Institute of Employment Rights

Enterprise and Regulatory Reform Act – Impact and Effects

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Early Conciliation: An Opportunity or a Threat!

Introduction

When considering the question of whether early conciliation is an opportunity or a threat it is important to first consider another question, 'What is the purpose of conciliation?' This is the starting point.

Prior to early conciliation there were the Statute Dispute Resolution procedures which proved to be a disaster for workers. The number of Employment Tribunal claims increased but not necessarily for the benefit of workers since there was a large body of satellite litigation which made determinations about whether or not the complex statutory procedures had been complied with. Not surprisingly, there was a review. The Gibbon's Review found that prescriptive legislation was unsuccessful and simpler and more flexible procedures should be introduced. As a consequence, the Statutory Dispute Resolution procedures were repealed and a new, less formal, approach was adopted.

The ACAS Disciplinary and Code of Practice was redrafted and came into force in April 2009. Although the code set out a 3 step process, which to a large extent mirrored the Statutory Dispute Resolution procedures, the Code reflected fair procedures that the employer would be expected to follow in a claim for unfair dismissal. There remains a risk for employers who fail to comply with the procedures, since where a claim for unfair dismissal is successful an Employment Tribunal can increase any compensatory award by up to 25%.

At the same time, the new ACAS Pre Claim Conciliation (not to be confused with the new Early Conciliation) was launched. This provided a service mainly to employees to contact ACAS through the helpline. There were some requirements before the Pre Claim Conciliation could be offered. These were:

(i) That the employer and employee have already made reasonable efforts to resolve the issue;
(ii) Eligibility criteria to make a valid Employment Tribunal claim are met, for example, the employee must meet any necessary service qualification; and
(iii) There must be an intention to claim.

The stated objectives of Pre Claim Conciliation was to:

(1) Encourage earlier and speedier resolution of disputes with positive employment relations outcomes;
(2) Reduce the administrative burden of conflict and reduce time and cost savings for employers, employees and the state; and
(3) Ensure a positive customer experience.

A number of surveys which considered the effectiveness of Pre Claim Conciliation followed[1]. Both of these concluded that Pre Claim Conciliation was a success. This was measured in terms of the effect it had on reducing Employment Tribunal claims. This was notwithstanding the fact that in both research reports one of the key barriers to success was found to be the failure of employers to engage with the process. In particular, the research reported that employers believe that they acted fairly and did not have a case to answer.

It is not, therefore, surprising that by the time of the Government's consultation on Resolving Workplace Disputes in January 2011 early conciliation as a means of resolving disputes was set out.

In particular, the Coalition Government, through the consultation, said it was seeking views on measures to:

- Achieve more early resolution of workplace disputes so that parties can resolve their own problems in a way that is fair and equitable for both sides without having to go to an Employment Tribunal;
- Ensure that where parties do need to come to an Employment Tribunal, the process is as swift, user friendly and effective as possible; and
- Help businesses feel more confident about hiring people.

In the same document, the Government said that it believed that more disputes would be resolved at an early stage if employers had clear HR procedures. In particular, it said:

> "*if an employer has reasonable procedures and these are followed, there is every chance that fewer disputes will arise in the first place and, therefore, that fewer employees will reach the point where they contemplate embarking on the ET process*".

Early conciliation as a means of resolving disputes in the workplace fairly and equitably, is something the Unions could hardly disagree with - that is what Unions do on a daily basis when resolving members' issues, be they formal or informal grievances. The aim being to achieve a fair workplace resolution for both sides.

Let's face it, those of us who have been to tribunal know it's not a pleasant experience and that while justice may be seen to be done, often members go away with the short sharp realisation that justice has not been done.

It is in that vein, that UNISON took up the mantle of early conciliation as a genuine opportunity to resolve workers disputes, where they should be resolved in the workplace with the help and support of the Union representatives.

[1] Dispute Resolution Regulations two years on: the ACAS experience – ACAS Research Paper – Davey, B, Dix, G (2011) and Evaluation of ACAS Pre Claim Conciliation Service TNS BRMRB (2013)

Thompsons, with UNISON, worked together on a pilot project involving ACAS in an attempt to encourage those employers with whom the Union had good relations to seek a swift resolution to workplace disputes.

Branches and Regional Organisers embraced the project.

But, what about the employers? Remember these are the "good" employers – well, they didn't. Hardly a good start to the beginnings of a model of workplace dispute resolution which is fair and equitable for both sides.

So why was this?

The Ministry of Justice launched its own consultation on fees at around the same time[2], but if you remember the consultation was not about whether fees should be introduced but rather the focus was on how much the fee should be and when it should be paid.

With the prospect of workers having to pay a fee in order to lodge a claim in the tribunal it's no - wonder – even the good employers were not interested in early conciliation.

Furthermore, the consultation on fees showed employers true colours - or was it perhaps a perpetuation of Government ideology - that what drives employers to seek a resolution of workplace disputes is not a genuine desire to resolve matters but a desire to avoid having a tribunal claim brought against them in the (mistaken) belief that tribunal claims are a burden on business. Even the Government's own research[3] acknowledged that the proportion of employers who have experienced a tribunal could be no more than 20%. Further research by Keith Ewing and John Hendy[4] showed that only 5% of claims for unfair dismissal resulted in employers being ordered to pay an award.

So having been presented by the Government as an opportunity to resolve workplace disputes, in a way that is fair and equitable to both sides has early conciliation turned out to be just another hurdle in the tribunal claim process or worse, a threat to dispute resolution by seeking to undermine the role of the Union and the ability to seek a collective resolution to disputes in the workplace?

We can answer this question by having a look at what early conciliation looks like.

What is Early Conciliation?

From the 6th May 2014, anyone who wishes to bring a claim in the Employment Tribunal cannot do so unless they contact ACAS and have been issued with a certificate and a unique reference number.

[2] Ministry of Justice: Charging Fees in Employment Tribunals and the Employment Appeal Tribunals. December 2011 to March 2012
[3] Employment Regulations Part A : Employer perceptions and the impact of employment regulations made 2013
[4] Unfair Dismissal Law – changes unfair? ILJ 41, 1, 115 – 121

It is a mandatory requirement to contact ACAS before a legal claim can be brought. So we can see that Early Conciliation is very different from the voluntary Pre-Claim Conciliation which had been championed following the disastrous statutory dispute resolution procedures. Indeed, early conciliation applies to nearly all Employment Tribunal claims with the exception of a few including applications for interim relief, employer contract claims and claims against the Security Service such as GCHQ.

So how does Early Conciliation Work in Practice?

Essentially there are 3 steps:

(1) The first step, which is mandatory, is that the employee, known in the early conciliation process as the' prospective Claimant', contacts ACAS by completing the Early Conciliation Notification Form (ECNF) online or by telephoning ACAS;
(2) ACAS then checks the details with the prospective Claimant, including clarifying the issues and confirming if she/he is happy for ACAS to contact the employer to see if a settlement can be reached. If the form is completed online ACAS will contact the employee within 2 days of the form being completed and received by ACAS.
(3) ACAS then contacts the employer and has a month to conciliate.

If no agreement has been reached at the end of the process, ACAS will issue a certificate with a unique reference number. If the matter then proceeds to the Employment Tribunal the unique reference number must be quoted on the Employment Tribunal Claim Form.

On the face of it the process is not objectionable. However, all is not as it seems:

(1) First, there is the form:

But what's in a form?

The Early Conciliation Notification Form is pretty basic.

In fact, the only details which need to be completed are the prospective Claimant's contact details – name, address, contact telephone numbers, email, etc, and basic employment details – dates of employment, job and date of the event which could lead to a tribunal claim. The employer's contact details must also be completed.

On the one hand the fact that the form is so basic means that there is little scope for further litigation arising from disputes between what is put on the Early Conciliation Notification Form and what is subsequently put on the Employment Tribunal Claim Form and so avoiding the problems that had resulted in litigation under the Statutory Dispute Resolution Procedures. On the other hand, with so little information it's hard to see how employers will be persuaded to resolve the matter.

Having said this, there are likely to be problems. As the ACAS Guidance points out, it is important that the employer's details are correct. If the name of the employer on the Early Conciliation Notification Form and the subsequent Employment Tribunal claim are different then this could lead to a claim being struck out.

Further potential issues arise if the employer is insolvent and there is more than one potential Respondent to a claim, such as in a claim for sexual harassment which can be brought against both the employer and the individual harasser. In the case of insolvency, it is best to ring ACAS who will advise how to proceed. But, in the case of a claim for sexual harassment, following an amendment to the Early Conciliation Exemption and Rules and Procedure Regulations, a separate Early Conciliation Form has to be completed for two Respondents – in this case the employer and the harasser. It will be rare that the prospective Claimant knows the harasser's personal address and we advise that they put the address as being as c/o the employer.

The other key issue is that if the prospective Claimant is being represented by her/his Union, there is no specific section on the form to record the Union representative's contact details. We advise the Union representative's contact details, telephone number, address, email, etc, should be put in the box which asks "How should we get in touch with you?"

Curiously, with the exception of multiple claims, ACAS will only contact the prospective Claimant in the first instance, even if the prospective Claimant has put the Union representative's details on the form. In fact, unlike voluntary Pre-Claim Conciliation ACAS positively discourages involvement of the Union at the outset, advising on its information page on the Intranet against Union reps submitting Early Conciliation Notification Forms on a member's behalf. Although, ACAS will speak to the Union representative once they have confirmed this with the prospective Claimant. So, it is important that the Union inform its members to speak to their Union representative before contacting ACAS under the Early Conciliation Scheme.

(2) Next

How do ACAS contact the prospective Claimant?

We have already seen that ACAS avoid contacting the Union rep in an individual case.

Once ACAS receives the form an acknowledgment is sent via email to the member. The email gives the prospective Claimant a case reference number and states that ACAS will contact them within the next 2 days. This gives the Union member time to contact the rep to make sure the Union rep will be available to talk to ACAS on their behalf.

This is important for 3 reasons:

i. Many employees will not have been in this position before and may be uncertain of dealing with ACAS on their own. Research from the experiences of Pre-Claim Early Conciliation showed that employees were less likely than employers to feel that ACAS was impartial; and

ii. Most employees will not necessarily be aware of any potential legal claim they may have. The Union representative, who is used to dealing with ACAS and will have more than likely represented the member in the internal disciplinary or grievance process, will often have a better idea of the potential tribunal claims.

iii. The early conciliation process is entirely voluntary. There is no obligation on the prospective Claimant to agree that ACAS contacts the employer. Likewise, there is no obligation on the employer to respond even if the prospective Claimant agrees that ACAS can contact the employer. Without some clear idea of the issues there is likely to be very little chance of any conciliation.

ACAS reported on its website on 6th May 2014 that 1,000 people had contacted them about early conciliation since it was launched on a transitional basis on 6th April. Although the site also reported that the first case was settled within 24 hours it's not clear what the settlement was, nor is it known what happened in the 4000 other cases.

As the Early Conciliation Notification Form contains very little information there is going to be very little prospect of reaching a settlement through early conciliation, unless the Union is involved setting out the case to ACAS.

(3) Finally, there is the impact on time limits for bringing a tribunal claim.

Ostensibly, as an incentive to encourage the parties to conciliate, the time limit for lodging a tribunal claim is extended to allow for the parties to negotiate a settlement without the prospect of a looming tribunal date. However, the extension is not a fixed period of time and depends on:

(1) When the Early Conciliation Form was received by ACAS (or completed over the telephone);
(2) When the Early Conciliation Certificate with the unique reference number was received by the prospective Claimant; and
(3) When normal limitation expires.

This is not straight forward. It is not simply that the time limit is extended by a month. The matter is further complicated where there are additional claims to be added say in a case of unfair dismissal which is then followed by a claim of victimisation or unlawful deduction from wages.

Certainly, there are traps for the unwary.

So where does that leave us?

Certainly, the Union has a key role to play in the resolution of work place disputes. Indeed, the 2011 Workplace Report shows that most Unions have been doing that for years. In the absence of an obligation on the parties to conciliate in a forum of what Bob Hepple[5] describes as "committed conciliation", it is hard to say what benefits there are for the worker of early conciliation other than the fact that the time limit for lodging a claim may be extended. The Government in its response to the consultation on Early Conciliation stated that it remained of the view that the introduction of Early Conciliation should not become a de facto increase to the limitations periods and that to prevent this it will be necessary for ACAS to terminate the Early Conciliation process.

Behind the rather benign 3 step process, lurks a threat. Early Conciliation has not been introduced with the purpose of resolving workplace disputes in mind, despite the rhetoric in the Government's Consultation that 'early conciliation would provide an opportunity to resolve matters in a way that is fair and equitable for both sides'. Furthermore, early conciliation is the last in a chain of reforms which limits the ability of workers who don't qualify for employment rights and who therefore are not able to access the conciliation service. In particular,

(i) The requirement to have 2 years' service in order to qualify for unfair dismissal which applies to those employed on or after the 6th April 2012 and means that fewer people will actually qualify to bring a claim for unfair dismissal. So they are not able to threaten Employment Tribunal claims and/or with that any kind of incentive for employers to resolve a workplace dispute, no matter how unfair;

(ii) The cap on the compensatory award for unfair dismissal is practically a green light to employers to offer little more than a commercial settlement in an attempt to under settle those claims where workers are not a member of the Union; and

(iii) The requirement to pay a fee firmly shifts the risk of litigation to the prospective Claimant while employers will wait and see whether or not workers will shut up or cough up the Employment Tribunal fee.

ACAS have argued that the effectiveness of conciliation whether before or after an Employment Tribunal claim rests in part on the fact that it is voluntary. Furthermore, (it is claimed) "If Early Conciliation were made mandatory it would undermine the conciliation process and the settlement of a claim".

But, having made it mandatory for a prospective Claimant to contact ACAS shouldn't there still be committed conciliation otherwise it is only when an Employment Tribunal claim is actually lodged that there any incentive to commence settlement negotiations. By having both a mandatory and voluntary element early conciliation is facing in two directions at the same time. In doing so at best, it only offers either a continuation of the discussion which the parties have already had during the grievance or disciplinary process and at worst is another barrier for workers to be able to access justice.

[5] See his article 'Back to the Future:Employment Law under the Coalition Government' Ind Law J(2013) 42(3): 203

No amount of early conciliation is going to persuade an employer who has already defaulted on paying £100 owed holiday pay or notice pay to conciliate when they know that a worker will have to pay £160 just to get what they are owed back. No amount of early conciliation is going to persuade a worker to pay out £160 before they can get the £100 holiday pay they are owed.

This reform, like all the other Employment Law Reforms, hit the lowest paid and the most vulnerable workers hardest.

The impact of fees shifts resolution of workplace disputes through early conciliation on settlement in monetary terms – termination payments. In doing so there is less focus on ensuring employers have reasonable procedures in place to prevent disputes arising in the first place and from seeking alternatives to dismissal. As a result, there is a risk that employers will rely on the recent MOJ's statistics which showed a reduction in employment tribunal claims of 79% as a reason not to review their practices and procedures and so condone bad practices in the workplace.

The only way of challenging bad practices is through the collective strength of the Union who can ensure that employers have clear HR procedures which are followed.