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BIS Consultation

Implementation of Early Conciliation

Response from the Employment Lawyers Association

14 February 2013

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INTRODUCTION

The Employment Lawyers Association ("ELA") is a non-political group of specialists in the field of employment law and includes those who represent claimants and respondents in courts and employment tribunals. It is therefore not ELA's role to comment on the political merits or otherwise of proposed legislation, rather to make observations from a legal standpoint. ELA's Legislative and Policy Committee is made up of both barristers and solicitors who meet regularly for a number of purposes including to consider and respond to proposed new legislation.

The Legislative and Policy Committee of the ELA set up a sub-committee under the co-chairmanship of Stephen Levinson of RadcliffesLeBrasseur and Maeve Vickery of Pardoes Solicitors to consider and comment on the consultation paper Early Conciliation: A consultation on proposals for implementation published by BIS in January 2013. Its report is set out below. A full list of the members of the subcommittee is annexed to the report.

Our comments are divided according to the section and question numbers used in consultation paper.

Executive Summary

A We consider that there does need to be reference to the nature of the dispute to avoid undesirable satellite litigation. There needs to be more clarity on how the EC procedure works when a party is represented.

B A list of exempted jurisdictions should be appended to the Regulations and include reference to applications for interim relief.

C The Early Conciliation Support Officer (ECSO) model may result in ECSOs effectively advising prospective claimants (which is not ACAS policy) and we are concerned with practicalities of the provision of this model.

D We consider a timeframe of 2 days for attempted ECSO contact suitable.

E We agree that the conciliator should not contact the prospective respondent without specific authority from the prospective claimant.

F More information describing the mechanism for “stop the clock” would be helpful.

G The drafting in relation to claimants being exempt from EC where respondents have sought EC need to be amended to avoid uncertainty as to which claims are exempt.

Question 1

We would welcome views on:

- **The content of the form;**
- **Our intention that claimants should not be required to provide information on the EC form about the nature of the dispute.**

1. We answer this question on the assumption that the Early Conciliation Support Officer (ECSO) model is appropriate but see the views expressed below in answer to Question 3. It would be helpful if all claimants could be asked about their availability and the timing (not simply the method) of contact by the ECSO.

2. Where the claimant is represented, it would be both helpful and consistent with ACAS practice for the ECSO to make contact with the representative rather than the claimant at first instance. The form should be amended accordingly. It is understood that this is thought to be potentially confusing to claimants who may be led to believe representation is necessary. This risk (if it has substance) can be avoided by appropriate drafting. ACAS policy when conciliating is not to speak to claimants where they are aware that they are represented professionally. It seems illogical and potentially confusing to keep this information from them if it is available.

3. There should be a simple tick box section to enable the claimant to identify the type of claim. It should not be prescriptive (in order to avoid the sort of satellite litigation arising from the Statutory Disciplinary and Grievance Procedures) but indicative only. There is a lack of clarity as to how continuing acts in discrimination cases are to be treated under this proposed regime and also what happens if as a result of one application for EC and an approach to the respondent a further act of discrimination takes place. It seems that a further application for EC may be required. The answer is unclear to us, as is what ACAS does in a TUPE situation where the identity of the employer is disputed.

Question 2

We would welcome your views on whether there are other jurisdictions where EC would not be appropriate, and the reasons for those views.

4. At paragraph 1.9 of the consultation paper, it is stated that, following consultation, other than in very limited circumstances, all prospective claimants should have to comply with the EC requirements. The only jurisdictions where the EC requirement should not apply are those with a very short period in which a claim can be brought (such that complying with the requirement would not be practicable), or where settlement would not be appropriate. The specific jurisdictions considered to be inappropriate for EC are listed in Annex C of the consultation paper.

5. We note that the jurisdictions listed in Annex C of the consultation paper are not specified in the draft Regulations set out in Annex A of the consultation paper. Although we assume that this is due to the fact that the jurisdictions

listed in Annex C are not listed within Section 18(1) of the Employment Tribunals Act 1996 (and, therefore, not "relevant proceedings" under the Regulations in any event), we are of the view that a specific list of such jurisdictions should be included in the Regulations for clarity.

6. Further, applications for interim relief are not expressly excluded from the EC requirement in the Regulations even though they are specifically referred to by Government in the consultation paper as being, in the Government's view, not appropriate for EC (see paragraph 1.9 of the consultation paper). Such matters should, in our view, be set out as a specific exception to the general EC requirement in the Regulations.

7. It is unclear from the consultation paper and draft Regulations whether the exception regarding an application for interim relief also includes the relevant proceedings instituted on the same claim form. We assume that it does and are of the view that this should be made clear in the Regulations. So, for example, if a claimant applies for interim relief on the basis that the termination of their employment was for an automatically unfair reason (because they made a protected disclosure, for example) the proceedings relating to their claim generally would also be exempt from the EC requirement (i.e. not just the application for interim relief).

8. We have, in our response of April 2011 to the Government consultation on resolving workplace disputes, indicated our view that EC is likely to be more useful in very straightforward claims, such as failure to pay wages, where the only required remedy sought is financial. We considered that EC would be unlikely to be useful in resolving discrimination, unfair dismissal, equal pay and whistleblowing claims where the facts and legal issues are more complex and where declaratory relief can be an important remedy for the claimant. We note that the Government has taken a different approach in this regard and, as noted, has decided that all prospective claimants should have to comply with the EC requirements, save in very limited cases.

Question 3

We consider that the ECSO model is the right way forward. If you disagree, please tell us why.

9. We disagree that the ECSO model is the right way forward for the reasons explained below.

10. We had noted our concerns with regard to the variable quality of service provided by ACAS and our belief that this is likely to be a reflection of the level of their funding arrangements in our response to the consultation on resolving workplace disputes (in April 2011). Given those concerns and the increasing workload of ACAS generally as a result of the reforms taking place, we query whether the ECSO model is the most efficient mechanism by which to operate the EC process, particularly in light of the Government's proposed timetable for the process.

11. The Government states, at paragraph 3.10 of the consultation paper, that it is envisaged that the ECSO will make the initial call ("First Stage Contact") to

the prospective claimant by the close of business on the day following receipt of the EC form. It is also envisaged that, within two working days of receipt of the EC form (and assuming both the prospective claimant and respondent have been contacted and agree to engage in EC), an ACAS conciliator will contact the prospective claimant. Given the current workload of the tribunals and the number of claims being submitted, we are concerned that these may be challenging timeframes and that it will be necessary for ACAS to recruit a number of ECSOs to undertake this "First Stage Contact" stage of the proposed process. It is understood the total number intended to be recruited is 25. Whilst this may be considered a management decision for ACAS our practical experience of using the service leads us to question whether the proposed timetable is workable.

12. The Government states that it views the ECSO model as being more cost-effective than a model which would involve an experienced conciliator spending time fulfilling the basic information gathering function of the "First Stage Contact" stage. We question the necessity of having the "First Stage Contact" at all. The Government notes that the duty of the ECSO will be to make contact with the prospective claimant and to check the details supplied on the EC form and obtain further basic information (such as length of employment, date of dismissal/incident complained of and best time/method for further contact). We are of the view that this information can be supplied on the form at Annex B of the consultation paper, as can an indication by the prospective claimant as to whether they are willing to engage in conciliation. The matter can then be referred to the conciliators who will have the necessary qualifications, knowledge and experience to work through cases quickly and efficiently.

13. We note that the proposal is also for the ECSO to "*explain and discuss any misunderstandings surrounding the prospective claim e.g. qualifying periods*". We are concerned with the proposal that such matters be discussed and information given to prospective claimants by individuals who may not have the required knowledge and experience to give such advice. We queried, in our response to the consultation on resolving workplace disputes, whether ACAS would have professional indemnity insurance in the event that their advice were found to be negligent (in relation to early conciliation generally). This point has not yet been clarified.

Question 4

We believe that ACAS should make reasonable attempts to contact the prospective claimant but that these attempts should not continue indefinitely. We would welcome views on what users might regard as 'reasonable attempts', including whether there should be a maximum number of attempts and/or a specified period of time for the ESCO to attempt to contact the prospective claimant.

14. Again this question is answered on the assumption the ESCO model is maintained but in any event our comments on timings are unaffected. This should be limited to attempts within 48 hours or two working days (whichever

is consistent with calculating two day/48 hour periods in the Regulations) from receipt/automated acknowledgement of the EC form.

15. The ECSO should attempt contact by landline (if the prospective claimant has provided one) and if no immediate answer, subject to permission having been granted on the form, leave a voice-mail message to return the call before the 48 hours/two working day period expires

16. If there is no landline, or no immediate answer, the ECSO should attempt contact on the mobile number (if there is one) and if no immediate answer, subject to permission having been granted on the form, leave a voicemail message and text message for the prospective claimant to return the call before the 48 hours/two working day period expires.

17. The suggestion of leaving messages - whether by text or voicemail - to return the call, envisages that the EC form would need to be amended to allow the prospective claimant to confirm (e.g. by ticking a box) whether it is acceptable for voicemail and/or text messages to be left taking into account confidentiality.

18. If the prospective claimant has indicated that it is not acceptable to leave messages (or has omitted a response on that point) then the ECSO will need to attempt contact more than once on each phone number provided. We suggest two calls during working hours, for example, one in the morning and one in the afternoon, on each day of the 48hours/two working day period.

19. If no response is received from the prospective claimant within this time frame then pre claim conciliation should close (by the issuing of the certificate).

20. If the ECSO model is retained, then the ECSO would be the correct person to be first contact with the prospective claimant, given the intention is that their role is limited to checking certain information and eliciting from the prospective claimant whether there is any prospect of pre claim conciliation.

21. If the prospective claimant makes contact within the requisite time period then the matter should transfer to the second stage ACAS officer (subject to the responses to Question 3, above).

22. We are concerned that there may be occasions when a claimant's telephone message is not picked up and returned. We consider there does need to be some mechanism for logging calls and an acknowledgement sent out, or at least guidance on the need to follow up if nothing has been heard from ACAS within 48 hours.

23. Whilst we acknowledge that not all individuals will have access to e mail we consider this facility ought to be available with an automatic read receipt as is currently used in the Employment Tribunal system. This read receipt should state that if the claimant does not hear back within 48 hours they should contact ACAS again.

Question 5

We would welcome your views on whether it is appropriate to apply the same time constraints, in terms of time and attempts, to contacting the prospective

respondent as that for the prospective claimant, or whether you consider a different approach is justified. If so, please explain what this might be and your reasoning.

24. Our view is that both sides should be treated in the same way but as already mentioned we have concerns that the time requirements are challenging. In the context of the overall period for settlement however that is understandable and it is appreciated that time cannot be wasted. Essentially this is an issue of internal management for ACAS.

Question 6

We would welcome your views on whether you consider our approach to contacting the prospective respondent is the right one. If not, please explain why.

25. For the reasons set out in the consultation paper, we agree that the conciliator should not contact the prospective respondent unless the prospective claimant agrees to participate in EC. At the point at which an individual contacts ACAS they may not have reached a settled decision to commence proceedings. That being the case, contacting the prospective respondent could set hares running unnecessarily. It may leave the employee in fear of reprisals and, if their complaint related to discrimination, it could potentially leave the employee in fear of being victimised.

Question 7

Do you consider there is any other information that should be included on the EC certificate?

26. We consider that it may be beneficial for the EC certificate to include an explanation of how "stop the clock" works and how the re-starting of the clock would differ depending on whether the EC certificate has been issued electronically or by post. It is likely that this will be discussed with the claimant by the ECSO or the conciliator, but it is important that the claimant is fully aware of the implications regarding time limits and that some record is maintained that it has been done. There may be situations where this is not discussed with the claimant (particularly where the ECSO has been unable to contact the claimant).

27. Whilst this is not mentioned in the consultation document we understand details of the dates relating to the EC and extended time are to be made available to respondents receiving an ET3. This is essential so that if time limits are an issue, the respondent can argue this in their ET3.

28. The form should make clear the use for which the document is intended. We assume it is not intended to be in the public domain. Potential claimants could be discouraged from entering into the process and fearful of victimisation if this is not clear.

29. The form currently only has space for one respondent. This may cause difficulty where the employee is not clear who the correct respondent is, in TUPE situations or within a corporate structure as well as in discrimination scenarios where the employee could claim against both the employer and individuals.

30. There may be situations where grievance and disciplinary processes are already in train when the employee seeks to participate in EC. The clock is not stopped in these circumstances and some guidance may assist as to how employers should manage this scenario. We considered that it may be appropriate to seek to agree a suspension of any formal process to permit EC to take place.

Such a measure would, however, be likely to result in employers undertaking a review of their grievance and disciplinary procedures, which would give rise to costs being expended as a result of the introduction of the EC process, contrary to the aim of the legislation. We consider that many employers will be likely to review their processes in any event as a result of the introduction of the EC process and that this may be the inevitable result of a change of this nature in any event.

31. We consider there is a risk that disgruntled claimants whose employers do not wish to participate in EC may seek to bring a grievance to that effect. Conversely, there is the risk of victimisation of employees who seek EC by their employers who are made aware of their request. We consider that clarity is needed that any refusal by an employer to participate in EC cannot found a grievance and that to subject any employee to a detriment on the grounds of applying for EC constitutes victimisation. The latter is likely to require legislative implementation, whether in the draft Regulations or otherwise.

Question 8

We would welcome any views on our proposed approach for handling prospective respondent EC requests.

32. We believe it is unlikely that respondents will often want to pre-empt a possible claim by requesting EC. In our experience many respondents prefer to sit back and wait for the time limit to expire. Where a respondent expects a possible claim, which they have an interest in settling, most would seek to reach a settlement under the terms of a compromise agreement before the potential claimant leaves their employment.

33. In terms of sitting back and waiting for the time limit to expire, this will no longer provide the respondent with the same certainty because the potential claimant may have issued an EC form at the last minute and stopped the clock without the respondent knowing.

34. Also, many respondent clients hand potential claims over to solicitors in order to avoid spending management time in dealing with them. If this happens should ACAS accept a request for EC from the respondent's representative?

35. Reg 3(c) states that where a respondent seeks EC a claimant will be exempt from complying with the requirement for early conciliation where *the proceedings on the claim form relate to the same "matter" in respect of which the respondent contacted ACAS.* "Matter" here could be interpreted as "type of claim" such as unfair dismissal or discrimination. It seems that where a claimant requests EC the EC certificate will cover them for any type of claim because there is no requirement on the claimant to nail their colours to the mast in the EC form they submit to ACAS. However, the wording in Reg3(c) could suggest that where a respondent requests EC, depending on the claims discussed with ACAS, the claimant may or may not be prohibited from bringing claims depending whether or not the respondent contacted ACAS about them. Given the approach where a claimant requests EC, we doubt this is the intended consequence of this regulation and what they actually mean by the word "matter" is "the same facts" or "the same dispute" (dispute being the word used in 6.5 of the consultation document). If so, the wording in Reg 3(c) should make that clear.

General comment

36. The position in relation to multiple claimants is not sufficiently clear, for example, where there is no "lead" case – which is more likely at an early stage when an individual or individuals may be contemplating bringing a claim. We consider there are likely to be many situations where it may not be possible to identify a group, who belongs to any group, whether they are organised, work together and are based in one location. Is there likely to be some mechanism for the ECSO (if that is the model to be used) to identify linked claims in the event the claimants are not aware of these? How confidentiality should be addressed in these circumstances also needs to be considered.

37. We consider that insolvency situations have their own complexity and suggest two possible approaches;

(a) To have guidance as to how the EC process should be applied in such scenarios, or
(b) To exempt insolvency situations from EC given their complexity and the involvement of insolvency practitioners, administrators etc.

38. The timetable for this consultation was very short. To assist in obtaining and considering full comment on proposals which will have a considerable impact on Tribunal procedure, a longer period is preferable.

APPENDIX

Members of the Sub-Committee

Stephen Levinson	RadcliffesLeBrasseur (Co-Chair)
Maeve Vickery	Pardoes LLP (Co-Chair)

Adele Aspen	Eversheds LLP
Emma Clark	Abbiss Cadres LLP
Chris Goodwill	Clifford Chance LLP
Felicia Epstein	Pattinson & Brewer
Andrew Firman	Carter Lemon Camerons LLP
David Green	Charles Russell LLP
Jo Hale	Collinson Grant SA
Alan Jones	Averta LLP
Anne Mannix	Kervin and Barnes Limited
Özlem Mehmet	Fox Williams LLP
Catherine Ridd	Morgan Denton Jones LLP