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How can Acas encourage more employers to make the best use of early conciliation

24 July 2025

Executive Summary

The Acas early conciliation (EC) service was introduced to see if workplace disputes between workers and employers could be resolved before proceeding to an employment tribunal. While there is good use of the service, Acas identified a group for whom take-up could improve: employers who decline early conciliation as they feel they do not have a case to answer. These claims often go on to settle or be withdrawn, after considerable time and expense for both parties.

Acas commissioned Basis Social to conduct research to understand why these employers do not engage in early conciliation, and how to convince them to engage, even if it seems against their interests. Basis conducted 24 online interviews with employers who had declined early conciliation and believed they had no case to answer.

What are the factors affecting employers' decisions to decline early conciliation?

There were 5 main reasons why employers decline early conciliation. These relate to employer beliefs that:

- the main purpose of early conciliation is financial settlement
- the employer does not have a case to answer
- engaging in early conciliation gives credence to a claim
- engaging in early conciliation is wrong in principle
- engaging in early conciliation sets a precedent for other claims perceived to be vexatious

Importantly, cost considerations were secondary to these factors.

Each is now explored in more depth.

Employers believed that early conciliation was a precursor to financial settlement with the claimant. This belief was based on prior experience, solicitors' advice, and the view that the claimant was financially motivated. Given this belief, employers' reasons for declining early conciliation were effectively their reasons for not wanting to offer a financial settlement.

Employers were reluctant to offer settlement because they felt they had no case to answer, with regards to the claim in question. This meant they were confident in the strength of their case, or conversely, that the employee's claim was without merit. Confidence in the case typically came from employers having followed their internal processes and policies very closely, meaning they felt they had not done anything wrong and would win if they went to tribunal. Doubts about a claim's merit came from unreasonably high claim amounts or suspicions the claim was being made in bad faith.

Employers did not want to do anything that they felt would give credence to the claim. They believed that engaging in settlement negotiations implied wrongdoing on their part, and that taking part in conciliation could wrongly encourage the claimant. At the same time, employers felt that early conciliation was a route to early financial settlement, which precluded the possibility of the employee

dropping the case.

While employers often described weighing up the financial costs of various outcomes (such as settlement or the legal costs of tribunal), commercial considerations were often secondary to other factors. Firstly, employers were often guided by principle, as they believed it would be the wrong thing to do to settle. This was particularly strongly felt in situations where employers had spent time and effort on attempting resolution and were frustrated to discover the employee had lodged a claim. Secondly, employers were extremely wary of setting a precedent among staff for offering financial settlements for any claims brought against them.

There were several other secondary factors that also influenced employers' decisions not to engage in early conciliation. These include:

- a desire to protect their reputation with their workforce
- the fact that internal processes were sometimes ongoing at the point of being offered early conciliation (which they preferred to finish before engaging with external conciliation)
- misperceptions about barriers to settling in cases where the employer had disclosure responsibilities

The importance of these varied depending on the employer’s organisational culture, structures and sector.

What are employers' perceptions of Acas and early conciliation?

On the whole, employers reported that Acas conciliators were helpful, clear and balanced. Conciliators were particularly appreciated for acknowledging the frustrations of both parties. However, employers expressed frustration if they felt conciliators seemed disengaged with the process and treated it as a tick-box exercise.

Employers were sometimes frustrated by the limitations of the conciliator's role, having expected them to be able to do more to challenge the claimant's evidence and advise them on the strength of the claim. Employers were also unaware of Acas's legal obligation to respond to all claims regardless of their merit, which led them to question why the claim was being taken seriously.

What could persuade employers to engage in early conciliation?

The argument that engaging in early conciliation could save employers time and money is unlikely to be effective with this group. Firstly, employers already understand this rationale, but do not believe it applies given their view of the claimant's intentions and the internal processes they have undertaken. Secondly, financial costs are not the most salient motivation, given the importance of principle and precedent setting.

In this context, there are 5 recommendations for Acas to convince employers of the value of engaging in early conciliation. They are:

- reframe the purpose of early conciliation in communications, replacing the association with financial settlement with a new proposition – for example as a routine way for all parties to understand the strengths and weaknesses of a case rather than focus on avoiding an employment tribunal
- to help avoid vexatious claims, ensure conciliators encourage claimants to fully explore their internal appeal procedures at the initial stages of a claim, and help the claimant fully consider what would need to be demonstrated for a claim to succeed
- overcome brinkmanship by providing information that only 1 in 4 cases where the employer fails to engage in early conciliation leads to the claimant withdrawing their claim, and that employers significantly underestimated the costs of preparing to go to a tribunal as cases progress
- create a consistent and positive employer experience by:
    - providing communications training for conciliators
    - ensuring the duty cover team are fully briefed about case circumstances and proactive in supporting conciliation
    - asking for feedback from employers to understand what worked well and what could be improved in the early conciliation process

- influence HR and legal advisers to employers, concerning the purpose and value of early conciliation, and specifically that any advice not to settle early is consistent with and supported by engagement in early conciliation

Background and method

Introduction

In April 2014, the Acas early conciliation (EC) service was introduced, under which it became mandatory for employees intending to lodge an employment tribunial (ET) claim to contact Acas in the first instance, to find out if the dispute could instead be resolved through early conciliation.

Therefore, anyone who intends to lodge an employment tribunal claim must contact Acas before employment tribunal proceedings can be initiated. Once an early conciliation notification is submitted, Acas has a duty to try and promote a settlement between the persons who would be the parties to employment tribunal proceedings and avoid an application to an employment tribunal being made.

Early conciliation cases are assigned to Acas conciliators who speak with the claimant or their representative, for example trade union rep or legal representative, to understand the dispute and how the claimant would like it to be resolved. If the claimant agrees, the conciliator will contact their employer to see if they are willing to take part in the early conciliation process. If the employer agrees, the conciliator will talk with each party with the aim of reaching an agreement. If the employer refuses to take part in early conciliation, the claimant will be given an early conciliation certificate to enable the employment tribunal claim.

One of Acas's strategic ambitions is to resolve disputes more quickly and effectively. Acas's evidence shows that early conciliation is helpful: through Acas conciliation efforts, a settlement is reached at the early conciliation stage in around 13% of cases. In total, 67% of early conciliation cases do not progress beyond the early conciliation stage, and only 33% come back as employment tribunal cases.

Of the cases that come back at employment tribunal, most of these then settle or withdraw after considerable time and expense for the parties, for Acas and for the employment tribunal. This suggests the possibility of resolving the dispute at the earlier early conciliation stage.

The focus for this research was on employers who decline early conciliation and an ET1 form was submitted by the claimant. Using figures for the 2022 to 2023 operating year as an example where there has been an outcome at the employment tribunal stage, employers who declined early conciliation and an ET1 form was submitted by the claimant featured in around 4,330 cases. Of these, 2,100 were later settled and 1,200 withdrawn by the claimant.

Acas wishes to better help employers to understand the benefit of continued engagement with conciliation, maximising the opportunity to settle these cases and reducing the number of cases that proceed to employment tribunal. In turn, this will save time and money for conciliation parties, Acas and the Employment Tribunal Service.

Research aims

The aims of this research were twofold and sought to answer the following questions:

Aim 1: To understand why employers don’t engage in early conciliation

- What do these employers understand about early conciliation?
- What factors affect their decision to decline early conciliation?
- Why do these employers settle after the early conciliation stage?

Aim 2: To explore how to convince employers to engage with early conciliation, even if it seems against their interests

- What is their perception of Acas and the conciliation service?
- What could persuade employers to engage at the early conciliation stage?

By understanding their reasons and finding effective arguments to encourage early conciliation participation, Acas hoped to increase employer engagement in the early conciliation process and maximise opportunities for early dispute resolution, benefiting all parties.

Research approach

Basis Social was commissioned to conduct 24 qualitative interviews with employers who had declined to participate in early conciliation. Specifically, research focused on employers where the following applied:

- they declined to participate in early conciliation because they did not believe they had a case to answer
- an ET1 form was submitted by the claimant
- a settlement was reached before the case went to tribunal, or the claimant withdrew their ET1 claim
- the employer was represented by a third party (a lawyer or HR consultant) or was unrepresented

Acas provided a database of relevant employers who had declined early conciliation in the past 9 months. Employers who provided consent were then invited to participate in research. More detail is provided in Appendix A.

It is important to acknowledge that the employers in this research represented a specific perspective, in that they felt they did not have a case to answer. Findings are therefore not generalisable to the wider employer population who participate in early conciliation. It is also worth noting that as only employers took part in the interviews (rather than claimants or conciliators), the research only reflects the employer experience.

Data collection

Basis Social undertook 24 online interviews which lasted up to 45 minutes in October to November 2024 using a piloted semi-structured topic guide (see Appendix B). Participants were individuals in the business who made the decision about whether to take part in early conciliation (either a senior manager or HR representative within employer organisations), stratified by:

- track or jurisdiction of case (with fast track being the most straightforward cases, open track being the most legally complex and standard track falling between the 2)
- size of organisation
- outcome – that is, settlement or withdrawal before a full employment tribunal
- whether the employer had a representative
- other reasons for non-participation in early conciliation

We ensured a balance of different criteria across the sample of interviewees, setting quotas in our recruitment. Please refer to Appendix C for details on achieved quotas.

Verbatim, anonymised quotes are used throughout the report to illustrate findings. The following convention is used to indicate the sample information for employer quotes: "Quote" (Whether the employer was in an HR role, whether the employer had past experience of early conciliation, case track, outcome of the claim, number of employees).

1. What is employers' understanding of early conciliation?

This chapter explores what employers understand by early conciliation. The main findings are:

- employers believe the main purpose of early conciliation is to reach a financial settlement with the claimant
- this was reinforced by a belief that claimants are mainly financially motivated, and claims are vexatious
- employers had mixed understanding of other outcomes arising from early conciliation and, where understood, such outcomes were not borne out by prior experience of early conciliation
- employers have poor understanding of Acas's legal duty to communicate a claim to a respondent, irrespective of its merits
- HR professionals generally had a better understanding of early conciliation than managers and a more favourable view of engaging in early conciliation

Employers' understanding of the purpose of early conciliation had a strong influence on their behaviour. There was a widely held belief that early conciliation was always, or almost always, a precursor to financial settlement with the claimant. The 2 were seen as so closely linked that it was not uncommon for employers to use 'early conciliation' and 'settlement' interchangeably.

Whether employers recognised alternative outcomes to early conciliation (such non-financial settlement or claimant withdrawal) was mixed. While some more experienced HR professionals had a broader understanding of the purpose and potential outcomes of early conciliation, on the whole, employers had often assumed that early conciliation only ever resulted in a monetary payout.

This was sometimes because of the way early conciliation had been characterised by external advisers, such as solicitors, who often framed it as a vehicle to settlement. However, it was also based on prior experience of early conciliation. Even if employers knew that in theory financial settlement was only one of several outcomes of early conciliation, in practice, early conciliation negotiations had always been about money.

"I was fairly confident by engaging with the early conciliation, that… we would go ahead and settle… every time we've engaged, it has resulted in settlement." (HR, prior experience, open, settled, 50 to 250)

The link between early conciliation and financial settlement was also predicated on the employer's view of the claimant's intentions. In the context of claims where the employer felt they had no case to answer, employers almost always expected that the employee was financially motivated, and that the relationship could not be restored. This was based on what had taken place in the lead up to the claim being brought, for example knowing the employee felt very upset, and on early experiences with early conciliation.

Following first contact from the conciliator, it would often quickly become apparent that the claimant was proposing a sum of money to settle and was uninterested in other forms of resolution. While employers might not always see an early conciliation claim as only financially motivated, in claims they viewed as vexatious at the point of being offered early conciliation, it was almost taken for granted that the claimant was seeking a payout.

"Very rarely does somebody say they want to conciliate and they would like you to agree to their flexible working request or, you know, to support their return to work better. They always want money, and it's a very difficult situation." (HR, prior experience, open, settled, 250 or more)

"Obviously there is a significant cost to a business to go and fight the case in a tribunal. But often people ... don't like being dismissed, they don't like the decision. So 'I want some money from the company' and often early conciliation is the way of them getting that." (HR, prior experience, standard, settled, 250 or more)

While employers tended to have a very narrow view of early conciliation in claims they viewed as vexatious, they often described a more nuanced view of early conciliation in general. Some employers said that they felt it was important that a means to challenge

employers existed, a view stronger among those who had experience of a friend or family member with prior experience of employment tribunal. The most positive views of early conciliation were among employers who primarily characterised it as a means to avoid tribunal, and the financial and reputational costs associated with employment tribunals. However, this definition of early conciliation was not widespread among interviewees.

Views of early conciliation were different among those working in HR compared to individuals in non-HR roles but with early conciliation exposure. Overall, HR professionals were slightly more knowledgeable about early conciliation compared to those in non-HR roles. For example, they were more likely to understand Acas's role in early conciliation, know that participation would be confidential, or to be aware that outcomes aside from financial settlement were technically possible.

Therefore, they were slightly more likely to perceive the benefits of engaging in early conciliation. HR representatives sometimes had to explain how early conciliation worked and Acas's role to their colleagues, to inform their decision about whether to take part. Some HR employers described the difficulty they sometimes had convincing senior decision-makers about the benefits of engaging with early conciliation.

HR professionals, often in larger organisations, tended to be more convinced by the idea of the cost-effectiveness of engaging in early conciliation, having had more experience of it, except in cases where the employer felt they had no case to answer.

"This is coming on the back of a lot of conversation with employees who are not in the HR function where they say, 'Which side is Acas on? If I talk to them, will they then go talk to you? ...what will they say?'...So that whole circle of information, what's confidential, what's not confidential, will I have to say this? ...[colleagues] are missing bits and pieces around it." (HR, prior experience, standard, withdrew, 250 or more)

There were also a few misperceptions or knowledge gaps about early conciliation across employers in the sample, which had implications for their perceptions of the service. Firstly, employers were unaware of Acas's legal duty to bring claims and communicate them to respondents irrespective of the claim amount, adherence to time limits or likelihood of success. Secondly, when hearing about early conciliation for the first time, there was an initial expectation among some employers that conciliation would be closer to mediation, in terms of what would take place and the role of the conciliator. It was rare for employers to accurately differentiate between conciliation and mediation as distinct services offered by Acas. These misunderstandings of early conciliation could potentially lead employers to question the value of the service.

Ambiguity about participation in early conciliation

Discussions with employers suggested some confusion about whether early conciliation had taken place. Though the sample of employers was drawn from those whom the conciliator had marked as having declined early conciliation, not all employers felt that they had. This was because they had taken part in extensive back and forth with the conciliator about their views of the claim and the claimant's perspective, which they sometimes perceived as having taken part in conciliation. However, once they said they were unwilling to offer a financial settlement, the process came to an end.

"I said I was happy to provide further information... I was sending information to Acas, they were then passing it on to the person. The person was then sending stuff for her views back to Acas and then sending that to us, and then we were responding... We engaged in [conciliation] and I was very happy to go forward and to potentially mediate... But I was very clear from my perspective that I would not be settling in this case." (Non-HR, no prior experience, open, withdrew, 50 to 250)

It is possible that employer perceptions of early conciliation as synonymous with financial settlement are supported by the ways in which Acas conciliators present decisions around early conciliation. Sometimes, the way the conciliator offered conciliation seemed to the employer as presenting a binary choice between financial settlement, or declining early conciliation. In some cases, employers felt that conciliators were encouraging financial settlement from the outset – this is discussed further in Chapter 5, 'What could persuade employers to engage?'

"Obviously [the claimant] wanted a payout and the gentleman I spoke to at Acas was there to say, can we negotiate a payout? So that was all that they were interested in... There was no other purpose... How it was framed was either, you can reach the settlement before he goes to tribunal or it moves to tribunal." (HR, prior experience, standard, settled, 250 or more).

The impasse in the progression of early conciliation was not always about the employer's unwillingness to engage in conciliation, but was a combination of (a) the claimant's stated interest in financial settlement and (b) the employer's unwillingness to agree to it. In one case, the conciliator also recommended against proceeding with conciliation given the gulf in settlement expectations of the 2 parties. While this may represent a less typical early conciliation experience, it also suggests that there may be a more complex story behind the data on employers who refuse early conciliation, as the process may be terminated by a combination of viewpoints:

- the claimant's position that payout is the only acceptable avenue
- the employer's disinclination towards payout
- the conciliator's view about the likelihood of early conciliation resulting in resolution

"There was an email from Acas that did tell me that the parties are very far apart in expectation… very far apart by a certain amount of cash and a polar opposite may entrench the claimant in their position... There isn't scope to conciliate at present. So therefore, did we want them to go ahead?" (Non-HR, no prior experience, standard, settled, 50 to 250)

2. What are the factors affecting employers decisions to decline early conciliation?

This chapter explores the factors affecting employers' decisions to decline early conciliation. The main factors are:

- belief that there was no case to answer
- belief that engagement in early conciliation implies employer liability

  the strategy of brinkmanship
- belief that engaging would be wrong as a matter of principle
- desire not to set a precedent for settling
- fear of reputational damage
- complication with concurrent internal processes
- effect of external advice
- perceived legal barriers to financial settlement

This chapter explores 9 factors that influence an employer's decision not to engage in early conciliation. It should be borne in mind that, given employers' understanding of early conciliation, their reasons for declining early conciliation can be read as their reasons for not wanting to offer a financial settlement.

Employers in the sample who had prior experience with early conciliation said that they made decisions about whether to take part in early conciliation on a case-by-case basis, and typically would consider engaging in early conciliation in 'the right circumstances'. The circumstances which lead employers to determine that early conciliation would be the wrong thing to do include:

- their beliefs about the weakness of the case
- their understanding of early conciliation
- strategic decisions around timing
- their principles and beliefs
- reputational risks
- adherence to process and legal advice or limitations

"So we do tend to look at each case on its own merit and say, look, let's weigh up. Is it worth the management time? Do we have a moral stance that we want to take here? Do we need to make a commercial decision? And whether we engage or not with early conciliation, those factors would be taken into account." (HR, prior experience, fast, settled, 250 or more)

No case to answer

All employers in the sample said they declined early conciliation because they felt they had 'no case to answer'. Primarily, this meant that they were confident in the strength of their case, or conversely, the employee's claim was groundless.

Employers were typically confident that they had a 'watertight' case when they knew they had followed their internal processes and policies very closely. Adherence to internal processes, usually with an accompanying paper trail, translated into high confidence that they had not done anything wrong and would win at tribunal.

There were 2 elements to this. Firstly, employers referred to their adherence to company policy with regards to the decision that had led to a grievance. For example, a decision could be supported by policy stated in their employee handbook about how they deal with misconduct. If employers felt they had made a decision in line with their stated policies, they concluded that the employee had no grounds for a claim.

"I didn't feel worried that she would be able to take us to tribunal and win a case against us because... I've got the paper trail, I've got an email trail... I've got everything... I knew there was nothing at all that could come back on me." (HR, no prior experience, fast, withdrew, 10 to 49)

Secondly, employers were confident they had followed their own internal processes for dealing with the grievance rigorously, again leading them to feel that their case would be robust if it was heard at tribunal. An internal process could include:

- an internal investigation
- performance management
- an appeal process, with accompanying communication to the employee

Having gone through rigorous internal processes also meant that employers were sure they had uncovered all the evidence relevant to the claim, and that their position on it would be unlikely to change.

"I would sleep at night knowing a grievance process and procedure has been thoroughly investigated and exhausted, as in appeal stage, and therefore we're robust in what we're doing." (HR, prior experience, open, withdrew, 250 or more)

Several other factors led employers to interpret claims as baseless or vexatious. Employers often said that they amount being claimed was, in their view, unreasonably high, either based on the grievance or what they had calculated the maximum claim value could be. Very high claim amounts could lead the employer to immediately disregard the claim and refuse to engage further.

"What he was asking in this instance was absolutely ridiculous. He… had only been with the company for 2 years and he wanted 24 months' pay, which he wouldn't have even got at tribunal. So clearly he'd not taken any legal advice. It was, without sounding flippant, laughable that he wanted 2 years' pay." (HR, prior experience, standard, settled, 250 or more)

"The claim coming back simply was just stupid. We would never have entered into a negotiation based on what he was offering to what we would have offered, we would never have been able to meet that... the people within the business would know that as well." (Non-HR, no prior experience, standard, settled, 50 to 250)

Employers were also wary of engaging with claims that they felt were made in bad faith. Where there was a particularly bad relationship with an employee, employers could regard a claim as spurious, motivated by an employee seeking to damage the organisation. In relation to dismissals for sexual harassment, 1 research participant working in HR was of the opinion that claimants had to bring a claim in order to be seen by their family to be defending themselves, despite perhaps knowing they did not have a case. Employers said they sometimes had discovered that the claimant had a history of making claims with previous employers, which tended to undermine their current claim.

Related to this, employers felt they had no case to answer when they believed the claimant was deliberately bringing a claim under the wrong jurisdiction, either to add weight to their case or to circumvent limitations set by employment law. For example, employees who had under 2 years' service were thought to have upgraded the seriousness of their claim inappropriately (in the employer's view) citing discrimination or whistleblowing. This was taken as evidence that the employee was 'trying their luck', undermining the validity of their claim.

"We were very clear that we hadn't dismissed him because of anything to do …with whistleblowing. We had been very clear from the start with the reason why we dismissed him. And because he was totally focused on [whistleblowing], we saw no reason to be able to [engage in early conciliation]." (Non-HR, no prior experience, standard, settled, 50 to 250)

"We said there was no right to appeal because she has less than 2 years of service at that point… Then we got the Acas letter… they told us that she was seeking discrimination on the grounds of her language. And she was also seeking discrimination on the grounds of sexual discrimination as a parent, as a mother. We listened to her version of events. They had a lot of detail from her that was very inaccurate." (HR, prior experience of early conciliation, standard, withdrew, 250 or more)

While employers often dismissed the validity of a particular claim, and perceived it to be spurious or vexatious, this did not mean that they took it lightly. Each of the claims were taken seriously and employers instigated the same internal conversations and processes as for other early conciliation or employment tribunal claims.

Engagement implies liability

A key reason for not engaging in early conciliation, when employers felt there was no case to answer, was due to a belief that engaging in settlement negotiations implied wrongdoing. They felt that engaging with Acas could wrongly encourage the claimant by suggesting their claim had some merit. Therefore, refusing to engage in early conciliation was, for some employers, a way of communicating to the claimant (and potentially to other employees who may hear about the claim) that they accepted no liability and would not entertain the claim. They felt this was important as they felt the very fact that Acas had taken on the claim led to inflated claimant confidence with regards to the strength of their claim.

"It is very, very rare that we would not engage in early conciliation. We would almost use not engaging with early conciliation as a firm stance to say, okay, we accept no liability. There is no case to answer here. We are not willing to entertain early conciliation because we are not at fault." (HR, prior experience, fast, settled, 250 or more)

"Most of the time it's more to do with whether or not it's a cost or benefit for us to engage with Acas or not. But I would also say there is a little bit of a stigma, there is a stigma that if you engage with Acas, you have potentially done something wrong." (HR, prior experience, standard, withdrew, 250 or more)

On the other hand, the same employers said they had engaged in early conciliation in the past when they recognised or suspected they had made mistakes. This meant that they were much more willing to consider settlement when they knew they had potentially wronged an employee, or had not properly or fully followed their internal processes.

Brinkmanship

Not only did early conciliation mean financial settlement to employers, it also meant early financial settlement. Where employers felt that a claimant's claim was unfounded, one strategy was to wait and see if the claim would be withdrawn. Employers felt that participating in early conciliation therefore precluded the possibility of the claimant withdrawing. Building on the previous point about what refusal to take part in early conciliation was seen to communicate to the claimant, refusal to take a claim seriously was seen to be more likely to lead to an employee giving up. Research for Acas shows that a quarter (26%) of claimant-side participants who had not reached a conciliation agreement (COT3) settlement did not go on to submit an early conciliation claim because they did not think they would win the case. It should be noted this research drew on evidence prior to the abolition of employment tribunal fees in 2017, which may also have acted to deter claims.

"I think the decision was primarily, if we show such a lack of engagement in this, maybe they'll accept that it's just not worth pursuing. If we're not willing to put the time behind it, maybe it's just not worth pursuing." (HR, prior experience, fast, settled, 250 or more)

While there was usually a commercial aspect to their decision, weighing up the costs of tribunal against the costs of early settlement, employers that engaged in brinkmanship had usually not fully considered how costs could escalate. There was a sense that as time went on, the claim could be withdrawn, or failing that, they could eventually settle (hopefully for a lower amount) to avoid tribunal.

However, employers engaging in this approach had usually not considered the scenario of settling or withdrawing close to the tribunal date, and the accompanying resource and legal costs involved in preparing for tribunal. The view that there was plenty of time for the claim to resolve before tribunal sometimes acted as a barrier to engaging in early conciliation (something that could be exacerbated by extending the timeframe for employment tribunal). There was a sense that settlement could take place right up to the day of tribunal. The fact that the claimant may also adopt a 'wait and see' approach was not salient for employers at the point of making a decision about early conciliation.

"Is it the right time to settle? Is it not the right time to settle? My recommendation to that business at that time was don't enter into discussions with him about settling because I don't think commercially you need to do that... or even to enter into discussions. There's plenty of time." (HR, prior experience, standard, settled, 250 or more)

Principle

While employers often described a commercial element to their decision making, the decision was significantly influenced by principle in almost all cases. This was particularly true when the employee's behaviour was perceived to be morally wrong, because they had been dismissed for discrimination or harassment. Here, financial settlement was perceived as the wrong thing to do, and to be rewarding the poor behaviour.

"Morally, compensating somebody for that period of time for doing something like that in the business… we can't compensate people who are simply wrong and unlawful in what they say." (Non-HR, prior experience, standard, settled, 50 to 250)

"When we look at settling and going through conciliation process, we're very clear that that shouldn't be seen as a reward for poor performance or it shouldn't be seen as a reward for HR … disciplinary matters." (HR, prior experience, open, settled, 50 to 250)

Stances based on principle were also stronger when the employer felt emotional about the claim, either because they felt personally affronted or even betrayed by the fact the employee had lodged a claim against them, This was particularly the case if they felt they had tried their best to resolve things during an internal grievance process. It was also more common in smaller- and medium-sized businesses, where there was more of a 'family culture'.

Emotional responses were strongest at the point of discovering the employee was making a claim, when they first heard from the Acas conciliator. With principle in the foreground at the point of making a decision about early conciliation, employers sometimes preferred to see the case through to tribunal, to 'do the right thing', rather than capitulate to what they perceived as the claimant's unfair demands. Financial costs therefore were secondary to an employer's moral position, as they felt they would rather pay solicitors, and pay a higher amount overall, than give money to the claimant. For example, if a claimant was asking for an amount that was similar a solicitor's estimate of their fees to defend the case at tribunal, the employer sometimes preferred to pay the solicitor fees (even though the solicitor's quote did not include the additional cost of possibly losing at employment tribunal).

Precedent setting

Setting a precedent was a key factor in employers' decisions not to engage in early conciliation. Employers did not want to become known among employees for paying out for claims perceived as vexatious, and for settling early. Engaging in early conciliation therefore meant capitulating to an employee's demands and settling immediately, whereas not engaging in early conciliation demonstrated that they would challenge claims even if it was difficult and expensive to do so.

"I'd rather pay the solicitors because, again, I don't want to set a culture where the business thinks we pay people off, because we will just keep getting tribunals." (HR, prior experience, open, settled, 250 or more)

The desire to avoid setting such a precedent was widespread across organisations – as small organisations felt they were very sensitive to the costs implicated by multiple claims, and large organisations felt they would become inundated if claims became normalised among their workforce.

This view was particularly strong when the claimant had relationships with and potential influence over others in the organisation, meaning the employer was more sensitive to the risk of 'contamination'. Although the sample was small, and it is not possible to draw conclusions on the basis of sector, feedback indicates that fear of precedent-setting might be stronger in manual occupations than office- based roles. For example, one employer reported that they would be much more wary of agreeing to an early settlement through early conciliation with a member of their warehouse staff, than their office staff.

"From a reputational element of it, it looked weak from our point of view that we settled it. The claimant had friends inside the business and was talking to people inside the business who then found out that we'd settled." (Non-HR, no prior experience, standard, settled, 50 to 250)

Reputational damage

While a reputation for settling was regarded as critical to avoid, some employers considered the risks to their reputation more broadly in relation to early conciliation, internally and externally. There were a few ways employers defined reputational risk:

- the risk of going to tribunal for certain claims, and the negative associations of discrimination or harassment cases that could damage their brand
- the risk of losing at tribunal and the negative media and social media exposure related to that
- the reputational impact on staff and potential staff, in terms of how the employer deals with claims being brought against them, regardless of whether they went to tribunal

Overall, it was important that the employer was seen to be acting fairly, consistently, and for the claims the be resolved quickly to help contain the risk.

"I think it's definitely a risk assessment. First of all, with every single case, it's a long- term situation. Looking at the picture of is this fair, is this what we've done previously and what we would do in the future? Are we making any kind of special treatments?" (HR, no prior experience, standard, sithdrew, 250 or more)

While reputation was a consideration in broader dealings with Acas and tribunal cases it was not usually a strong influence on their decision not to engage in early conciliation if employers felt they had no case to answer. Employers were generally confident that if they went to tribunal, they were unlikely to lose and would be vindicated by the result, meaning external reputational risks would be minimal. On the other hand, employers were slightly more conscious of the impact on internal reputation, in terms of how other staff would view their actions and how they might be affected by long, drawn-out disputes.

"As much as you keep these things confidential within businesses, I know that lots of people in my business knew that this had gone to tribunal... She was at liberty to speak with members of my staff. And that has long- term repercussions on my business. Culturally, it has affected my business... because my staff don't know what happened and they've only heard one side of the story because obviously it's a confidential matter, we wouldn't discuss it." (Non-HR, no prior experience, open, withdrew, 50 to 250)

Ongoing internal processes

In a handful of claims, an employer declined to participate in early conciliation because of their own internal disciplinary or grievance policies. Typically, employers had already been through an internal process at the point of being offered early conciliation. However, some employees were still part-way through the process and had brought the claim at the same time (usually to ensure they started a claim before the employment tribunal deadline). This could sometimes lead an employer to decline early conciliation as they felt they needed to complete their own internal investigations and processes, and feel confident about the evidence, before they felt ready to negotiate.

If an employer had an appeals procedure, and an employee had filed a claim without using the appeals system, this could lead to an automatic rejection of early conciliation. This was in part because they felt they would be contradicting their own policy by engaging in early conciliation, and therefore not be acting fairly and consistently.

"To even go to a tribunal, you should have exhausted the internal procedures in terms of going through the appeal process… if he had appealed then we could have addressed some of his concerns at that appeal… I think for somebody to come to early conciliation, they should have at least appealed first and be able to demonstrate that they've done that." (HR, prior experience, standard, settled, 250 or more)

"If we'd have got an appeal in by the individual... if that appeal had come in, we would have had a conversation with Acas and sat down… We wouldn't have settled still, but we certainly would have entertained more of a conversation with them." (Non-HR, prior experience, standard, withdrew, 10 to 49)

External advice

Some employers were influenced by advice from external HR or legal advisers, in their decision to decline early conciliation. Employers in the sample had various arrangements in terms of how they accessed HR support and the ways in which they used lawyers (whether they would engage them throughout the claim or, more commonly, only when tribunal approached). Typically, external advice at the point of early conciliation was not to settle early if there was no case to answer. This was interpreted as advice not to engage in early conciliation. Given the sample is of employers only, it is not possible to accurately determine whether legal and HR advisers advised employers not to engage with early conciliation, or whether this was employers' interpretation of the advice.

"We didn't have a case to answer for. We felt like the [HR] advice was that it was the other way around. The advice at the time was, there is no case here…" (Non-HR, no prior experience, open, settled, 1 to 9)

Legal advice sought later on in the process generally encouraged financial settlement in order to avoid tribunal. This is discussed further in Chapter 5.

Perceived legal barriers to settlement

In one case, the employer believed they were unable to engage in early conciliation for legal reasons. As the claim involved a safeguarding concern about the claimant and they are legally required to disclose child protection concerns, the employer (mistakenly) believed that a COT3 and financial settlement would prevent disclosure. Acas policy states that a settlement cannot prevent undertaking a legal responsibility such as reporting safeguarding concerns. They were also concerned that Acas conciliators did not necessarily have the specialist knowledge of how employment and child protection laws interact, and therefore early conciliation would not be appropriate for them.

"Legally we are not allowed to enter into settlements because settlements obviously stop us revealing that information and we are not legally allowed to not reveal that information. So, for example, if this individual went to go and work in any other environment where they were working with children, we have a legal obligation to disclose that they have been dismissed for safeguarding reasons. And if we go through settlement process, we're not allowed to." (HR, prior experience, standard, withdrew, 250 or more)

3. Why do employers settle after the early conciliation stage?

This chapter explores why employers, who believe they have no case to answer, chose to settle after the early conciliation stage. The reasons are:

- mounting legal costs as the organisation starts to prepare for an employment tribunal (this was the main reason)
- a reduction in the amount the claimant was seeking
- employer decisions being led more by pragmatism than principle as the case continued
- employers discovering minor procedural technicalities, or factors outside of their control, that have weakened the strength of their case

Sixteen of the 24 claims in the sample went on to settle after early conciliation. This chapter explores the reasons the claim eventually settled, and whether and how that affected the employer's view of early conciliation.

The main reason cited for settling with the claimant as tribunal approached was the mounting legal costs as the organisation had begun to prepare for tribunal. Projections of the costs of progressing to tribunal, provided by solicitors, led the business to engage in negotiations with the claimant.

Some employers less experienced with employment tribunals were unaware of the actual costs of going to tribunal until this point, though this was relatively uncommon. As time went on, employers also realised the impact on staff, in terms of time and resource in dealing with the claim, and sometimes, the emotional toll. Smaller organisations, with smaller or non-existent HR functions, were more

sensitive to this.

"Going to tribunal, even though we felt that we would get the right result, it would still cost far too much money….literally the solicitor's bill and her telling us how much a barrister would cost at that point, rather than in November trying to think about how much that would have cost because we wouldn't really have had an idea of the true cost that it would have run to before it had been taken to the tribunal." (Non-HR, no prior experience, standard, settled, 50 to 250)

"The case became more and more complicated and complex. It was impacting the wellbeing of some of the leaders in the team… and it was impacting the kind of the morale of the team that were picking up the work. It looked like we weren't getting to a solution and actually the more and more time spent on it, the more and more that the hourly rates of the people involved were creeping up." (HR, prior experience, open, settled, 50 to 250)

Crucially, at the same time as legal costs were rising, the claim amount often reduced, often significantly. In the sample, the final settlement amount was between a sixth to a quarter of the original claim. This was sometimes seen as a good outcome for the employer considering the projected legal costs and the amount compared to the original claim.

However, it was also sometimes taken as evidence of the weakness of the claim in the first place, leading to occasional resentment that the claimant had managed to negotiate a payout at all, given their lack of case. Employers often felt, at that point, that a few thousand pounds was worth paying to avoid the time, inconvenience and cost of going to employment tribunal.

"They originally asked for well over £20,000 and they ended up settling for 4…it's not a realistic claim in the first place." (HR, prior experience, standard, settled, 250 or more)

As discussed, some employers (particularly in smaller organisations) had felt very frustrated by the fact that the employee had brought a claim against them, and in the period immediately after being contacted by Acas, were unwilling to consider settlement. However, as time passed, employers' initial emotions about the claim tended to have cooled, and they were more willing to listen to the rationale for settling.

A key issue for this research was around the potential for employer overconfidence about the strength of their case, and whether engaging in early conciliation could have surfaced evidence that would have led them to settling earlier. There were a small number of claims where employers discovered additional information that they were initially unaware of at the point of declining early conciliation. However, in the employer's view, these tended to be relatively minor technicalities rather than significant infractions that might lead them to lose at tribunal. Such discoveries did lead to financial settlements, but again for much lower amounts compared to the original claim.

"The reason I finally settled is … that we didn't suspend for two weeks while we investigated…I was comfortable with that. Arguably that was us [who got it] wrong. I think we did it for the right reasons and it was defendable. But that was against the Acas guidance of how to conduct those kinds of investigations. It's not rules and regulations, but it's Acas guidance. And the courts, the courts will defer to Acas guidance… So that, for me, didn't feel like I was compensating them for putting them out of work. That would just compensate them for us not following due process." (Non-HR, prior experience, standard, settled, 50 to 250)

Sometimes the employer offered a settlement as their case began to weaken for external reasons, unrelated to the original claim. For example, 1 claim had gone on for several years, meaning the employees who would have been called as witnesses no longer worked at the company. In a couple of claims, separate HR disputes had begun, which involved the original claimant. In these situations, the company chose to settle to avoid both claims becoming more complicated, and to avoid the original claimant becoming a 'hostile witness' in the concurrent claim.

Despite the outcome, and the fact that they had often had to pay out legal costs in addition to the settlement, employers who eventually settled with the claimant very rarely said they regretted declining early conciliation. This was because of the importance of

other factors above and beyond purely financial costs, namely, the principle of not settling early for claims that were perceived to be vexatious, and the desire to avoid a reputation for doing so.

4. What are employers' perceptions of Acas and early conciliation?

This chapter explores employers' perceptions of Acas and their role in the early conciliation process. The main findings are:

- employer perceptions of Acas are broadly positive, though shaped by the experience of dealing with individual conciliators
- employers value conciliators who are responsive, helpful and pragmatic, could articulate the facts of a claim clearly, and act as an honest broker between parties
- employers expressed concerns about conciliators who are perceived as being disengaged from the early conciliation process and treat it as a tick-box exercise or who place pressure on the employer to settle
- employers also expressed concerns about a lack of conciliator continuity on cases, and associated gaps in knowledge
- whilst employers acknowledge Acas needs to remain impartial during early conciliation, employers believed this was sometimes used as an excuse to avoid challenging claims which were factually or legally incorrect

Experience of early conciliation and Acas conciliators

Employers' experiences with Acas conciliators were mixed, reflecting inconsistency in the early conciliation experience. Individual employers with prior experience of early conciliation pointed to both positive and negative examples, and were of the view that the service depended on the individual conciliator.

On the whole, employers reported that Acas conciliators were helpful and responsive, highlighting their ability to articulate facts clearly and maintain a balanced approach. Conciliators were particularly appreciated for acknowledging and understanding the frustrations of both parties involved, and for fostering a safe space for open and honest conversations. One employer especially noted that experienced conciliators did not push for settlements but rather facilitated understanding between parties.

"I've never had any concerns with Acas. It's always been prompt and efficient. And I also think that they come across quite kind, knowing potentially probably the stress this is putting people under. I've never felt anyone be particularly pushy or anything like that, so I've never had any concerns about the conciliators." (HR, prior experience, open, settled, 50 to 250)

Some employers perceived conciliators as fair and unbiased, which gave them confidence in their handling of early conciliation negotiations. They particularly valued approaches that helped them understand the claimant's perspective and thought process before potentially proceeding to employment tribunal.

"I've always found them to be so impartial. And it's nice, I suppose it's good to understand from the employee's perspective. It gives you a bit of an indication of where their thought process is before you think it's going to go to an employment tribunal. Yeah, I find it really beneficial." (HR, prior experience, fast, settled, 250 or more)

On the other hand, some employers reported less positive experiences with conciliators. In the worst instances, employers felt that conciliators came across as disengaged from the process and treated it as a 'tick-box exercise. In these cases, they felt the conciliator was encouraging the employer to settle financially, as the decision about whether to continue with early conciliation was framed as a binary choice between financial settlement or ending conciliation. This could lead the employer to question whether Acas was a neutral intermediary or in fact, sided with employees over employers. Sometimes it also discouraged employers from engaging in early conciliation.

"I feel that [early conciliation] is very much a tick-box exercise. I don't see the value that it brings to the employment tribunal. That's my strong view." (HR, prior experience, standard, withdrew, 250 or more)

Some employers expressed frustration around inconsistencies in the quality of service provided by conciliators, citing issues like limited case knowledge, lack of clarity around procedure, and unclear communication, especially if they felt they had a less-experienced conciliator. Employers also noted that delays in the early conciliation process, for example due to conciliators taking holidays, disrupted continuity and responsiveness.

"We have a lot of situations arise where they tend to go on holiday halfway through the conciliation and you're then dealing with someone who knows nothing about that case or nothing about the background, and you're having to, sort of, reiterate or repeat everything you're doing." (HR, prior experience, standard, withdrew, 250 or more)

There was a mismatch between employers' expectations and the role of conciliators. There was sometimes an implicit expectation that conciliation would be more akin to mediation and conciliators would be able to do more to challenge the claimant's evidence and advise them on the strength of their claim. Though employers often acknowledged that Acas has to remain impartial, and that advice could fall outside the conciliators' scope, they felt that in claims that were in their view clearly vexatious or with very unrealistic claim amounts, Acas could do more. For example, employers suggested that the conciliator could indicate the strength of the claim to claimants or to refer them to the maximum amount they could win at tribunal.

"I was kind of looking to the Acas conciliator to say, 'Well, look, [the claimant's] clearly not got any evidence, she's clearly not got any witnesses. You know, clearly, she hasn't got a case.' And [the conciliator's] like, but that's not my role..." (Non-HR, no prior experience, open, withdrew, 50 to 250)

Employers' experiences with Acas conciliators and the early conciliation process can impact their perceptions of Acas as an organisation. Positive experiences, such as dealing with conciliators who are professional, responsive, and impartial, can enhance its reputation. It should be noted that among employers who do participate in early conciliation, ratings of the conciliator are largely positive, with 71% of employers providing a positive rating of the explanation of the conciliation process, and 67% providing a positive rating the conciliator relaying proposals and offers to and from the claimant.

Conversely, negative experiences, such as feeling pressured to settle or sensing a lack of genuine conciliation efforts, can sometimes lead employers to question Acas's credibility as an unbiased mediator.?This typically led to disillusionment about the value that early conciliation offered, and could lead employers to decline the service in future.

Role of Acas as an adviser

In general, employers tended to view Acas's role in early conciliation separately from its advisory function. They recognised the origins of Acas and regarded its establishment as a positive step, appreciating its role as an independent advisory body offering guidance on employment law and rights. Acas was valued as a reliable resource for templates and guidance, often serving as the first point of reference for legislative changes. Among the sample, Acas's wider work had a reputation for an impartial and factual approach.

"We use them [Acas] for training. Our senior staff go on their training. We use them for advice, we've used them for policies and procedures. We're using their guidance. So, it's an independent HR advice service from the government which is very well regarded… If there's a new change in legislation, we will seek our lawyer's view, but very often we'll go to Acas first…" (Non-HR, prior experience, standard, settled, 50 to 250)

While Acas was generally valued for its impartiality and advisory role, some felt that conciliators' can use impartiality as an excuse to avoid challenging claims which are seen as factually or legally incorrect. Employers felt that this could leave both parties without clear guidance on the strength of their cases or the potential risks of going to a tribunal.

"I think they were very impartial, but maybe too impartial. There's got to be a role for Acas in understanding cases and maybe having that legal background in terms of the strength of cases, and providing advice on that basis, really. And I didn't feel that was there. I just felt that they were just a go-between." (Non-HR, no prior experience, open, withdrew, 50 to 250)

Acas's perceived lack of challenge to claimants led to frustration among some employers, who believed that it created false hope f or claimants. Some employers felt that the fact Acas had 'accepted a claim' at all lent legitimacy to an employee's claim and inflated their expectations of success, underlining their lack of understanding that Acas must legally respond to all claimants. Employers were unaware of Acas's legal responsibilities to accept claims and communicate what the claimant wants regardless of whether claim amounts are realistic, or they are within legal time limits.

"Every time I have entered into early conciliation, knowing that they [claimant] don't have a legal case, but thinking, we'll go through the process with Acas… I've actually found it really unhelpful because Acas won't provide them with any legal advice... They think that if Acas have allowed them to go into early conciliation, it must mean that we have a case to answer…" (HR, prior experience, standard, withdrew, 250 or more)

These employers expressed a desire for Acas to take a more active role in the early conciliation process. When it comes to addressing claims employers viewed as vexatious in particular, they suggested that Acas could do more to help claimants explore the merits of a claim and ideally, help filter out weaker claims.

"It [Acas] needs to be more advisory, whereas at the moment it feels like they are a sort of, mediator. They sit in the middle and they don't advise, they just hear, they just listen, which has a lot of power behind it, but it has no worth to us as a business." (HR, prior experience, standard, withdrew, 250 or more)

Overall, while Acas is recognised for its impartiality and procedural guidance, employers see a need for it to enhance its advisory capacity to provide clearer, more directional advice to both employees and employers to add value through the early conciliation process.

5. What could persuade employers to engage?

This chapter explores what could persuade employers to engage in early conciliation. The main findings include the need for Acas to:

- reframe the purpose of early conciliation to explore the strengths and weakness of a case, rather than being mainly concerned with financial settlement
- provide examples of alternative outcomes beyond financial settlement
- provide greater detail on the early conciliation process, especially concerning Acas's legal duties, which need to be discharged irrespective of the merits of a case
- create a more consistent and positive employer experience when engaging with conciliators
- consider the timing of different communications in relation to the changing needs of employers as the case progresses

There are several barriers to persuading employers who feel they do not have a case to answer to participate in early conciliation. The most powerful barriers tend to relate to employers' individual views and beliefs, that:

- the only outcome of early conciliation can be financial settlement, based on their view of the claimant's intentions
- they must avoid a reputation for settling
- their internal processes have been rigorously followed, meaning they are unlikely to discover new evidence and feel confident about winning at tribunal
- out of principle, they prefer tribunal over a payout for what they view as a vexatious claim

Furthermore, at the point of making a decision about early conciliation, emotions about the claim tended to be highest, meaning employers are likely to be less receptive to the idea of entering into conversations with the claimant. Taken together, these are challenging barriers to overcome, as the reasons for employer's views are largely based on their relationship with the claimant.

The rationale that engaging in early conciliation could save employers time and money is unlikely to be effective with this group at this moment. Firstly, employers already understand this reasoning about early conciliation in general, but do not believe it applies in this claim given their view of the claimant's intentions, and the internal processes they have already undertaken.

Secondly, financial costs are not the most salient motivation, given the importance of principle and of not setting a precedent. This chapter explores the arguments that could be effective at changing employers' views of the value of engaging in early conciliation where they feel they do not have a case to answer.

Reframe the purpose of early conciliation in early communications with employers

Fundamentally, the perception that needs to be challenged among employers is the view that early conciliation is only about financial settlement. Acas could reframe early conciliation by landing a new core message with employers about what it aims to achieve and the benefits of taking part. The new framing of early conciliation should avoid talking about settlement and instead should aim to get employers to see early conciliation in a new light. For example, a new core message could focus on early conciliation being:

- about exploring the strengths and weaknesses of a claim
- a space for resolution
- a space for communication
- a route to understanding the claimant's point of view
- a way of avoiding tribunal

To be effective at rebranding early conciliation with employers, it would be best to focus on 1 or 2 core messages, and to develop these into slightly more detailed narratives that conciliators (and others, such as the communications team) can draw upon. It will then be important to ensure that consistent language is used to embed the new definition across employers' interactions with Acas. This could include:

- how early conciliation is introduced in initial phone calls and emails from the first contact between conciliators and employers
- how early conciliation is explained in follow up emails
- how early conciliation is described on Acas's website and associated support materials
- how Acas talks about early conciliation in wider outreach and engagement with employers, that take place outside an early conciliation process

This approach would mean that all employers engaging with early conciliation would encounter the same messaging, even though it is aimed at employers in specific circumstances. Therefore, it is important that the messages selected are felt to be appropriate for early conciliation audiences more broadly. An alternative route would be to adopt a triage process, with conciliators making a judgement about using them in the right situations. For example, if an employer indicates that they feel a claim is vexatious.

"Typically, you're dealing with an employee and then some form of legal or HR department who will have a huge amount more legal experience on employment law than that employee will… Why are they pursuing this kind of thing? It's because they don't know, they don't know these things. So actually it would be really useful for Acas to be able to give them a little bit of an overview or some guidance." (HR, prior experience, standard, withdrew, 250 or more)

Reference examples of alternative outcomes

When exploring the definitions of early conciliation, employers were often surprised to learn that non-financial settlements could be an outcome of an early conciliation process. Giving examples of what these might be, for example withdrawal, agreements about

references, or 'drop hands' agreements where both parties agree to cover their own costs), would be an important part of raising awareness, as employers were sometimes unable to think of any non-financial resolutions. These could be introduced by the conciliator in early conversations, and in follow-up emails. The examples could be reinforced by information provided on the Acas website.

Provide more visibility to employers of the early conciliation process

One of the key barriers to engagement with early conciliation was employers' lack of awareness of how the early conciliation process worked, in terms of Acas's legal duties and their conversations with the claimant. Giving employers more visibility of the early conciliation process and explaining what will happen as part of the conversations with both parties could help overcome this. Specifically, it would be useful for employers to know that:

- Acas has a legal obligation to take on claims and communicate claim amounts irrespective of their chance of success
- early conciliation involves exploring the merits of a claim with both parties, such as the typical outcome and maximum award at tribunal, and potentially that this sometimes does lead claimants to withdraw (speaking generally, rather than disclosing anything actually discussed with the claimant)

"If I knew that [Acas] can establish whether the case is strong or not, they could perhaps talk to the employee, for example, and explain to them. Hang on, you don't really have a case here, so we can still try to settle, but it's very unlikely you're going to be successful… And that's probably going to work for both parties" (HR, no prior experience, open, settled, 50 to 250)

Improving visibility of process could have benefits in both ways – as another barrier to engagement was when early conciliation was seen to conflict with ongoing internal processes. It may be useful for conciliators to ask about the status of internal grievance or appeals processes and to be prepared to discuss the benefits of early conciliation being undertaken in parallel.

Experiences with conciliators should be consistent and positive

It is important that the experience of early conciliation reinforces rather than undermines the reframed purpose of early conciliation. Therefore, the experience of engaging with conciliators must demonstrate that conciliators are engaged in the process that is, it does not feel like a tick box exercise), and do not seem to be exclusively working towards a financial settlement.

Related to this, it would be beneficial if conciliators dealing with claims where the employer feels there is no case to answer were able to draw on the skills referred to in Chapter 4 namely:

- tacitly acknowledging the difficulty of the situation and the employer's position
- facilitating a space to have an open and honest conversation
- remaining impartial and explaining some of the ways in which they help both parties explore the merits of a case

This could be achieved by assigning cases of this nature to a particular group of conciliators who could specialise in these conversations, or by providing training and support to all conciliators to help them navigate the particular needs of this group of employers.

Finally, improvements in handovers of claims in the event of conciliator leave would further improve employer experiences.

Consider the timing of communications with employers

Given the fact that employers were often most emotional at the point of learning that a claim was being brought against them, it is worth considering when conciliators attempt to engage with employers, and at what points they are likely to be receptive to information. For example, following first contact, it might be useful to offer to speak to the employer again in a few weeks once they have had a chance to reflect on the claim, timescales permitting.

Furthermore, while it may not be effective to discuss the financial costs of tribunal at the point of offering early conciliation, it may be useful to introduce later in the process. While this may not necessarily lead to greater take up of early conciliation, it represents an opportunity to provide information that some employers may not discover until much later in the process, once they have already incurred legal costs. It will be important that this information does not seem to be encouraging financial settlement, however, so it may be best to leave this to conciliator discretion to introduce into the conversations.

Recommendations

Based on the research, there are 5 recommendations that arise from the research to encourage employers to engage in early conciliation when they do not believe they have a case to answer.

The first recommendation is to reframe the purpose of early conciliation in communications, to challenge the following employer beliefs. This includes:

- reframing the process of engagement as good practice that is routinely adopted amongst employers no matter what the merits of a case, to help address the belief that engagement is an admission of guilt
- reframing the motivation to engage in early conciliation as a way for all parties to better understand the strengths and weaknesses of their case, to help address the belief that it is to avoid tribunal costs
- reframing the potential outcomes arising from early conciliation as wide ranging for example, references, withdrawal, employer awareness), rather to help address the belief it mainly concerns financial settlement

The second recommendation relates to the above and concerns the advice and support that conciliators offer claimants. This includes:

- encouraging claimants to fully explore their internal appeal procedures at the initial stages of a claim. It should be noted that Acas guidance recommends that claimants try and resolve their disputes with their employer, either informally or by raising a formal grievance, prior to making a claim. However, the extent to which conciliators discuss and verify this process at the beginning of a claim is less clear.
- indicating the strength of the claim to claimants, and what would need to be demonstrated for a claim to succeed

Importantly, for both factors above, Acas should explain to the employer that this process has been followed in their case; and that Acas has a legal obligation to facilitate early conciliation.

The third recommendation concerns brinkmanship and employers believing that adopting a 'wait and see' approach will result in claimants withdrawing their case or settling for far less. It includes:

- myth-busting to highlight that only 1 in 4 cases where the employer fails to engage in early conciliation leads to the claimant withdrawing their claim
- communicating that employers significantly underestimated the costs of preparing to go to a tribunal as cases prolong, modelling the costs involved for different types of cases and providing this information to employers at an appropriate moment

The fourth recommendation relates to creating a more consistent employer experience when engaging with Acas. It includes:

- training to support communications at different stages of the early conciliation process
- ensuring the duty cover team, who pick up conciliation during a period of absence, are fully briefed about case circumstances and proactive in supporting conciliation
- getting feedback from employers to understand what worked well and what could be improved in the engagement process

The fifth recommendation concerns influencing HR and legal advisers about the purpose and value of early conciliation. It includes:

- ensuring that advice to an employer to not settle early if there was no case to answer, does not preclude early conciliation
- that early conciliation supports their advice as it helps examine the strengths and weakness of the case

Appendix

A. Screening questionnaire

The sample of employers provided by Acas was contacted by specialist recruitment agency, Criteria, and screened according to the following questionnaire.

Screening questions

Early conciliation is the free service offered by Acas to help employers and claimants to resolve an employment dispute before the claimant formally notifies the court of their intention to go to an employment tribunal by submitting form ET1, for making an employment tribunal claim. This survey focuses on the reasons for your organisation deciding to decline early conciliation talks during a recent employment dispute in the following case:

- [Case Ref – Col B in sample]

- [Claimant name – Col AD in sample]

- [Case closed date – Col J in sample]

Q1 Were you responsible for dealing with this particular employment dispute?

[Single response]

1. Yes, I was solely responsible
2. Yes, I was responsible along with someone else?
3. No, I was not responsible for dealing with this particular case or dispute
4. I'm not aware of or do not recall the details of that case or dispute

[End survey if Q1 = code 3 or 4]

Q2: When you dealt with this employment dispute, did you do so as…?

[Single response]

1. Someone who works at the organisation named in the claim?
2. Someone external to the organisation named in the claim, for example as their solicitor or consultant
3. Someone else (Please specify)

[END survey if Q2 = code 2 or 3]

Q3 Thinking about your reason(s) for declining early conciliation, which of the following factors were important in making that decision?

Please select all that apply.

[Multicode, randomise answer options except code 10 – fix at end]

1. I or my organisation did not believe there was a case to answer in relation to the dispute
2. My organisation has a policy of not engaging in early conciliation?
3. I or my organisation had a previous poor experience of early conciliation
4. I was concerned about disclosing information during early conciliation that could harm the case at an employment tribunal
5. I or my organisation was advised not to engage in early conciliation?
6. I was not aware of what early conciliation involved?
7. I or my organisation felt that the matter had already been resolved (either formally or informally)
8. I or my organisation did not believe that a formal application to the Employment Tribunal would be made by the claimant(s)
9. The dispute was still being dealt with through internal procedures.
10. Other [please write in]

Q4 What was the main reason to decline early conciliation?

[Single code, pipe through all codes selected at Q3]

1. I or my organisation did not believe there was a case to answer in relation to the dispute
2. My organisation has a policy of not engaging in early conciliation
3. I or my organisation had a previous poor experience of early conciliation
4. I was concerned about disclosing information during early conciliation that could harm the case at an employment tribunal
5. I or my organisation was advised not to engage in early conciliation
6. I was not aware of what early conciliation involved
7. I or my organisation felt that the matter had already been resolved (either formally or informally)
8. I or my organisation did not believe that a formal application to the employment tribunal would be made by the claimant(s)
9. The dispute was still being dealt with through internal procedures.
10. Other [please write in]

Q5 What was the outcome of the case?

1. The case was settled before the employment tribunal hearing
2. The claimant withdrew from the case
3. The case is ongoing
4. Other outcome (write in)

[If code 1 at Q5 go to Q6; if codes 2, 3 or 4 skip to Q7]

Q6 Thinking about your reason(s) to settle, how important were the following factors in your or your organisations' decision to settle?

Randomise order or statements

1. The costs of going to an employment tribunal were prohibitively high?
2. It would have involved too much management time
3. I or my organisation was advised to settle the case
4. Potential risk of reputational damage to our organisation?
5. Information came to light prior to the employment tribunal hearing that strengthened the employee's case
6. Other (write in)

Response scale, reverse order for half of sample:

1. Not at all important
2. Somewhat important
3. Fairly important
4. Very important
5. Do not know

Q7 Which of the below best describes the nature of the organisation or business to which this early conciliation case relates??

1. An organisation mainly seeking to make a profit
2. A public sector organisation
3. A social enterprise
4. A charity or voluntary sector organisation
5. Don't know
6. Prefer not to say

Q8 Approximately how many employees work for the organisation involved in the early conciliation case?

1. 1 to 9
2. 10 to 49
3. 50 to 250
4. 250 or more
5. Don't know

Q9 Does your organisation have a personnel or human-resources specialist or department?

1. Yes
2. No
3. Don't know

?[Ask only if code 1 or 2 at Q1, all others go to Close]

Q10 Would you be willing to take part in a 45-minute interview with Basis Social to discuss your answers to this survey in more depth? The interview will be confidential, and you will be offered a £80 shopping voucher as a thank you for your time if you are selected and take part.

1. Yes
2. No

?Q11 Please confirm your name, telephone number and email address for the follow up interview.

Name:

Telephone number:

Email address:

CLOSE – Thank you for completing the survey, your responses have been recorded.

B. Topic guide

Introduction and warm up (2 mins)

- Thank you for taking part in a recent survey with us and for agreeing to take part in this interview. It should take up to 45 minutes.
- This research is being conducted on behalf of Acas by Basis Social. We are an independent research agency.
- The research aims to understand the factors affecting different employers decision not to engage in early conciliation.
- We will be asking about a specific case, that you referred to in the survey. However, we are not looking to explore the details of the dispute with the employee. Rather, we just want to focus on why you decided not to engage with early conciliation in the context of that case.
- We appreciate this can be a sensitive topic. We want to reassure you that the interview is totally confidential and anonymous.
- We have specific topics we have to cover, so I might need to move the discussion on if we get side tracked, so we can keep to time.
- Permission for recording.
- Any questions.

Respondent background (3 mins)

- A bit about your organisation – number of employees, main activity
    - Is the business or organisation unionised?
- Your job role
    - If HR: how is your HR team structured?
    - Length of time in organisation
- Your role in relation to the case (referred to in the survey)
- Your involvement in the decisions about the case
    - Who else was involved in decisions (HR, lawyer, senior management, employee's manager)?
    - Who was ultimately responsible for the decisions about whether or not to proceed with the case or how you worked together?
- Very briefly – before this case, any prior experience of the employment tribunal process?

The case and the reasons for declining early conciliation (10 mins)

Researchers explain that Acas provided us with limited details about the case in question including the name, the outcome and the dates. Confirm the dates and first name of the case with respondent, and explain we want to map out a basic timeline of the case from their perspective, before going into a bit more detail.

- Briefly, what the case was about?
    - Can you talk me though the background to the case and the process you went through?
    - What internal procedures had you gone through, if any (formal or informal)?
    - When did you first became aware of the employee's intention to make a claim?
- What do you remember about being offered early conciliation:
    - What was your understanding of what early conciliation involved?
- What happened next (before declining early conciliation):
    - For example, including internal conversations, contact with employee, seeking advice
- At what point did you decline early conciliation (or, do you recall declining early conciliation)
- To what extent was the decision to decline:
    - an active or conscious decision
    - a quick vs more drawn out decision
- In the survey, you mention your reasons for declining early conciliation as [x]. Can you tell me more about this?
- The top reason was [x]. Why was that?

- [Where not the top reason] You also mentioned that the business did not have a case to answer. Why did you think that?
- Referring to outcome of this case: settlement or claimant withdrew
  - How this came about
  - How long it took
  - Whether it was what you expected
  - What is your view on why the case was settled or the claimant withdrew

Moderator note: if respondent does not want to discuss the case details or cannot comment meaningfully on the decision not to pursue early conciliation, please skip this section and use the vignettes.

Deconstructing the decision (using the model) (20 mins)

We now want to go back and dig into the details and context surrounding the decision not to take part in early conciliation.

You mentioned earlier that . . .

- At the time (refer to date if possible) when the conciliator first got in touch [NB if respondent can't recall first contact, ask about the months leading up to the case]
  - What else was going on in the business/organisation at this time (for example, economic pressure, competing job demands)
  - And were there any pressures on you personally? (If needed, that is anything that would affect time and capacity to deal with the case)
  - To what extent did you feel well equipped to deal with the case?
- Did you have any prior experience of early conciliation?
- To what extent do you believe these factors influenced your decision to engage in early conciliation?
- Had you discussed the case with HR management colleagues or external advisers in advance, including about your approach to early conciliation?
- If yes, what happened?
  - How they would describe organisational culture in relation to cases like this?
  - Does the company have specific policies or procedures for dealing with disputes that escalate to potential employment tribunal and reasons for this?
  - How they would characterise the views of others involved, including senior management, HR or lawyers?
  - To what extent do you believe colleagues influenced your decision not to engage in early conciliation?
- If no, why not?
  - To what extent do you believe a lack of advice influenced your decision not to engage in early conciliation?
- I now want to take you back to the first contact [adapt as per answer above] you had with the conciliator:
  - Show stimulus: email template [Moderator note: it is possible that the person receiving the email from the conciliator could be different from the person who engaged with the conciliator]
  - You may have received an email like this one. Do you remember receiving this?
    - If yes: Can you remember where you were; what happened next?
    - If can't recall: What, if anything, can you remember about any early conversations with Acas about this case?
  - How were you feeling personally about the case at the time?
  - What feelings did you have about early conciliation? Probe any concerns about:
    - Confidence in dealing with the claim
    - Losing control
    - Degree of formality
    - Lack of time to prepare
  - What were your impressions of the conciliator? If engaged in some way with the conciliator:
    - What went well?

        - What went less well?
    - To what extent do you believe these factors influenced your decision to engage in early conciliation?

Thinking about early conciliation more generally

- Beliefs about early conciliation
    - What they thought early conciliation would be like?
        - Role of the conciliator
        - Any benefits of taking part
        - Any risks or downsides
    - Where views come from
- When I say Acas, what sorts of things come to mind?
    - If time: probe on views of Acas's wider service, for example helpline, website, advisory work
- In terms of early conciliation, to what extent do you believe Acas is impartial between the employee and employer? Why?
- Perception of the cost or benefit
    - How they managed risk in the process
        - Where they saw the greatest risk in the dispute
        - The nature of the risk
        - Whether they expected to go to tribunal, what they thought would happen, expected costs

Vignettes (15 to 20 mins)

Alternative section for those who cannot discuss the decision not to engage in early conciliation.

Moderator explains that we have an example case where an employer is offered early conciliation. Read them the example that most closely matches their case in terms of personnel type and track, and explore their response to the example using the probes below.

Jenny, a senior HR manager at an architecture firm. . .

- Fast track: ...has been helping to manage an employee's claim about unpaid wages following a payroll issue. The issue has gone back and forth with management but the employee does not agree with the figures.
- Standard track: …was involved in overseeing the process of letting a member of staff go for consistent poor performance last year.
- Open track: …has been managing difficult conversations with a pregnant employee who did not get a promotion they were expecting, and who believes it is because of discrimination.

Jenny has just received an email from an Acas conciliator saying that the employee has initiated the first step in the legal process before making a claim to an employment tribunal. The conciliator has offered a free early conciliation service, to try to help come to an agreement. Jenny does not want to take part in conciliation, as she feels that the business has not done anything wrong and should not have to engage with the claim. She discusses it with a member of the senior team, who says that ignoring the email will probably lead to the employee dropping the case, to avoid the legal fees of actually going to tribunal. Jenny is thinking about turning down the offer of early conciliation and waiting to see what happens.

Ed, a head of team at an advertising firm…

- Fast track: …has been going back and forth with a member of his team about unpaid wages following a payroll issue. The issue has gone back and forth but the employee does not agree with the figures.
- Standard track: …was involved in letting a member of staff go for consistent poor performance last year.
- Open track: …has been managing difficult conversations with a member of his team who did not get a promotion they were expecting, and who believes it is because of discrimination because she was pregnant at the time.

Ed has just received an email from an Acas conciliator saying that the employee has initiated the first step in the legal process before making a claim to an employment tribunal. The conciliator has offered a free early conciliation service, to try to help come to an agreement. Ed is feeling reluctant to take part in conciliation, as he's never been involved in something like this before. While he thinks they are in the right, he's worried he might say the wrong thing. He discusses it with his manager, who says they will probably need to spend a long time to prepare for the meeting, which they don't have time for.

Probes for the vignette:

- Views of their perspective
  - How do they think the individual feels, why?
  - What else do they think could be influencing the decision about whether to engage?
  - What could be making this more difficult for the individual to navigate
    - What, if anything, could help them?
  - Expected outcome of engaging in early conciliation, and not engaging
- Views of their strategy
  - Any risks or benefits of this approach?
  - What risks are they trying to avoid, are they the right ones, why or why not?
  - What advice would they give them?
- Expected perception of early conciliation and Acas
  - Do they think they trust the process or Acas, reasons?
- Whether they recognise similar views or culture in their organisation or within their sector
  - Where they think this comes from

What could persuade them to engage in early conciliation? (10 mins)

- If they were to go through this case again from the start
  - Whether they would choose to engage in early conciliation, why or why not
  - What, if anything, could have encouraged them to take part in early conciliation
- Was there a risk the case could have gone to tribunal
  - What the ramifications of that would be
  - What was the most important thing they wanted to avoid
- Do you think early conciliation:
  - Could have saved you time
  - Could have saved you money
  - Could have resolved the issue earlier (that is, before the employee made a notification to employment tribunal)
  - Could have restored the working relationship(s)

If time: light touch proposition testing (rotate across interviews)

1. Taking part in early conciliation can save employers time and money by avoiding a tribunal. Cases that escalate to tribunal can cost the business £45,000 on average and, even if successful, take up significant staff time.
2. Early conciliation can help employees recognise that their case is not as strong as they thought, meaning they may withdraw the claim before it escalates to tribunal. This can save both parties time and money. Early conciliation can also bring to light evidence that employers may not be aware of. As one employer says: "I believed the employee had no case at all. We thought that taking part in early conciliation would just encourage them, but in the end we did it on advice of our lawyer. I'm glad we did, as it turned out there was evidence we were unaware of that would have hurt us at tribunal, and would have been a massive reputational hit. We were able to reach a settlement instead."
3. Early conciliation consists of an impartial conciliator talking to the employer and employee. They will help both sides explore the strengths and weaknesses of the case, and discuss options without making recommendations.
4. Early conciliation may lead to a few different outcomes, including:

- Restoring the working relationship
- Non-financial settlement
- Financial settlement
- The case being withdrawn
- Or if an agreement cannot be reached, employment tribunal

Follow up questions:

- Thoughts on this message
- Does it change your views about whether early conciliation:
    - could have been useful in this case
    - is an option you would consider in future?
        - Reasons
- Any final comments?
- Thank and close

C. Achieved sample

Sample quota

Quota	Target	Achieved
Total	24	24

Organisation size of the respondent

Number of employees	Target	Achieved
1 to 9	2 or 3	2
10 to 49	4 or 5	3
50 to 249	5	6
250 or more	11	13

Sector of the respondent's organisation

Sector	Target	Achieved
Public sector	2 to 4	5
Charity or voluntary	2 or 3	3
Private sector	17 to 18	14
Social enterprise	0	1
Prefer not to say	0	1

Size of organisation (employees)

Track	Fast	Standard	Open	Total
1 to 9	1	0	1	2
10 to 49	1	1	1	3

Track	Fast	Standard	Open	Total
50 to 249	0	3	3	6
250 or more	2	6	5	13
Total	4	10	10	24