

**GUIDANCE FOR BRANCHES
(In England, Scotland and Wales)
ET PROTOCOL**

ISSUED 2017

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Guidance for Branch – ET Protocol

1. What's New

This guidance is to explain the changes to the ET Protocol and CASE form following the decision of the Supreme Court in *R (UNISON) v Lord Chancellor*. The ET protocol and CASE form were amended in 2014 following the introduction of fees on 29 July 2013. The CASE form was amended to include a fee advance and early conciliation agreement that our members were required to sign as a condition of receiving legal assistance from UNISON. Following the Supreme Court decision, fees will no longer be payable in Employment Tribunal cases nor will it be necessary to apply for fees remission. The CASE form has been amended to remove reference to fees and fees remission. **Please note that it is still a requirement that claimants initiate early conciliation through ACAS before starting an Employment Tribunal claim.** This guidance confirms the process for commencing ACAS early conciliation.

There are tight timescales when an Employment Tribunal claim form (known as an ET1) has to be lodged at the Employment Tribunal. Generally the time limit or limitation deadline is 3 months less one day from the act the member is complaining about. So, for example, where a member is dismissed on 4 July, a claim will have to be lodged at the Employment Tribunal by 3 October. The exceptions to this are claims for equal pay and redundancy pay which must be lodged within 6 months less one day.

You cannot lodge an ET1 without getting a certificate from ACAS to say that you have been through a process called Early Conciliation. This process will be dealt with by Organisers in the Region. You should know that triggering the process has the effect of changing limitation deadlines.

The ACAS Early Conciliation process will be dealt with by Organisers because it will only be triggered where a case has been assessed by our Solicitors as having reasonable prospects of success. This is to ensure time limits for lodging Employment Tribunal claims are not missed as triggering the ACAS Early Conciliation process can change the limitation deadline.

It is a condition of legal assistance that a member **does not** trigger ACAS Early Conciliation without UNISON's agreement.

Where a member has triggered the ACAS Early Conciliation procedure themselves, please contact your Organiser who will obtain advice from the Head of Legal Services.

2. What is the effect on UNISON's legal assistance scheme?

UNISON is committed to providing access to legal advice and assistance for our members.

UNISON believes that most issues are best resolved in the workplace and encourages workplace reps and branch officers to seek a negotiated solution which is in the best interests of the member.

UNISON supports those legal claims which have reasonable prospects of success.

Before a case can be lodged, the ACAS Early Conciliation process must be triggered. This process will be triggered by Regional Organisers once the Union's Solicitors advise a case has merit. This is because triggering the ACAS Early Conciliation process will affect the limitation deadline i.e. the date by which a claim must be lodged. (<http://www.legislation.gov.uk/uksi/2014/254/made>).

Where the member comes to the Branch for advice and assistance less than 28 days before the time limit for lodging an Employment Tribunal claim expires, you must contact the Region immediately. This is because UNISON's Solicitors will not have enough time to assess the merits of a claim. Therefore you must explain to the member that the Region, in consultation with the Union's Solicitors, will decide if the ACAS Early Conciliation procedure will be triggered and if any Employment Tribunal application will be lodged by the Union or if the member will be responsible.

3. UNISON's Protocol

To ensure UNISON can continue to provide the best employment law service for our members we have reviewed our existing practices and procedures. This includes:

- 1) An amended ET Protocol, which sets out the revised rules for providing members with legal assistance at an Employment Tribunal;
- 2) A revised CASE Form that removes reference to the Fee Advance and Early Conciliation Agreement.

If our Solicitors have not received an acceptance form and Early Conciliation agreement by 4pm, 28 days before the time limit for lodging an Employment Tribunal claim expires, then the Region will decide whether to: trigger the ACAS Early Conciliation procedure and subsequently lodge an Employment Tribunal claim on the member's behalf; or to advise the member that they will be responsible and that UNISON is not able to accept any responsibility for triggering the ACAS Early Conciliation procedure or for lodging the claim.

It would not be appropriate for UNISON generally to lodge protective claims at the last minute and it is not fair to other members who seek advice in good time.

There is a revised CASE Form which contains guidance on how to fill the form.

This Guidance sets out what branches need to do where the member comes for advice when there are more than 28 days before the time limit for lodging an Employment Tribunal claim and how to complete the new Case Form.

4. What does the Branch have to do?

Before UNISON can provide legal advice and assistance a CASE form must be completed by the member and the Branch. You should first check in accordance with Rule K, that the member:

- 1) has been in membership of the Union for at least 4 weeks prior to the incident that leads to her/him seeking legal assistance from the Union; and
- 2) is not in arrears of contributions.
- 3) has not triggered the ACAS Early Conciliation process

Note that a member may also come to you for assistance after she or he has lodged their own Employment Tribunal claim and the matter is coming up to a Hearing.

Please remember that only UNISON's regional and national managers can instruct our Solicitors..

The CASE form is sent to our Solicitors by the Organiser/Case Unit and forms the basis on which legal advice is sought.

Because of this it is crucial that the CASE form is fully completed. Any which are not will be referred to the nominated Regional Manager who will decide whether legal assistance will be given. Where the Case form is incomplete due to missing information from the member you must inform the member that assistance may not be given until all the information is provided. This is because it is difficult to give proper advice without all the information.

If there is a potential Employment Tribunal claim (see below) inform the member the time limit for lodging a claim is within 3 months less one day of the incident they are complaining about, 6 months less one day in the case of equal pay and redundancy pay.

Before a case can be lodged, the ACAS Early Conciliation process must be triggered. This process will be triggered by Regional Organisers once the Union's solicitors advise a case has merit. This is because triggering the ACAS Early Conciliation process will affect the limitation deadline i.e. the date by which a claim must be lodged. (<http://www.legislation.gov.uk/uksi/2014/254/made>).

Step 1 – Carry out initial checks

Check the CASE form for the following:

i. Is it fully completed by the member and the workplace representative?

Personal Details (Box 4) - please complete this information including salary information which will be kept confidential.

If there is no workplace representative (Box 15) allocate to a representative and put their details on the form.

ii Has a legal claim been identified? Check box 19 on the CASE form.

Not all members who complete a CASE form will have a legal claim for example: The Case Details on the form has no date completed and in the Box the member has put "I want to put in a request for flexible working but my manager won't tell me how I can do this". If no legal claim is identified seek a workplace resolution. In the example given this could mean drafting a letter for the member to send to the employer requesting flexible working.

In other cases it may not be clear if a member has a legal claim. For example, where a member put in the Case Details on the CASE form: "I applied for early retirement and was dismissed on 30 June". In that case you should seek further advice from other colleagues e.g. a senior branch officer, Organiser or member of the Case Unit as to how to proceed.

In some cases you may need to see more documents. A checklist is set out in step 2.

iii. Check time limits

If a legal claim has been identified or you think there may be a legal claim after consulting others as per ii above, check if the claim is still in time. In most cases the time limit for lodging a claim to an Employment Tribunal is 3 months less one day from the act which your member is complaining about. The most common exceptions are equal pay claims and redundancy pay claims for which the time limit is 6 months less one day.

Before a case can be lodged, the ACAS Early Conciliation process must be triggered. This process will be triggered by Organisers once the union's solicitors advise a case has merit. This is because triggering the ACAS Early Conciliation process will affect the limitation deadline i.e. the date by which a claim must be lodged. (<http://www.legislation.gov.uk/uksi/2014/254/made>).

Set out below are some examples of ET limitation deadlines; but if in doubt you should contact your Organiser/Case Unit for further advice on time limits. **Do not guess the time limit, if you do not know or are unsure. Always seek advice. The earlier the better.**

1) If the member has stated that they were dismissed on 1 June 2014 the time limit for <u>lodging a claim for unfair dismissal to an Employment Tribunal is 31 August 2014.</u>
2) If the member says they asked the employer on 5 June 2014 for a new chair because they have a disability and the employer has not responded, you should treat the time limit for lodging a claim for disability discrimination as running from the earliest date i.e. when the member asked for the chair. The time limit is 4 September 2014.
3) Here are a number of members who say that they transferred on 2 July 2014 and have not received their overnight allowance since then. The time limit for a claim for unlawful deduction of wages is ongoing but it is best to refer the CASE form as soon as possible.

NB: if the time limit for lodging an Employment Tribunal claim is less than 28 days away, you must remind the member of the time limit for lodging an ET1 and contact the Region **immediately**. You must explain to the member that the Region will advise whether it can put in an ET1 or if the member is responsible for lodging their own ET1.

You should submit the CASE form to the Organiser and confirm you have advised the member, in writing (e.g. by email) of the Employment Tribunal time limit.

In addition, the ACAS Early Conciliation Procedure can affect the limitation deadlines and there is a high risk of error in computing the limitation deadline. Please send the CASE form as soon as possible to your Organiser or seek their urgent advice by phone/email.

Step 2 - Where a legal claim has been identified on the CASE Form and is in time

Ensure the following is completed:

- (1) Ensure that the member has completed *all* relevant sections 1-14, assisting the member where necessary – if needed, you can contact the Member Records staff at your branch or regional office for information.
- (2) Explain to the member that any financial information will be treated confidentially and will be necessary if an Employment Tribunal claim has been assessed as having reasonable prospects of success.
- (3) In addition, you must complete sections 15-22.

- (4) If more than one member is involved, all members will need to complete relevant section 1-14 of a Case Form and you should note on each form the name and workplace of the other members who have a similar claim.
- (5) If the form has been forwarded to you complete, enter your contact details in the box on the tear-off slip at the back and return that section of the form to the member without delay.
- (6) If you should need to refer the case to a more experienced UNISON representative or your branch secretary, please ensure you forward this Case Form, with copies of all documents and correspondence, and a summary of the actions you have taken.

NB. If you are completing the Case Form and the Employment Tribunal deadline is within 28 days, you must immediately refer the Case Form to the Organiser.

5. Documents

The documents are important in supporting your member’s case. If the matter is to proceed to an Employment Tribunal you will need, as a minimum, the following documents:

Dismissal	Grievance
Contract of Employment	Contract of employment
Letter of dismissal	Letter of grievance
Appeal against dismissal letter	Appeal against grievance letter
Suspension letter	Investigation letter employer
Investigation hearing union notes/minutes	Investigation union notes/minutes
Letter outcome of investigation	Letter outcome of investigation
Disciplinary hearing minutes and union notes	Grievance hearing minutes and union notes
Appeal hearing minutes and union notes	Appeal hearing minutes and note
Appeal letter	Appeal letter
Disciplinary Procedure	Grievance procedure
Redundancy Procedure	Harassment procedure
Redeployment procedure	Bullying procedure
Disability procedure	

Note: if the relevant documents have not been included make a note of time limits. You should ensure all documents are received more than 28 Days before the time limit for lodging an ET1 expires.

6. Legal Services Agreement

It is a condition of legal assistance that the member does not trigger the ACAS Early Conciliation procedure.

If a member has triggered the ACAS Early Conciliation procedure, it will affect the limitation deadline. Always speak to your Regional Organiser to find out if the Region will still provide legal assistance in these circumstances.

7. Declaration

You must explain to the member what this means i.e. that the union will only support a legal claim to an Employment Tribunal if:

- 1) it has been assessed as having reasonable prospects of success; and
- 2) the Legal Services Agreement has been signed and completed.

You must explain to the member that if they give misleading information including withholding documents that UNISON legal support will be withdrawn.

You must check that the Declaration and Legal Services agreement on the Case Form have been signed.

You must explain that the union can only provide legal assistance if both the Declaration and Legal Services Agreement are signed.

Step 3 - Refer to the Organiser/Case Unit

You should refer the following to the Organiser/CASE Unit as soon as possible.

- 1) the fully completed CASE Form;
- 2) All the relevant documents, (refer to check list above)
- 3) Where the member has triggered the ACAS Early Conciliation procedure themselves, then a copy of the ACAS Early Conciliation certificate (you will need to check first with the Region first if they will represent a member that has triggered the ACAS Early Conciliation procedure).
- 4) If the member has already lodged an Employment Tribunal claim (ET1), a copy of the ET1 and, if there is one, the employers response (known as an ET3), together with any correspondence with the Tribunal;
- 5) Any statements from the member and witnesses where appropriate;

Step 4 - What happens after the case is referred to the Organiser/Case Unit?

The Organiser/Case Unit may do one of the following:

- 1) Inform the branch that the case has reasonable prospects of success, and that the Solicitors will now be writing to the member to inform them that they will be representing them. The Solicitors may contact the branch if they require the branch representative / officer to be a witness; OR
- 2) Refer back to the branch on the basis that the matter does not have reasonable prospects of success. In most cases this will mean that you will receive a summary of the advice which explains why the claim does not have reasonable prospects of success. This can lead to the following responses:

- a) The advice includes points you may be able to use to negotiate a settlement in the case. If it appears that the member may be at risk of being dismissed, the employer may contact her or him to attend a pre termination negotiated settlement meeting. Do not use the ACAS pre-conciliation procedure as this will affect the deadlines for lodging an ET claim which the member may later need to avail themselves of. This is because a member may wish to instruct their own solicitor, and may want to / need to extend the limitation period by triggering the ACAS Early Conciliation process. This then gives the member the option to do this and does not limit their choices. You can attend and use the information from the advice letter. Please DO NOT show the advice letter to the employer as it is legally privileged. Showing the letter to the employer may leave you open to claim of negligence if the employer reduces any offer to settle as a result; OR
- b) The member still wants to pursue the claim. They may ask if you can help. You can refer them to the ACAS Early Conciliation procedure and give them a copy of an ET1 and guidance. You should gently remind them that as the claim has been assessed as having no reasonable prospects of success that they remain responsible for triggering the ACAS Early Conciliation procedure and lodging the claim. You can inform them that they can come back to you for further advice later.. However, UNISON will not represent them in relation to the ACAS Early Conciliation procedure or at the Employment tribunal; OR
- c) Request further documents from member – this is likely to come back to the branch - in which case you will be need to ensure that you get the documents from the member and refer them to the Organiser well before the time limit for lodging a claim to the Employment Tribunal to allow time for a merits assessment.

Appendix A – Reserved Areas

These claims must be sent to the Legal Services Department, and not to Thompsons.

- 1) Judicial Appeals, including Employment Appeal Tribunal, Court of Appeal and Supreme Court;
- 2) Civil claims arising out of employment issues;
- 3) Defamation;
- 4) Equal Pay;
- 5) European Law;
- 6) Immigration;
- 7) Industrial Action (advice should be sought from ballot section);
- 8) Injunctions and Interdicts;
- 9) Judicial Review;
- 10) Matters affecting national terms and conditions, e.g. Single Status, Agenda for Change or other cases which clearly have national and strategic significance;
- 11) Negligent misstatement;
- 12) New law (as defined by UNISON guidance);
- 13) Pensions;
- 14) Public Sector Equality Duty;
- 15) Public or private enquiries;
- 16) Rules;
- 17) Trade Union recognition;
- 18) TUPE
- 19) Collective issues; and Cases otherwise identified by the Union as particularly strategic in line with the Union's policy and priorities from time to time