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A PRACTICAL VIEW FROM TRIBUNAL

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In a regular feature, *A practical view from tribunal*, members of Littleton Chambers and Devereux Chambers share practical guidance from their recent experiences in the employment tribunal.

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EARLY CONCILIATION: A PRACTICAL APPROACH (ALICE CARSE, DECEMBER 2015)

The Acas early conciliation (EC) regime has been in place for approximately 18 months so this is a good moment to pause and reflect on how the regime has affected employment tribunal (ET) litigation. The comments below are based on my own experiences and those shared with me anecdotally by my instructing solicitors.

First, experience in the ET shows that while the requirement to participate in EC is being applied strictly, the EC rules themselves are not. In practice, this means that claimants who have entered the process are unlikely to have their claims rejected by ETs based on arguments supporting a strict interpretation of the rules relating to the EC regime.

The decisions of Langstaff P in the EAT in *Sterling v United Learning Trust UKEAT/0439/14 and UKEAT/0440/14* and *Cranwell v Cullen UKEAT/0046/14* demonstrate a strict approach to the requirement to participate in EC. However, once a claimant has participated in EC, the ET is generally unlikely to be persuaded that a particular claim should be prevented from being heard because it was not raised in EC. It follows that where a claim is not entirely unrelated to the matters raised in EC, the ET will be inclined to hear it (see *Science Warehouse Limited v Mills UKEAT/0224/15*). For example, experience informs us that a claim of sex discrimination can be presented to the ET where only race discrimination has been raised in EC. This includes cases where the employee has complained of harassment because of race in EC, but decides to include an allegation of sex discrimination in the ET1.

However, it is worth bearing in mind that just because the ET will consider an additional claim, this does not mean it has good prospects. If, for example, an internal grievance only referred to harassment because of race, and not sex, the claimant will have to explain this omission to the ET if they subsequently include a sex discrimination claim.

Despite the ETs' apparently lenient approach, claimants should ensure that the 'headline points' of their claims are raised in EC. This prevents the respondent being able to challenge a claim in the ET on the basis that it was not raised in EC and presenting the claimant as badly prepared or disorganised. Respondents should duly consider whether it is worth challenging claims on this basis. The test of whether a claim is 'entirely unrelated' to matters raised in EC is one with a very low threshold.

Secondly, the issue that consistently causes the most practical problems is the calculation of the limitation period or periods following EC. The most difficult situation to navigate is determining the limitation period for the purposes of an application to strike out, effectively working backwards, where there are a series of allegedly discriminatory acts. In these circumstances it seems that ETs allow a generous interpretation of the limitation period allowing the maximum available extension. Respondents are advised to focus their arguments on breaking up the alleged period of discrimination by arguing that there was no continuing act and earlier acts are therefore out of time.

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Another example of difficulties with limitation periods is where the claimant has commenced EC before the termination of their employment. In these cases the respondent's argument is that the period of EC before the cause of action arose does not count for the purposes of calculating the limitation period, therefore the limitation period is shorter than contended for by the claimant and the claim is out of time. My own experience is that ETs are unlikely to look favourably on this argument. In *Chandler v Thanet District Council ET/2301782/14*, an ET rejected this argument and although this is not binding on other ETs, they have considered it persuasive and applied the reasoning.

Anecdotally, there is a feeling among some employees' rights organisations that often the opportunity to push the claimant's case in EC is missed due to the failure to identify the claimant's best points and the value of the claim. On the other hand, some users of the regime are of the view that it can make parties more entrenched in their dispute and unlikely to settle at an earlier stage of proceedings. In practice, some have remarked, EC requires employment lawyers to focus on their negotiation, not litigation skills and to deploy them at an earlier stage in employment disputes.

Alice Carse, Devereux Chambers, December 2015.

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