Lanyon Bowdler SOLICITORS

Update

Your quarterly bulletin on legal news and views from Lanyon Bowdler

Acas early conciliation

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The new Acas Early Conciliation ("EC") process went live on 6 April.

Acas conciliators have long been appointed following the commencement of employment tribunal proceedings in order to promote a settlement, and for some time a pre-conciliation procedure had been available to employers and employees (or former employers / employees, as will often be the case) in order to assist in trying to resolve disputes prior to the commencement of proceedings.

EC replaces pre-conciliation and, in most instances, notifying Acas under the EC procedure will be mandatory before employment tribunal proceedings are commenced from 6 May.

The procedure can be broken down into the following steps:

Step 1: A prospective claimant must provide his/her name and contact details, and those of the prospective respondent(s), to Acas either on an EC form (which is available at https://ec.acas.org.uk and may be submitted on-line or by post) or by telephone. Where there is more than one prospective respondent and forms are being used, a separate one is required for each prospective respondent.

Step 2: An Early Conciliation Support Officer ("ECSO") will attempt to make contact with the prospective claimant. If contact is made, the ECSO will explain the EC process, take some details and check there is actually a wish to proceed with conciliation. The prospective claimant may instruct a solicitor or other representative to deal with EC on their behalf, in which case they should notify Acas. If there is a wish to conciliate, the prospective claimant's information (including their representative's details, if applicable) will be sent to a Conciliation Officer ("CO").

Step 3: The CO will contact the prospective claimant (or their representative, if appointed). In addition to discussing their complaint, the CO will check that the prospective claimant agrees to the CO contacting the prospective respondent(s).

Financial penalties for employers who lose at tribunal

In employment tribunal proceedings commenced on or after 6 April, tribunals can order employers who lose to pay a financial penalty where the case has "one or more aggravating features".

There is a lack of clarity as to what will amount to "aggravating features", which are not defined in the legislation. In its response to consultation when the proposed changes were at a formative stage, the Government suggested that tribunals would impose penalties where "the breach involves unreasonable behaviour, for example where there has been negligence or malice involved". The Government's March 2013 progress report on the changes suggested that genuine mistakes by the employer will not be penalised.

The explanatory notes to the Bill behind the changes suggested that it would be for each tribunal to decide whether the conditions for imposing a penalty are met, taking into account any factors that it considers relevant, including the circumstances of the case and of the employer, which could include the employer's size, the duration of the breach of the employment right or the behaviour of the parties.

It is clear from the legislation, however, that tribunals will, at least, have to take account of the employer's ability to pay.

The minimum penalty will be £100 and the maximum will be £5,000. A fine may be levied even where no compensation is ordered to be paid to a claimant. However, if a financial award is made, the penalty must - within the stated limits - be 50% of the amount of the award.

An employer will only have to pay half the penalty, however, if it pays within 21 days.

"Friendly, professional service with clear explanation of my options to achieve an acceptable outcome"

Mrs L Harris, Telford

Flexible working

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From 30 June, all employees with at least 26 weeks' continuous service will have a statutory right to request flexible working.

Before then, a similar statutory right is available only to employees who care for a child under 17 (or 18, if disabled) or, in certain circumstances, an adult. However, many employers – particularly amongst larger ones – have voluntarily permitted flexible working requests from the wider workforce for some time, and it is reported that this approach tends to have a positive effect on staff morale and retention.

A statutory request must be in writing and dated and, unless the employer has less detailed requirements under a flexible working policy, must state:

- the change to working conditions being sought;
- the date from when the employee would like the change to come into effect;
- what effect, if any, the employee thinks the change would have on the employer and how it might be dealt with;
- that it is a statutory request; and
- if and when any previous such requests have been made (as only one request is permitted in any 12 month period).

Under the current regime relating to carers, a strict timetable is set out regarding steps that should be taken by employers when dealing with a flexible working request. Under the new regime, this is replaced by a duty to consider requests in a "reasonable manner" and notify employees of a decision within 3 months (unless an extension is agreed). There is also a new Acas Code of Practice which will be taken into account by employment tribunals in relevant cases ("the Code") and non-statutory Acas guidance ("the Guidance") (for which go to www.acas.org.uk).

The Code requires employers who are not minded to agree to a request to meet with the employee to discuss it before making a decision, and to allow an employee to appeal against any decision to refuse a request in whole or in part.

The Code recommends that employees be permitted to be accompanied by a colleague at meetings. This replaces a statutory right to be accompanied under the current regime.

If an employee fails to attend a meeting and also a rearranged one without good reason, employers are permitted to consider the request to have been withdrawn.

Employers will continue to be able to reject a statutory request for one of the following business reasons:

- burden of additional costs
- inability to reorganise work amongst existing staff
- inability to recruit additional staff
- detrimental impact on quality
- detrimental impact on performance
- detrimental effect on ability to meet customer demand
- insufficient work for periods which the employee proposes to work
- planned structural change to the business

Separate from the above statutory procedure, employers should at all times be wary of the potential impact of discrimination legislation in the context of flexible working requests.

Working mothers have protection against indirect sex discrimination, and any refusal of a flexible working request from such an employee must be "justified" within the meaning of the Equality Act if it is not to be unlawful. Correspondingly, to refuse a request by a man that would have been accepted if made by a woman will be direct sex discrimination.

Rates & Limits

	From 6 April 2014	From 6 April 2013
Statutory sick pay ("SSP")	£87.55	£86.70
Statutory maternity, paternity and adoption pay - prescribed rate	Lesser of £138.18 per week or 90% of average weekly earnings	Lesser of £136.78 per week or 90% of average weekly earnings
Cap on weekly pay for statutory purposes, e.g. statutory redundancy pay	£464.00 (for dismissals on or after 6 April)	£450.00 (for dismissals on or after 6 April)

From 6th April it is no longer possible for employers to reclaim SSP from the State.

Previously, employers could reclaim SSP which exceeded 13% of its national insurance contributions in any month. The money saved (estimated at £50m a year) will be put towards the new Health & Work Service, due to start in 2015, which will help employees and employers put together plans to facilitate a return to work.

"My first time using a solicitor. I would always recommend you to other people. Thank you"

Mr J Savage, Telford

As long as the CO is able to contact a prospective respondent and it is willing to participate in EC, the CO must try to promote a settlement within the prescribed period - which is initially up to a month from when the prospective claimant first contacted Acas, and may be extended by up to 14 days. Prospective respondents may instruct a solicitor or other representative to deal with EC on their behalf.

An EC certificate must be issued if:

- it is not possible to contact a party;
- a party does not wish to conciliate; or
- a settlement is not reached, either because the CO considers that settlement is not possible, or because the prescribed period expires.

The certificate will give the prospective claimant a unique reference number which they will have to include on their Claimant's Form (ET1) should they go on to present a claim.

Prospective claimants and respondents are encouraged to consider carefully how they deal with any dispute, including if and when to use EC in the first place and, in any event, how they frame their respective cases and formulate any offers and counter offers in respect of settlement. This can be key to:

- maximising the value of a settlement or tribunal award if you are an employee, or minimising the value of a settlement or award, or indeed avoiding paying anything out at all, if you are an employer; and
- ensuring that the settlement terms themselves adequately protect their interests.

Parties should remember that Acas are impartial, and that for actual advice they need to look elsewhere. We can, of course, assist in this regard.

Meet the team

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Employers have an obligation to make reasonable adjustments for disabled employees; and carers of the disabled and the elderly have protections under the Equality Act when making flexible working requests in connection with their obligations by virtue of their association with people in protected groups.

For these reasons, particular consideration should be given to flexible working requests from disabled employees, or employees with care responsibilities for children or disabled or elderly people, whether or not they meet the requirements of the statutory procedure.

When changes are made to an employee's contract following a flexible working request, they should be put in writing in order to ensure certainty, and also compliance with the employment legislation (which requires that certain core terms are set out in a written statement, and that any amendments to them are recorded in writing). Also, do not forget to consider the knock on effects of any changes in working hours, such as on holiday and sick pay entitlement.

The Guidance encourages employers to have flexible working policies in place, and if you would like us to help you prepare one, or perhaps adapt a policy which you already have in place to take account of the new law, Code and Guidance, please contact us.

Our solicitors have a particular specialism in employee transfer issues, which often arise when a business or a contract changes hands.

Contact 01952 291222 or email info@lblaw.co.uk

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