official EC procedure.

Key tips

- ▶ Early conciliation is compulsory. Without an EC certificate it will not be possible for an employment tribunal claim to be submitted.
- ▶ At the outset EC is a Claimant led process. Your member must personally submit the EC form and speak to the Early Conciliation Support Officer. If the conciliation proceeds a representative can then represent them in the negotiations. It is important that members are told about the process, its requirements, and their personal involvement as early as possible.
- ▶ It is important that members keep copies of EC documents/emails. For example, keep a copy/record of the EC form as submitted, and it is crucial to keep the EC certificate safe as it will be needed to commence an employment tribunal claim.
- ▶ Make sure the names and addresses of the Claimant and Respondent on the EC form are correct (as they must match the ET1 in due course). If there is more than one Respondent fill in a form for each.
- ▶ Have an early discussion with members about what they are looking for by way of resolution to their dispute.
- ▶ Treat time limits with caution. It is easy to get the two different kinds of extension confused which could lead to the wrong limitation date being calculated. The safest course of action will be to start EC early and, if it fails, make sure any tribunal claim is issued in good time before expiry of the primary limitation date.
- ▶ Advising a member on how to protect their position if necessary when the time limit is imminent is now more straightforward, as the EC form requires less information and is more straightforward to complete than an ET1. The process also provides an increased opportunity for early resolution. However, advice should be sought as soon as possible if there is any doubt about the impact of EC on the time limit. The EC form can be found here:
<https://ec.acas.org.uk/Submission/Create>





Employment Tribunal fees – An Update

The High Court has dismissed Unison's challenge to the introduction of fees in the employment tribunals and EAT. The court observed that the fundamental difficulty with the case was that it had been brought prematurely and that, as a result, the robust evidence needed to persuade it to overturn the fees regime had been absent. Scrutiny of the impact of the introduction of fees is therefore not over, and the court made it clear that the Lord Chancellor will be under a duty to amend the fees regime if future statistics show that the "principle of effectiveness" under EU law is being infringed.

In the meantime, Unison has stated its intention to appeal to the Court of Appeal. This will no doubt have been boosted by the Ministry of Justice's publication in March 2014 of tribunal statistics for the quarter October to December 2013 (the first full quarter since the introduction of employment tribunal fees on 29 July 2013). There were 79% fewer employment tribunal claims issued than the same quarter in 2012.

Revised MoJ guidance now provides that a successful claimant should generally expect to recover their fees from the Respondent, and consideration is being given to amending the ET and EAT rules so as to clarify the position.



Bye Bye Questionnaires

Statutory questionnaires were repealed on 6 April 2014. There is however still a range of options open to try to secure information needed to evaluate and advance a discrimination claim. These include:

- ▶ On 6 April 2014 Acas issued non-binding, good practice guidance on how employers should deal with questions regarding discrimination in the workplace. In effect, the statutory questionnaire procedure will be replaced with 'an informal approach' which looks remarkably similar to the old questionnaire process. No adverse inferences will be able to be drawn from an employer's failure to respond or to respond fully or promptly to questions about discrimination. However, a tribunal may take answers or the failure to provide answers into account when deciding discrimination claims
- ▶ Once proceedings have been issued, seeking a tribunal order for disclosure of relevant documents or information
- ▶ If the information sought is the member's personal data, then make a data protection subject access request. A £10 fee is payable
- ▶ If the information sought is not specific to the member, consider making a Freedom of Information Act request
- ▶ Statutory questionnaires may still be served where they relate to matters which took place before 6 April 2014. There will therefore be a short period in which it remains possible to serve a statutory questionnaire.

Financial Penalties

The Employment Tribunal now has the power to impose financial penalties on employers who lose a case with aggravating features. The fine can be up to 50% of any financial award to the claimant with a minimum threshold of £100 and a maximum amount of £5,000. The penalty is reduced by 50% if paid within 21 days. The money goes to the public purse, not to the individual Claimant. Imposing a financial penalty will be at the tribunal's discretion.

If you need further assistance, in the first instance please contact your local Joint Branch Board.

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