Department for Business, Innovation and Skills

Early conciliation: a consultation on proposals for implementation

February 2013

About Thompsons

Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 28 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members.

Thompsons represents the majority of UK trade unions and advises on the full range of employment rights issues through its specialist employment rights department.

Introduction

Thompsons broadly supports this initiative.

While the majority of the measures proposed here are sensible, albeit able to be improved on in order to enhance the prospects of success, we are very concerned that they fundamentally misunderstand the reality of how multiple claims are collated, prepared and run.

In our view, the provisions relating to multiple claims will create the sort of confusion, satellite litigation and injustice that was the hallmark of the discredited statutory dispute resolution procedures. We urge the department to redraft these in order avoid such a repetition and we suggest options for doing so in the conclusion of this response.

Question 1: We would welcome views on:

The content of the form;

We make the following observations:

- While English and Welsh should of course be available as language options, the prevalence of speakers of other languages requiring access to the Employment Tribunal's jurisdiction means that further language options should be added. These should include Punjabi; Sylheti; Bengali, Urdu, Cantonese and Polish.
- We not infrequently see claimants who misidentify their employer. The most common errors are mistakenly giving their manager's name when they are asked for their employer's name, citing the wrong group company, or using a generic name that covers a variety of businesses (e.g. 'Network Rail' instead of 'Network Rail Ltd', Network Rail Development Ltd', Network Rail Development Ltd' etc). Often this is legally incorrect. There are also occasions where there is genuine confusion (e.g. agency staff naming the agency or the place of work). We would hope that there is adequate provision for this form for the claimant or ACAS to amend and correct as required and that it is not subjected to an overly legalistic analysis.
- We note that the ECSO will make contact by telephone. Many people have periods of the day where either they are unable to be contacted (e.g. because their employer prohibits it) or where it is impossible to have a telecom of the type envisaged (e.g. during the school

run). There will also be some who keep non-standard hours (e.g. shift workers). It would therefore be helpful if the form asked when a good time to be contacted is. This will reduce the possibility of people being considered as non-responders and having early conciliation (EC) brought to a premature conclusion.

- We anticipate that some claimants will have this form completed by a representative, or will have a representative involved. The form should seek to establish the position, and ask who ACAS should contact. We think this is important. If a claimant has appointed a representative then there is little point in having ACAS expend resources contacting anyone else. Time will be wasted contacting a claimant only to be told they have a representative and this also risks causing confusion for the claimant.
- Another reason for our view is that research shows that outcomes for represented claimants are at a higher value level than for unrepresented claimants. If the form's design forces ACAS to bypass a claimant's representative on first contact then its reputation for neutrality could be threatened if this is perceived to be attempting to secure an unrepresented status outcome. Confidence in the system will be key to its success and this simple change to the form will help to ensure that user support for it is not undermined.
- The adjacency of the buttons for 'Clear My Form' and 'Submit My Request' may cause 'button confusion'. In turn this may result in incorrect forms being submitted prematurely or completed forms being wiped inadvertently. It may be sensible to put more distance between the two.
- Not everyone may be able to access a printer and so it would be useful to have an option whereby a PDF version could be created, either for download or for forwarding to an email address.
- To avoid the possibility of IT failures preventing successful transmission, and therefore instances of missing limitation inadvertently, we suggest that the form state that if a receipt or acknowledgement is not received immediately then the form should be resubmitted.
- The 120 character limit in box 3 is too small.
- The form asks for 2 contact numbers then says ACAS will contact you at 'the number' given. This is confusing. A clearer approach may be to ask for 2 or 3 contact numbers in order of preference.

Our intention that claimants should not be required to provide information on the EC form about the nature of the dispute.

We agree with this. Keeping the information required to a minimum ensures that access to EC is not a test either of literacy, legal knowledge, or argument formulation. We also believe that it rightly avoids the pitfall of having the dispute become more difficult to resolve by virtue of the fact that it has been committed to writing.

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

We have the following suggestions:

- Application or complaint by the EHRC in respect of discriminatory advertisements or instructions or pressure to discriminate (including preliminary action before a claim to the county court) – this is an enforcement role and not appropriate for conciliation.
- Failure of an employer to comply with an award by a tribunal following a finding that the employer had previously failed to consult about either a proposed TUPE transfer or in connection with redundancies – these are claims where the respondent has been the subject of a judgement which they are either unwilling or unable to pay. These claims are

therefore enforcement action. We are concerned that asking ACAS to become involved in these situations could undermine their reputation as non-partisan.

- Interim relief applications – the consultation indicates that these would be exempted, although they do not appear in the ANNEX Claimant list. Both types of interim relief should be covered. Also, as these are parasitical in nature as they must be brought in conjunction with an unfair dismissal claim, that unfair dismissal claim should also be specifically excluded to avoid confusion.
- Multiple claims of any sort (see below).
- Claims involving insolvent respondents. Insolvency Practitioners have little or no ability to reach deals of the type that under pins EC and there seems little point in these cases.

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

We have no objection to this model. Our only concerns would relate to the need to ensure that ECSOs have appropriate levels of knowledge, training and language skills to ensure that the information gleaned is fit for purpose.

Question 4: We believe that ACAS should make reasonable attempts to contact the prospective claimant but that these attempts should not continue indefinitely. We would welcome views on what users might regard as "reasonable attempts", including whether there should be a maximum number of attempts and/or a specified period of time for the ECSO to attempt to contact the prospective claimant. Explain your response:

We think that this is best left undefined. ACAS is experienced and diligent in attempting to conciliate and we believe that their judgement should be trusted. There is a world of difference between two people returning each other's calls but missing each other, and someone who ignores all calls. We fear that any attempt to formally define this, or impose a guillotine period, would add unwelcome and unnecessary complexity.

Question 5: We would welcome your views on whether it is appropriate to apply the same constraints, in terms of time and attempts, to contacting the prospective respondent as that for the prospective claimant, or whether you consider a different approach is justified. If so, please explain what this might be and your reasoning. Explain your response:

We repeat our observations to Question 4.

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

We agree with this approach. The relationship between employee and employer is a complex one, and can extend long after their respective legal statuses have passed. Potential claimants who remain in employment need to have an eye on that on-going relationship. Employees who have left are still in thrall to their former employer by virtue of the importance that a good reference has to future prospects.

If, after talking to ACAS, the potential claimant decides not to proceed then it is best left there. To do otherwise risks adverse repercussions against that individual, whether deliberately or not. As that could damage either their employment or their prospects of employment this would undermine the key aims of these reforms.

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

We believe that the certificate should be as simple as possible. Given its importance to limitation, and whether or not the claimant is able to seek a remedy after a failed EC, we believe that scope for confusion should be minimised as much as possible. For that reason we question whether the provision of just dates will be a help or a hindrance.

The effect of the EC period on limitation clearly requires everyone involved to identify it with sufficient precision for the revised limitation period to be calculated. This is vital to ensure that claimants are not disadvantaged by becoming barred from making a claim due to avoidable confusion. The provisions are already complex enough with the "receipt" date varying depending upon the method of communication, and there would inevitably be arguments about such matters as whether the certificate can be properly deemed to be received on a date when there is no postal delivery, whether whole days only must be counted and whether the date of posting is day one or day zero.

The case law of 40 years is littered with such arguments, and most can be avoided.

Our suggestion is that the certificate identifies the start date and the end date, with the latter being the date of actual or deemed receipt. We suggest that this period is also expressed as a total number of days. That would then enable the prospective claimant to easily add that number of days onto their original limitation date. The certificate could usefully illustrate how to approach that task, or refer the potential claimant to a webpage where they could enter their original limitation date, and the total days on the certificate, and it would produce a revised limitation date for them. This is maths, not advice.

Our remaining observations are:

- We consider that the certificate should cover all complaints which the claimant may have against the respondent, whether specifically raised or not during the EC process. This avoids the problems which have blighted cases that came up through the statutory grievance procedure. We consider that the spirit of EC is seeking a holistic remedy, and that this is undermined by any legalistic analysis of whether a jurisdiction was, or was not, raised.
- We note that Part 7 refers to a unique reference number, but that Part 5 does not. This should certainly be included; and
- We would urge the government to limit the proof of EC completion to quoting the unique reference number. If the certificate had to be filed with the ET1 this would open up the potential problem of certificates being mislaid, or those with insufficient IT skills being unable to file it, or having to go via post where it may be lost.

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

We have only a few observations on this, although we are surprised that the consultation does not include the format of the prospective respondent's form.

We are worried by the fact that a respondent's approach will not stop the limitation clock. We do not see any value in that approach and it could become a source of confusion and cause real injustice. With all due respect to them, prospective claimants are generally unlikely to possess sufficient knowledge or acumen to differentiate between the two types of EC, especially as this type is likely to be rare.

It is our experience that systems work best where there is internal consistency and we would urge the government to rethink this provision.

We are unclear on why there is to be no ECSO involvement as the rationale for them appears just as applicable to prospective respondents.

An important note about Multiple Claims

Part 5.3 sets out the proposals in relation to multiple claims, and how they would progress through the EC process. They appear to be based on the following assumptions:

- That the number of potential claimants in a multiple is finite;
- That the individuals within the group are readily identifiable at the outset;
- That any individual is able to readily identify themselves as part of that group;
- That they are a single and cohesive group;
- That the members of the group are sufficiently organised to identify a lead claimant;
- That there is efficient and co-operative dissemination of information within the group members;
- That they act in unison; and
- That they are in one geographic location.

Undoubtedly some multiples are like this, but many are not. The following example is based on experience, and is not a deliberately convoluted construct.

> *Imagine a national manufacturer with 5 sites across England and Wales. It employs hundreds of staff in a wide variety of roles. There are both blue collar and white collar staff. It recognises two trade unions. One third of the staff is in union A, one third in union B and the rest are not union members. The two unions generally co-operate with each other but have an active rivalry in trying to recruit the non-members.*
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> *One Monday staff arrive at work to find the gates unexpectedly locked, liquidators on site, and everyone is handed notices of dismissal.*
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> *As there was no consultation there will be claims for that. Trade unions were recognised so they must bring them in their names. Additionally all individuals have claims for unlawful deductions from wages, wrongful dismissal, and holiday pay. Some have sufficient continuous employment to claim a statutory redundancy payment. Others do not but do have enough continuous employment to claim unfair dismissal and thus secure payment of the Basic Award via the RPO. Some individuals will have neither. The common thread running through these claims is that they arise because of the closure. Additionally, a small number of individuals will also have existing and on-going complaints about other sundry matters such as disability discrimination and flexible working. These pre-date the closure and are independent of it.*
>
> *The two unions mobilise and start to gather the names and addresses necessary to identify which of their members have what claims. Some members will be referred to the unions' solicitors in order to merit assess some of the trickier claims, such as for disability discrimination. Neither union wants to be seen as lagging behind the other so both press on but this task will take some time to complete. Meanwhile the individual non-members make their own arrangements and one gets out his smartphone whilst stood at the factory gates and starts EC.*
>
> *When Employment Tribunal claims are lodged they are done so sporadically. The unions lodge batches for their own members, but inevitably some come out of the woodwork later and so this is done in several tranches. Various individuals also lodge some claims. The unions instruct their solicitors to run the claims. Some individuals are litigants in person, others instruct a range of different firms, representatives and agencies. This pattern is repeated across all 5 sites which are covered by different Employment Tribunal regions, and different ACAS offices.*

The first practical problem here is identifying the multiple. Various possibilities present themselves:

- Union A's members as one multiple, Union B's as another, and the non-union members as another;

- Those employees who solely have claims arising out of the closure;
- Those employees who have claims which do not arise out of the closure;
- Those employees who have claims which partly arise out of the closure and partly do not; or
- The unions as one multiple as only they can lodge the protective award, and the individuals as another.

There are numerous other possibilities. Complicating that of course is the multi-site aspect. With 5 sites there could be 5 times as many options. Realistically, unless a broad brush approach is taken there are likely to be several natural multiples before all the possible Employment Tribunal jurisdictions are accounted for.

The next problem is identifying the 'lead claimant'. Paragraph 5.3 talks about

> *"Other members of the multiple, who relied on the submission of the "lead" EC form to meet their obligation to comply with the requirement to contact Acas, can rely upon the certificate in relation to any claim which they have in common with the prospective claimant who contacted Acas."*

In this scenario the first one to initiate EC is an individual non-member. They do not do so on anyone's behalf, or in any formal lead capacity. They cannot run a protective award as the law limits that to the recognised trade unions. Their individual claims will only accurately reflect those of their colleagues by coincidence. If that individual considers the matter their own private business they may not even tell colleagues what they have done, far less what claims they discussed with ACAS, what their unique reference number is, or what adjustment needs to be made to the limitation period.

ACAS will presumably be prevented from discussing this with other potential claimants by virtue of the Data Protection legislation, and confidentiality.

Colleagues therefore have no way of knowing whether limitation is running, or paused, what claims have been raised or have not, whether a certificate has been issued or not, or what unique reference number one may have. The natural response from organised representatives such as unions and solicitors will be to trigger EC themselves to protect their clients and members. This means that ACAS will be bombarded by EC applications which need co-ordinating, streamlining and analysing. That problem will be multiplied across the 5 regions.

When the claims come to be lodged at the Employment Tribunal there is the issue of how many, and which, unique reference numbers need to be listed on the form to ensure that the claimant is properly covered. Even then arguments over jurisdiction and limitation are almost inevitable. They can only be properly addressed if there is full knowledge of what claims each potential claimant raised in all regions.

The consultation further says that,

> *"The exemption from the EC requirement will apply where the claims are presented on the same ET1."*

The degree of organisation this relies on is often not present and simply creates further delay, complication and possible confusion. It will encourage last minute lodging of claims by representatives hoping to scoop everyone up, which again increases the risk of jurisdictional arguments about limitation. The Employment Tribunals will seek to hear all related cases together and will join together the various individually lodged ET1s. Limitation points are normally taken as preliminary issues at a pre-hearing review. The likelihood is that having to resolve jurisdictional arguments for the few will delay the delivery of justice for the many.

This example shows how badly the proposals deal with all but the most organised multiple claims and that they are a recipe for disaster.

Thompsons has carefully considered how these problems might be avoided. One option is to issue a certificate which covers the entire workforce, regardless of claim type and genesis. Whilst it has the advantage of simplicity there remains problems relating to promulgating that fact amongst all

those with potential claims in circumstances where ACAS will simply not have the information necessary to identify them. Only one individual needs to be missed to cause real injustice.

Another approach is to empower the Employment Tribunals to waive the need for a certificate in certain cases by Presidential Direction. This though can only be reactive and so it would likely come too late to avoid bogging down ACAS, or for some limitation periods. There is the same problem of promulgation. The existing Presidential Directions are not advertised and very few know they exist, or where to access them.[1]

The only straightforward way which we can see around this problem is to entirely disapply the EC certificate provision to multiple claim situations. This would not necessarily prevent the use of EC, but it would avoid the chaos and scope for injustice that requiring a certificate for those cases would cause. It is not an entirely tidy solution, but that reflects a very untidy problem.

We conclude our response by repeating that the scenario above is realistic and happens regularly. Similar problems could easily be seen in other scenarios which are already known such as the mass local government and NHS equal pay claims and the airline pilots cases. Thompsons represents most of the claimants in those cases, and we provide the vital degree of organisation. We suggest that, as part of this consultation, it would be a useful experiment to consider how it would be if those claims were brought under the proposed arrangements, and without that organisational input from employment law specialists.

Contact details/further information:
Thompsons Solicitors
Congress House
London
WC1B 3LW

jenniewalsh@thompsons.law.co.uk

[1] By way of example, even many specialist practitioners are unlikely to know about Direction 83 (28 December 2012) which deals with claims brought against Comet (in administration). The full list is at http://www.justice.gov.uk/tribunals/employment/rules-and-legislation#england