

# Review



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## MORE CHANGE FOR EMPLOYMENT TRIBUNAL CLAIMS COMPULSORY EARLY CONCILIATION

From 6 April 2014, there is a new mandatory duty on parties and ACAS to attempt Early Conciliation (EC) of employment disputes before a tribunal claim is issued. The period between 6 April 2014 and 5 May 2014 is a transitional period with the system becoming mandatory for all claims presented on or after 6 May 2014.

STATUTORY INSTRUMENTS

2014 No. 254

EMPLOYMENT TRIBUNALS

The Employment Tribunals (Early Conciliation: Exemptions and  
Rules of Procedure) Regulations 2014

Made

Laid before Parliament

11th February 2014

13th February 2014

14 March 2014

## Where to Find the New Law

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Section 7 of the Enterprise and Regulatory Reform Act 2013 (ERRA 2013) inserts new sections 18A and 18B into the Employment Tribunals Act 1996 (ETA 1996) requiring prospective claimants to contact ACAS before instituting proceedings. The ETA 1996 is supported by The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014, as amended by the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2014 'the EC Regulations' and The Early Conciliation Rules of Procedure 'the EC Rules' set out in the Schedule of the EC Regulations.

## Early Conciliation to Replace Pre-Claim Conciliation

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The duty on ACAS to provide EC stems from the success of the ACAS Pre-Claim Conciliation Service (PCC) which came into force in April 2009. The aim of the PCC was to resolve employment disputes before they reached the Employment Tribunal (ET). Employers and employees could telephone the ACAS Helpline seeking assistance if they thought they were to become involved in ET proceedings. If the relevant criteria were met and PCC was accepted by both the employer and the employee, a PCC trained conciliator would work with both parties to try and resolve the dispute and avoid the need for an ET claim.

## What the Government Says About Early Conciliation

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The Department for Business, Innovation and Skills says EC is to reduce the costs and risks of claims against employers which they say may prevent employers from taking on staff. The Government says it is also concerned about the stress and costs claimants face. The Government also wants to reduce the Exchequer's cost of running the ET system. The Government's main objective behind EC is to reduce the number of claims reaching the ET and to increase the number of potential claims reaching settlement. The Government also believes claimants in particular can be overconfident about the tribunal outcome and that EC will lower those expectations. Another rationale for the implementation of EC is that ACAS conciliators will be able provide parties with impartial advice and information about the tribunal process such as the calculation of awards and the length of time proceedings can take, which could help parties decide whether or not to pursue the matter through the ET. The Government hopes that EC will improve the overall satisfaction with the employment dispute resolution system.

## The Possible Downside of Early Conciliation

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It remains to be seen the extent to which employers will use EC to try to get rid of meritorious claims early and cheaply, or make no offer at all and see if the Claimant can afford the fee for making an Employment Tribunal claim rather than make early reasonable offers to settle. What is certain is that compulsory EC is another step a claimant has to take before lodging a tribunal claim and adds another layer of complication to calculating the correct time limit for lodging claims in the Tribunal (see below). This combined with the introduction of Employment Tribunal fees last summer will deter or prevent many claimants with meritorious claims receiving just compensation or being compensated at all. Already the Government's figures show a 79% drop in the number of Employment Tribunal claims lodged in the last quarter of 2013 compared with the same quarter of 2012.

Employees who are thinking of making a claim to the Employment Tribunal should contact their union representative or otherwise seek advice before applying for EC and speaking with ACAS.

## The Early Conciliation Four-Step Procedure

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Section 18(A) of the ETA 1996 introduces a four-step procedure which a prospective Claimant must follow before instituting proceedings in the ET:

**Step 1: Before a prospective claimant presents an application to the ET to institute 'relevant proceedings', the prospective claimant must send to ACAS prescribed information in the prescribed manner.**

Rule 1 of the EC Rules states that the prospective claimant will need to send a completed EC form to ACAS or contact ACAS by telephone. The form must be submitted online or sent to ACAS by post. Whichever method the prospective claimant decides to use, the prospective claimant must provide details of his/her name and address as well as the prospective respondent's name and address (Rules 2 and 3).

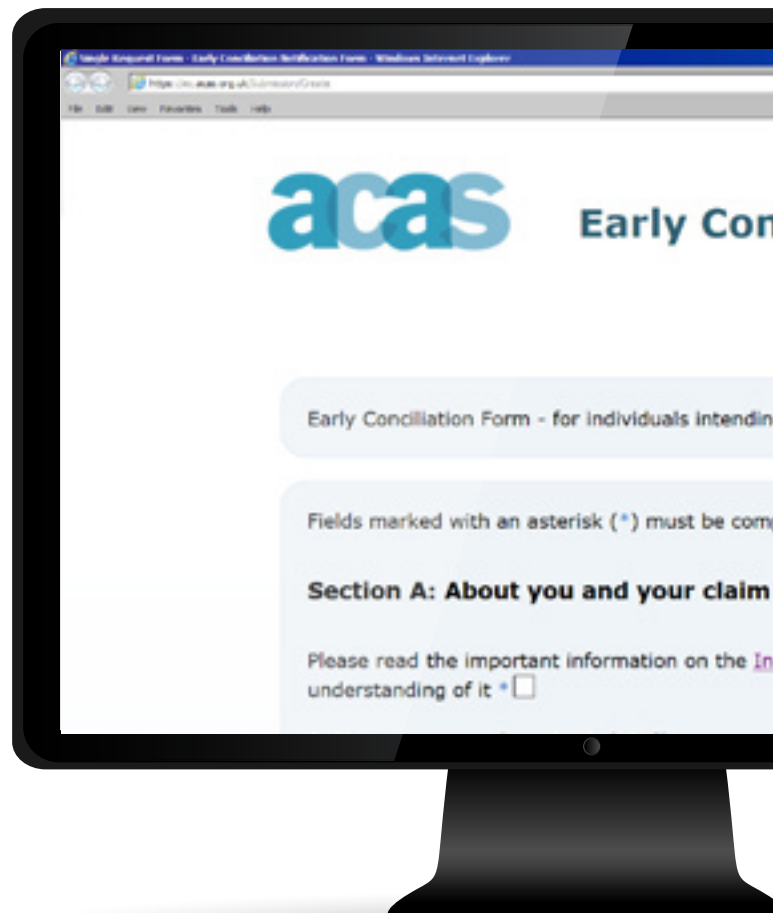
If there is more than one prospective respondent, the prospective claimant must present a separate early conciliation form in respect of each respondent or, in the case of a telephone application, must name each prospective respondent.

For EC forms submitted online, the date of receipt will be the date it is received by ACAS and an acknowledgement email will be sent to a prospective claimant. Hard copy EC forms received in the post will be date stamped on the date they are received by ACAS and an acknowledgment will be sent by post.

'Relevant proceedings' to which this applies are those proceedings listed in section 18(1) of the ETA 1996 covering the majority of ET claims including discrimination claims and equal pay claims.

Regulation 3 of the EC Regulations allows certain exemptions from the EC procedure. This is where:

- a) There is a group action and one of the claimants has already complied with the EC requirement;
  - b) The claimant is also instituting proceedings which are not 'relevant proceedings' on the same claim form;
  - c) The Respondent has contacted ACAS to conciliate the dispute;
  - d) An unfair dismissal claim is accompanied with an interim relief application (e.g. an application that the employee remain on full pay until the claim is concluded) supported by a certificate from the a trade union;
- and
- e) The claimant is instituting proceedings against the Security Service, the Secret Intelligence Service or the Government Communications Headquarters.



**Step 2: On receiving the proscribed information in the proscribed manner, ACAS shall provide a copy of it to a conciliation officer.**

ACAS shall provide the proscribed information to a conciliation officer.

**The prospective claimant will be contacted by an EC Support Officer (ECSCO) to establish whether the prospective claimant wishes to proceed with EC.** The purpose of this step is so that an ECSCO can check the information provided by the prospective claimant on the EC form and obtain basic information about the claim. The ECSCO will outline the conciliation process and also explain and discuss the claims the prospective Claimant is looking to pursue.

Rule 5 of the EC Regulations provides that ACAS must make 'reasonable attempts' to contact the prospective claimant. The ECSCO will make an initial telephone call to the prospective claimant by close of business on the day after the EC form is received. Having received consent from the prospective claimant, the ECSCO will then make reasonable attempts to contact the prospective respondent.

ACAS will use its discretion as to what it regards as 'reasonable attempts' rather than it considering a maximum number of attempts to make contact with the prospective claimant.

Where the ECSCO fails to make contact with the prospective claimant or the prospective respondent, ACAS must conclude that settlement is not possible. Where the prospective claimant refuses to engage in conciliation, the ECSCO will issue a certificate confirming that the prospective claimant has complied with their obligation to contact ACAS before instituting proceedings. The prospective claimant can then issue a claim at the ET.





**Step 3: The conciliation officer, during the prescribed period, must try to promote a settlement between the parties.**

Where the prospective claimant chooses to conciliate, the ECSO will pass the file to a conciliation officer (CO). The CO will confirm again with the prospective claimant that they want to engage in conciliation and then contact the prospective Respondent.

**Where both parties are in agreement to conciliate, the CO will have one calendar month to promote settlement between the parties starting from the date of receipt by ACAS of the EC form or the telephone contact from the prospective claimant to ACAS (Rule 6 of the EC Rules).**

Rules 6(2) and 6(3) allow a conciliator an extension of up to 14 days, provided that the prospective claimant and prospective respondent both consent, where there is a reasonable prospect of achieving a settlement before the expiry of the extended period.

Section 18(A)(9) of the ETA 1996 makes a specific provision that a CO can promote re-instatement or re-engagement on terms which appear to be equitable to a CO or promote a compensation payment in proposed unfair dismissal proceedings.

If the CO is unable to make contact with the prospective respondent or the prospective respondent refuses to take part in the EC, the CO will inform the prospective claimant and issue an EC certificate.



**Step 4: If a conciliation officer concludes that a settlement is not possible or the prescribed period expires without reaching a settlement, the conciliation officer will issue a certificate to that effect. The conciliation officer may continue to try to promote settlement after the expiry of the prescribed period.**

Rule 7 of the EC Rules provides that if at any point during the EC period, the CO concludes that settlement is not possible or the period expires without a settlement, ACAS must issue an EC certificate.

ACAS must send the EC certificate to the prospective claimant and the prospective respondent, if contact has been made with the prospective Respondent.

Rule 8 states that an EC certificate must contain the following information:

- a) The name and address of the prospective claimant;
- b) The name and address of the prospective respondent;
- c) The date ACAS received the EC form or the date the claimant telephoned ACAS;
- d) The unique reference number given by ACAS to the EC certificate; and
- e) The date of issue of the EC certificate which is the date ACAS send the certificate and a statement of the method by which the certificate is sent.

If settlement has been reached, parties should agree terms recorded in a COT3 agreement.

If the CO is unable to make contact with the prospective respondent or the prospective respondent refuses to take part in the EC, the CO will inform the prospective claimant and issue an EC certificate.

## When and How Early Conciliation Changes Time Limits

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Schedule 2 of ERA 2013 makes a number of amendments to various provisions in employment legislation in relation to extending the time limits for presenting claims at the ET during EC. The effects of these amendments are that whilst EC is taking place, it will 'stop the clock' beginning with the day the prospective claimant contacts ACAS and ending on the day when they receive the EC certificate from ACAS. This will allow conciliation to take place without the worry of the clock ticking on the limitation period.

Where the time limit for lodging an ET claim expires **before** the claimant applies for EC there will be **no** extension of time.

Where the ET time limit would expire **between the prospective claimant contacting ACAS and ending a month after the EC certificate is received from ACAS, the time limit will instead expire one month after the receipt of the EC certificate.**

Where the ET time limit would expire **after one month after the claimant applies for EC the ET time limit is extended by the period of EC** (of one month or, if extended 6 weeks).

Prospective claimants must keep in mind that if limitation has expired before EC has been initiated, then the claim will remain out of time for the purpose of EC and ET proceedings.



## Employers and EC

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Respondents will also have the opportunity to contact ACAS for EC to try and settle a matter which may go to an ET. The respondent will be required to contact ACAS, either online or by telephone. If EC is requested by an employer:

- **The ‘stop-the-clock’ limitation provision will not apply to any claim the prospective claimant might bring**
- EC will not need to take place within a specific timeframe
- The case will be referred to a CO rather than an ECSO

If the Claimant refuses to take part in EC or conciliation is not reached, the conciliator will issue an EC certificate to the prospective Claimant that the prospective Claimant has satisfied the obligation for EC indicating to the ET that there is no suspension of the limitation period to be taken into account.

## Early Conciliation Application Form and the New ET1 Claim Form

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**The EC form is available from the ACAS website at [https://ec.acas.org.uk/ Submission/Create](https://ec.acas.org.uk/Submission/Create)**

ACAS says it wants the form to contain minimum detail as their experience from the PCC service shows that they do not necessarily need written information to successfully resolve disputes.

The ET claim form (ET1) will be amended to include the EC reference number showing the ET that the prospective claimant has complied with EC.



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