



DEPARTMENT FOR THE ECONOMY
12 MONTH REVIEW OF EARLY CONCILIATION

Introduction

1. The Department for the Economy requested that the attached report be completed by the Labour Relations Agency (LRA) in order to assist the department in fulfilling its duty under section 9 of the Employment Act (Northern Ireland) 2016, to review Early Conciliation after 12 months.

Background

2. Following a review of employment law, which sought to identify opportunities to reduce regulatory and administrative burdens on businesses whilst protecting the rights of individual employees, the Employment Act (NI) 2016 was introduced.
3. The introduction of Early Conciliation was a provision of the Act and it meant that in most cases, a prospective tribunal claimant must first have submitted the details of their claim to the Labour Relations Agency before they can lodge a claim at an industrial tribunal or the Fair Employment Tribunal.
4. Early Conciliation (EC) provides a period of up to one calendar month (which can be extended by two weeks if progress is being made) for parties to engage in the conciliation process with a view to resolving the dispute.
5. Tribunal claims are no longer accepted by the Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET) unless the complaint has been referred to the LRA and an EC certificate issued. The EC certificate confirms that the Early Conciliation requirements have been met, in that the claimant has engaged with the LRA first and then either declined the offer of conciliation, or the conciliation process has been unsuccessful. There are some technical and jurisdictional exemptions from the early conciliation process that do not require the employee to have an EC certificate number in order to proceed to an industrial tribunal.

Section 9 of the Employment Act (Northern Ireland) 2016

6. Section 9 of the Employment Act (Northern Ireland) 2016 places a requirement on the Department to undertake a review of Early Conciliation and lay the findings of the review in a report to the Assembly.
7. It stipulates that the review must be carried out at the end of one year and then again at the end of three years following introduction of the Early Conciliation provisions of the 2016 Act.
8. Section 9 states:

Review of early conciliation

9—(1) The Department must review the operation of—

(a) Articles 20 to 20C of the Industrial Tribunals (Northern Ireland) Order 1996;

(b) Articles 46B and 88ZA to 88ZC of the Fair Employment and Treatment (Northern Ireland) Order 1996; and

(c) the amendments made by Schedules 1 and 2,

at the end of the period of one year beginning with the commencement of this section.

(2) The Department shall, having consulted with relevant stakeholders including employers, lay the findings of this review in a report to the Assembly.

(3) The report shall in particular include—

(a) a synopsis of consultation responses;

(b) an assessment and evaluation of the effectiveness of these provisions;

(c) the number of cases overall, the number of cases dealt with by early conciliation, the average length of time taken to deal with cases and the outcome of cases;

(d) any savings directly attributable to the introduction of these provisions.

(4) The Department shall also review and report as in subsections (2) and (3) at the end of the period of three years beginning with the coming into operation of early conciliation.

Review Exercise

9. The introduction of Early Conciliation was overseen by a project board containing representatives from the Department for the Economy, the Labour Relations Agency and the Office of Industrial Tribunals and the Fair Employment Tribunal.

10. The project board agreed in December 2019 that the LRA would complete a review for the Department of the first 12 months operation of Early Conciliation and present its findings by way of a report.

11. The specification for the review required that it include the following elements:

- consultation with relevant stakeholders;
- a synopsis of consultation responses;

- an assessment and evaluation of the effectiveness of early conciliation;
 - the number of cases overall, the number of cases dealt with by early conciliation, the average length of time taken to deal with cases and the outcome of cases; and
 - any savings directly attributable to the introduction of early conciliation.
12. The Department is satisfied that the report provided by the LRA meets the specifications agreed by the Early Conciliation project board and provides findings which allow for an assessment of the first 12 months operation of Early Conciliation, including the impact of Early Conciliation on potential tribunal claimants, employers and on the respective representatives of both.
13. In quantitative terms, the LRA report found that:

In the period from introduction (January 2020) to January 2021 there were 12,306 early conciliation cases, with 12,076 early conciliation certificates issued and 230 early conciliation cases settled.

Operation of Early Conciliation

14. The introduction of Early Conciliation and its first year of operation coincided with the emergence and subsequent sustained economic and societal impact of Covid-19. The LRA has highlighted this as a limiting factor on its ability to fully embed the new service, deliver some aspects of the service, and establish the evaluation mechanisms required to thoroughly assess the service.
15. Technical issues with the LRA Early Conciliation IT system prevented the online portal, which was linked to the case management records system, from fully functioning during the launch period. Consequently, telephone contact became the primary channel for notification of early conciliation cases as opposed to the online portal. As a further consequence of the early IT failures, regular users of the service subsequently continued to make use of the telephone facility even when the technology was fully functioning.
16. There were no indications that the IT technical issues impacted upon claimants', respondents' or representatives' ability to engage with the new Early Conciliation process, nor were there any indications that Early Conciliation case numbers were impacted.
17. The impact caused by the Covid-19 pandemic on the tribunal also made it difficult for the LRA to accurately determine, how many of the EC certificates that were issued, subsequently resulted in a tribunal case.
18. Implementation of the new Early Conciliation service coincided with a large (approximately 28,000) number of tribunal claims linked with holiday pay.

Approximately 80% of Early Conciliation notifications received by the LRA in the first 12 months involved multiple cases (similar cases with the same respondent) and the majority of these were also holiday pay related. This anomalously large volume of holiday pay cases had a disproportionate impact on anticipated casework for the early and wider conciliation service provided by the LRA.

19. The combination of holiday pay cases and the unprecedented impact of Covid-19 upon the wider labour market has made it difficult to be able to confidently forecast Early Conciliation case volumes in the immediate to medium term. This has also had an impact upon the validation of original LRA resourcing assumptions for the Early Conciliation service and upon defining the longer-term staffing requirements for the service.

Early Conciliation Service Users

20. Early Conciliation service users were consulted by way of a customer satisfaction survey, carried out in June 2021. Overall satisfaction rates were: 64% amongst unrepresented claimants, 78% amongst claimant and respondent representatives and 71% amongst respondents.
21. Whilst there was a relatively low response rate to the survey (11% for unrepresented claimants, 10% for representatives and 5% for respondents), it was nevertheless a valuable consultative exercise in that it provided insightful qualitative feedback about the early conciliation process from a user perspective.
22. It is accepted, especially in light of the impact of Covid-19, that the 3 year Early Conciliation review will provide a more accurate understanding of the impact and effectiveness of Early Conciliation. It will also be able to assess its impact upon the wider employment relations landscape. The project board determined that the 12 month review should focus upon service user stakeholders of the LRA Early Conciliation service and that a broader range of stakeholders from across the employment relations landscape should be consulted as part of the 3 year review.
23. Labour Relations Agency's Conciliation Officers were also surveyed as part of the consultation exercise by way of facilitated focus groups. Conciliation officers work closely with represented and unrepresented individuals during the Early Conciliation process and are therefore uniquely positioned to provide practical insight into how the process and procedure has been perceived by service users.
24. There was a polarity of opinion amongst respondents, with satisfaction indices grouped at either the lower or higher end of each scale. It is possible that the

extreme satisfaction or extreme dissatisfaction expressed by the majority of respondents was the motivating factor behind their participation with the survey. This presents the possibility of a gap in responses from those service users that were neither extremely satisfied nor extremely dissatisfied with the service.

25. Amongst unrepresented claimants there were some who highlighted the notification process as not being easy to use. LRA Early Conciliation facilitators were considered by the majority of unrepresented claimants as being knowledgeable, polite and courteous. Whilst there was an overall satisfaction rate of 64% there were negative opinions expressed alongside positive opinions. The negative opinions included a sense of disappointment or a feeling of being let down. It is a distinct possibility that a failure to reach a satisfactory resolution could lead to an unfavourable opinion about the Early Conciliation process. This is an aspect which could be further explored during the year 3 evaluation.
26. Amongst claimant and respondent representatives, the Early Conciliation phone service was viewed favourably whilst some reported difficulties with using the portal. Again, there was an overall favourable opinion of LRA Early Conciliation facilitators. Some representatives expressed a desire for conciliators to discuss in more detail legal issues and time limits affecting Early Conciliation claims.
27. Amongst respondents, satisfaction with the service was overall positive but there were mixed opinions about Early Conciliation facilitators, with some respondents highlighting issues such as some staff being more contactable and motivated than others. Positive comments about Early Conciliation facilitators included praise for having 'fantastic knowledge' and for being helpful.
28. Early Conciliation facilitators reported that there was a high level of engagement amongst all parties to the process. They also highlighted their belief that a significant barrier to settlement is the fact that many workplace grievances or appeals are ongoing during Early Conciliation, with a belief that claimants enter the process too early. It was reported that settlement was generally more likely when a Trade Union or Lay representative was involved in the process and that there was a reluctance amongst unrepresented respondents to put forward proposals for a settlement out of a fear that it could be perceived as an admission of guilt or wrongdoing. Engagement with represented respondents was reported as high although there was also a perception amongst some facilitators that the conciliation period was sometimes used to fact find in preparation for a future claim.

OITFET

29. A key delivery partner in the introduction of Early Conciliation is the Office of Industrial Tribunals and the Fair Employment Tribunal (OITFET).
30. Similar to the issues experienced by the LRA, OITFET was also significantly impacted by Covid-19 and the large volume of holiday pay cases during the first 12 months of Early Conciliation. A number of operational issues were rectified in the months immediately following the introduction of Early Conciliation.
31. The technical issues highlighted by the LRA review meant that the OITFET IT system was initially unable to fully converse with the LRA IT system. This resulted in a longer than anticipated validation process of Early Conciliation certificates for newly submitted tribunal claims.
32. The large volume of holiday pay cases initially resulted in multiple individual Early Conciliation certificates being sought by claimant representatives for group tribunal claims. This in turn created a significant resourcing commitment for OITFET. Following engagement with the respective claimant representatives and their subsequent familiarisation with the process, this practice changed and representatives felt confident with submitting one EC certificate for group tribunal claims.
33. An ongoing issue highlighted by OITFET is the requirement for the Secretary of the Office of Tribunals to refer a Tribunal claim form to an employment judge if the recorded name or address on the claim form for either the claimant or the respondent differs materially from that provided on the associated Early Conciliation certificate.
34. For the vast majority of such referrals, Employment Judges have determined that the disparity between the information provided on the respective forms is not sufficient to warrant rejection of the Tribunal claim.
35. OITFET has identified this particular issue as having a disproportionate administrative impact, with little added value for the tribunal claim process. A change to the tribunal rules of procedure was recently made in GB in order to address this issue and OITFET is presently considering whether to request a similar change to the rules for Northern Ireland in order to allow the Secretary of the Office of Tribunals to make the determination that presently rests with an Employment Judge.

Conclusion

36. In the first 12 months of operation, 230 cases were settled through the Early Conciliation process. Whilst not all of these cases may have previously resulted in a tribunal, the figure nevertheless represents a substantial volume

of casework that claimants, respondents and representatives otherwise may have had to contend with had they progressed to tribunal.

37. Based on previous departmental estimations, tribunal costs for 230 cases could amount to approximately £363,000 for claimants and £1,012,000 for employers.
38. The LRA has identified learning points from its evaluation which it believes will help it to further develop, improve and promote the Early Conciliation service. It has also identified areas for incorporation into practice and operational guidelines. This is to be commended and will be discussed at the final project board meeting in September.
39. Whilst Covid-19, the large volume of holiday pay claims and the early IT issues undoubtedly had an unforeseen impact on the first year of Early Conciliation, the LRA nevertheless efficiently discharged the service and successfully conciliated 230 cases to settlement. Coupled with this are the customer satisfaction levels achieved by the LRA. Accordingly, the department is satisfied that despite the impact of these issues, the first 12 months of the Early Conciliation service has been delivered to a high standard and has had a positive impact on many Early Conciliation service users.
40. The attached research report and this assessment fulfil the statutory requirement placed on the Department by section 9 of the 2016 Act.