Will new early conciliation rules be successful in promoting settlement between parties?

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Abstract

Employment analysis: Nicholas Lakeland, partner and Alban Radivojevic of Silverman Sherliker, consider the possible implications of the introduction of the new conciliation regime.

Analysis

Original news

Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014, LNB News 14/02/2014 85

SI 2014/254: Prospective claimants in Employment Tribunal claims will have to obtain an early conciliation certificate before they can proceed to a tribunal, as of 6 April 2014. As of 6 March 2014 the Secretary of State may prescribe one or more forms to be used by prospective claimants in fulfilling the early conciliation requirement.

What are the most significant changes being made to conciliation in relation to employment claims?

Where parties could previously request for the Advisory, Conciliation and Arbitration Service (ACAS) to provide a voluntary pre-claim conciliation, the new regime will impose a duty on the parties and ACAS to attempt conciliation before a claim is submitted. This is what is referred to as 'early conciliation'.

Accordingly, prior to filing a claim, the following four steps must be followed:

o before lodging a claim to institute 'relevant proceedings' a prospective claimant must send ACAS 'prescribed information' in the 'prescribed manner'--'prescribed' in both of these instances means prescribed by the regulations.

o ACAS must then send a copy of the information to a conciliation officer

o the officer must try to promote a settlement within a 'prescribed period'--the government's response to the consultation process suggested that the prescribed period would be one month

o if a settlement is not reached, either because settlement is not possible in the conciliation officer's view or the prescribed period expires, the officer must issue a certificate to that effect--a claimant may not submit a claim without this certificate--the officer may continue to promote settlement after the period has elapsed

In the case of a former employee bringing a claim for unfair dismissal, the new Employment Tribunals Act 1996, s 18A(9) makes specific provision for a conciliation officer to be able to promote in particular reinstatement or re-engagement of the employee with either the employer, a successor or an associated employer 'on terms appearing to the conciliation officer to be equitable' as a means of settlement. The

conciliation officer can also promote settlement by way of compensation where reinstatement or re-engagement are not practicable or the employee does not wish to be reinstated or re-engaged.

Claimants will have to include on their Claim Form a unique early conciliation (EC) reference number provided by ACAS to show that they have satisfied the EC requirement, otherwise any claim filed at an Employment Tribunal will be rejected.

The clock will be stopped in relation to limitation periods, starting on the date the prospective claimant contacts ACAS and ending on the date they receive (or are deemed to have received) an EC certificate from ACAS.

What are the objectives behind the changes?

The main objectives behind these changes are to promote settlement between the parties before a claim has been issued and simplifying and streamlining the Employment Tribunal process. Although the likelihood of achieving this objective is yet unclear and open for debate (as some question what appetite the parties (or potential parties) to litigation will have to reach a settlement before a claim has been issued) it is worth noting that ACAS has reported good success rates with the current voluntary pre-claim conciliation. Furthermore, the introduction of fees in the employment tribunal earlier this year (29 July 2013) may similarly effect the success of this new regime as where employees may be more willing to settle (and may therefore settle for a lower amount), in order to save the issue fee, employers, on the other hand, may show an increased tendency to 'wait and see' whether the claimant is serious, and may therefore be less likely to settle (or less likely to offer anything other than a derisory sum in settlement) until after the fee has been paid.

There will also no doubt be satellite litigation (as there was with the statutory dispute resolution procedures) about whether time limits have been complied with. There may be an increase in the number of cases in which such jurisdictional points need to be determined at a preliminary hearing, which would detract from the government's stated aims of reducing tribunal hearings and burdens on business.

It is clear from ACAS's response that it welcomes the government's 'light touch' approach to the proposed regulations for the new EC process. In its view, the precise arrangements for the new service would be a work in progress which will need to be modified 'in the light of experience'. One further tactical concern may be that neither party enters into early conciliation with a spirit of compromise but may only be doing so to gain a better understanding of the strengths and weaknesses of an opponent's case.

How easy are the changes likely to be to implement in practice?

In January 2013, the government launched a consultation on the new system, to be known as 'Early Conciliation' (EC). The consultation annexed a draft of a form for prospective claimants to complete. The claims which will be exempted from the EC process, together with rules of procedure, are set out in draft regulations which are also annexed to the consultation.

Details on the EC form will be limited to the parties' names, addresses and contact numbers. It is not proposed that the claimant will have to set out details of their potential claim(s). Under a proposed two-stage process, an Early Conciliation Support Officer (ECSO) will make 'reasonable efforts' (the government sought views on what this should be) to contact the claimant to obtain basic information and outline the conciliation process. If ACAS is unable to contact the claimant, it will issue a certificate to confirm that the prospective claimant complied with their duty to contact ACAS (the certificate). Once the claimant has the certificate, they will be able to present a claim to a tribunal, including a unique EC reference number in their ET1 to confirm compliance.

Where prospective claimants wish to participate in EC, the ECSO will pass the matter to a conciliator who will then contact both parties. If the prospective respondent does not wish to participate, the conciliator will immediately issue the certificate. If they do, the conciliator will have up to one calendar month (which can, with the parties' agreement be extended by a further two weeks) to facilitate a settlement.

Ultimately, the new regime will provide ACAS with more power and responsibility in dealing with claims/potential claims, moving them towards the forefront of employment matters.

What are the implications for lawyers and their clients?

Lawyers and their clients need to thoroughly familiarise themselves with this new procedure and both will have to accept that the whole employment claims process is going to be elongated yet further so even more patience for all involved in the process will be required.

How does this fit in with other developments in the area?

At present the trend is for the coalition government to make it harder for claimants to bring claims by seeking to impose this early conciliation requirement hot on the heels of the introduction of tribunal fees. For now, this hopefully will be it until the new regime settles down but a great deal will depend on the makeup of the next government after May 2015. If we get a Labour or even a Lib/Lab coalition I consider that we will see a marked swing of the pendulum to enable claimants to bring claims more easily and perhaps redress the balance which under the present government seems to have been rather anti-claimant in character.

Interview by Diana Bentley.

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