



Department
for Business
Innovation & Skills

EARLY CONCILIATION :

A consultation on proposals for
implementation

JANUARY 2013

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Early Conciliation

Government is taking primary legislation through Parliament, in the Enterprise and Regulatory Reform Bill (“the Bill”), to provide the right conditions for business success and to promote a new economic dynamism by harnessing our economic strengths and removing barriers that inhibit innovation and enterprise.

The Bill contains a range of measures to support these aims, and encourage long term growth, by addressing the fears business tell us they have of ending up in an employment tribunal; fears that can impact on their decision to take on staff and grow. Through the Bill we are making changes to the dispute resolution process to give parties greater opportunity to resolve their dispute without the need for employment tribunals.

In November 2011, following a public consultation on proposals to simplify and streamline the employment tribunal process, Government announced its intention to introduce Early Conciliation (“EC”) as the first part of the process. The requirement for most potential tribunal claims to be referred to Acas in the first instance will allow parties to be offered the option of resolving their dispute through conciliation before a claim is made.

The Bill provides the legislative foundations for the EC process, including setting out when Acas will issue a certificate following EC, that relevant proceedings may not be commenced without an EC certificate and how expiry of the limitation periods will be suspended to allow for the EC period. However, the implementation of EC requires secondary legislation and the development of the necessary administrative process. This consultation sets out how we intend that EC should operate, together with a draft set of Rules of Procedure, and some questions on which we would welcome views.

This consultation relates to England, Wales and Scotland and is relevant to businesses, individuals, trade unions, representative bodies and other interested parties.

Issued: 17 January 2013

Respond by: 15 February 2013

Enquiries to: earlyconciliation@bis.gsi.gov.uk

Or by telephone to:

Gail Davis 0207 215 3859

You can respond to the consultation on-line at :
<https://www.surveymonkey.com/s/VGN9MGQ>

Foreword

The Government set out, in the Resolving Workplace Disputes consultation¹, our commitment to deliver a flexible, effective and fair labour market through supporting and encouraging the earlier resolution of workplace disputes and improving the efficiency and effectiveness of the employment tribunal process.



We have already taken steps to make this commitment a reality, through the mediation network pilots we are running for SMEs in Cambridge and Manchester, which will provide access to low cost mediation for those members of the network. And we have extended the qualification period for unfair dismissal from one to two years, to provide more time for employers and employees to get the employment relationship right.

Following Mr Justice Underhill's review of the Employment Tribunal Rules of Procedure, we have consulted on his recommendations for a new set of rules that ensure employment tribunal cases can be managed effectively, flexibly, proportionately and consistently in order to ensure a system that is fair to all parties and we will publish our response, setting out the changes we intend to make, shortly.

And we are taking further steps streamline the existing tribunal system, and encourage employer compliance with their employment obligations, through the Enterprise and Regulatory Reform Bill, currently before Parliament. Amongst other things, the provisions in this Bill will provide the legislative platform for the introduction of Early Conciliation, a new measure that, rightly, has received support from all quarters.

While the requirement for prospective claimants to contact Acas before they can lodge proceedings at the Employment Tribunal will be mandatory, the decision whether to accept the offer of Early Conciliation will be entirely voluntary. Prospective claimants who do not want to attempt to settle the matter outside of the tribunal will be able to decline EC and proceed to lodge their claim. Prospective respondents, too, will be free to refuse EC.

But those who just want to resolve their dispute, without the cost and stress of the tribunal process, will be able to do so with the support of Acas conciliators.

While the principles underpinning EC have been established, there is still work to be done to determine how it will operate in practice. We have set out

¹ <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-511-resolving-workplace-disputes-consultation.pdf>

our proposals in this consultation. As we have repeatedly said, we do not want EC to become another step in what can already be a lengthy process, nor do we want it to be burdensome on prospective claimants and respondents, and I believe the process set out here reflects that commitment.

We also recognise that this is a new measure, and one of many changes that we are making to the employment tribunal system. We want to be able, if necessary, to refine how the EC process operates in light of these other changes and with that in mind have made the draft Regulations as “light-touch” as we can.

I believe that Early Conciliation is an important addition to the dispute resolution toolkit and I look forward to hearing your views on our proposals for implementation.



Jo Swinson MP
Minister for Employment Relations and Consumer Affairs

Executive Summary

In the Government response to the Resolving Workplace Disputes consultation², we set out our intention to introduce Early Conciliation. The necessary primary powers are contained in the Enterprise and Regulatory Reform Bill, but these do not deal with how the process will operate in practice. This level of detail is a matter both for secondary legislation, through a set of Regulations, and of operational delivery decisions for Acas.

In this consultation, we have set out our proposals for what should be covered in the Regulations, and how the process should operate in practice. We are seeking views in particular on:

- The draft Regulations (at Annex A);
- The draft EC form (at Annex B);
- Whether there are any other jurisdictions, in addition to those we have identified, in which EC would not be appropriate;
- Whether there is any evidence that the ECSO model we intend to operate is not appropriate;
- Whether there should be a limit on the number of attempts, or length time, in respect of Acas' attempts to contact the prospective claimant and, where relevant, the prospective respondent;
- The contents of the EC Certificate;
- Our proposals for handling prospective respondent requests for EC.

² <http://www.bis.gov.uk/assets/biscore/employment-matters/docs/r/11-1365-resolving-workplace-disputes-government-response.pdf>

How to respond

When responding, please state whether you are responding as an individual, or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation form and, where applicable, how the views of members were assembled.

The consultation will close on 15 February 2013.

You can respond to the consultation on-line at :

<https://www.surveymonkey.com/s/VGN9MGQ>

Alternatively, a copy of the consultation form is available at Annex F. If you decide to respond this way, the form can be submitted by letter, fax or email to:

Labour Market Directorate
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Fax: 0207 215 6414
Email: earlyconciliation@bis.gis.gov.uk

A list of those organisations consulted is at Annex D. We would welcome suggestions of others who may wish to be involved in this consultation process.

Confidentiality & Data Protection

Information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004. If you want the information that you provide including personal data to be treated as confidential, please be aware that, under the FOIA, there is a Statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.

In view of this, it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

A copy of the principles of consultation can be found at Annex E.

Help with Queries

Questions about the policy issues raised in the document can be addressed to:

Gail Davis
Labour Market Directorate
Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 0207 215 3859
Fax: 0207 215 6414
Email: gail.davis@bis.gsi.gov.uk

Context

If employees experience a problem at work there are a number of ways in which the matter can be resolved, including discussing the issue internally (either informally, or using formal discipline & grievance procedures), mediation, seeking external advice (such as from Acas or Citizen's Advice Bureaux) or, ultimately, taking the matter to an employment tribunal.

If an individual decides to make a claim to an employment tribunal they must complete and submit an ET1 form. This form is sent to the employer – the respondent – who then completes and submits an ET3 form in response. Details of those claims lodged with the employment tribunal in which Acas can conciliate are automatically passed to Acas, who have a statutory duty to offer parties the opportunity to conciliate the matter(s). If Acas conciliation is successful, the parties can enter a binding agreement (known as a COT3 settlement) which settles the dispute and ends the employment tribunal process. If conciliation is unsuccessful, the matter may be determined at a tribunal hearing.

Business representatives have told us that employers are worried about the prospect of employment tribunal claims being brought against them, particularly because of the costs involved in preparing for, and attending, an employment tribunal whether they are successful or not. BIS has been told by a number of business organisations that this concern about the potential risk of claims against them can affect an employer's decision to take on staff.

Employment tribunal claimants also face significant cost and stress in pursuing a claim, whilst the Exchequer cost of administering the employment tribunals system and funding Acas' conciliation work is also significant. These costs are set out in more detail in the accompanying impact assessment.

In the Resolving Workplace Disputes consultation we set out our proposal for an EC process that would make it a requirement for most prospective claimants to send the details of their claim to Acas before they are able to lodge the claim with the employment tribunal. This would enable Acas to offer the parties the opportunity to resolve their dispute without the need for tribunal involvement.

There is evidence that demonstrates that if disputes are resolved in the workplace this is far less costly to both parties, delivers more positive results in terms of continued employment and business productivity, and saves money for the Government by reducing demand on Her Majesty's Courts and Tribunals Service. Even where it is not possible to resolve the dispute in the workplace or to preserve the employment relationship, there are still clear benefits to parties of resolving the matter without the need for judicial intervention. Conciliation is not only less costly for parties, in terms of time and money, but it can also deliver outcomes for individuals that are not possible at an employment tribunal – for example, an agreed reference, or an

apology. And a reduction in the number of cases that go to tribunal clearly benefits the Exchequer.

There was broad support for the proposal from a wide range of stakeholders, including business and individuals, with the majority of respondents who expressed an opinion agreeing that EC was likely to be an effective way of resolving more disputes before they reach tribunal. In November 2011 in the Government response to the Resolving Workplace disputes consultation, the Government announced its intention to introduce EC as the first part of the employment tribunal process.

While the Government response set out some broad details of how EC would work in practice, including the period for “stop-the-clock” (ie the suspension of the relevant limitation period), and which jurisdictions would be subject to EC, it made clear that there was still work to be done to develop the detail of the process.

This consultation document sets out how we intend that the process should work and seeks views from stakeholders on specific issues. The necessary primary legislation is currently before Parliament as part of the Enterprise and Regulatory Reform Bill. There will, however, be a need for secondary legislation to implement EC and a set of draft Regulations are attached at Annex A for comment.

1. How the Early Conciliation process is commenced

1.1 Unless they are exempt from the requirement to contact Acas before they can lodge their claim with the tribunal, prospective claimants will need to complete and submit a form to Acas. While we recognise that there will be claimants who have a representative, we are minded that, other than in those multiple claims which have been notified to Acas on specified form, the first contact by Acas should be with the claimant; it will be for the claimant to refer the conciliator to their representative if they so wish.

1.2 As we made clear in the Government response, and during debate of the clauses of the Enterprise and Regulatory Reform Bill in Committee, we intend that the form will require very basic information – the name, address and contact details of the claimant and respondent – so as to minimise the burden on the claimant. The information which the prospective claimant is required to provide will be the ‘prescribed information’ stipulated in EC Regulations.

1.3 We have reflected upon whether it would be appropriate to require the prospective claimant also to give a brief indication as to the nature of the dispute on the EC form.

1.4 It has been suggested that requiring prospective claimants to provide Acas with information on the nature of the dispute, will give Acas the opportunity to attempt conciliation on all of the elements of the dispute and this could possibly increase the rate of settlement. In addition, the prospective claimant could be provided with relevant advice (e.g. median awards, length of time for determination in the employment tribunal) on all of the elements of the dispute, which would enable them to make a more informed decision about handling their claim.

1.5 However, we believe that it may be difficult for certain prospective claimants, particularly those who are unrepresented, or considered more vulnerable, to understand the breadth and nature of their disputes and to accurately describe them in writing. While it might be possible to mitigate against this risk by including broad descriptors and guidance on the EC form, we consider there would remain a risk that many prospective claimants would fail to indicate all their potential claims on the EC form, simply because they were unaware that they existed, or might indicate the wrong ones. For example, a prospective claimant who knew that they had been unfairly dismissed, but did not realise until during, or after, the EC stage that the dismissal had involved discrimination, would be unable to present a discrimination claim to the tribunal unless and until they had submitted the discrimination matter to EC. This would be a departure from current

procedures, which allow additional jurisdictions to be added to a claim after it has been lodged at tribunal (subject to judicial discretion).

1.6 Although it might theoretically be possible for the Acas conciliator to amend the EC form during the course of EC if it became clear that there were additional claims that had not been included by the prospective claimant on the form, we do not consider it would be appropriate to place this additional duty on Acas. Nor would it address the problem where Acas were unable to make contact with the prospective claimant.

1.7 We do not therefore consider it necessary to ask prospective claimants to provide any information on the nature of their claim on the form.

1.8 A copy of the draft form is attached at Annex B.

- **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.

Jurisdictions

1.9 Following consultation, and in the absence of agreement between those who responded as to which jurisdictions would be more or less likely to benefit from EC, the Government decided that other than in very limited circumstances, all prospective claimants should have to comply with the EC requirement. The only jurisdictions in which the Government considers that the EC requirement should not apply are those where a very short period exists for presenting a claim, such that complying with the requirement would not be practicable (for example, an application for interim relief), or where settlement would not be appropriate (for example, an appeal against an improvement or prohibition notice).

1.10 The list of relevant proceedings for EC will be set out in section 18(1) of the Employment Tribunals Act 1996 and that list will also apply to Acas' other conciliation duties.

1.11 We have set out in Annex C those jurisdictions which we consider are not appropriate for EC and which we do not intend to include in the list in section 18(1) of the Employment Tribunals Act 1996. As a consequence, prospective claimants will be able to present claims in these jurisdictions without complying with the requirement to contact Acas with details of their claim.

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

2. Exemptions to the requirement to make an Early Conciliation request

Prospective claimants

2.1 We consider that there are certain circumstances in which it would make little sense to require prospective claimants to first submit the details of their claim to Acas, and we have therefore provided a number of exemptions in the draft Regulations. The exemptions apply to:

- prospective claimants who are part of a multiple claim, where another person in the multiple has complied with the EC requirement by submitting details of the claim to Acas. A multiple claim is one in which there are multiple claimants bringing claims against the same respondent(s) on the same or a similar set of circumstances. The claimants in a multiple may present their claims together on one ET1 form. The exemption from the EC requirement will apply where the claims are presented on the same ET1. In such cases, a conciliator may attempt to settle the dispute on behalf of all members of the multiple.
- prospective claimants who are commencing relevant proceedings on the same ET1 form as proceedings which are not subject to EC;
- prospective claimants where the prospective respondent has contacted Acas and asked them to conciliate the dispute. If Acas are already providing conciliation in the case, it appears to us overly-bureaucratic to require that the claimant should submit an EC form for the same dispute. However, where the prospective respondent contacts Acas, there will be no suspension of the limitation period, ie no “stop-the-clock”. Therefore, if the prospective claimant is concerned that they may run out of time to lodge a claim at ET, they will not be prevented from submitting an EC form in respect of the same dispute (or another matter), if they so wish and so may be able to benefit from the “stop-the-clock”;
- prospective claimants who intend to bring a claim against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.

3. Presenting the Early Conciliation Request

3.1 In accordance with the Government's Digital by Default strategy, prospective claimants will be encouraged to submit the EC form on-line, in order to allow the data to be automatically up-lifted to the Acas case management system. This has the advantage of keeping data entry costs to a minimum. However, for those individuals who are unable to use the on-line route, hard copies of the form will be made available. Hard copy forms will be required to be sent to the specific Acas address set out on the form; forms sent to any other Acas address will not be accepted.

3.2 Prospective claimants who contact the Acas Helpline for advice on lodging a claim will be directed to the relevant website to access the EC form (or advised as to where they can obtain a hard copy if appropriate). We considered whether it would be appropriate for Acas to take telephone requests for EC and input the information directly into their IT system, but concluded that this would require a substantial increase in staff, involving on-going costs for the tax-payer, unlike a predominantly electronic system which involves one-off set-up costs only.

3.3 Claimants will remain responsible for ensuring that any claim which they present to an Employment Tribunal is presented within the relevant statutory time limit (ie 3 or 6 months, depending on the nature of their claim). Acas will have no role in determining, as part of the EC process, whether a claim would be in time or not were it to be presented to an Employment Tribunal. However, as part of their advisory role, Acas will inform the parties of the relevant limitation period for any claim.

3.4 Acas will record receipt of an EC form and this information, along with the information about issue of the EC certificate (see below), will allow the Employment Tribunal to decide whether to accept or reject the claim on the basis of an expiry of the limitation period if the matter is not resolved in EC and a claim is subsequently presented.

3.5 For EC forms submitted on-line, date of receipt by Acas will be the date on which the EC form is received and that date will be recorded automatically. For EC forms submitted in hard copy, whether by post or by hand, the date of receipt will be that on which the form is received by Acas. Hard copy forms received by Acas will be date stamped with the date of receipt.

3.6 On receipt of the electronic form, an automated acknowledgement will be issued, which will contain information for the claimant on the EC process – next steps etc. We considered whether a similar acknowledgement should be issued in respect of hard copy forms, taking into account the fact that in many cases the first contact from an Acas official could precede the receipt by the claimant of a written acknowledgement. We concluded that, even though this

might be the case, there was merit in sending a letter on the grounds that providing information on the EC process might have the effect of persuading the claimant to agree to EC where their initial reaction had been to decline. The cost of issuing letters will be minimal as they would be electronically generated following data entry into the Acas IT system, but the benefits could potentially be significant.

3.7 When a duly completed EC form is received by Acas, the prospective claimant will have satisfied the EC requirement and the running of the limitation period will be suspended (ie the clock will stop) to allow conciliation to take place.

First Stage Contact

3.8 Once the claim has been received by Acas, we intend to operate a two-stage process where claims are initially passed to an Early Conciliation Support Officer (ECSO) to make telephone contact with the prospective claimant. We envisage that the ECSO will check the details supplied by the prospective claimant, obtain basic information such as length of time employed, date of dismissal/incident complained of, best time/method for further contact and whether the prospective respondent is still trading. They will outline the process for conciliation and check whether the claimant requires any reasonable adjustments eg the provision of an interpreter. The ECSO will also be able to explain and discuss any misunderstandings surrounding the prospective claim eg qualifying periods, and a proportion of prospective claimants can consequently be expected not pursue their claim any further.

3.9 We consider that it is likely to be more cost-effective to have an ECSO complete the first stage contact role, rather than to have an experienced conciliator spend time fulfilling this basic information-gathering function. We recognise, however, that there may be arguments in favour of having the first contact made by a Conciliation Officer, for example, because they will have a greater opportunity to persuade a claimant to agree to participate in EC.

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

3.10 We envisage that the initial call to the prospective claimant will be made by the close of business on the day following receipt of the EC form. We anticipate that there will be some prospective claimants who are difficult to contact. In these cases, we consider that the ECSO should make reasonable attempts to contact the prospective claimant, but that these attempts should not continue indefinitely. In the event that the prospective claimant cannot be contacted we believe it is reasonable to assume that they are not interested in taking up the offer of EC, especially since in the majority of cases

they will have received an electronic acknowledgement that their form has been received and been advised to expect a call. We therefore propose that, where the ECSO has been unsuccessful in attempts to contact the prospective claimant, they should then close the case by issuing a certificate to confirm that the prospective claimant has complied with their obligation to contact Acas. The prospective claimant will then be able to present a claim to the tribunal, should they wish.

- **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 ECSO to attempt to contact the prospective claimant.**

3.11 Where, following a conversation with the ECSO at the initial stage, the prospective claimant concludes on the basis of the information provided that they are unlikely to be able to bring a claim to the tribunal (ie because they do not have the required service, or they are out of time), and therefore do not wish to participate in EC, we consider that it will still be necessary for Acas to issue a certificate. This is because only the tribunal can ultimately decide whether to accept a claim and, in the event that the prospective claimant changes their mind and wishes to bring a claim, they will require a certificate to confirm that they have complied with their obligation to contact Acas.

Second Stage Contact

3.12 For all other prospective claimants, the ECSO will pass the relevant details to the conciliator, who will then contact the prospective claimant. In general, we expect that second stage contact will be made within two working days of receipt of the EC form by Acas.

3.13 It will be for the conciliator to formally establish whether the prospective claimant wishes to attempt to settle the dispute. Where the prospective claimant does want to attempt conciliation, regardless of whether or not the conciliator considers that the prospective claimant has a justiciable claim (for example, it appears that the limitation period has expired), the conciliator will be required to proceed with conciliation (decisions on justiciability are matters for the tribunal to decide, not Acas).

3.14 In cases where the prospective claimant has indicated that they wish to attempt EC, the conciliator will contact the prospective respondent to see if they are also willing to engage in discussions. This contact will usually take place within two working days. The prospective respondent will be able to decline EC and, if they do so, the conciliator will notify the prospective claimant and immediately issue a certificate. As before, we consider that the conciliator should make reasonable attempts to contact the prospective

respondent. In the event that they are unable to contact the prospective respondent, there is clearly no prospect of a successful EC and a certificate will therefore be issued to the prospective claimant.

- **We would welcome your views on whether it is appropriate to apply the same 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.**

3.15 Where both parties agree to participate in EC, the conciliator will have up to one calendar month from the date of receipt of the EC form to facilitate a settlement between the parties. Where, at any point during that period, the conciliator believes that there is no reasonable prospect of achieving a settlement, or if discussions fail, or either party elects to withdraw from the process, the conciliator will end the process and issue a certificate.

3.16 Where the one month period is due to expire but the conciliator considers that there is a reasonable prospect of achieving a settlement, they may, with the agreement of both parties, extend the conciliation period by up to a further two weeks.

4. Contact with prospective respondents

4.1 In the event that the prospective claimant declines to participate in EC, we do not intend that the conciliator should have any contact with the prospective respondent. We expect that there will be a number of cases where the prospective claimant complies with their obligation to contact Acas but does not then go on to present a claim with the tribunal. We believe that, if we were to notify prospective respondents that a prospective claimant had submitted an EC form, in many cases their immediate reaction would be to take steps that would incur cost, whether through contacting a legal adviser or tasking a member of staff to undertake information-gathering activities. This could potentially prove to be unwarranted expenditure and would undermine a key objective of the process – to reduce costs to business.

4.2 We further considered whether it would be appropriate to give the Acas conciliator the discretion to decide whether contact with the prospective respondent might be beneficial in the particular circumstances of a case but concluded that this would be counter-productive. For prospective claimants, the fact that the conciliator may choose to contact the prospective respondent – whether or not they were still their employer – may dissuade them from lodging their case with Acas in the first instance, thereby ultimately denying them the ability to bring a claim to tribunal. The introduction of EC was not intended to act as a barrier to justice and therefore we need to guard against introducing elements to the process that may have such unintended consequences. In addition, if conciliators had such a discretion it would, in effect, lead to uncertainty for prospective respondents. A prospective respondent could not be confident that, in the absence of contact from Acas, the (former or existing) employee had decided not to pursue a claim. In deciding that there should be no contact with the prospective respondent without the prospective claimant's agreement, we are not altering the current position where respondents are generally unaware that there is to be a claim made against them until they receive a copy of the ET1, and the blank ET3 response form, from the tribunal office.

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

5. The EC Certificate

5.1 If EC is successful, a legally binding settlement (either a COT3 or a private agreement) would be signed by both parties, and no claim would then be brought. In these circumstances, there will, however, still be a need for the conciliator to issue a certificate so that, in the event the settlement fails, the claimant is able to satisfy the tribunal they had met their obligation to first contact Acas. However, if only some of the matters in dispute are settled, a certificate will be required to be issued to enable the prospective claimant, should they wish to, to present an ET claim for those elements of the claim that remain in dispute.

5.2 A certificate will be issued either electronically, where the prospective claimant has provided an email address, or by hard copy. Where the certificate is issued electronically, the date of receipt will be that on which the certificate was sent. Where the certificate is issued in hard copy, it will be deemed to have been received by the prospective claimant two days after the date of posting. The date of receipt of the certificate is relevant to determining the “stop-the-clock” period; the remainder of the prospective claimant’s limitation period will start running on the day following its receipt. In order for the tribunal to be able to consider limitation periods, the certificate will state the day the EC form was received by Acas, the date the certificate was issued and how it was issued, ie whether electronically or by post.

5.3 For multiple claims, a certificate will be issued to the “lead” prospective claimant (i.e. the individual who has contacted Acas and complied with the EC requirement). That person will be able to rely on the certificate to present any claim at ET. Other members of the multiple, who relied on the submission of the “lead” EC form to meet their obligation to comply with the requirement to contact Acas, can rely upon the certificate in relation to any claim which they have in common with the prospective claimant who contacted Acas. If any of the members of a multiple have a claim which differs from the claim(s) to be brought by that “lead” prospective claimant, they will be unable to bring that claim as part of the multiple in any event and would have to present a separate ET1 in relation to that matter; in relation to that additional matter, they would be unable to rely upon the certificate obtained by the “lead” prospective claimant (a separate certificate would be needed).

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

6. Request for EC from prospective respondents

6.1 While we expect that the significant majority of requests for EC will come from the prospective claimant, we have provided for prospective respondents to request EC where they consider there is a matter that might give rise to tribunal proceedings if it is not settled.

6.2 In these circumstances, the respondent will need to contact Acas with the details of the prospective claimant. While we will provide a respondent EC request form for them to complete, which they will be able to submit on-line, Acas will also be able to accept respondent requests via other means, including telephone contact.

6.3 As already mentioned, where EC is requested by the prospective respondent, there will be no “stop-the-clock” provision and therefore no specified period of time in which EC must take place. Where EC is initiated by the prospective respondent, we propose that the case should be referred directly to a conciliator as there is less of a role for the ECSO.

6.4 In the event the prospective claimant declines the offer of conciliation, or conciliation is unsuccessful, the conciliator will issue a certificate to the claimant confirming that their obligation to contact Acas has been satisfied as a result of prospective respondent contact. This will allow the prospective claimant to lodge a tribunal claim if they so wish, and will make it clear to the tribunal that there is no suspension of the expiry of the limitation period to be taken into account.

6.5 If the prospective claimant subsequently sends an EC form to Acas in relation to the same dispute, this will trigger the “stop-the-clock” provisions, and Acas will manage the EC process as for any other prospective claimant.

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

7. ET Claims

7.1 In the event that EC is unsuccessful in resolving the dispute, the prospective claimant will be able to proceed to present their claim at ET. We propose to amend the Employment Tribunal Rules of Procedure to require that a claimant include evidence – ie the unique EC reference number given to them by Acas – on their ET1 form to demonstrate that they have satisfied the EC requirement. Where the EC requirement applies and the claimant fails to include the EC reference number on their ET1 form, the Employment Tribunal will dismiss the claim.

7.2 We recognise that there will be occasions where the prospective claimant says that they have complied with the obligation to contact Acas in the first instance and submitted the EC form, but Acas have no record of it having been received. Where such instances occur the prospective claimant will be unable to lodge a claim with the tribunal as they will not have the necessary EC reference number. If they wish to bring a claim, they will need to make a second request for EC. In the event this delays matters such that the claim is presented out of time, it will be for the tribunal to decide whether to exercise their discretion and extend the limitation period and accept the claim.

ANNEX A - Draft Regulations

STATUTORY INSTRUMENTS

2013 No. 0000

EMPLOYMENT TRIBUNALS

The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2013

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State, in exercise of the powers conferred by sections [18A(7), (11) and (12)] and 41(4) of the Employment Tribunals Act 1996⁽³⁾, makes the following Regulations:

Citation and commencement

1.—(1) These Regulations may be cited as the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2013 and the Rules of Procedure contained in the Schedule may be referred to as the Early Conciliation Rules of Procedure.

(2) These Regulations come into force on [DATE].

Interpretation

2. In these Regulations and in the Schedule—

“ACAS” means the Advisory, Conciliation and Arbitration Service referred to in section 247 of the Trade Union and Labour Relations (Consolidation) Act 1992⁽⁴⁾;

“claim form” means the form prescribed by the Secretary of State in accordance with regulation [14(1)(a)] of the Employment Tribunals Regulations;

“conciliation officer” means an officer designated by ACAS under section 211 of the Trade Union and Labour Relations (Consolidation) Act 1992;

⁽³⁾ 1996 c. 17; by virtue of the Employment Rights (Dispute Resolution) Act 1998 (c. 8) industrial tribunals were renamed employment tribunals and references to “industrial tribunal” and “industrial tribunals” in any enactment were substituted with “employment tribunal” and “employment tribunals”. Section 18A was inserted into the Employment Tribunals Act 1996 by [section 7 of] the Enterprise and Regulatory Reform Act 2013 (c. ?).

⁽⁴⁾ 1992 c. 52.

“early conciliation certificate” means the certificate prescribed by the Secretary of State in accordance with Regulation 4(b);

“early conciliation form” means the form prescribed by the Secretary of State in accordance with Regulation 4(a);

“Employment Tribunal” means an employment tribunal established in accordance with regulation [5] of the Employment Tribunals Regulations;

“Employment Tribunals Act” means the Employment Tribunals Act 1996;

“Employment Tribunals Regulations” means the [Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013]⁽⁵⁾;

“prospective claimant” means a person who is considering presenting a claim form to an Employment Tribunal in relation to relevant proceedings;

“prospective respondent” means the person against whom the prospective claimant is considering presenting a claim form to an Employment Tribunal;

“relevant proceedings” are those proceedings listed in section 18(1) of the Employment Tribunals Act;

“respondent” means the person against whom proceedings are brought in the Employment Tribunal; and

“requirement for early conciliation” means the requirement set out in section [18A(1)] of the Employment Tribunals Act.

Exemptions from early conciliation

3.—(1) A case is a prescribed case for the purposes of section [18A(7)] of the Employment Tribunals Act and a person (“A”) may institute relevant proceedings without complying with the requirement for early conciliation where—

- (a) another person (“B”) has complied with that requirement in relation to the same matter and A wishes to institute proceedings on the same claim form as B or seeks to join proceedings in an Employment Tribunal that B has instituted;
- (b) A institutes those relevant proceedings on the same claim form as proceedings which are not relevant proceedings;
- (c) A is able to evidence that the respondent has contacted ACAS in relation to a matter that (if not settled) is likely to give rise to relevant proceedings against the respondent, ACAS has not received information from A under section [18A(1)] of the Employment Tribunals Act in relation to that matter, and the proceedings on the claim form relate to that matter; or
- (d) A is instituting proceedings against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.

(2) Where A benefits from the exemption in subparagraph (a), the requirement for early conciliation shall be treated as complied with for the purposes of any provision extending the time limit for instituting relevant proceedings in relation to that matter.

(3) For the purposes of sub-paragraph (a), proceedings relate to the same matter where they arise out of the same set of facts.

Power to prescribe

4. The Secretary of State may prescribe—

- (a) a form to be used by all prospective claimants for the purpose of complying with the early conciliation requirement and shall publish the form in a manner which the Secretary of State considers appropriate to bring it to the attention of prospective claimants and their advisers; and

⁽⁵⁾ S.I. [2013/ADD S.I. NUMBER] SI not yet made

- (b) a certificate to be issued by ACAS if rule 6 of the Schedule applies.

[Date] Parliamentary Under Secretary of State for Employment Relations and Consumer Affairs
Department for Business, Innovation and Skills

SCHEDULE

THE EARLY CONCILIATION RULES OF PROCEDURE

Starting early conciliation

Presenting an early conciliation form

1. To comply with the requirement for early conciliation, a prospective claimant must present a completed early conciliation form to ACAS.
2. The early conciliation form may be delivered to ACAS—
 - (a) using the online form on the ACAS website; or
 - (b) by being sent by post, or delivered in person, to the ACAS address set out on the early conciliation form.

Rejection

3. If an early conciliation form does not contain—
 - (a) the prospective claimant's name, address, and contact details; and
 - (b) the prospective respondent's name, address, and contact details;

ACAS may reject that form as incomplete and return it to the prospective claimant or may contact the prospective claimant to obtain any missing information.

The early conciliation process

Contact between ACAS and the parties

- 4.—(1) ACAS will make reasonable attempts to contact the prospective claimant and prospective respondent, save that ACAS will contact the prospective respondent only with the express consent of the prospective claimant.
- (2) If ACAS is unable to make contact with the prospective claimant or prospective respondent it must conclude that settlement is not possible.

Period for early conciliation

- 5.—(1) For up to one calendar month from the date of receipt by ACAS of the early conciliation form, the conciliation officer will endeavour to promote a settlement between the prospective claimant and the prospective respondent.
- (2) The period for early conciliation set out in paragraph (1) may be extended by ACAS, provided that the parties consent to the extension and the conciliation officer considers that there is a reasonable prospect of achieving a settlement before the expiry of the extended period.
- (3) An extension under paragraph (2) of the period for early conciliation may only occur once in relation to any particular early conciliation form and may be for up to a maximum of two weeks.

Early conciliation certificate

- 6.—(1) If at any point during the period for early conciliation, or during any extension of that period, the conciliation officer concludes that a settlement is not possible, ACAS will issue an early conciliation certificate.
- (2) If the period for early conciliation, including any extension of that period, expires without a settlement having been reached, ACAS will issue an early conciliation certificate.

7. An early conciliation certificate will contain—

- (a) the name and address of the prospective claimant;
- (b) the name and address of the prospective respondent;
- (c) the date of receipt by ACAS of the early conciliation form;
- (d) the unique reference number given by ACAS to the early conciliation form; and
- (e) the date of issue of the certificate, which will be the date that the certificate is sent by ACAS, and a statement indicating the method by which the certificate is to be sent.

8.—(1) Where ACAS issues an early conciliation certificate, it will send a copy to the prospective claimant and, if ACAS has had contact with the prospective respondent during the period for early conciliation, to the prospective respondent.

(2) ACAS will send the early conciliation certificate by email or, where this is not possible, by post.

(3) An early conciliation certificate will be deemed received—

- (a) if sent by email, on the day it is sent; or
- (b) if sent by post, on the day on which it would be delivered in the ordinary course of the post.

Settlement

9.—(1) If at any point during the period for early conciliation, or during any extension of that period, the prospective claimant and prospective respondent agree to settle, ACAS will draw up an agreement recording that settlement and will issue an early conciliation certificate.

(2) Rules 7 and 8 apply to any early conciliation certificate issued by ACAS under paragraph (1).

EXPLANATORY NOTE

(This note is not part of the Order)

The [Enterprise and Regulatory Reform Act 2013] amended the Employment Tribunals Act to introduce a requirement for prospective claimants to contact ACAS before they are able to present a claim in the Employment Tribunal. This requirement applies to claims which are relevant proceedings for the purposes of section 18(1) of the Employment Tribunals Act.

Regulation 3 sets out the circumstances in which a claimant may present a claim for relevant proceedings without complying with the requirement for early conciliation.

The exemption in regulation 3(1)(a) relates to claimants who are presenting a claim on the same claim form as other claimants or joining a claim which has already been presented to the Employment Tribunal by another claimant (so called ‘multiples’); in such instances, a claimant may rely upon the fact that another claimant has complied with the requirement for early conciliation and has a certificate from Acas.

The exemption in regulation 3(1)(b) means that if a claim for relevant proceedings appears on the same claim form as proceedings which are not relevant proceedings, there is no need for a claimant to satisfy the early conciliation requirement in relation those relevant proceedings. For example, if a claimant makes an application for interim relief under section 128 of the Employment Rights Act 1996 on the same claim form as a claim for unfair dismissal under section 111 of the Employment Rights Act 1996, the effect of regulation 3(1)(b) is that the claimant can present the claim for unfair dismissal, which is relevant proceedings, without complying with the requirement for early conciliation.

The exemption in regulation 3(1)(c) means that a claimant need not comply with the requirement for early conciliation where they have already had contact with ACAS in relation to that matter as a result of a request to ACAS from the prospective respondent.

The exemption in regulation 3(1)(d) means that a claimant does not have to comply with the requirement for early conciliation where the claim is against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.

The power in regulation 4 allows the Secretary of State to prescribe a form which prospective claimants must use to contact ACAS in relation to the requirement for early conciliation and a certificate for ACAS to issue following early conciliation.

Rules 1 and 2 of the Schedule set out how a prospective claimant should provide information to ACAS so as to comply with the requirement for early conciliation and rule 3 sets out when a form submitted by a prospective claimant may be rejected.

Rule 4 details the process for early conciliation. Rule 5 provide that conciliation may be attempted for up to one calendar month and that this period may be extended for up to two weeks.

Rules 6 to 8 set out what will happen if early conciliation is unsuccessful and rule 9 sets out what happens if settlement is achieved.

ANNEX B - Draft EC Form

ACAS
EC Form – to be used by an individual who is considering bringing a claim to an Employment Tribunal

Select your Language [Cymraeg](#) Print this page

1. Your name and contact details

Title *Options: Mr, Mrs, Ms, Miss, Capt, Dame, Dr, Lady, Lord, Maj, Prof, Sir*

First name(s)

Surname or family name

Your address
Address 1, Address 2, Address 3, Address 4, Address 5, Postcode

Telephone Mobile No

Email address

Confirm email address

2. The relevant employer or organisation

Company or organisation name

Company / organisation's address
Address 1, Address 2, Address 3, Address 4, Address 5, Postcode

Telephone

3. Getting in touch with you

We will phone you at the number given above. However if you have a disability please let us know here if you have an alternative preferred way our conciliator should use to get in touch with you

Number of characters remaining: 120

Are you aware of any other employees from the organisation you work for, or used to work for, who are making claims in the same circumstances as you?

Please check the box to confirm that you have read and accepted the [Terms and Conditions](#).

ANNEX C - List of Jurisdictions not appropriate for EC

Description	Right	Cause of action
Application by the Secretary of State BIS to prohibit a person from running an Employment Agency	Sections 3A and 3C EAA	Sections 3A and 3C EAA
Appeal against improvement or prohibition notice	Section 24 HSWA	Section 24 HSWA
Appeal against assessment of training levy	Section 12 ITA	Section 12 ITA
Duty of Secretary of State to pay unpaid contributions to pension scheme	Section 124 PSA	Section 126 PSA
Reference to ET related to payment out of NIF	Section 170 ERA	Section 170 ERA
Payment of out the NIF	Section 182 ERA	Section 188 ERA
Appeal against an unlawful act on a notice issued by the EHRC	Section 21 EA 2006	Section 21 EA 2006
Void of unenforceable term of collective agreement	Section 145 EA 2010	Section 146 EA 2010
Appeal of decision of compensating authority	Reg. 42 CEC	Reg. 42 CEC
Appeal against improvement or prohibition notice		Para. 6 or Schedule 3 of WTR
Appeal against improvement or prohibition notice	Reg. 18 COMAH	Reg. 18 COMAH
Appeal against improvement notice	Para. 6(2) of Schedule 2 to the RTR	Para. 6(2) of Schedule 2 to the RTR
Failure to notify employee liability information	Reg. 11 TUPE	Reg. 12 TUPE
Appeal against notice from HSE or LA	Part 2 of Schedule 8 to REACH	Part 2 of Schedule 8 to REACH

The abbreviations used in the table on the previous page are explained below.

CEC	Colleges of Education (Compensation) Regulations 1975
COMAH	Control of Major Accident Hazards Regulations 1999
EA 2006	Equality Act 2006
EA 2010	Equality Act 2010
EAA	Employment Agencies Act 1973
ERA	Employment Rights Act 1996
HSWA	Health and Safety at Work Act 1974
ITA	Industrial Training Act 1982
PSA	Pension Schemes Act 1993
REACH	REACH Enforcement Regulations 2008
RTR	Road Transport (Working Time) Regulations 2005
WTR	Working Time Regulations 1998
TUPE	Transfer of Undertakings (Protection of Employment) Regulations 2006

ANNEX D - List of organisations consulted

Acas
Administrative Justice and Tribunals Council
British Chambers of Commerce
British Retail Consortium
Chartered Institute of Personnel and Development
Citizens' Advice
Confederation of British Industry
Council of Employment Judges
Council of Employment Tribunal Members' Association
Employers' Forum on Disability
Employment Lawyers' Association
Engineering Employers' Federation
Equality and Diversity Forum
Equality and Human Rights Commission
European Employers' Group
Federation of Small Businesses
Forum of Private Business
Free Representation Unit
Institute of Directors
Law Centres Federation
National Council for Voluntary Organisations
Peninsula Business Services Ltd
President Employment Appeal Tribunal
President Employment Tribunal England and Wales
President Employment Tribunal Scotland
Public and Commercial Services Union
Public Concern at Work
Recruitment and Employment Confederation
The Law Society
The Law Society of Scotland
Trades Union Congress
Trades Union Congress Scotland
Unison
Unite the Union

ANNEX E - The Principles of Consultation

The Civil Service Reform Plan commits the Government to improving policy making and implementation with a greater focus on robust evidence, transparency and engaging with key groups earlier in the process.

For details of the revised principles of engagement, please see <http://www.cabinetoffice.gov.uk/sites/default/files/resources/Consultation-Principles.pdf>

The policy issues addressed in this consultation document have been the subject of ongoing discussion with stakeholders. They are also undergoing Parliamentary scrutiny as part of the Enterprise and Regulatory Reform Bill currently being taken through the Houses of Parliament. For this reason, we consider that a four-week consultation period is appropriate.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

John Conway,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone John on 020 7215 6402 or e-mail to: john.conway@bis.gsi.gov.uk

ANNEX F - Response form



Department for Business, Innovation & Skills

Early Conciliation: Proposals for implementation – response form

A copy of the consultation document can be found at:

<https://www.gov.uk/government/publications/>

You can complete your response online through Survey Monkey :

<https://www.surveymonkey.com/s/VGN9MGQ>

Alternatively, you can email, post or fax this completed response form to:

Email:

earlyconciliation@bis.gsi.gov.uk

Postal address:

Gail Davis
Labour Market Directorate
Department for Business, Innovation and Skills (BIS)
3 Floor
1 Victoria Street
London
SW1H 0ET

Tel: 0207-215 1850

Fax: 0207-215 6414

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is: **15 February 2013**

Your details

Name:

Organisation (if applicable):

Address:

Telephone:

Fax:

Please tick the boxes below that best describe you as a respondent to this consultation

- Business representative organisation/trade body
- Central government
- Charity or social enterprise
- Individual
- Large business (over 250 staff)
- Legal representative
- Local government
- Medium business (50 to 250 staff)
- Micro business (up to 9 staff)
- Small business (10 to 49 staff)
- Trade union or staff association
- Other (please describe)

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.

Question 2: We would welcome views on whether there are other jurisdictions where EC would not be appropriate, and the reasons for those views.

Explain your response:

Question 3: We consider that the ECSO model is the right way forward. If you disagree, please tell us why

Explain your response:

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 ECSO to attempt to contact the prospective claimant.

Explain your response:

Question 5: We would welcome your views on whether it is appropriate to apply the same 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.

Explain your response:

Question 6: We would welcome views on whether you consider our approach to contacting the prospective respondents is the right one. If not, please explain why.

Explain your response:

Question 7: Do you consider there is any other information that should be included on the EC certificate?

Explain your response:

Question 8: We would welcome any views on our proposed approach for handling prospective respondent EC requests.

Explain your response:

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