Department for Business Innovation & Skills

EARLY CONCILIATION

Government Response to consultation on proposals for implementation

JULY 2013

Contents

GOVERNMENT RESPONSE TO EARLY CONCILIATION IMPLEMENTATION CONSULTATION

Foreword from the Minister for Employment Relations and Consumer Affairs

This Government set out our commitment to delivering a flexible, effective and fair labour market which encourages the earlier resolution of disputes as part of the Resolving Workplace Disputes consultation.[1] Early Conciliation forms part of this. It aims to provide parties with the opportunity to resolve their disputes without the cost and stress of going through an Employment Tribunal, with the support of Acas conciliators. It is an approach has been welcomed by all quarters.

The Enterprise and Regulatory Reform Act set out the legislative framework required to introduce a system of Early Conciliation to the dispute resolution process. Debate in both Houses of Parliament allowed us to develop the principles for a system that will help to resolve more disputes early, and outside of the Employment Tribunal. This consultation then focused on the detail of the practical operation of the scheme.

The concept of a system that makes it mandatory to contact Acas and consider resolving a dispute outside of Employment Tribunal with the help of a conciliator is simple, but it is important to get the detail right. Stakeholder input through this consultation has been invaluable. I am therefore grateful to those organisations and individuals who took the time and trouble to give us their feedback. The consultation responses demonstrated that stakeholders were broadly content with the approach to Early Conciliation. They also uncovered some additional points that we will continue to work through with Acas, Her Majesty's Courts and Tribunals Service and stakeholders on to resolve as we move towards implementation.

Early Conciliation is designed to deliver early settlement of some disputes, and not simply add further delays to what can already been a long process. It is my intention that all employers and employees consider the benefits of resolving their disputes through Early Conciliation. I look forward to continuing to work with you on getting the detail right ready for its implementation in early 2014.

Jo Swinson MP

[1] www.gov.uk/government/uploads/system/uploads/attachment_data/file/31439/11-1365-resolving-workplace-disputes-government-response.pdf

Executive Summary

The Enterprise and Regulatory Reform Act 2013 sets out the broad legislative framework for delivering Early Conciliation. The implementing regulations will deal with how it will operate in practice. This consultation was designed to inform the drafting of these regulations and to help identify issues that will need to be addressed in the guidance and forms that accompany the introduction of Early Conciliation. It is the intention to publish both these regulations and the accompanying guidance well in advance of the implementation of Early Conciliation, in order to allow parties to familiarise themselves with the detail of this new process.

This government response is designed to be read alongside the consultation document, which was published on 17th January 2013 and ran until 15th February. In total, 55 responses were received from a wide variety of respondents, including key representatives of the employee, employer and employment law community. The distribution of respondents is set out below in Figure 1. A full list of organisations is available in Annex 3.

This document provides a summary of the main points arising from the consultation, and outlines how the Government intends to address the issues raised. It covers:

- the content of the draft Early Conciliation request form –(Annex 1);
- jurisdictions that should be exempt from Early Conciliation;
- the ECSO model for conciliation;
- whether there should be a limit on Acas attempts to contact parties to try and engage the in Early Conciliation;
- content of the Early Conciliation certificate (Annex 2);
- proposals for handling prospective respondent requests for Early Conciliation

Respondents raised a number of issues over and above those set out in the consultation. Whilst this document does not cover these points in any detail, they are being considered in full by BIS and Acas, and will be worked through as work on implementation continues. This includes how to deal with multiple claims, which was raised by a number of stakeholders.

Figure 1 – Consultation Respondent Categories

Indicated respondent category	Number	Percentage
Business representative organisation/trade body	10	18%
Central government	2	4%
Charity or social enterprise	4	7%
Individual	6	11%
Large business (over 250 staff)	5	9%
Legal Representative	10	18%
Local government	1	2%
Medium business (50 to 250 staff)	2	4%
Micro business (up to 9 staff)	3	5%
Other	0	0%
Small business (10 to 49 staff)	0	0%
Trade Union or Staff Association	12	22%
Total	**55**	**100%**

Summary of responses to the consultation

Q1: The content of the form and our intention that claimants should not be required to provide information on the EC form about the nature of their dispute.

1. Section 1 of the consultation set out Government's proposals on how the Early Conciliation (EC) process should be commenced. In particular, we explained our intention that claimants should not be required to provide any information on the nature of their dispute on the EC request form. Having considered the matter carefully, Government had concluded that it may be difficult for some prospective claimants to fully understand the nature and breadth of their dispute and that to require them to provide such information on their request form might ultimately prevent them from being able to bring some elements of their dispute to the employment tribunal. We sought the views of respondents to this approach, together with the content of the draft EC request form (Annex 1).

Summary of responses

2. With regard to the form, in addition to general comments on the layout, respondents from across all sectors suggested that it would be helpful for the prospective claimant to be able to indicate in some way when it would be more (or less) convenient for Acas to call. There was also a call for the form to ask the prospective claimant to identify a specific person within the prospective respondent's organisation to enable Acas to more accurately direct any contact, as well as for provision to name multiple prospective respondents.

3. There was some concern amongst respondents as to whether and how prospective respondent details should be verified, with respondents querying what would happen if the respondent name on the ET1 differed from that on the Certificate. One respondent argued that incomplete or inaccurate EC request forms should be rejected by Acas.

4. Another respondent suggested that the form should also allow the prospective claimant to indicate whether the prospective respondent had an impairment that Acas should be aware of, for example in the case of care assistants employed by the service user.

5. Of particular concern to legal and employee-representative respondents was the lack of anywhere on the form to indicate whether the prospective claimant had representation, and the relevant contact details.

6. Opinions on the Government's intention not to require prospective claimants to provide any information on the request form on the nature of their dispute were clearly divided, with employee-representative respondents almost entirely in agreement with the Government's proposed approach while the majority of employer and employer-representative respondents held the view that prospective claimants should be required to provide at least some information. The views of legal respondents were also divided, broadly equally, between those in favour of the proposed approach and those who disagreed.

7. Those who disagreed with the proposed approach argued that, while it might be appropriate not to seek technical detail from prospective claimants, it ought to be possible to ask them to provide at least some basic information on the nature of the problem. They offered a variety of reasons for this: that, otherwise "Acas could find themselves dealing with complaints …outside of the employer/employee relationship.."; that "it is highly unlikely that an employer would consider settling a claim unless they were fully aware of what they were being accused of"; that "the earlier the information is provided in the resolution process the better chance of reaching an agreed outcome that avoids litigation"; and that, without some indication of the dispute on the form, "a prospective claimant could use the EC process to raise a matter at tribunal which they had never raised with the respondent, circumventing normal process for dealing with workplace issues".

Government Response

8. Government is grateful for the comments on the content of the form. There were some concerns about the general layout, and we have attempted to address these as can be seen from the revised draft request form at Annex A. We agree that it would be helpful to allow prospective claimants to indicate how and when it might be best for Acas to attempt to contact them, and to ask them for a named contact in the prospective respondent organisation. In order to keep the draft form simple, we will ensure that these issues are addressed in the first contact made with the claimant by the Acas Early Conciliation Support Officer (ECSO), which is expected to take place within 48 hours of Acas receiving the request form.

9. While we understand the calls from legal and trade union respondents to include a field on the request form for representative details, Government does not intend to make this change. Including a box for representatives' details on the form may indicate to prospective claimants that it is the norm to have a representative when in fact that is not the case (the Acas pilot of the ECSO model indicated that representatives were used in 10-20% of cases at Pre-claim Conciliation (PCC). We know from the behavioural sciences that norms can influence behaviour and we therefore consider that it may be counterproductive to request this information when a substantial number of prospective claimants are likely to be unrepresented.[2]

10. However, we do not intend that the EC process should exclude a prospective claimant's representative and, in addition to making it clear in guidance that those individuals who have representation should direct Acas to contact their representative, Acas themselves will check with the prospective claimant when they initially make contact and, where there is a representative acting on behalf of the individual, Acas will obtain the necessary contact details and continue the process through the representative (if that it what the prospective claimant has requested).

11. Acas will also be able to establish, via either the prospective claimant or their representative, whether the prospective respondent has any impairment and we do not therefore consider there is a need to obtain this information via the request form.

[2] http//www.instituteforgovernment.org.uk/sites/default/files/publications/MINDSPACE.pdf

12. Some respondents raised the issue of incomplete or inaccurate EC request forms, and differing respondent details as between the request form, and consequently the EC Certificate, and the ET1. We have provided in the draft Rules for Acas to either reject the form if it does not contain the prospective claimant and respondent details or to contact the prospective claimant to obtain missing information; we do not consider that any further provision needs to be made in this regard. We recognise, however, that there are likely to be occasions where the prospective claimant describes the prospective respondent in one way on the EC request form, and in a slightly different way on the ET1 – for example "Joe Bloggs & Sons" and "Joe Bloggs & Sons Ltd". We will provide the tribunal with the discretion to accept a claim where it appears to them that the respondent name on the EC Certificate and the ET1 relate to the same organisation and therefore the EC requirement has been satisfied for that matter.

13. We have considered the arguments made by those in favour of asking the prospective claimant to include some information about their problem on the request form, however we are not persuaded that these arguments sufficiently outweigh the potential negative consequences, ie that prospective claimants who do not understand the breadth of their potential claim at the outset are subsequently denied the opportunity to bring some element of the claim to the tribunal.

14. Clearly, Government accepts that the Acas conciliator will not be able to enter into, or facilitate agreement on, settlement discussions with a prospective respondent without being able to explain to the prospective respondent what the prospective claimant considers the dispute to be about. But, for that process to begin, we do not agree that it is necessary for the prospective claimant to provide any information on the request form; this is information that Acas will be able to obtain in their conversations with the individual. Acas' experience of the current Pre claim conciliation (PCC) service they operate, which does not require claimants to provide written details of their dispute, shows that the absence of written information is not a barrier to successful resolution.

15. Government recognises that a consequence of this approach may be that a prospective claimant may include on any subsequent ET1 a head of claim that they had not previously mentioned to Acas and which was therefore not the subject of EC discussions with the prospective respondent. However, Acas tell us that their PCC experience suggests that prospective claimants are more likely than not to include all the details of their dispute. We therefore consider that this is not a situation that will occur often and we believe that to restrict an individual's ET claim to only those matters that they have drawn to the attention of Acas either on the request form or in subsequent discussions, would not only be a departure from current procedures (which allow for additional matters beyond those included on the ET1 to be added to a claim at judicial discretion) but also burdensome to the system and therefore taxpayers, as prospective respondents sought to challenge the proceedings on the grounds of whether a particular element of the claim was covered by the EC Certificate. The Government notes that the Presidents of the Employment Tribunals (England & Wales, and Scotland) are supportive of our approach.

16. We acknowledge that there are likely to be times when Acas receive a request for EC which relates to a matter out of scope, eg a neighbourhood dispute, and we will therefore amend the draft Rules to allow Acas to reject such requests without issuing a certificate.

Q2: Views on whether there are other jurisdictions where EC would not be appropriate, and the reasons for those views.

17. Those who responded to this question suggested that there were a number of additional jurisdictions which should not be subject to the requirement to first contact Acas. These were:

- widening the scope of the interim relief exemption to include both types of claim under section 128 of the Employment Rights Act 1996, as well as the unfair dismissal claim on which the interim relief claim is based, and section 161 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA);
- section 192 of the TULRCA 1992, which relates to non-payment of a protective award;
- "Most TUPE claims, but specifically Regulation 15(10)";
- Claims involving insolvent respondents, as Insolvency Practitioners have little ability to reach agreements of the type that underpin EC;
- Application or complaint by the EHRC in respect of discriminatory advertisements or instructions, or pressure to discriminate;
- Failure of an employer to comply with a tribunal award following a finding of failure to consult about either a proposed TUPE transfer, or in connection with redundancies;
- Whistle blowing and acts of bullying and harassment;
- Protective awards.

18. One respondent also suggested that it would be helpful to make clear that employer contract claims do not fall within the scope of the EC scheme.

Government Response

19. Government agrees that where a claimant makes an application for interim relief on a claim form, there should be no obligation for them to have complied with the EC requirement in relation to the underlying unfair dismissal claim, and we will amend the list of jurisdictions in s18(1) of the Employment Tribunals Act 1996 accordingly.

20. We do not, however, consider that failures by respondents to comply with awards ordered by the tribunal, whether protective or otherwise (eg Reg 15(10) awards under TUPE 2006, should be excluded from EC; if Acas are able to persuade an employer to make the outstanding payment, this will avoid the need for a claim to be brought to the tribunal, which is the objective of EC.

21. With regard to insolvent employers, we recognise that EC is unlikely to be an option in these cases and, when Acas establish that the prospective respondent is insolvent, they will simply issue a certificate to the prospective claimant to allow them to proceed to ET should they wish. Where the insolvency of the respondent is less clear, they will investigate before deciding to issue the certificate. There is, however, no need to exclude jurisdictions as a consequence.

22. We are also unclear as to the reasoning behind the call for most TUPE claims to be exempted but, having reviewed these again, do not consider that there is a case for not including them in the list of jurisdictions appropriate for EC. Nor do we accept that excluding whistle blowing claims is appropriate; if the argument is that there is a greater risk of the individual suffering further detriment then this is mitigated both by the prospective claimant's right to decline EC, and by the protections that already exist under PIDA.

23. The issue of applications or complaints by the EHRC are, as the respondent who raised this point observed, matters of enforcement and are made, under s24 of the EA 2006, to the county court, not the employment tribunal. As EC does not apply to claims outside the ET, there is no need to exclude this jurisdiction. We will, however, take steps to make clear that employer contract claims are not within scope of EC.

Q3: Whether the ECSO model is the right way forward.

24. Section 3 set out the Government's proposals for how the EC request would be presented, and how such requests would be handled by Acas. Once the EC request was submitted to Acas, we intended that there should be a two stage contact process. The first stage would involve an Early Conciliation Support Officer (ECSO) contacting the claimant to confirm basic information about the claim and briefly setting out the next stage of the process, while the second stage contact would be by a conciliator who would formally establish whether the prospective claimant wanted to engage in EC with a view to settling the dispute.

Summary of responses

25. 47 respondents answered this question. Of those who responded, 70% wholly or partially supported the approach while 30% thought that it was unnecessary.

26. A number of those who disagreed with the ECSO model did so on the grounds that this was an unnecessary step in the process, and one that could lead to confusion or frustration for prospective claimants. Concerns were expressed that the prospective claimant would naturally want to go into detail about their case on the first call and that having to repeat what they have said to a conciliator, rather than receiving immediate advice and support, may result in them not engaging in the process. It was suggested that the information it was envisaged the ECSO would obtain could be requested on the form and that the initial call could then be made by the conciliator who would handle the case, giving the prospective claimant only one point of contact within Acas. This would allow the conciliator and individual to establish a good rapport from the outset and might lead to better outcomes.

27. Other concerns about the proposed two-stage approach centred on the cost to Acas of recruiting and training ECSOs when there were already experienced conciliation officers within the organisation, and whether the use of ECSOs, who would be less skilled at dealing with potentially challenging conversations, might result in fewer prospective claimants accepting EC.

28. Those who supported the proposed approach, either wholly or partially included the majority of trade unions and staff association groups. They supported the Government's view that the ECSO model would provide for conciliator time to be used more efficiently; rather than spending time on confirming basic information, they could instead focus on supporting parties to settle the dispute.

29. However, an issue raised across a number of respondent groups was the need to clearly define the role of the ECSO. A number of respondents, particularly trade union and legal representatives, were concerned that ECSOs should not discuss details about qualifying periods, merits of the claim or any other jurisdictional issues, focussing instead on providing the prospective claimant with information on the purpose of EC, particularly that it was a voluntary process and refusal would not have an impact on any subsequent ET claim, establishing whether they had representation and confirming suitable contact times.

30. Trade Unions, in particular, commented that EC would become the "gateway" to the employment tribunal and that it was therefore incumbent on Acas to ensure that their communications with prospective claimants did not have the effect of deterring or discouraging ET claims. The TUC expressed concern at Government's assessment that a proportion of claimants could be expected not to pursue their claim any further following a conversation with an ECSO and said that "*such an outcome would demonstrate a serious failing in the early conciliation process*".

Government Response

Government has considered the various responses received to this question. Although the majority of those who submitted a response supported the use of ECSOs either in whole or partially, it was the findings of an Acas pilot, using the ECSO model as part of their existing PCC service, that persuaded us that we should adopt such an approach.[3] In their pilot, the ECSO generally adopted a four-stage process – clarification (explaining that they were not the conciliator, to manage expectations about what could be achieved during the call); understanding, expanding and filtering (understanding the case and the claimant's situation, needs and intentions with a view to whether PCC was still the appropriate course of action); checking and gathering information (contact details etc); and preparation (getting relevant information together before the call with the conciliator). Acas concluded that the ECSO model added value in EC. The role performed by an ESCO allows the conciliator to have a shorter, more focused conversation with the prospective claimant because he or she is better prepared. The ECSO is also able to make the claimant aware of the basis on which tribunals assess eligibility so that claimants can assess their position for themselves. This provision of information will not be a form of early neutral evaluation and like conciliators, they will have no judicial powers.

31. Government does not accept the assertion that EC will become a gateway to the ET. Procedurally, although the prospective claimant will be required to satisfy the tribunal that they have complied with their obligation to contact Acas (where such an obligation exists), as we have already made clear, they will be able to decline the offer of EC if they so wish and proceed straight to tribunal. The tribunal will have no regard to whether or not they, or the prospective respondent, declined EC when considering any claim.

32. We recognise, however, that there is a need to ensure that, in practice, the introduction of EC does not act as a disincentive for prospective claimants to seek to address a potential breach of their rights. We have made the EC request form simple to complete and, although some respondents said that it ought to be possible to request at least some of the information we propose the ECSO should obtain on the form, we believe that this would run counter to our commitment to keep the form simple. In addition, we will work with Acas to make sure that there is clear guidance available to prospective claimants on EC, its operation and benefits etc so that individuals are clear what is expected of them.

33. Nor do we agree that a decision by prospective claimants not to pursue an ET claim following a conversation with an ECSO would constitute a "serious failing" in the EC process. There will inevitably be cases where the prospective claimant decides that they do not wish to pursue the matter, either because they have a better understanding of the ET system and what it can deliver by way of remedy, or because they realise that they do not have a claim. This does not constitute failure of EC but rather success, with better-informed individuals with more realistic expectations.

[3] Soon to be published on the Acas wesbite

34. That said, we recognise the concerns expressed by a number of respondents as to the precise role of the ECSO. It is our intention that, in addition to obtaining information on whether the prospective respondent is insolvent, preferred times for conciliator contact etc, the ECSO will provide prospective claimants with information on what the law says for example with regard to qualification periods or limitation periods, and the claimant can use this information to decide how to proceed. We agree however that it is not for them, or a conciliator for that matter, to offer an opinion on the merits of any prospective claim. It will be part of the ESCO role to ensure that the prospective claimant understands that only the tribunal can adjudicate on ET claims, including whether a claim is late or whether the qualification requirements are satisfied.

Q4: Views on what would be regarded as "reasonable attempts" by Acas to contact prospective claimants

35. Section 3 also set out our proposals for first-stage contact, following receipt of the EC request form. In general, we envisage that the initial call to the prospective claimant will be made by close of business on the day following receipt of the EC form. For prospective claimants who are difficult to contact, Government believes that while the ECSO should make further reasonable attempts to make contact, this should not continue indefinitely and that there must come a point at which Acas should close the case by issuing the EC certificate. We sought the views of respondents on what might be regarded as "reasonable attempts".

Summary of responses

36. While some of the 51 respondents who offered a view expressly agreed that attempts to make first-stage contact should not continue indefinitely, there were a wide range of opinions as to what could be regarded as "reasonable", with suggestions ranging from *"a single approach on the same occasion using two alternative means of communication"*, to any number of attempts throughout the one month EC period. Most, however, seemed to consider that a number of attempts, by different methods and/or at different times over 1-2 weeks would be appropriate.

37. 29% (15) of respondents, including those from business, trade union and legal backgrounds, some of whom had suggested what might constitute reasonable attempts, felt that it should be left to the ECSO's discretion to decide what was reasonable rather than for Government to try and be prescriptive. Acas themselves felt that it would be *"unhelpful to place restrictions on [their] judgement prior to the start of the service….it would be more appropriate to allow [them] to develop operational guidance on matters such as this. This would allow [them] to review quickly and to make appropriate adjustments in the light of experience"*.

Government Response

38. Government remains of the view that the introduction of EC should not become a de facto increase to the limitation periods and that, to prevent this, it will be necessary for Acas to terminate the EC process where it is clear that contact with the prospective claimant is unlikely. We recognise however, that there are inherent difficulties in attempting to prescribe when such a decision should be taken, not least the lack of flexibility to adapt the process as its operation evolves.

39. We therefore agree that the decision about when to terminate the process should be left to the ECSO's discretion at this stage. We will work with Acas to ensure that clear guidance is provided to staff about how, and how often, attempts should be made to contact the prospective claimant before concluding that there is no reasonable prospect of EC being successful. That guidance will help to ensure consistency in case management between ECSOs, and will take into account the views expressed by respondents to this question.

Q5: Whether it is appropriate for the same constraints to be applied to prospective respondents

40. Section 3 went on to outline our proposals for second stage contact, including contacting the prospective respondent where the prospective claimant has agreed to the offer of EC.

Summary of responses

41. Of the 46 respondents who offered views, half felt it was appropriate to apply the same constraints to contacting prospective respondents as prospective claimants, while a further 33% considered that contact should be a matter of discretion for the ECSO.

42. There was a difference in opinion amongst those respondents who favoured an alternative approach for contacting prospective respondents, with one arguing that less latitude should be applied to prospective respondents as *"they are in a much better position to be available to respond"*, while another argued that no constraints should apply, suggesting *"it would be better to give the full month, if necessary, to attempt contact with the [prospective] respondent"* rather than deny them the opportunity to participate in EC because of problems getting hold of the relevant organisation (whether because they were absent, or difficult to identify).

Government Response

43. Government considers that, for the same reasons as those relating to contact with prospective claimants, this should be a matter of Acas discretion.

Q6: Detail on Acas contact with prospective respondents

44. Section 4 set out Government's proposals for contact with prospective respondents. Clearly, where the prospective claimant agrees to the offer of Early Conciliation, the next stage will be for the conciliator to make contact with the prospective respondent to establish whether they, too, are willing to engage in EC. However, where the prospective claimant declines to participate in EC, then we considered that there should be no contact with the prospective respondent for a number of reasons: that a number of prospective claimants who contact Acas will not go on to present a claim to the tribunal and, in such cases, any contact with the prospective respondent may result in them incurring unnecessary cost (whether for legal advice or other activities); and that some prospective claimants may be dissuaded from contacting Acas because of concerns that the conciliator may contact their (ex) employer.

Summary of responses

45. Of the 80% (44) of respondents that provided a view on this issue, four responses (9%) were not relevant to the question, while two (5%) were partially supportive. Of the remaining respondents, 18% disagreed with the Government's proposal.

46. While Acas believed that, in the large majority of cases the prospective claimant would be agreeable to Acas engaging with the prospective respondent to explore the scope for settlement, they argued that EC was the start of the process of enforcing rights and it was an inevitable part of such a process that the respondent would eventually find out that action was being taken against them. This view was shared by other respondents, who felt that prospective claimants would not be deterred from contacting Acas for fear their employer would be informed. They argued that prospective claimants approaching Acas would be considering issuing formal legal proceedings against their employer, and would therefore have an expectation that their employer would be notified of their claim if they were to proceed – it was unlikely that most would distinguish, when contemplating a possible claim, whether that was likely to occur sooner or later.

47. Although Acas recognised the argument that making contact with an employer may entail them undertaking unnecessary preparatory work or appointing a representative for a tribunal claim that may never be made, they noted that a common complaint from employers has been that they were often not aware that an employee held a grievance against them until an ET1 arrived in the post. This concern was echoed by other respondents, who said that employers would want to be put on notice that there was an issue at an early stage. One respondent, however, was less tolerant of Government's concern that an employer who, on being informed of a referral to Acas, might seek professional advice unnecessarily, arguing that *"It is a matter for the prospective respondent to decide whether and if they wish to incur the costs of seeking legal advice and the belief that they may do so should not be a reason for failing to contact them".*

48. However, 68% of respondents, including the majority of business and business representative organisation respondents, as well as all the respondents in the Legal Representative category, agreed with the proposal. Like Acas, the CBI were of the view that such a situation was unlikely to arise very often but felt that, where it did, it was most likely that the prospective claimant was either unsure about bringing a claim or was determined to have their day in court. They commented that *"if it was the former situation, notifying the employer of the contact could cause them to take steps that would incur expense despite there being a good chance that no claim will be initiated, or their taking action could re-open a dispute which the prospective claimant had thought better of. In the latter situation it is unclear what is to be gained by notifying the employer as if the claimant is determined to have their day in court and has no interest in settlement then there is little prospect that the employer will be able to prevent them from doing so."*

49. Aside from concerns over breach of confidentiality and the potential that individuals may be deterred from contacting Acas in the first place if they believed conciliators would speak to their employers without their consent, a number of respondents raised concerns that contact with an employer might risk making the individual vulnerable to victimisation or harassment where they were still in employment, or might have an effect on their ability to secure a reference where that employment has ended. Indeed, one respondent observed that the fear of suffering detriment might itself prevent a prospective claimant still in employment from contacting Acas. Concerns about detriment were not confined to those who supported the Government's proposal; two respondents who disagreed with the proposal commented that it would be important to ensure that employees were protected against victimisation for having raised a request for EC "*and legislation should be in place to ensure this was the case*".

Government response

50. While some respondents disagreed with our concern that the fear that a conciliator might contact their employer without their knowledge or agreement might dissuade some claimants from contacting Acas in the first place, others expressly supported our view. A number of respondents went further and raised the issue of prospective claimants potentially suffering detriment if their employer became aware they had even contemplated an employment tribunal claim.

51. While some respondents argued that employers should be made aware of a potential ET claim against them, with one respondent arguing that it was a matter for each employer to decide whether or not they wanted to incur legal costs rather than for Government to try and takes steps to address this, we note that the majority of business respondents shared the Government's view that there was little to be gained by having early notice of a potential claim and that the risk was that some businesses may incur what could prove to be unnecessary costs, particularly in respect of legal advice, as a consequence.

52. Government shares the view of Acas that EC will be declined only in a minority of cases; we believe that, once the conciliator has explained the benefits of EC, prospective claimants will be content for the conciliator to contact their employer. However, where prospective claimants are unsure whether, or decline, to participate in EC, we remain of the view that it is not appropriate for Acas to make contact with the prospective respondent without their express consent.

Q7: Any other information that should be included on EC certificate

53. Section 5 set out how and in what circumstances the Government intends that an EC certificate (Annex 2) should be issued, and invited comments on whether there was any other information, beyond the names of the claimant and respondent(s), dates on which the EC request form and Certificate were received and issued by Acas, and a reference, that should be included.

Summary of responses

54. While some of the 32 respondents who offered comments on this question agreed that there should be minimal information on the certificate, a number of trade union respondents suggested that it should contain wording to the effect that it is an important document that should be kept safe, while a number of legal respondents called for the certificate to include an explanation of how "stop-the-clock" works, perhaps by way of a worked example.

55. Other respondents called for the certificate to include an indication of the circumstances in which the certificate had been issued (eg who initiated the EC request, and at what stage the certificate was issued – pre or post contact with either party), the reasons why EC was "not feasible", details of the claims that were subject to EC, and what the prospective claimant is seeking as an outcome.

56. Some respondents also questioned the need for a certificate to be issued when a COT3 settlement had been agreed between the parties, arguing that issuing a certificate in such circumstances was not consistent with the drafting of the primary legislation and that it might make the prospective claimant think that they could bring a claim despite the fact that the COT3 will state that they cannot, leading to confusion. One respondent suggested that an alternative approach would be to make provision for a different type of certificate to be issued in such cases.

Government response

57. Government agrees that it would be helpful to indicate on the certificate the importance of keeping the document safe, and will set out in accompanying guidance the relevance of the certificate for any further ET claim, including the need to include the reference number on the ET1. Where a prospective claimant is unable to locate their certificate, they will be able to contact Acas to obtain their reference number in the event that they wish to submit a tribunal claim.

58. While we recognise that the "stop-the-clock" provisions may be difficult for some prospective claimants to understand, we do not consider that it is appropriate to include information on this on the certificate. We will, however, ensure that an explanation of how the provisions work is clearly set out in EC guidance.

59. Nor do we consider it is appropriate for the certificate to contain any details about whether and how EC was commenced or concluded; as we have made clear, while the requirement to contact Acas is mandatory for most prospective claimants, the decision as to whether to accept the offer of EC is voluntary for both parties. And, importantly, the tribunal will have no regard to whether either party declined the offer of EC, or whether and why EC was unsuccessful. As such, there is no need for the certificate to contain the information suggested.

60. We have already set out above our intention that the EC form should not contain details of the elements of the prospective claim, and we therefore do not propose that there should be any such information on the certificate. Prospective claimants will be able to rely on the certificate to lodge proceedings about any alleged breach of their rights, whether or not these were matters that were discussed with Acas and, where there was contact, with the prospective respondent. EC is intended to offer parties an opportunity to settle a dispute without the need to go to tribunal, it is not intended to act as a barrier to judicial determination. And we are conscious of the need to ensure that we do not disadvantage prospective claimants who do not realise the extent of their claim at the EC stage, as well as the need to avoid satellite litigation on whether or not a matter was raised with Acas and therefore able to be accepted by the tribunal. The ET Presidents are supportive of this approach.

61. Government has considered the comments made about issuing a certificate where there has been a COT3 agreement, and we agree that issuing a certificate where the dispute has been settled in its entirety would be inconsistent with the primary legislation. Our intention in providing for a certificate to be issued in such circumstances was to allow the prospective claimant to lodge proceedings in the Employment Tribunal where the terms of the COT3 are not subsequently complied with by the prospective respondent. However, where that is the case, the simplest option for the claimant would be to seek to enforce the COT3 through the county courts (and the ET Fastrack scheme apply to COT3 settlements as well as for ET awards).

62. However, in the event that the COT3 does not settle all the elements of the dispute, the prospective claimant will have the right to bring a claim on outstanding matters and, where they choose to do so, will need to be able to demonstrate to the tribunal that they have met their EC obligations. In these cases, Acas will issue a certificate.

Q8: Views on proposed approach for handling prospective respondent EC requests.

63. Section 6 set out the Government proposals for handling requests for EC from prospective respondents who considered there was a matter that might give rise to tribunal proceedings if not settled.

Summary of responses

64. Although a number of respondents commented that there were likely to be few such requests as employers would seek to resolve the matter via internal discipline and grievance procedures or settlement agreement rather than pre-empt a claim by requesting EC, the majority of those who offered a view were broadly supportive of the principle that prospective respondents should be able to request EC.

65. Concerns were, however, raised on a number of points, most notably with regard to the fact that prospective respondent requests would not "stop-the-clock". Employee-representative respondents, together with some legal respondents, argued that the different approach would cause confusion for claimants, who *"are unlikely to possess significant knowledge to differentiate between the two types of EC"* and who may therefore mistakenly presume that they have at least a month to submit their claim after receiving the EC Certificate. They called on Government to rethink its approach or, at the very least, to ensure that Acas informed prospective claimants in writing that the time limit had not been frozen.

66. Some respondents also wanted the Acas conciliator to make it clear to prospective respondents that EC is voluntary and that prospective claimants could not be pressured into agreeing to it. One respondent to the consultation, however, argued that where a prospective claimant declined a respondent-requested EC, or where the conciliation had failed, they should then be barred from contacting Acas themselves for EC as it would not be *"appropriate for the prospective respondent to potentially have to go through two attempts at settlement when one has already failed…"*.

67. Other respondents held the view that prospective respondent requests should only be made by form, in the same way as those by prospective claimants. One respondent sought clarity as to whether EC requests could be made in respect of ex-employees, while another questioned whether requests could be made via the prospective respondent's representative.

Government Response

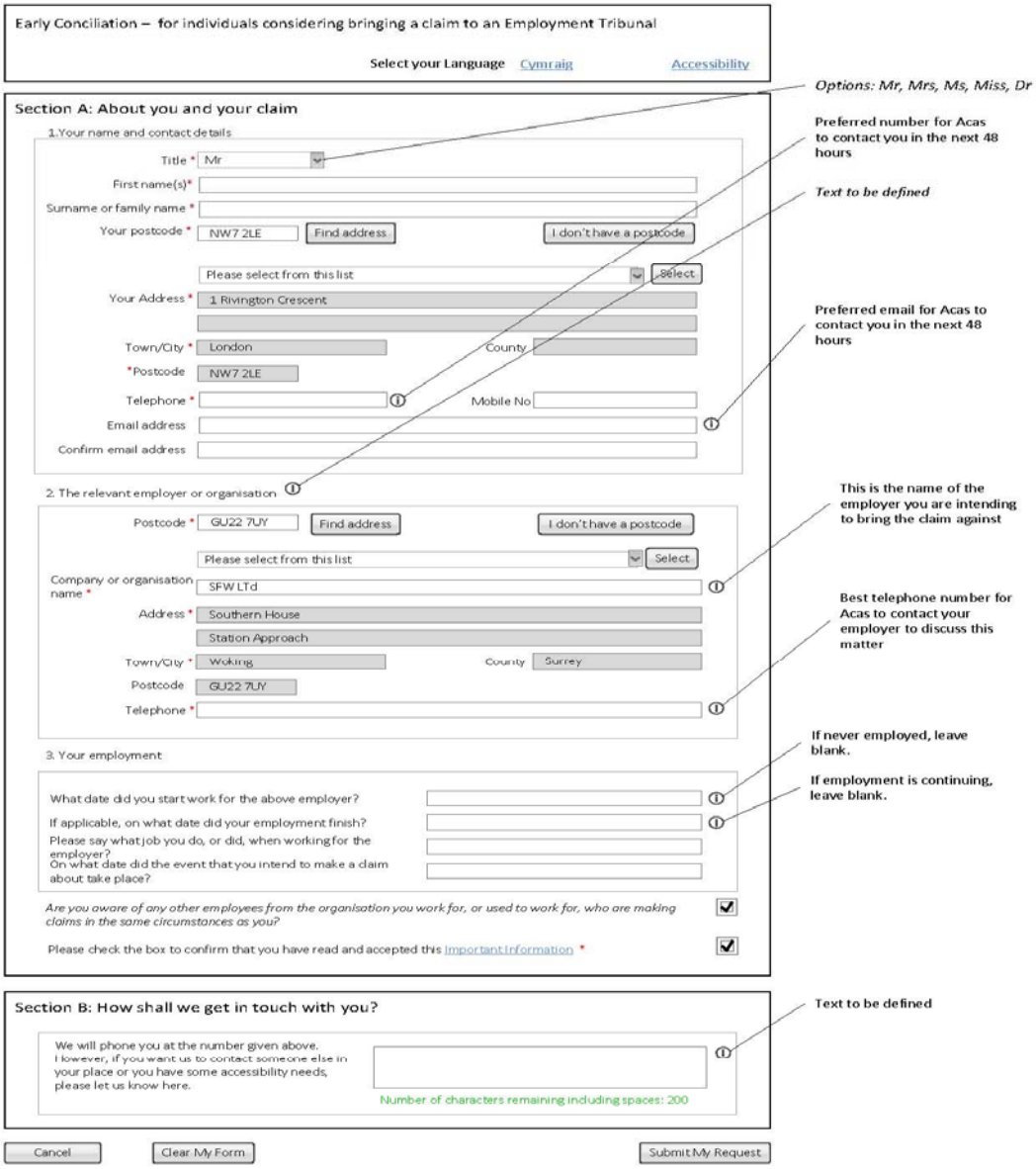
68. Government agrees that there are likely to be relatively few respondent requests for EC but, as the PCC demonstrates, there are circumstances in which employers may want to settle potential claims before the matter escalates. We therefore consider it appropriate to continue to make such provision for those employers who may wish to use it.

69. We acknowledge, however, that having different provisions in respect of expiry of the limitation period has the potential to cause confusion for prospective claimants. We do not intend to change the current proposals so that prospective respondent requests "stop-the-clock" because this provision can only be applied once, and it has to be provided to the claimant, who has the responsibility of meeting the limitation period for bringing a claim to tribunal. However, when speaking to the prospective claimant, the Acas conciliator can make them aware that, in order to benefit for the stop-the-clock provisions, they would need to submit their own request for EC. In addition to ensuring that this point is clearly explained in EC guidance, where EC has been triggered by the respective respondent, Acas will also, as suggested by respondents to the consultation, advise prospective claimants in writing that there has been no suspension of the expiry of the limitation period.

70. We will also ask Acas conciliators to make it clear to prospective respondents that EC is voluntary for both parties and that prospective claimants have the right to decline to participate if they so wish. We do not, however, intend that any prospective claimant who declines an offer of EC made as a result of a prospective respondent request should then be barred from contacting Acas. If on reflection a prospective claimant decides that they wish to attempt settlement, and the respondent agrees, then is clearly in the interests of all parties for Government to offer what support it can. And, as we have made clear, any claimant who wishes to benefit from the stop-the-clock provisions will be able to submit their own EC request.

71. Prospective respondent requests for EC will be accepted whether made by the respondent themselves or by their representative, and can be in respect of either a current or ex-employee. A draft respondent request form is attached at Annex B for information.

Annex 1: Draft Early Conciliation Request Form



Annex 2: Draft Early Conciliation Certificate

Acas logo

EARLY CONCILIATION CERTIFICATE

- Employment Tribunals Act s18A

Acas EC Reference Number xxxxxxxxxxxx/xxxx

Prospective Claimant

Name

Address

(second and subsequent names/addresses appended at Annex 1)*

* *delete if single case*

Prospective Respondent ***(potentially multiple Rs)***

Name[4]

Address

Date of receipt by Acas of the EC form xx/xx/xxxx

Date of issue by Acas of this Certificate xx/xx/xxxx

Method of issue - e mail/post* (* delete as appropriate)

This Certificate is to confirm that the prospective claimant has complied with the requirement under ETA s18A to contact Acas before instituting proceedings in the Employment Tribunal.

Please keep this Certificate securely as you will need to quote the reference number in any Employment Tribunal application concerning this matter.

Conciliator

[4] A certificate is also released under Section 18B of the Employment Tribunals Act when a prospective employer contacts Acas about a matter in dispute which is likely, if not settled, to give rise to formal proceedings in the Employment Tribunal EC, or a prospective claimant, exempt from the requirement to contact Acas about a dispute as per ETA s18A, contacts Acas about a dispute which is likely, if not settled, to give rise to formal proceedings in the Employment Tribunal.

Draft covering note to accompany certificate

Subject Box – Acas Early Conciliation – Certificate – Ref xxxxxxx

It is a legal requirement that a prospective claimant, before lodging a claim on an ET1 with the Employment Tribunal, notifies Acas of their intention to do so, unless exempt under the Employment Tribunals Act s18A(7). That notification triggers Acas to endeavour to promote a voluntary settlement in the matter as per www.acas.org.uk/ECexplained.

At the conclusion of all cases of Early Conciliation, except where a settlement has been reached through Acas conciliation and recorded on form COT3, Acas issues a Certificate to the prospective claimant and, if there has been contact, to the prospective respondent(s) to confirm that the obligation to notify Acas has been complied with. It is this Certificate that accompanies this e mail/letter*. (* *delete as appropriate*)

It is not an obligation to make a Tribunal claim once in possession of a Certificate, but if a claim is made the prospective claimant must quote the Acas reference number given on the Certificate on the ET1. Please note, it is the claimant's responsibility, **not** Acas', to ensure that the ET1 lodged is submitted on time.

Acas has issued this Certificate to confirm that the prospective claimant has complied with the requirement to notify us of their intention to make a claim. The Certificate does not indicate that Acas has taken any view on the relative merits of the matters in dispute. An Acas conciliator can discuss the strengths and weaknesses of prospective claims but cannot know what the outcome of tribunal proceedings will be if a claim is made.

If a claim is made to Employment Tribunal, and where there is a statutory duty to conciliate in the matters in dispute, Acas will again offer the chance to explore settlement, again without taking sides.

For more information about post ET1 Acas conciliation – see www.acas.org.uk/cot5

Conciliator

Annex 3: List of Organisations consulted

ACAS
ASCL
Birmingham Law Society
British Retail Consortium
CAB
CBI
Centre for Effective Dispute Resolution (CEDR)
CIPD
CMC
CMP Resolutions
CWU
EEF
Electrical Contractors' Association
Employment Lawyers Association
Employment Tribunals Scotland
Exchange head office
Federation of Clinical Scientists (the TU arm of the Association for Clinical Biochemistry)
Forum of Private Business
FRU
FSB
GMB
IoD
John Stamford + Associates Ltd.
John Turner
Joint Industry Board for the Electrical Contracting Industry (JIB)
Law Society
Lewis Silkin LLP
Nationwide Building Society
NUJ
PCAW
PCS Acas Branch
PCS Union
Peninsula Business Services Ltd
Road Haulage Association
Royal College of Midwives
Scottish and Northern Ireland Plumbing Employers' Federation (SNIPEF)
Simmons & Simmons LLP
STUC
The Shield Guarding Co Ltd
Thompson's Solicitors
Trade Union or Staff Assoc
Transport for London
Travers Smith LLP
TUC
UNISON

USDAW
Weightmans LLP
Welsh Government
West Yorkshire Police
Workable Management Solutions Ltd
Zurich Insurance Plc

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