

ELA Covid-19 Working Party

Employment Tribunal Litigation: Limitation Holiday, Compliance with Orders and Early Conciliation Notifications England & Wales and Scotland

25 March 2020

This paper covers the following topics

Early Conciliation	Section 1
Case Management Orders	Section 2

Introduction

The Employment Lawyers Association's ("ELA") Legislative and Policy Committee has set up a standing working party to respond and make recommendations on measures relevant to employment law during the current coronavirus crisis.

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 not ELA's role to comment on the political or policy merits or otherwise of proposed legislation or regulation, rather it is to make observations from a legal standpoint. ELA's Legislative and Policy Committee consists of experienced solicitors and barristers who meet regularly for a number of purposes including to consider and respond to proposed legislation and regulations.

A sub group of the working party has prepared the paper below to consider limitation holidays, compliance with orders and Early Conciliation notifications in the Courts and Employment Tribunals. The sub group members are as follows and the full ELA Working Party is listed at the end of this paper.

Shantha David, Unison
Catrina Smith, Norton Rose Fulbright

1. Early Conciliation

- 1.1 Other than in very limited circumstances, Acas Early Conciliation ("EC") is mandatory prior to claimants presenting claims at an Employment Tribunal ("ET"). EC must be pursued before the limitation date for pursuing an ET claim has passed. Most employment claims need to be presented to the ET within three months of the date they arise. An ET will only extend deadlines in

limited circumstances. To trigger the EC process, a Claimant must provide their name and address and that of each of the prospective Respondent (if more than one) on an EC form which may be submitted online, by post or by contacting ACAS to complete the form. The time within which to bring the claim to the ET will be extended by the period spent in early conciliation. Claims may only be started at an ET once an EC has ended and a certificate has been granted. An ET will reject claims (rules 10 and 12 of the ET rules) where a claim form does not contain an EC number or confirmation that an EC exemption applies.

- 1.2 There is no indication at this stage, following the two Presidential Directions on 19 and 24 March 2020, that Claimants will be permitted limitation holidays. Whilst it is possible to pursue EC online, by post or by phone, this assumes that there will be someone at ACAS who will be fielding these notifications and contacting the parties to facilitate EC. There were 132,711 employer notifications between 2018-2019 of which there were over 4,190 group notifications, covering more than 29,300 individuals. Not all these notifications become ET claims, however, we do not know if ACAS has the resources to handle this volume of calls remotely.
- 1.3 If limitation holidays are not permitted, and where parties are unable to seek instructions from clients or access necessary documentation, in time, ELA's working party suggests it would be useful if there is guidance to indicate whether or not the ET will rely on the overriding objective to permit parties to amend claims and responses at a later date where limited details are available.
- 1.4 With regards to ET claims, ELA is also concerned as to whether ET administrative staff are equipped to field calls and administer remotely the issuing of claims and responses. ELA understands that parties must still comply with Case Management Orders (as to which, please see Para 3 below) and the inability of staff to handle emails and field calls remotely will also impact regular ET communications which include applications made by the parties (e.g. postponements of hearings, extensions of deadlines etc). Where communications are by post, both the ET and the parties may not have the printing facilities to send post. It is likely that administrative staff are prevented from removing physical files from ET offices because of data protection legislation (GDPR). It is likely that overworked administrative staff and Employment Judges may have to allocate time to preliminary hearings to deal with each of these matters. These are issues that the ET must consider when next making guidance.

1.5 Other issues:

- 1.5.1 In addition there is the prospect that, parties / legal representatives may be unable to give /take instructions in the event of illness or because they are unable to access information.
- 1.5.2 Parties may be unable to obtain expert reports or medical reports (especially as GP practices will be busy)
- 1.5.3 If some hearings are to proceed by phone, parties may not have the facilities or indeed the relevant documents to prepare bundles. A requirement to travel to obtain such documentation maybe contrary to the Government’s current advice to stay at home.

1.6 Where limitation holidays are permitted, there will be claims such as claims for an unlawful deduction of wages, where the amount of back pay is limited to two years from the date the claim is made. Will any extension of time to limitation be included in any calculation for remedies?

2. Case Management Orders

- 2.1 ELA’s working party believes that guidance on Case Management Orders would also be helpful. While we expect that neither party to litigation would want it to be unduly delayed, the same practical issues highlighted in this paper in terms of complying with limitation periods and High and County Court case management orders apply equally to Employment Tribunal Case Management orders.
- 2.2 Clearly the ability to comply with CMOs in a timely fashion will depend on:
 - The nature of the case
 - The sophistication (other otherwise) and technology available both the parties and their advisers; and
 - The nature of the order
- 2.3 We are concerned in particular that unrepresented applicants, or those relying on e.g. law centres or other volunteer advice services will be particularly hard hit by the practical issues which arise as a result of the current situation.
- 2.4 To deal with these concerns ELA’s working party would suggest the following:
 - 2.4.1 For cases already on foot where a CMC can be held, this would be the opportunity to consider what accommodation needs to be made to the extent and, more importantly the time limit for complying with orders. We would suggest a standing enquiry about the ability of both

parties to comply with orders. This should take into account factors such as:

- Whether either party has difficulty accessing technology, for example, because of lack of equipment at home and the non-availability of such equipment given the closure of libraries, law centres etc.
- Whether either party has difficulty accessing advice e.g. because of illness or unavailability of legal advisers with particular emphasis on parties who are reliant on voluntary legal advice services.
- The practicalities of accessing information and/or people. For example, the ability to produce documents may be hampered by there being in an inaccessible work place where they cannot be retrieved for the time being. Witnesses may be unable to give full or any witness statements because they are unwell, are unable to access the records they need.

2.4.2 Consideration could also be given to assuming that orders would be timed to run back from the date of the hearing (as used to be common) rather than forward from the date of presentation of the claim/CMC hearing.

2.5 For new claims, we would suggest that, to avoid the employment tribunal being overrun with requests for the relaxation of CMO timetables that:

- Standard directions run back from the date of the hearing (as suggested above).
- The parties are directed to consider requests from opposing parties for a relaxation of the CMO timetable sensibly with an assumption that if certain factors exist (such as those outlined above), the opposing party should be encouraged to be sympathetic to difficulties faced by the other party within relevant guidelines.
- If extensions/relaxations cannot be agreed, then the party in difficulty would, naturally, have the option to request the same from the employment tribunal.

Members of ELA Covid-19 Working Party

Co-chairs: Paul McFarlane, Weightmans; Kiran Daurka, Leigh Day

Shubha Banerjee, Leigh Day

Emma Burrows, Trowers & Hamlins

Shantha David, Unison

Peter Edwards, Devereux Chambers

Howard Hymanson, Harbottle & Lewis

Nadia Motraghi, Old Square Chambers
Louise Skinner, Louise Skinner, Morgan Lewis & Bockius UK
Catrina Smith, Norton Rose Fulbright
Caroline Stroud, Freshfields Bruckhaus Deringer
David Widdowson, Abbiss Cadres