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INVESTOR IN PEOPLE

the ACAS arbitration scheme for the resolution of flexible working disputes

a guide to the scheme

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This Guide is intended as an overview of the Scheme and should not be treated as a substitute for the wording of the Scheme itself or for taking your own advice. It does not purport to be a complete account of the Scheme. If in doubt please refer to the Scheme which can be obtained from the Stationery Office or from the ACAS web site www.acas.org.uk

Waiver of rights Back page pull out

A summary of the key features of the Scheme

Arbitration is a method for resolving a dispute in which an arbitrator's decision is binding as a matter of law and has the same effect as a court judgement

- The Scheme provides an alternative to an employment tribunal hearing in disputes arising from a request for flexible working.
- The arbitration process is confidential, relatively fast, cost efficient, non-legalistic and informal
- Entry to the Scheme is entirely voluntary and there must be agreement by both parties to the dispute to go to binding arbitration
- The employee/s must either have an existing application to the employment tribunal pending or must claim that they have grounds to potentially lodge such an application
- Entry to the Scheme is via an Arbitration Agreement reached with the assistance of an ACAS conciliator or in the format of a compromise agreement drawn up by appropriate representatives
- Both parties must sign a waiver form which confirms their agreement to go to arbitration and that they understand the process
- The Arbitration Agreement must be received by the ACAS Arbitration Section within 6 weeks of it being concluded by the parties
- On receipt of a valid Arbitration Agreement ACAS will appoint an arbitrator from its arbitration Panel. Parties will not have a choice of arbitrator
- Where an employee has a claim(s) in addition to flexible working, any other claim(s) must be pursued separately
- The Scheme is not designed to deal with complex legal issues
- In agreeing to go to arbitration the parties waive any jurisdictional issues for example, whether the Flexible Working Claim has actually been made, whether the applicant is eligible to lodge a Flexible Working Claim, whether or not time limits have expired.
- The Scheme is not intended to deal with issues of EC law. If such issues arise the arbitrator may appoint a legal adviser to provide guidance
- Where issues arise under the Human Rights Act 1998 the arbitrator may appoint a legal adviser to provide guidance
- In addition to the information on the employee's application to the employment tribunal (IT1) and the employer's response (IT3) (where an application to the employment tribunal has been made), the parties will be invited to submit a written statement of their case in advance of the hearing
- Parties to the dispute must comply with any instruction given by the arbitrator and will be expected to co-operate in the production of relevant documents and the attendance of appropriate witnesses
- Hearings will be held at a location convenient and accessible to the parties and will not normally last for more than half a day
- Each party meets their own costs in attending the hearing, however, if a Flexible Working Claim is upheld the arbitrator can include in the calculation of any compensation a sum to cover the costs incurred by the employee personally in attending the hearing
- The arbitrator may adjourn hearings if the parties do not co-operate in making the arrangements for the hearing, or draw such adverse inferences from the act of non-compliance as the circumstances justify
- If parties do not attend a hearing without good cause the arbitrator has the power to continue the hearing and determine the dispute, or where an employee fails to attend without good cause, the case can be treated as dismissed
- The arbitrator will use an inquisitorial rather than adversarial approach – there will be no

cross-examination of witnesses by a party or representative, or swearing of oaths; rather the arbitrator will question the witnesses

- Instead of applying strict law or legal precedent the arbitrator will take account the Flexible Working Regulations.
- Exceptions to the non-application of strict law concern EC law or the Human Rights Act 1998 where these are relevant
- Following the hearing the arbitrator will issue a dated, binding "Award" summarising each party's case, the arbitrator's main considerations, the decision and, if the Flexible Working Claim is upheld, the remedy. The award will be confidential to ACAS and the parties
- If a claim is upheld, an arbitrator can order the same remedies as an employment tribunal.
- There are very limited grounds for challenging an arbitrator's award and parties cannot appeal against an arbitrator's binding award on points of law except in cases where EC law or the Human Rights Act 1998 are relevant.

Copies of the Scheme can be purchased from the Stationery Office. The Scheme is also available on the ACAS website www.acas.org.uk

A guide to the ACAS Arbitration Scheme

Copies of the Scheme can be purchased from the Stationery Office. The Scheme is also available on the ACAS website www.acas.org.uk

Introduction

1. The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 ("the Scheme") has been introduced to provide a voluntary alternative to the employment tribunal for resolution of Flexible Working claims. "A Flexible Working Claim" is a claim that an employer has failed to deal with an application made under section 80F of the Employment Rights Act 1996 in accordance with section 80G(1) of that Act or that a decision to reject the application was based on incorrect facts. ACAS was given the power to introduce the Scheme by the Employment Rights (Dispute Resolution) Act 1998, which inserted a new section, section 212A, into the Trade Union and Labour Relations (Consolidation) Act 1992, making provision for it, and as amended by the Employment Act 2002. The Scheme has been designed to initially operate in England and Wales although a Scheme to cover Scotland will begin operation during 2003. This booklet provides guidance on the Scheme itself, on how to make applications under the Scheme, how to prepare for arbitration hearings, and on the procedure which will be adopted by arbitrators at the hearings.

2. The intention is that the resolution of disputes under the Scheme will be confidential, relatively fast and cost efficient. Procedures under the Scheme are non-legalistic and far more informal and flexible than the employment tribunal. The process is inquisitorial rather than adversarial with no formal pleadings or cross examination by parties or representatives. Instead of applying strict law or legal tests (but see paragraphs 12, 83-87) the arbitrator will have regard to The Flexible Working (Procedural Requirements) Regulations 2002 and the Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 ("the flexible working regulations"). In addition, as it is only possible to appeal or otherwise challenge an arbitrator's award (decision) in very limited circumstances, the Scheme should also provide quicker finality of outcome for the parties to Flexible Working dispute.

3. This Guide outlines how the Scheme caters for both the informality of alternative dispute resolution as well as the constraints and procedural requirements imposed on it as a matter of law.

4. ACAS has established a panel of arbitrators who were recruited through a transparent, accountable and non-discriminatory process. The arbitrators were selected for their knowledge, skills and employment relations experience. They are not employed by ACAS, but are appointed on standard terms of appointment, initially for a period of two years, although this might be renewed by ACAS at its discretion. It is a condition of their appointment that the arbitrators exercise their duties in accordance with the terms of the Scheme. They are appointed by ACAS from the panel on a case by case basis and the parties do not have any choice as to which arbitrator is selected to hear their case. There is however a limited challenge procedure (see paragraphs 103-111). Arbitrators are paid on the basis of time spent in connection with arbitration proceedings. Standard Terms of Appointment are available from ACAS.

5. Although it is called the ACAS Arbitration Scheme, ACAS's role in the Scheme is to recruit the arbitrators, appoint them on a case by case basis and to provide administrative assistance to them. ACAS has no role in any case-related decision making which is undertaken exclusively by the arbitrators.

6. Once the parties to a flexible working dispute have concluded an Arbitration Agreement to have the dispute resolved under the Scheme, the Flexible Working Claim can no longer be heard by an employment tribunal.

What types of cases does the Scheme cover

7. The Scheme is available as an alternative to going to an employment tribunal hearing only for cases allegedly contravening the flexible working regulations, where either an application has been made to the employment tribunal or where an individual claims that circumstances exist in which they could present such an application. The Scheme is intended for straightforward cases under the flexible working regulations, which do not involve jurisdictional or complex legal issues nor raise points of EC law.

Inappropriate cases

8. The Scheme excludes from its scope other kinds of claim which may be related to or raised at the same time as a claim under the flexible working regulations, for example, sex/race discrimination cases. If the claim covers alleged breaches of employment rights other than those covered by the flexible working regulations, and the parties want to have the claim heard under the Scheme, the other claim(s) will have to be pursued separately before an employment tribunal or settled. If the non-flexible working claims cannot be settled or withdrawn, the parties should consider whether they really want to have two hearings, or whether it would be better to have both the flexible working and other claim(s) dealt with by the employment tribunal at a single hearing.

9. If the parties decide that they want the flexible working dispute resolved by arbitration and the other claim(s) resolved in the employment tribunal the arbitrator may decide, where there is an overlap in the cases or if the evidence or findings in one hearing might have a bearing on the other, to postpone the arbitration proceedings pending the outcome of the claim(s) at the employment tribunal. This, however, is a matter for the arbitrator's discretion.

10. Parties should be aware that the normal time limits apply for applications to the employment tribunal and where they wish the employment tribunal to consider other claims they must ensure that these have been made within the time limits. If they have not, although the employment tribunal has discretion to extend time limits in certain circumstances, it is not possible to guarantee in any particular case that it will do so.

11. The Scheme is not intended for cases which raise questions of EC law such as flexible working claims which require reference to an EC right. It is strongly recommended that parties who have cases which raise such questions consider applying for their dispute(s) to be heard at the employment tribunal. Examples of such cases could include those where an employee is claiming that the reason for the refusal to consider a request for flexible working is sex discrimination or is connected to the transfer of an undertaking; and claims that the refusal

to consider a request for flexible working was related to exercising a right under the Working Time Regulations.

12. If cases are referred where EC law is relevant or where such issues are identified during an arbitration hearing, any of the parties may apply to the arbitrator or the arbitrator may decide of his or her own volition, that a legal adviser be appointed by ACAS to report to the arbitrator and the parties on the question of EC law. (see paragraphs 83-87.)

13. Additionally, if the dispute raises complex legal issues, the Scheme should not be used. If parties are unclear as to whether a dispute involves such issues, they should seek advice.

14. Nor should it be used where there is a dispute between the parties over whether or not the employment tribunal has jurisdiction to hear the flexible working case. Examples of jurisdictional disputes include whether the applicant was an employee of the employer; whether the employee had the necessary period of service to bring a claim; whether a refusal to consider a request for flexible working actually took place; or, whether the claim was made within the specified time limits. When agreeing to go to arbitration under the Scheme, both parties waive their ability to have such issues considered and are accepting as a condition of the Scheme that no such jurisdictional issue is in dispute between them. The arbitrator will not therefore deal with such matters and will make the assumption that all jurisdictional issues have been resolved prior to the hearing, even if they are raised by the parties during the arbitration process.

15. Where the parties decide not to use the Scheme, the services of an ACAS conciliator will remain available to the parties if they wish to attempt to reach a settlement which will resolve the matter without the need for an employment tribunal hearing. Where parties or their representatives are in any doubt as to whether to use the Scheme they should contact the Arbitration Section at ACAS Head Office (see details in paragraph 114).

When to consider using the Scheme

16. Generally it is better if the parties, or their representatives, can resolve the dispute between them through internal procedures (where these exist), by negotiating directly with each other, or with the help of an ACAS conciliator. When it is clear that none of these ways is likely to resolve a flexible working claim, the parties may wish to consider using arbitration as an alternative to going to an employment tribunal hearing. Each of these methods has different features, for instance, ACAS Arbitration is a private, non-confrontational and non-legalistic means of resolving the dispute. Each party should make themselves aware of the features of each method, so that they can decide which one they would prefer to use. However, as arbitration is voluntary, both parties have to agree to go to arbitration before the Scheme can be used. A comparison of the areas where there are significant differences between the approach adopted by employment tribunals and the one used in arbitration is at Appendix 1.

Legal aid

17. Legal aid might be available for limited initial advice on an employee's case and for preparation for the arbitration hearing. However, legal aid is not available for representation at the hearing. For further information contact a solicitor or a Citizen's Advice Bureau. The Community Legal Service Directory line, 0845 608 1122 (calls charged at local rate) or Minicom 0845 609 6677, can give you contact details of a suitable solicitor local to you and the organisation's website may be accessed at www.legalservices.gov.uk

Entry into the Scheme

Arbitration Agreement

18. Entry to the Scheme is entirely voluntary. Once both parties have concluded an agreement to go to arbitration (the Arbitration Agreement), the Flexible Working Claim can no longer be pursued in an employment tribunal. It is important therefore that all the parties involved are fully aware of the effect of referring their dispute to arbitration, and that they understand clearly how the arbitration process works. If the agreement to go to arbitration is subsequently not accepted by ACAS because it does not satisfy the requirements set out in the Scheme, the parties will have to resolve their dispute by other means or if available, have recourse to an employment tribunal. Employees will, of course, wish to bear in mind the time limits (normally three months from the date on which the employee is notified of the outcome of his appeal under the employer's internal procedure) for presenting a Flexible Working Claim to an employment tribunal.

19. To ensure that parties are fully informed on the implications of referring their dispute to arbitration, an Arbitration Agreement can only be reached either through an ACAS Conciliated Agreement or a Compromise Agreement following advice to the former employee from a relevant independent adviser. Both types of Agreement must be in writing, and any Compromise Agreement must conform to the statutory requirements for example at section 203 of the Employment Rights Act 1996.

20. In submitting the dispute to arbitration the parties are accepting that the arbitrator's decision is final and binding. They are also agreeing to do everything necessary for the arbitration process to proceed smoothly, including co-operating in the arrangement of any hearing and complying with any order or direction of the arbitrator. They are accepting the way in which the arbitration process is conducted, as outlined in the Scheme and explained in this Guide, including the procedure at the hearing itself. They will therefore be expected to cooperate fully with the process by fulfilling the duties placed on parties by it (see paragraphs 46-47).

21. The suggested wording for inclusion in

Arbitration Agreements is at Appendix 2. However it should be noted that there are other statutory requirements for compromise agreements which must be met. The employee's relevant independent adviser will advise on these requirements.

22. Parties may use their own wording for other parts of a conciliated agreement if they are settling other issues in dispute or reaching agreement on other matters which are outside the scope of the Scheme. However, it is recommended that the agreement to go to arbitration be on a separate document.

Although parties can vary the words of the agreement to go to arbitration and not use those suggested in Appendix 2, no provision of the Scheme can be varied.

Waiver

23. Given its informal nature, parties agreeing to refer a dispute to the Scheme are taken to have agreed to waive certain rights that they would otherwise have if the matter had been heard by an employment tribunal. Such rights include; the right to a public hearing; the cross examination of witnesses; compelling the attendance of witnesses; the production of documents to be ordered; the right to a published and fully reasoned decision and the right to have the dispute resolved in accordance with strict law (except in cases involving points of EC Law or issues under the Human Rights Act 1998, other than procedural matters within the Scheme). In order to confirm this waiver, a Waiver Form (a copy is included in this guide) must be completed by each party in all cases and must accompany either the Conciliated Agreement or Compromise Agreement in order for the Arbitration Agreement to be valid. Employees must personally sign their form although a representative may sign the employer's waiver on their behalf and the signature on the Waiver Form must be witnessed in all cases. The witness can be anyone selected by the party but please note that an ACAS conciliator cannot act in this capacity.

Parties are advised to keep a copy of their own waiver form, however, the ACAS Arbitration Section will send a copy of each party's waiver to the other party/ies.

Terms of reference

24. Every Arbitration Agreement under the Scheme will be taken as an agreement that the arbitrator should decide whether the Flexible Working Claim should be upheld or not and if so the appropriate remedy.

25. The terms of reference which will be used by the arbitrator in each case are:

"In deciding whether to uphold the Flexible Working Claim, the arbitrator shall:

- have regard to the relevant provisions of the Flexible Working (Procedural Requirements) Regulations 2002 and to any relevant Acas Guidance.
- apply EC law.

The arbitrator shall not decide the case by substituting what he or she would have done for the actions taken by the Employer.

If the arbitrator upholds the Flexible Working Claim, he or she shall determine the appropriate remedy under the terms of this Scheme."

Nothing in these Terms of Reference affects the operation of the Human Rights Act 1998 in so far as this is applicable and relevant and (with respect to procedural matters) has not been waived by virtue of the provisions of the Scheme.

26. Parties are not able to require an arbitrator to hear a case which would require him or her to depart from the provisions of the Scheme. If an Arbitration Agreement seeks to vary any provision of the Scheme, the dispute will not be eligible for arbitration under the Scheme.

Existing dispute

27. The Arbitration Agreement must relate to an existing dispute. There should be no automatic references to the Scheme in an individual's contract of employment or company procedures as this would compromise the voluntary nature of entry to the Scheme.

28. Checklist for a valid Arbitration Agreement

- i. the Agreement must be in writing
- ii. the Agreement must concern an existing dispute
- iii. the Agreement must not seek to vary or alter any provision of the Scheme (including the Terms of Reference)
- iv. the Agreement must have been reached either with the assistance of an ACAS conciliator (a "Conciliated Agreement") or through a compromise agreement conforming to the requirements of the Employment Rights Act 1996 (a "Compromise Agreement")
- v. the Agreement must be accompanied by completed Waiver Forms (one from each party). There is a copy of the form in this Guide
- vi. the Agreement must be received by the ACAS Arbitration Section (address at paragraph 114 of this Guide) within two weeks of its conclusion by the parties.

29. In cases where the Arbitration Agreement is reached through a Compromise Agreement it will be the responsibility of the parties' representatives to ensure that a valid Arbitration Agreement for the Scheme is concluded. Where there is any doubt on this issue the ACAS Arbitration Section should be contacted (see paragraph 114). In cases where the Arbitration Agreement is brokered via an ACAS conciliator, the conciliator will inform the parties or their representatives of the requirements of a valid Arbitration Agreement.

Notification to ACAS of an agreement to go to arbitration under the Scheme

30. In all cases the concluded Arbitration Agreement should be forwarded to the ACAS Arbitration Section at ACAS Head Office (see paragraph 114) as soon as possible but within the two week time limit after both parties have signed the agreement to go to arbitration and each party has signed a waiver form.

31. Where the parties have agreed to opt for arbitration under the Scheme through an Agreement reached with the assistance of an ACAS conciliator, either the conciliator or the parties/representatives must send the Conciliated Agreement and Waiver Forms to the ACAS Arbitration Section at ACAS Head Office (see paragraph 114) within the two week time limit. Where IT1 and IT3 forms have been completed, copies of these should also be sent. Where an IT1 has not been submitted to an employment tribunal the parties should advise the ACAS Arbitration Section of the circumstances of the claim. This notification should be in writing or recorded by any means so as to be usable for subsequent reference eg e-mail/facsimile. Although the ACAS conciliator may assist the parties by sending documentation, responsibility for ensuring that the appropriate documentation is sent to the ACAS Arbitration Section remains with the parties / representatives.

32. Where the parties have opted for arbitration under the Scheme by means of a Compromise Agreement, the parties or their independent adviser or representative(s) must notify the ACAS Arbitration Section (see paragraph 114) by sending them a copy of the Compromise Agreement and the Waiver Form within the two week time limit. Where IT1 and IT3 forms have been completed, copies of these should also be sent. Where an IT1 has not been submitted to the employment tribunal the parties should advise the ACAS Arbitration Section of the circumstances of the claim. This notification should be in writing or recorded by any means so as to be usable for subsequent reference e.g. e-mail/facsimile.

33. On receipt of the Arbitration Agreement the Arbitration Section at ACAS Head Office will check that all requirements of the Scheme have been met and will then notify the parties accordingly. Having accepted a case into the Acas Arbitration Scheme

Acas will contact the Employment tribunal and inform them that there will be no need for a tribunal hearing in respect of the Flexible Working Claim. If an IT1 has not been submitted to an employment tribunal Acas will not need to contact the Tribunal Service. **Remember, any other associated claims not covered by the Acas Arbitration Scheme will need to be settled or must proceed to a separate hearing at the Employment Tribunal.**

Invalid Arbitration Agreements

34. Where an Arbitration Agreement is received which is invalid the case will not be eligible to be heard under the Scheme. Where this situation arises, the ACAS Arbitration Section will contact the parties or their representatives to establish whether this situation can be rectified. If it cannot and no valid Arbitration Agreement is reached, the parties will have to resolve their dispute by other means or apply/re-apply to the employment tribunal if they are able to do so.

Time limit for notification of Arbitration Agreements

35. In order to avoid delays parties are advised to send Arbitration Agreements to the ACAS Arbitration Section as soon as possible after they have been concluded. ACAS will not provide a hearing under the Scheme if the Arbitration Agreement is notified to the ACAS Arbitration Section more than two weeks after the conclusion of the Agreement by the parties unless it was not reasonably practicable to notify ACAS within this time limit. "Notified" here means the date the Arbitration Agreement is received by the ACAS Arbitration Section. The Arbitration Agreement is treated as "concluded" on the date it is signed, or if signed by different people at different times, on the date of the last signature. If it was not reasonably practicable for the Agreement to be notified to ACAS within the two week period, any party notifying an Agreement outside this period should explain the reason for the delay in writing, and send this explanation to the ACAS Arbitration Section. ACAS will ask an arbitrator to consider the explanation, and the arbitrator may seek the views of the other party and may call both parties to a hearing to discuss the reasons for the delay. The arbitrator will then issue an award on whether or not the Agreement can be accepted for hearing under the Scheme.

Withdrawal or settlement of cases before or during arbitration hearings

Withdrawal

36. Once the Arbitration Agreement has been concluded and forwarded to ACAS, the employee bringing the claim of under the Flexible Working Regulations is free to withdraw from the arbitration process at any time provided that the withdrawal is in writing, and sent either to the ACAS Arbitration Section or to the arbitrator (via the ACAS Arbitration Section) (see paragraph 114). This withdrawal will constitute a dismissal of the claim. In withdrawing the claim the individual must understand that they have no right to re-open the original claim to the employment tribunal. The employer cannot unilaterally withdraw from the agreement to go to arbitration.

Settlement

37. Parties are free to reach private agreements to settle the dispute which was the subject of arbitration at any time before the end of the hearing. Having done so the parties may ask the ACAS Arbitration Section or the arbitrator (if one has been appointed) to terminate the arbitration proceedings. They can also request the arbitrator (if appointed) to record this agreement as their "agreed" award which would then be enforceable in the same way as any other award. The arbitrator has the power only to record such agreements, and will not approve, vary, transcribe, interpret or ratify them in any way. In order for the arbitrator to do this, the parties will first have to agree the wording of the agreement which they wish the arbitrator to record.

38. The arbitrator does not have the power to record agreements which are outside his or her remit, for example, an agreement to vary the terms and conditions of employment. The arbitrator is limited to financial compensation or the reconsideration of the request to work flexibly. If parties wish to settle disputes which are wider than the issue being determined by arbitration, but they wish the appropriate part of their agreement to be endorsed by the arbitrator, the agreement must clearly identify the part of the settlement which relates to the issue before the arbitrator. Any other parts of the agreement will may be recorded by the arbitrator but will be specifically excluded from their award.

39. Alternatively, parties may agree terms privately between themselves, usually in writing, on the basis of which they wish to withdraw from arbitration but, in doing so, they must accept that the terms do not constitute an award by the arbitrator. In this case confirmation in writing, or recorded by any means so as to be usable for subsequent reference eg e-mail/facsimile, that the employee wishes to withdraw from arbitration must be sent to the ACAS Arbitration Section or given to the arbitrator.

The Scheme in outline

Arrangements for the hearing

The following description is by way of general guidance only. It is to be noted that all procedural and evidential matters are within the arbitrator's discretion, subject to certain provisions of the Scheme.

Appointment of an arbitrator

40. Once ACAS has accepted an Agreement for arbitration under the Scheme, an arbitrator will be appointed by ACAS from its arbitration Panel and the parties will be notified of the arbitrator's name.

41. Before being appointed and until the arbitration is concluded, the arbitrator has a duty to disclose to ACAS in writing any circumstances, in a particular case, likely to give rise to any justifiable doubts as to his or her impartiality. This information will be disclosed to the parties.

42. Parties will not normally have a choice about a particular arbitrator to hear their case, although there may be exceptional circumstances when a party feels that the appointed arbitrator might not be able to be impartial, for example because they have a connection with one of the parties. That party should then contact the ACAS Arbitration Section as soon as possible.

Removal of an arbitrator

43. Arbitrators may only be removed by ACAS or by order of the Court. A party to an arbitration can apply to remove an arbitrator where circumstances exist that give rise to justifiable doubts as to his or her

impartiality or where he or she is physically/mentally incapable of conducting the proceedings or there are justifiable doubts as to his or her capacity to do so. Where a party has such doubts about the arbitrator they should apply in the first instance to ACAS. If ACAS refuses the application the party may then apply to the Court. The Court will only exercise its discretion with respect to removal if the party has already applied to and been refused by ACAS. The arbitrator may continue the proceedings and make an award while an application to ACAS or the Court is pending.

Death and replacement of an arbitrator

44. The authority of an arbitrator is personal and ceases on his or her death. In the event of an arbitrator dying or becoming incapacitated after being appointed to conduct an arbitration under the Scheme, but before an award has been signed by the arbitrator, a new arbitrator will be appointed. If, for any reason, including death or incapacity, an arbitrator ceases to hold office, ACAS will appoint a replacement arbitrator who will decide whether, and to what extent, any previous proceedings should stand.

General duty of the arbitrator

45. The arbitrator has a general duty to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his or her case and dealing with that of his or her opponent, and also to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense so as to provide a fair means for resolution of the dispute.

General duty of the parties

46. The parties to an arbitration have a duty to do everything necessary to ensure that the proceedings progress smoothly and are not delayed. They must comply with any direction made by the arbitrator.

47. If either party fails to comply with any aspect of the procedure set out in the Scheme or any direction by the arbitrator, the arbitrator may adjourn a hearing if in his or her view it would be unfair to either party to proceed or may draw an adverse inference from the act of non-compliance. In drawing such an adverse inference an arbitrator may assume that a party has

failed to comply in an attempt to conceal a weakness in the merits of their case.

Consolidation of cases/combined proceedings

48. ACAS has the power, with the agreement of the parties, to consolidate cases which are brought against the same employer and are based on common facts.

Agreeing the hearing date and venue

49. Once appointed, the arbitrator, with the administrative assistance of the ACAS Arbitration Section, will arrange a hearing as soon as is reasonably practicable. The Scheme does not allow a decision to be made on written evidence alone even if both parties wish it. The ACAS Arbitration Section will contact the parties with details of the date and venue for the hearing.

50. The hearings will be held as far as possible at a location convenient for both parties, usually at a neutral venue such as ACAS premises or a hotel. However, where the parties agree, the hearing can be held at the employee's workplace, or at a representative's premises, such as the offices of a trade union or an employers' association where this does not prejudice independence or impartiality. Where premises have to be hired, ACAS will meet reasonable costs in doing so.

51. Parties will be expected to co-operate by agreeing a date and venue with the arbitrator for a hearing to take place within 28 days of the ACAS Arbitration Section being notified of the Agreement. The appointed arbitrator has the power to decide:

- a. when and where the hearing should be if the parties are unable to agree on a mutually acceptable date and
- b. on the merits of any applications by either or both parties for postponements.

52. The ACAS Arbitration Section will contact all parties with details of the date and venue for the hearing.

Expedited hearings

53. An arbitrator has the discretion to expedite a hearing at the request of any party.

Applications for postponements of, or different venues for initial, and other, hearings

54. Once the arbitrator has set a date and venue for the initial hearing, an application for a postponement of, or a different venue for, a hearing may be made to the arbitrator in writing, via the ACAS Arbitration Section (see paragraph 114), setting out reasons why a party feels that the arbitrator should review the decision to hold the hearing on that date or at that venue. This should be done within 14 days of the date of the letter notifying the hearing arrangements. The parties will be given reasonable opportunity to comment on the application following which the arbitrator, without an oral hearing, will make a decision as to whether the application should be allowed. If the application is rejected the original arrangements will stand.

55. Applications for postponements or change of venue of the hearing received after the 14 days specified above will be considered at the arbitrator's discretion.

56. As well as this specific power to postpone initial hearings the arbitrator has a general discretion with respect to subsequent postponements.

Non-attendance at the hearing

57. If a party fails to attend the hearing without providing an acceptable explanation, the arbitrator may continue the hearing in that party's absence, taking account of any written submissions and documents which have been submitted by that party, or he may adjourn the hearing.

Where it is the employee who fails to attend the hearing without providing an acceptable explanation, the arbitrator also has the option of writing to them asking for an explanation for their non attendance. If the employee does not demonstrate reasonable cause why they did not attend, the arbitrator may rule in an award that the claim is deemed to have been dismissed.

Assistance at the hearing

58. Where a party will need any assistance at the hearing, such as the services of an interpreter, signer or communicator, they should let the ACAS Arbitration Section know at the earliest opportunity in order that appropriate arrangements can be made. Where the arbitrator agrees that such help is required, ACAS will meet the reasonable cost of providing it. Parties should also let the ACAS Arbitration Section know if they have any special requirements which might affect arrangements for the hearing.

Use of the Welsh language

59. The proceedings will generally be in English, however, where the provisions of the Welsh Language Act 1993 apply, ACAS will offer a choice of language for the proceedings and arrangements will be made to correspond with parties in the Welsh language should they wish it. For arbitrations in Wales either a Welsh-speaking arbitrator or translator will be provided where either of the parties or any witnesses indicate that they would like to speak Welsh at the hearing.

Travelling expenses/loss of earnings

60. It is a provision of the Scheme that each party will meet their own travelling expenses and those of others assisting them, whether representatives or witnesses. In addition, no loss of earnings are payable by ACAS to anyone involved in the arbitration. However, where an arbitrator upholds a flexible working claim, he or she may include in the calculation of any compensation sum to cover reasonable travelling costs and loss of earnings incurred by the employee personally in attending the hearing.

Outline of procedure before the hearing

61. Arbitration is most effective as a method of resolving disputes when each party, and the arbitrator, has the fullest possible opportunity to consider the arguments of both parties before the hearing takes place. Once a date has been agreed for the hearing, the parties should bear in mind the need to allow enough time for the preparation of their case, and for sending via the ACAS Arbitration Section to the other party, and to the arbitrator, written evidence such as copies of documents that they will be making use of and statements from others who they will be calling to speak at the hearing. To help them in preparing their case, parties should read the ACAS advisory leaflet, Flexible Working, which the arbitrator may have regard to in reaching a decision. Copies of these documents can be obtained from ACAS Publications, the address of which is at the back of this Guide.

62. The parties should send written statements of case (see paragraph 64) and any supporting documentation or other material which they wish to rely on at the hearing to the ACAS Arbitration Section (see paragraph 114) so that they are received by ACAS at least 14 days prior to the hearing. These will be in addition to the IT1 and IT3 forms where an application to the employment tribunal has been made. All written submissions received will be sent to the arbitrator and copied to the other party. Written statements of case which have not been provided prior to a hearing may only be relied upon at the hearing with the arbitrator's permission.

64. Written statements of case should briefly set out the main particulars of the case as the party sees it, and which can then be expanded upon, if necessary, at the hearing. It is helpful for statements to be written (typed if possible) on one side of the paper. It is also helpful if the pages and paragraphs are numbered. The statement should include an explanation of the events which led up to the Flexible Working Claim being brought, including an account of the sequence and outcome of any relevant meetings, interviews or discussions and the efforts the employee and employer went to in considering and justifying alternative work patterns. Copies of relevant documents/supporting documentation may include:

- the original request to work flexibly
- contracts of employment
- notes of meetings held between employee and employer to consider the application for flexible working
- letters of appointment
- time sheets
- written statement of particulars of employment
- any written reasons for refusing the Employee's flexible working application
- company handbooks, rules and procedures
- signed statements of any witnesses or outlines of evidence to be given by witnesses at the hearing.
- any other written information which may assist the arbitrator in deciding the Flexible Working claim

65. In addition, information which will help the arbitrator to assess compensation, if it is awarded, should be sent (see paragraph 81).

Requests for documents

66. Before the hearing either party may request from the other party access to, and/or copies of, documents which are not in the requesting party's possession, but which they feel could be important to their case. Where such documents are copied direct to the other party, a copy should also be sent to the ACAS Arbitration Section to forward to the arbitrator. In responding to reasonable requests for copies of documents, parties should normally bear the cost of reproducing them, and of sending them to both the requesting party and to ACAS.

67. Although arbitrators have no power to compel either party to comply with the requirement to exchange information, they can take failure to do so into account in reaching their decision. An arbitrator may draw an adverse inference and it could therefore count against a party if they have

refused to cooperate by exchanging documents and other information before the hearing.

68. Documents, other than copies of the IT1 and IT3, which may have been supplied to an ACAS conciliator before an agreement to go to arbitration was reached, will not be copied to the arbitrator or the other party by ACAS from its own records. In addition, the ACAS conciliator will not provide the arbitrator with any details of the conciliation process.

Calling others to speak at the hearing

69. At least 14 days prior to the hearing the parties should also provide the ACAS Arbitration Section with a list of names and title/role of all those people who will accompany them to the hearing or be called as a witness. In deciding this issue each party should consider whether they wish to have present at the hearing others who, for example, can support from their personal experience statements made about events leading up to the alleged breach of the regulations; speak about their role in any meetings; or, inform the arbitrator about the operation of the organisation's rules, practices and procedures, and where relevant, those operating in the industry or sector concerned. Parties should bear in mind, however, that unlike at an employment tribunal hearing, the arbitrator will not ask such people to swear an oath or an affirmation, nor allow a process of cross-examination. However, it is very likely that such witnesses will be questioned directly by the arbitrator. Parties may consider it sufficient to submit a signed statement from the witness containing their account of events instead of calling the witness to the hearing, although this would mean that the witness could not add to their statement during the hearing or be questioned on it and it is therefore possible that the evidence will not carry as much weight. Any such statements should be sent to the ACAS Arbitration Section to be copied to the arbitrator and to the other party. Even where people are to appear in person, details of what they are going to say should be sent to ACAS for copying to the arbitrator and the other party.

70. All those people who are on the list(s) of those accompanying each party should be present at the start of the hearing. Any witnesses whose details have not been provided in advance of the hearing may only be called with the arbitrator's permission.

Requests for attendance of witnesses

71. The arbitrator has no power to compel anybody's attendance at the hearing, whichever party has asked them to come. However, employers who are parties to arbitration hearings should co-operate by allowing current employees time off from work should the dismissed employee wish to call them to attend the hearing. Such employees should only be those who are in a position to provide relevant information to the arbitrator. The arbitrator may draw an adverse inference and it may count against the employer when the arbitrator is reaching a decision if they have unreasonably refused time off in these circumstances to a current employee who has relevant evidence to give.

Preliminary hearings and directions

72. In cases, where the arbitrator believes that there are likely to be considerable differences between the parties in respect of procedural points, for example over the availability or exchange of documents, or whether or not certain employees will be allowed time off to attend the hearing, the arbitrator has the power to call the parties to a preliminary hearing to attempt to resolve their differences. Alternatively the arbitrator may give procedural directions in correspondence. The arbitrator may express views on the desirability of information and/or evidence being available at the hearing, and remind the parties of their duty to act co-operatively in order to progress the arbitration hearing.

Conduct of the hearing

73. In conducting the arbitration hearing (as with every other part of the proceedings) the arbitrator has a responsibility to act fairly and impartially, giving each party a reasonable opportunity of putting their case and dealing with that of the other party. The arbitrator must adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense and providing a fair way of resolving the dispute.

74. The arbitrator is responsible, within general principles contained in the Scheme, for the conduct of the hearing and all matters relating to procedures and evidence. Given this discretion the arbitrator

is free to conduct the proceedings in a way which is very different from the employment tribunal (see Appendix 3). The arbitrator also has the power to adjourn a hearing.

75. The language of the proceedings will be English, unless the Welsh language provisions apply (see paragraph 59).

76. The purpose of the hearing is to allow both parties to explain their case in full to the arbitrator, and also to comment on the case being put by the other party. It also allows the arbitrator to put questions directly to either party or anybody else attending the hearing in order to ascertain the facts and clarify any points being made, and to attempt to resolve any inconsistencies or conflicts in the two accounts being presented by the parties before making a decision. The arbitrator will adopt an inquisitorial approach and encourage both parties, and anyone whom they have called to be present at the hearing, to speak freely in order that as full a picture as possible of what happened can emerge. At the hearing the arbitrator will also consider documents submitted by the parties, and question them about these.

77. Parties may bring, if they wish, someone to help them present their case at the hearing, although no special status will be accorded to legally qualified representatives. The parties are liable for any fees or expenses incurred by any representative they appoint. The arbitrator will have the right to address questions direct to either party and to anybody else who is attending the hearing to speak on their behalf. However, nobody will be required to swear oaths or affirmations and no party or witness will be cross examined by any other party or representative.

78. Hearings will be informal, and normally completed in less than a day. The rules of evidence which apply in the courts will not apply in the arbitration hearing. **The hearing will be held in private, generally with only the arbitrator, the parties and sometimes, with the consent of the parties, an ACAS official or arbitrator in training present. In the case of EC law or Human Rights Act 1998 being relevant a legal adviser may also attend the hearing (see paragraphs 83-85).** The arbitrator will normally open the hearing by

explaining his or her role and then confirm that he or she will be deciding whether to uphold the Flexible Working Claim and if so, what the remedy should be.

79. The arbitrator will then conduct the hearing in accordance with his or her general discretion using, as a broad guide, the standard arbitration hearing procedure (see Appendix 3). The arbitrator retains a full discretion, however, to depart from this suggested order of procedure. The arbitrator will be able to assist any party having difficulties in fully explaining their case. Before the hearing is closed the arbitrator will normally obtain an assurance from each party that everything that they wished to say has been said, and that they have had sufficient opportunity to comment on or attempt to rebut what has been said by the other party.

80. Towards the end of the hearing and before the arbitrator has decided whether to uphold the Flexible Working Claim, he or she will explain to the employee what orders for reconsideration of the request for flexible working may be made and in what circumstances and ask the employee whether he or she is seeking such a remedy.

81. The parties will be asked to agree the details provided concerning the employee's pay which will be used to calculate any award of compensation, should the arbitrator decide to uphold the Flexible Working Claim. The parties should attend the hearing able to provide the arbitrator with information relevant to the calculation of compensation, if appropriate, which may include documents showing: weekly take home pay, pay slips, P60s or wage records.

82. No further evidence will be accepted after the end of a substantive hearing, without the arbitrator's permission, although the arbitrator may occasionally request that a party sends further documentation. Where this happens, the documentation should be sent to the ACAS Arbitration Section (see paragraph 114) for copying to the arbitrator and to the other party who will be able to comment, if necessary, before the arbitrator reaches a decision.

Appointment of legal advisers for points of EC law and the Human Rights Act 1998

83. The Scheme is not intended for cases which involve issues of EC law. Parties who have such cases are strongly recommended to have them heard in the employment tribunal. However, where such cases are referred to be heard under the Scheme or cases are referred which involve matters under the Human Rights Act 1998, the arbitrator has the power, either at his or her own discretion or at the request of either party (and with his or her agreement) to require the appointment of a legal adviser. On request from the arbitrator ACAS will appoint a legal adviser to report to the arbitrator and the parties. The legal adviser is under the same duty of disclosure as the arbitrator (see paragraph 41) and must disclose in writing to ACAS any circumstances likely to give rise to any justifiable doubts as to his or her impartiality in any particular case to which they are appointed.

84. Where such issues of EC law or the Human Rights Act 1998 are not identified prior to the hearing but arise once the hearing is underway, the arbitrator may identify the need for a legal adviser to be involved and will inform ACAS, who will then make the appointment. In these cases there may need to be an adjournment of the hearing pending appointment of the legal adviser.

85. The legal adviser may attend the hearing or be consulted in correspondence. He or she will advise the arbitrator but will not take over responsibility for the arbitration proceedings and will not ultimately decide the dispute. The parties will be given a reasonable opportunity to comment on any information, opinion or advice offered by the legal adviser. Following this the arbitrator will take the legal adviser's information, opinion or advice into account when determining the dispute. The proceedings will remain informal and the arbitrator will continue to use an inquisitorial approach.

Court determination of preliminary points

86. In cases where EC law and/or the Human Rights Act 1998 are relevant a party may apply to the High Court or Central London County Court for the determination of a preliminary point of law. Any such application must identify the question of law to be determined. The application may only be made with the agreement of all parties to the arbitration or otherwise with the permission of the arbitrator stating the grounds on which the question is to be decided by the Court. The party making the application must notify the other party/ies and the Court must be satisfied that the determination of this point substantially affects the rights of one or more of the parties to the arbitration.

How the arbitrator reaches a decision

87. Each case will be decided in accordance with the Terms of Reference. Having listened to the arguments put forward by the parties and any others whom they have asked to speak, and taken into account any documentation tabled during the arbitration process, the arbitrator will come to a decision. In doing so the arbitrator will have regard to The Flexible Working (Procedural Requirements) Regulations 2002 and to any relevant Acas Guidance. The arbitrator will not base any decision on legal tests or precedent except in cases where the law and/or the Human Rights Act 1998 are relevant, even if these have been referred to by the parties during the hearing. Nor will the arbitrator substitute what he or she would have done for the actions taken by the employer.

The arbitrator will not decide or announce the outcome of the case at the hearing.

Remedies available under the Scheme

Reconsideration of the request for flexible working

88. In all cases where the arbitrator decides to uphold the Flexible Working claim, taking account of the employee's wishes, the arbitrator may order reconsideration of the request for flexible working. An order for reconsideration will require the employer to reconsider the employee's application

for flexible working as if the application had been made on the date of the order.

Awards of compensation

89. Where the arbitrator decides to uphold the flexible working claim, he or she can award compensation to be paid by the employer to the employee.

90. Where compensation is awarded it will consist of an amount of money which the arbitrator considers just and equitable taking into account all circumstances and subject to a maximum of eight weeks pay. Additionally, the arbitrator may award a further two weeks pay in situations where an employee has been refused a reasonable request for a work companion to accompany him or her to the meeting. In arriving at a just and equitable amount the arbitrator will consider the behaviour of the employer (e.g. whether they have been truthful) and of the employee (e.g. their willingness to consider acceptable alternatives).

Limits on the compensatory amount

91. The arbitrator is required to have regard to the statutory maximum limits on a "week's pay" used for the calculation of the compensatory amount (see section 220–229 of the Employment Rights Act 1996). This is subject to a statutory limit which is reviewed each year.

Double recovery

92. The parties must supply details of any relevant awards of compensation that may have been made by any tribunal or court in connection with the matters which are the subject of the claim before the arbitrator. Where an employee relies on the same act by the employer in a flexible working claim as he or she relies on in a claim before an employment tribunal under the Sex Discrimination 1975 and/or the Race Relations Act 1976 and/or the Disability Discrimination Act 1995, the arbitrator cannot award compensation in respect of any loss which has already been taken into account by the tribunal.

Insolvency of employer

93. As with the Employment Tribunal, in cases where the employer has become insolvent, the compensatory amount will not be paid by the Secretary of State for Trade and Industry.

The form of the arbitrator's award (decision)

94. The arbitrator's decision is called an "award". The arbitrator will send to the parties, or their nominated representatives, through ACAS, a final and binding award stating whether or not the claim for flexible working should be upheld. The arbitrator's award will be in writing and will include reference to the main considerations which were taken into account in reaching the decision regarding the claim. If the arbitrator has decided to uphold the flexible working claim, the award will also contain details of the remedy which the arbitrator has awarded. The award will be signed and dated by the arbitrator.

95. The arbitrator may make more than one award at different times on different aspects of the matters to be determined in the case. For example he or she may make an award relating to whether or not the claim is upheld, but due to lack of information available at the hearing on the employees' income may subsequently issue an award on compensation.

Correction of awards

(NOTE – Correction of award in this context refers only to the removal of any clerical or computational mistake, or error arising from an accidental slip or omission, or to clarify or remove any ambiguity in the award and does not imply the ability to overturn the arbitrator's award through an appeal or challenge.)

96. The arbitrator's award will be issued simultaneously by ACAS to both parties. Before the award is circulated the ACAS Arbitration Section may check it for any clerical or other errors and may refer the award back to the arbitrator to establish whether he or she wishes to rectify these before the award

is issued to the parties. ACAS does not however interfere with the decision itself. The arbitrator may, either on his or her own initiative or on application of a party or ACAS, correct the award or clarify any ambiguity. Any correction of the award shall be made within **28 days** of the date the application was received by the arbitrator, or where the correction is made at the arbitrator's initiative, within **28 days** of the date of the award. Any correction of the award will form part of the award.

97. If the arbitrator decides that it is necessary he or she may make an additional award in respect of any claim which was argued before him or her but not dealt with in the original award. If a new issue has arisen the arbitrator will afford the parties the opportunity to comment before issuing an additional award. It should be noted however, that an additional award cannot revisit any issue that has already been dealt with in a previous award. Any additional award will be made within **56 days** of the date of the original award. Any application for an additional award must be made to the ACAS Arbitration Section within **28 days** of the date the award was despatched to the applying party by ACAS.

Confidentiality of awards

98. Arbitrators' awards are confidential to ACAS, the parties and their representatives and will not be published by ACAS. However, ACAS maintains confidential records of cases, decisions and awards for monitoring and evaluation purposes and may publish general summary information concerning cases heard under the Scheme as it sees fit, without identifying individual cases or parties. Awards will not be lodged with the employment tribunal by ACAS. However, an award may be presented at an employment tribunal by a party who is applying in respect of a subsequent Flexible Working Claim following an award of reconsideration.

Effect of awards

99. The arbitrator's award is final and binding both on the parties and on any persons claiming through or under them.

Enforcing awards

100. Awards will be enforceable in the High Court or County Court.

101. Where an arbitration award for reconsideration of the claim has been made and not complied with, the employee in the original flexible working case will have the right to submit a claim to the employment tribunal in regard of the new alleged breach of the Flexible Working Regulations.

Interest

102. Where an employer does not pay any compensation awarded by the arbitrator within 42 days of the date of despatch of the award by ACAS to the employer, interest will be payable on the same basis as for employment tribunal awards.

Appeals

103. There will be no right of appeal on a point of law or fact in respect of the arbitrator's award, which will be final and binding on the parties. The only exception to this is a narrow exception with respect to points of EC law and the Human Rights Act 1998 (see paragraphs 110-111).

Challenging the arbitrator's award

104. Challenges to the arbitrator's award can only be made in the very limited circumstances which are outlined below.

Challenges on grounds of substantive jurisdiction

105. A party to an arbitration may challenge an arbitrator's award on the grounds of substantive jurisdiction. Such a challenge could be to the validity of the arbitration and whether the dispute was within the scope of the Scheme, the way in which the arbitrator was appointed and/or which matters were submitted to arbitration in accordance with the Arbitration Agreement.

106. Challenges should be made to the High Court or Central London County Court within 28 days of the date the award was despatched to the party by ACAS and notice of the challenge should be sent to ACAS, the arbitrator (via ACAS) and to the other party/ies. However, parties may lose their right to make a challenge if they did not raise the points at issue at the time with the arbitrator or otherwise raise the issue within the provisions of the Scheme and if they continued to take part in the proceedings without objection. If the Court upholds a challenge on the grounds of substantive jurisdiction, it may confirm the award, vary the award or set the award aside either in whole or part.

Challenges on grounds of serious irregularity

107. Challenges in respect of the conduct of the arbitrator, the proceedings or the award may only be made on the grounds of serious irregularity which has caused or will cause substantial injustice to the party making the challenge. Such challenges concern the way in which the dispute was determined rather than the end result itself.

108. Challenges should be made to the High Court or Central London County Court within 28 days of the date the award was despatched to the party by ACAS and notice of the challenge should be sent to ACAS and to the other party/ies. However, parties may lose their right to make a challenge if they did not raise the point(s) at issue at the time with the arbitrator or otherwise raise the issue within the provisions of the Scheme and continued to take part in the proceedings without objection. If the Court upholds a challenge on the grounds of serious irregularity, it may remit the award to the arbitrator for reconsideration, set the award aside, or declare the award to be of no effect. It may do any of these in respect of the award as a whole, or only in respect of part of it.

109. The limited categories of serious irregularity on which a challenge may be brought are set out in the Scheme. The test of "Substantial Injustice" has been very narrowly defined in the Report of the Departmental Advisory Committee (DAC) on Arbitration Law – the official guide to the Arbitration Act 1996. It states that "The test of a "substantial injustice" is intended to be applied by way of support

for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the court to take action". It continues "Having chosen arbitration the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice"

Appeals on questions of EC law and the Human Rights Act 1998

110. Where a point of EC law or a matter under the Human Rights Act 1998 has been considered by the arbitrator, a party may appeal to the High Court or Central London County Court on a question of law arising out of an arbitrator's award. The appeal must be made within 28 days of the date the award was despatched to the party by ACAS and notice of the appeal should be sent to ACAS and to the other party/ies. The Court will only consider the appeal with either the agreement of the other party or if it grants permission itself to hear it. It will only grant permission on the basis that the determination of the question will substantially affect the rights of one or more of the parties; if the appeal raises a point of EC law, that the point is capable of serious argument; or in other cases the decision of the arbitrator is obviously wrong or the question is one of public importance and the arbitrator's decision is open to serious doubt and that despite the agreement of the parties to have the matter determined by arbitration, it is just in the circumstances for the Court to determine the question. As with other challenges this form of review is extremely narrow.

111. If the Court upholds an appeal on a question of EC law or a matter under the Human Rights Act 1998 it may by order confirm the award, vary the award, remit the award to arbitration, in whole or part, for reconsideration in the light of the Court's determination or set aside the award in whole or part.

Immunity

112. An arbitrator will not be liable for anything done or omitted in the discharge of his or her functions as an arbitrator, unless the act or omission is shown to have been in bad faith. This applies also to a legal adviser appointed by ACAS.

113. ACAS, by reason of having appointed an arbitrator or a legal adviser, will not be liable for anything done or omitted by the arbitrator or a legal adviser in the discharge of his or her function as an arbitrator.

Service of documents and notices on the ACAS arbitration section

114. All documents relating to the Scheme which are for the attention of ACAS should be sent by pre-paid post to:

ACAS Arbitration Section
ACAS Head Office
Brandon House
180 Borough High Street
London SE1 1LW

Tel No: 020 7210 3742

or transmitted by facsimile to the ACAS Arbitration Section at the following number:

Fax No: 020 7210 3691

Or sent by e-mail to: arbitration@acas.org.uk

Territorial operation of the Scheme

115. The Scheme is to operate throughout England and Wales.

Further information

116. If parties to an arbitration under the Scheme require any further information about the arbitration process, they should contact the Arbitration Section at ACAS Head Office (see paragraph 132) rather than the appointed arbitrator for their case or the ACAS conciliator who had previously dealt with the employment tribunal claim.

Address of ACAS Reader

Copies of all ACAS publications can be obtained from the ACAS mailing house at:

Acas Publications,
PO Box 235,
Hayes,
Middlesex,
UB3 1DQ

Tel No; 0870 242 9090
FAX No; 020 8867 3225

Email; acas@eclogistics.co.uk

Appendix 1

Employment tribunals and ACAS arbitration: a comparison

| Flexible Working/ key process areas | Employment tribunal | Arbitration |
|--|--|---|
| Decision based on | Flexible Working Regulations, statute and case law | Flexible Working Regulations |
| Those hearing the case | Legally qualified Chairman and side members. | ACAS arbitrator with knowledge/experience of employment relations, sitting alone |
| Location of hearing | ET office | By agreement at a hotel/ ACAS office/the workplace/ representatives' premises or other |
| Length of hearing | Normally at least one day | Normally half a day |
| Presentation of evidence | Cross-examination of witnesses on oath | Informal presentation, no oaths or cross-examination by parties but questioning by arbitrator |
| Availability of witnesses and documents | Witness orders, orders for discovery/inspection or production by witnesses of documents | No powers in Scheme to make orders, but failure of parties to cooperate can count against them when decision is made |
| Expenses to attend hearing/ loss of earnings | Tribunal can reimburse expenses and losses for parties, witnesses and some representatives | No expenses paid by ACAS, but compensation may include a sum for cost of attending hearing |
| Remedies/Awards | Statutory provisions | ACAS Scheme |
| Publicity | Public hearing and award | Private hearing/ confidential award |
| Appeal/Challenge | Can be made to EAT and Appellate courts | No appeal on point of law or fact (other than EC law or Human Rights Act issues) challenge only for jurisdiction and serious irregularity |

Adapted from an original table by Jon Clark and Roy Lewis, first published in *Personnel Management*, June 1992

Appendix 2

Suggested wording for inclusion in an Arbitration Agreement

“The parties hereby agree to submit the dispute concerning the alleged contravention of the Flexible Working Regulations in respect of (name of employee) to arbitration in accordance with the ACAS Arbitration Scheme having effect by virtue of the ACAS Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003 No 694)”

Appendix 3

Standard arbitration hearing procedure

(The following is a guideline only: procedures are flexible and an arbitrator may structure the procedure in any way that is appropriate in accordance with his or her general duty.)

The arbitrator is responsible for the conduct of the hearing, for ensuring that he or she obtains all the information needed to make his or her award and that the parties are given every opportunity to present their evidence and arguments. Although the arbitrator will decide the way in which the hearing is to be conducted, the following paragraphs broadly describe the procedure that an arbitrator would normally adopt.

Stage 1: Introduction

The arbitrator will introduce him or herself and ask the parties to introduce all those present at the hearing. He or she will explain the way in which the hearing is to be conducted and any domestic arrangements applicable to the location, for example, fire instructions.

Stage 2: Oral presentations

Each party will be asked to make an opening statement that draws attention to the main points of their respective cases, and which may include comments on the other party's written submission. The employer would normally make their statement first. These statements would usually be made without interruption unless the arbitrator or the other party, through the arbitrator, wished to clarify any factual information.

Stage 3: Discussion of the issues

The next stage is that the arbitrator will discuss the issues with the parties. This normally starts with the arbitrator asking questions of the parties. One party may also suggest questions which the arbitrator might put to the other party. The party to whom the question is directed may respond themselves or call upon anyone accompanying them to respond. The person answering the question may call upon another member of the team to make a supporting statement. If one party responds to a question, the other party will be given the opportunity to comment on the response. Again, the party may comment themselves or invite someone accompanying them to do so instead or as well.

The arbitrator will seek information which will help to inform the calculation of compensation should it be awarded as well as establishing whether the employee is seeking a reconsideration of the request to work flexibly. Finally, the arbitrator will ask the parties if they feel that they have had an opportunity to say everything that they wished to say and sufficient opportunity to respond to what the other party had to say. The arbitrator may suggest a short adjournment to allow the parties to prepare for their final submissions.

Stage 4: Closing statements

The parties will be offered the opportunity to make a final statement to the arbitrator; the employer would usually make their statement first. The final statements should be a summary of the main points the parties wish the arbitrator to take into account in reaching his or her decision and should contain no new material. In closing the hearing the arbitrator will seek a final confirmation from each party that they have nothing further to add.

The arbitrator will not announce his or her decision at the hearing.

Waiver of rights

The ACAS Arbitration Scheme ("the Scheme") is entirely voluntary. In agreeing to refer a dispute to arbitration under the Scheme, both parties agree to waive rights that they would otherwise have if, for example, they had referred their dispute to the employment tribunal. This follows from the informal nature of the Scheme, which is designed to be a confidential, relatively fast, cost-efficient and non-legalistic process.

As required by section VI of the Scheme, as a confirmation of the parties' agreement to waive their rights, this form must be completed by each party and submitted to ACAS together with the agreement to arbitration.

A detailed description of the informal nature of arbitration under the Scheme, and the important differences between this and the employment tribunal, is contained in the ACAS Guide to the Flexible Working Arbitration Scheme ("the ACAS (Flexible Working) Guide"), which should be read by each party before completing this form.

The Scheme is not intended for disputes involving complex legal issues, or questions of EC law. Parties to such disputes are strongly advised to consider applying to the employment tribunal, or settling their dispute by other means.

This form does not list all the differences between the Scheme and the employment tribunal, or all of the features of the Scheme to which each party agrees in referring their dispute to arbitration.

I,,
**the Applicant / Respondent /
Respondent's duly authorised
representative** [delete as appropriate]
**confirm my agreement to each
of the following points:**

1. Unlike proceedings in the employment tribunal, all proceedings under the Scheme, including all hearings, are conducted in **private**. There are no public hearings, and the final award will be confidential.

2. All arbitrators under the Scheme are appointed by ACAS from the ACAS Arbitration Panel (which is a panel of impartial, mainly non-lawyer, arbitrators appointed by ACAS on fixed, but renewable, terms). The appointment process and the ACAS Arbitration Panel is described in the Scheme and the ACAS Guide. Neither party will have any choice of arbitrator.

3. Proceedings under the Scheme are conducted differently from the employment tribunal. In particular:

- arbitrators will conduct proceedings in an **informal** manner in all cases;
- the attendance of witnesses and the production of documents cannot be compelled (although failure to co-operate may be taken into account by the arbitrator);
- there will be no oaths or affirmations, and no cross-examination of witnesses by parties or their representatives;
- the arbitrator will take the initiative in asking questions and ascertaining the facts (with the aim of ensuring that all relevant issues are considered), as well as hearing each side's arguments;
- the arbitrator's decision will only contain the main considerations that have led to the result; it will not contain full or detailed reasons;

4. Once parties have agreed to refer their dispute to arbitration in accordance with the Scheme, the parties cannot then return to the employment tribunal.

5. In deciding whether the employee's complaint that his Employer has failed to deal with an application under section 80F of the Employment Rights Act 1996 in accordance with section 80G(1) of that Act or that a decision by his Employer to reject the application was based on incorrect facts, the arbitrator shall have regard to the Flexible Working (Procedural Requirements) Regulations 2002, as well as any relevant ACAS guidance. Unlike the employment tribunal, the arbitrator will not apply strict rules of evidence.

6. Unlike the employment tribunal, there is no right of appeal from awards of arbitrators under the Scheme (except for a limited right to appeal questions of EC law and, aside from procedural matters set out in the Scheme, questions concerning the Human Rights Act 1998).

7. Unlike the employment tribunal, in agreeing to arbitration under the Scheme, parties agree that there is no jurisdictional argument, ie no reason why the claim cannot be heard and determined by the arbitrator.

Signed.....

Dated.....

In the presence of:

Signature

Full name.....

Position.....

Address.....

.....

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