IoD response to the consultation paper *Early Conciliation*

The IoD welcomes this opportunity to respond to the consultation document "*Early Conciliation*" issued by the Department for Business, Innovation & Skills.

About the IoD

The IoD was founded in 1903 and obtained a Royal Charter in 1906. It is an independent, non-party political organisation of approximately 45,000 individual members. Its aim is to serve, support, represent and set standards for directors to enable them to fulfil their leadership responsibilities in creating wealth for the benefit of business and society as a whole. The membership is drawn from right across the business spectrum. 80% of FTSE 100 companies and 60% of FTSE 350 companies have IoD members on their boards, but the majority of members, some 72%, comprise directors of small and medium-sized enterprises (SMEs), ranging from long-established businesses to start-up companies. IoD members' organisations are entrepreneurial and resolutely growth orientated. More than two-fifths export. They are at the forefront of flexible working practices and are fully committed to the skills agenda.

General comments

1. We very much support the thrust of the proposals for early conciliation (EC), which have the potential to reduce the unacceptably high number of Employment Tribunal claims. We want the scheme to be a success. We do have reservations though about some of the detail of the proposed arrangements, which we think will need to be refined in a number of respects. We give details in our responses to the questions posed, below.

2. We are disappointed at the proposal not to require details of the potential claim to be provided to Acas and not to prevent a claim going forward unless the specific claim has been notified to Acas first. We felt that the original proposal, which did not involve any consequences for unreasonably refusing to engage in conciliation, was weak and needed greater incentives to use the scheme. However, the proposal has been weakened further by allowing claims to go ahead when no information at all about the potential claim has been given. See our more detailed comments on this point below.

3. A second general comment we would make is that we would not be surprised if the scheme was used by individuals for "fishing trips", eg to get some free advice from an independent expert (ie Acas) on whether they have a potential tribunal claim; or in the hope of extracting compensation from a former employer, but without any intention of pursuing a tribunal claim. This could result in Acas receiving very large numbers of requests, which could put a severe strain on its resources. Acas conciliators will need to be careful about being used in this way, and should not put substantive time and resource into a case until the prospective claimant has agreed to engage in conciliation (which means agreeing to the prospective respondent being informed). We assume Acas intends to produce some guidance for prospective

claimants who are considering making a request/notification to Acas. We suggest this should include making clear that the procedure is for individuals who believe they have a valid claim and who are planning to make a tribunal claim.

Responses to questions in the consultation document

Question 2: We would welcome views on:

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

4. Some forms may give inaccurate, false or incomplete information, for example, the name, address and/or contact details of the employer. It is not clear from the consultation document or the Rules whether Acas will – or will be able to - reject a form on this basis. Para 3.1 refers to not accepting a hard copy form if it is sent to the wrong address. Is it the intention to have other grounds for rejecting a form, such as inaccurate etc information? We suggest it should. Also, if a different employer name is given on the EC form/certificate to that given in the ET1 form, would the ET1 form be rejected?

5. As noted earlier we are disappointed that the proposal has been weakened further by not requiring the nature of the claim to be included in the form, and not preventing a claim going forward unless details of the claim have been notified to Acas. This seems to be a change of approach from that envisaged in the *Modern Workplaces* consultation document and the follow up Government response, and also from the approach envisaged by the primary legislation. The ERR Bill will insert a new s.18A to the ERA96 which prevents a person presenting an ET claim unless they have provided to Acas "prescribed information ... about that matter" (subsection (1), and have obtained a certificate from Acas (subsection (8)). However, as proposed, the Rules would not require the individual to give any information about the matter – either at the start of the process, or at any other stage. The only obligation imposed by the Rules is to send Acas the prospective claimant's name, address and contact details, and the name/contact details of an employer. Having done so, and having obtained an EC certificate, they will be free to bring an ET claim on any complaint (subject to the 3/6 month deadlines. Indeed, the ET will have no way of knowing whether the claim presented to it is the claim about which the claimant contacted Acas. From a legal point of view, there seems to be an inconsistency between the wording of the draft Bill and that of the draft Rules.

6. The proposal begins to break down in the case of multiple claims. The consultation document says (para 5.3) that a member of a multiple claim with a claim that differs from that of the lead claimant, could not rely on the EC certificate issued to the lead. This is reflected in Reg 3(1)(a) which refers to complying with the EC requirement "in relation to the same matter". However, if the lead claimant provides no information about the nature of the claim, and if, as proposed, the EC certificate contains no information about the nature of the claim, the ET will have no way of knowing if there are any differences. This policy objective, and the limitation to the

exemption in 3(1)(a) cannot be achieved if there is no requirement to provide information about the prospective claim.

7. We believe the completed EC form should contain information about the nature of the claim (in the same way as an ET1 form), and the EC certificate should state the claimed jurisdictions, and an ET claim should only be allowed in respect of those jurisdictions. This seems to be the concept on which BIS consulted, and is reflected in the wording of the primary legislation. The ET could still have discretion to allow other jurisdictions to be added to the claim later in the process, but not at the ET1 stage.

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

8. We agree that the excluded jurisdictions should be kept to an absolute minimum in order to encourage use of EC in as many cases as possible.

9. Exemptions. As noted earlier, if the EC form/certificate says nothing about the nature of the claim, the limitation of the exemption at (a) for multiples cannot be enforced. Para 2.1 1st tiret of the first consdoc refers to complying with the EC requirement "by submitting details of the claim to Acas", but in fact there will be no requirement to submit any "details of the claim" to Acas.

10. We do not understand the second exemption here – ET1 forms concerning relevant proceedings and those that are not. Why should the fact that a form cites proceedings that are not subject to EC relieve the complainant of the obligation to contact Acas about the relevant proceedings? Perhaps we have misunderstood it.

11. We have reservations about the possibility of a respondent initiating the procedure – see para 22 below.

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

12. We agree that the first contact should be by a support officer, in order to manage resources effectively. As noted earlier, there could be a lot of "fishing trips".

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.

13. We agree that attempts to contact the claimant should not continue indefinitely so as to use resources efficiently. We do not think there should be any given maximum number of attempts – flexibility is needed to deal with the myriad

circumstances that will be faced. EC needs to be given as much chance as possible to succeed, given that, as proposed, it will rely totally on the willingness of both sides to engage. There should be a guideline period of time (eg 2 weeks) for contacting the complainant and this should be notified to them as part of the acknowledgement of receipt of the form.

14. Paragraph 3.11 envisages a claimant deciding not to pursue a claim following discussion with Acas, but says Acas would still issue an EC certificate. This does not seem to be consistent with the primary legislation which says an EC certificate will be issued where a settlement is not possible or where the 1 month period has expired without a settlement, and the certificate will be "to that effect". Moreover, an EC certificate in these circumstances could make the complainant think they have a viable claim, which would be misleading. We think a better and simpler approach would be to make provision for a complainant to withdraw their EC form, and for Acas to close the case without issuing a certificate.

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.

15. We are strongly of the view that no such constraints should apply to contacting the respondent. Bear in mind that the complainant and respondent are in different positions – the complainant knows that a request/notification has been sent to Acas, the respondent does not. The relevant individual at the respondent organisation may be absent abroad or on leave, or may be difficult to identify in a larger organisation (as proposed, the claimant will only be required to give the employer's name, not a contact point there). The respondent should not be denied the opportunity to engage in conciliation because there was a problem getting hold of the relevant person. It would be better to give the full month, if necessary, to attempt contact with the respondent.

16. We are not convinced it is necessary to limit the extension of the conciliation period to 2 weeks. If both sides are willing to continue longer, or if circumstances prevented one side engaging during that 2 week period (eg sickness, absence on leave etc), why impose a hard and fast 2 week rule? We appreciate there could be some resource constraint for Acas conciliators, who may have other cases to deal with at the same time. But the deadline seems unnecessarily inflexible. Experience may show that greater flexibility is needed.

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.

17. We agree with the proposed approach, in the interests of minimising costs and burdens to employers. Automatically notifying employers could deter "fishing

trips" by individuals (see our point at para 3 above), but it should suffice to inform the individual early on that the employer will be notified if s/he agrees to EC and to avoid putting substantive time into a case until the individual has agreed to EC.

18. We note that the consultation document does not say how conciliation will be conducted – whether face to face, by telephone, email etc, or whether both parties will always be involved, or it could involve discussions with each side separately. Neither does it say how conciliation will be conducted in the case of multiple claims, eg just with the "lead" claimant or with all claimants, or with all individuals who request to be involved? Further information is needed on these point.

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

19. We do not agree that an EC certificate should be issued where a COT3 or private agreement has been signed. Again, it is not consistent with the draft primary legislation which states that an EC certificate is to be issued where conciliation is not possible, or the one month period has expired without a settlement, and the certificate is to be "to that effect". Moreover, an EC certificate in these circumstances could make the complainant think they can bring an ET claim (which is what the legislation says), whereas the agreement will state that they cannot bring a claim. This will be confusing and misleading (and we wonder whether it will be consistent with legislation on compromise/settlement agreements). We think a better and simpler approach would be to make provision for a different type of certificate in such cases.

20. As noted at para 7 above, in our view the EC certificate (as well as the EC form) should state the nature of the claim so that an ET claim can only be brought in relation to the stated jurisdiction(s), while continuing to give the ET (limited) discretion to allow additional jurisdictions to be added later.

21. In relation to multiple claims, as noted earlier, unless the certificate states the relevant jurisdiction(s), it will not be possible to prevent other members of a multiple adding additional elements to a claim.

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

22. We have reservations about the proposal to allow prospective respondents to proactively notify Acas. It adds additional complexity to the rules and puts the situation on a legal footing that seems unnecessary. We would prefer to see such proactive approaches allowed, but on an informal basis..

We hope you find these comments helpful. For further details please do not hesitate to contact me.

Regards,

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