

# The Acas Arbitration Scheme for the resolution of unfair dismissal disputes (Scotland)

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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 [www.legislation.gov.uk](http://www.legislation.gov.uk)

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# A summary of the key features of the scheme

## What is the Arbitration 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 judgment

Acas arbitration is a tried and tested way of resolving disputes, and is often used by employers and trade unions and other employee representatives. Our independent arbitrators are chosen for their proven experience in employment relations and in resolving disputes.

In Scotland, the person who would conduct an arbitration is more usually referred to as an "Arbiter". However, because of the more precise legal definition of the word we are using "Arbitrator" in this guide in line with the terminology used in the Statutory Instrument setting out the formal Acas Arbitration Scheme.

The Scheme provides an **alternative to an employment tribunal hearing** in cases of unfair dismissal and is a confidential, relatively fast, cost efficient, non-legalistic, informal and non-confrontational process.

**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 have grounds to lodge such an application.

Entry to the Scheme is via an Arbitration Agreement reached with the assistance of an Acas conciliator or in the form of a settlement 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 2 weeks of it being concluded by the parties.

In agreeing to use the Acas Arbitration Scheme you must choose either the provisions as they apply in Scotland, or those of England and Wales. Normally this choice will be determined by the location of the employee's workplace. Where there is any dispute over which provisions the parties are to use, you must decide which Scheme you wish to sign up to. It is essential that both sides agree to use the same version of the Arbitration Scheme.

Where an employee has other claim(s) in addition to unfair dismissal, any other claim(s) must be pursued separately or settled (Acas may be able to help here). The Scheme is not designed to deal with issues of EU law or issues arising under the Human Rights Act 1998 (apart from procedural matters set out in the Scheme), or any devolution issue. In these cases the arbitrator may appoint a legal adviser to provide guidance.

In addition to the information on the employee's application to the employment tribunal (ET1) and the employer's response (ET3) (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 dismissal is found to be unfair 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 has the power to set dates and locations of hearings if the parties do not cooperate in these arrangements.

**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 of general principles of fairness and good practice in the workplace including the principles set out in the Acas Code of Practice on Disciplinary and Grievance Procedures and the Acas Discipline and Grievances at Work Handbook.

Following the hearing the arbitrator will issue a binding “Award” summarising each party’s case, the arbitrator’s main considerations, the decision and, if the dismissal is unfair, the remedy. The award will be confidential to Acas and the parties. If a dismissal is found to be unfair **an arbitrator can order the same remedies as an employment tribunal**. These are re-instatement, re- engagement and compensation.

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 EU law or the Human Rights Act 1998, or any devolution issue are relevant.

## The arbitration hearing – what will happen on the day?

Your hearing will take place in an Acas office, Hotel or other suitable place. We will make sure that there is somewhere private and separate for you and the other side to go if you need to discuss your case, as well as a good sized room for the hearing. The arbitrator will sit at the head of the table and you will sit to one side, facing the other party to the case. Occasionally, with your agreement, Acas will arrange for a newly appointed arbitrator or member of staff to sit in on a hearing to gain experience of arbitration.

Any person sitting in as an observer will have no say in the decision the arbitrator makes on your case.

The arbitrator will start with introductions of all those present, and then they will outline how they plan to run the hearing. Although it is up to the arbitrator how the hearing is conducted, the following is broadly what you should expect.

- Before the hearing we will have asked you to **provide a written statement** telling the arbitrator what you think are the most important parts of your case, as well as some other paperwork about the dismissal. We will have copied all these papers and forwarded a set to the arbitrator, as well as a set to you and the other side. It is important that you bring the full set with you on the day.
- To begin, the arbitrator will ask one of the **two sides to explain their case**. Often the arbitrator will ask the employer to speak first and they should be allowed to talk without interruption. The arbitrator will then invite the other side to comment on what they have heard, and explain their own case. Again, the other side will be able to comment.
- **The arbitrator will then ask questions** of you and the other side so that they can be sure they understand all of the issues. The arbitrator will allow you and the other side to suggest questions where you think there are points which need to be explored or clarified. As there is no right to cross-examine in an arbitration hearing, it is important that you make the arbitrator aware of any questions you would like to have answered.
- Once the case has been thoroughly discussed the arbitrator will ask you and the other side to make **your final statements** about the case, and summarise the main points you wish the arbitrator to take into account in reaching the decision.
- **At the end of the hearing** the arbitrator will ask questions about the possibility of the employee going back to work with the employer. The arbitrator will also ask for information that will help with working out any compensation that might be awarded. This will happen in every case, whether the arbitrator feels the dismissal was fair or unfair, so that another hearing is not necessary. It is vital that if you have any objections to an award involving the return to work, you should make this known to the arbitrator at this point. In order to make sure that all of these issues can be dealt with at the hearing it is important that information such as the level of the employee's earnings before the dismissal, any earnings since the dismissal, benefits received and attempts to find a job is brought to the hearing.
- Finally, **Acas will send the arbitrator's award to both sides at the same time**, usually within two to three weeks of the hearing. The decision will not be announced before the award is sent out to the parties.

# A guide to the Acas Arbitration scheme

The Scheme is available at [www.legislation.gov.uk](http://www.legislation.gov.uk)

## Introduction

1. The Acas Arbitration Scheme (“the Scheme”) has been introduced to provide a voluntary alternative to the employment tribunal for resolution of unfair dismissal disputes. 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. The Scheme was designed to initially operate in England and Wales and was extended to cover Scotland from April 2004<sup>1</sup>. 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. 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 (see paragraphs 12, 84-88) the arbitrator will have regard to general principles of fairness and good conduct in employment relations including, for example, principles referred to in the Acas Code of Practice on Disciplinary and Grievance Procedures and the Acas Handbook Discipline and Grievances at Work which were current at the time of the dismissal. 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 an unfair dismissal 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 122 129). 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’ 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.
1. If you wish to proceed using the Scheme as it operates in England and Wales, you will need to obtain the relevant guidance from Acas using the contact details listed in paragraph 131.

- Once the parties to an unfair dismissal dispute have concluded an Arbitration Agreement to have the dispute resolved under the Scheme, the unfair dismissal claim can no longer be heard by an employment tribunal.

## What types of cases does the Scheme cover?

- The Scheme is available as an alternative to going to an employment tribunal hearing only for cases of alleged unfair dismissal, 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 of unfair dismissal eg where an employee has been dismissed because of their conduct/ capability, which do not involve jurisdictional or complex legal issues nor raise points of EU law.

## Inappropriate cases

- The Scheme excludes from its scope other kinds of claim which are often related to or raised at the same time as a claim of unfair dismissal, for example, sex/ race discrimination cases and claims for unpaid wages. If the claim covers alleged breaches of employment rights other than unfair dismissal and the parties want to have the unfair dismissal claim heard under the Scheme, the other claim(s) will have to be settled or pursued separately before an employment tribunal. If the non-unfair dismissal 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 unfair dismissal and other claim(s) dealt with by the employment tribunal at a single hearing.
- If the parties decide that they want the unfair dismissal 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.

- 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.
- The Scheme is not intended for cases which raise questions of EU law such as unfair dismissal claims which are based on an EU 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 their dismissal is sex discrimination; dismissals relating to the transfer of an undertaking; and claims that the dismissal was related to exercising a right under the Working Time Regulations.
- If cases are referred where EU law is relevant or where EU Law issues or questions relating to the Human Rights Act 1998, or to devolution 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 EU law, or the Human Rights Act questions or devolution issues. (see paragraphs 84-88.)



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. The Scheme should not be used where there is a dispute between the parties over whether or not the employment tribunal has jurisdiction to hear the unfair dismissal 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 dismissal 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 accept 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. Acas will accept cases of alleged constructive dismissal for hearing under the Scheme where both parties request this but with the following proviso. In such cases, employees are attempting to argue that certain conduct of their employer amounted to a fundamental breach of their contract of employment, and that they were therefore entitled to resign. In such circumstances there will normally be a dispute between the parties as to whether or not a dismissal took place, and an employment tribunal and not arbitration will be the route for having the case heard. However, if both parties agree that the events which took place amounted to a dismissal, then the case could, if the parties wish, go to arbitration under the Scheme for an arbitrator to decide whether the dismissal was fair or unfair. Indeed, in agreeing to use the Scheme the

parties will be taken to have agreed that a dismissal has taken place.

16. 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 National (see details in paragraph 131).

## When to consider using the Scheme

17. 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 an unfair dismissal 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, and neither one is 'better' than the other. 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 may be found at Appendix 1.

## 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 unfair

dismissal 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 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 effective date of termination) for presenting a claim of unfair dismissal 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 Settlement Agreement, following advice to the former employee from a relevant independent adviser. Both types of Agreement must be in writing, and any Settlement 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 47-48).

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 settlement agreements which must be met. The employee's relevant independent adviser should 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 EU Law, issues under the Human Rights Act 1998 or any devolution issue, 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 Settlement 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 signatures 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<sup>2</sup>.**

### Terms of reference

24. Every Arbitration Agreement under the Scheme will be taken as an agreement that the arbitrator should decide whether the dismissal was fair or unfair and also the appropriate remedy.
25. The terms of reference which will be used by the arbitrator in each case are: "In deciding whether the dismissal was fair or unfair, the arbitrator shall:
- have regard to general principles of fairness and good conduct in employment relations (including, for example, principles referred to in any relevant Acas Disciplinary and Grievance Procedures Code of Practice or Discipline and Grievances at Work Handbook), instead of applying legal tests or rules (eg court decisions or legislation)
  - apply EU 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 finds the dismissal unfair, he or she shall determine the appropriate remedy under the terms of this 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.
2. If you wish to proceed using the Scheme as it operates in England and Wales, you will need to obtain the relevant guidance from Acas using the contact details listed in paragraph 131

### 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.

### Checklist for a valid Arbitration Agreement

28. 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 settlement agreement conforming to the requirements of the Employment Rights Act 1996 (a "Settlement 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 131 of this guide) within 2 weeks of its conclusion by the parties.
29. In cases where the Arbitration Agreement is reached through a Settlement 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 131). 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 National (see paragraph 131) 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, then

- either the conciliator or the parties/representatives must send the completed Conciliated Agreement and Waiver Forms, together with ET1 and ET3 forms (if completed) to the Acas Arbitration Section at Acas National (see paragraph 131) within the two week time limit.
- where an ET1 has not been submitted to the employment tribunal, the parties should advise the Acas Arbitration Section of the circumstances of the dispute.
- 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 Settlement Agreement, then

- the parties or their independent adviser or representative(s) must notify the Acas Arbitration Section (see paragraph 131) within the two week time limit by sending them a copy of the completed Settlement Agreement and the Waiver Form, together with ET1 and ET3 forms (if completed).
- where an ET1 has not been submitted to the employment tribunal, the parties should advise the Acas Arbitration Section of the circumstances of the dispute.
- this notification should be in writing or recorded by any means so as to be usable for subsequent reference eg e-mail/facsimile.

33. On receipt of the Arbitration Agreement the Arbitration Section at Acas National will check that all requirements of the Scheme have been met and will then notify the parties accordingly.

### 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 individual who brought the claim of unfair dismissal is free to withdraw from the arbitration process at any time provided that the withdrawal is in writing or recorded by any means so as to be usable for subsequent reference eg. email/facsimile, and sent either to the Acas Arbitration Section or to the arbitrator (via the Acas Arbitration Section) (see paragraph 131). This withdrawal will constitute a dismissal of the claim. In withdrawing the claim the individual must understand that they have no right to reopen 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 in respect of a personal injury claim associated with the dismissal, or which contain a remedy which it is beyond the power of the arbitrator to award, such as the retention by the employee of a company car. 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 may be set down by the arbitrator but will be specifically excluded from their award.

39. Alternatively, parties may reach an agreement privately between themselves on the basis of which they wish to withdraw from arbitration. Usually this will be in writing and in making such an agreement the parties 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.

Acas. The arbitrator may continue the proceedings and make an award while an application to Acas is pending.

## The Scheme in outline

### Arrangements for the hearing

40. 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

41. 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.

42. Before being appointed and until the arbitration is concluded, the arbitrator has a duty to disclose in writing to Acas 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.

43. 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

44. In Scotland, 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 to

### Death and replacement of an arbitrator

45. 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

46. 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

47. 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.
48. 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**

49. 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**

50. 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.

51. 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 former workplace, or at a representative's premises, such as the offices of a trade union or an employers' association. Where premises have to be hired, Acas will meet reasonable costs in doing so.

52. Parties will be expected to co-operate by agreeing a date and venue with the arbitrator for a hearing to take place within two months 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.

### **Expedited hearings**

53. An arbitrator has the discretion to expedite (speed up) the arrangements for a hearing in a range of relevant circumstances either

on his or her own initiative or at the request of the parties.

54. In particular, if an employment tribunal has made an order for interim relief before the parties opt to have their unfair dismissal dispute decided by arbitration Acas is able to appoint an arbitrator who will attempt to arrange a hearing as soon as is reasonably practicable. Interim relief is a remedy available to employees who have alleged that their dismissal was for an "inadmissible reason". For example, this could include dismissal for being a member of, or taking part in the activities of, an independent trade union, or refusing to join or remain a member of a trade union. An arbitrator has no power to award provisional or interim relief.

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

55. If you need to request a change to the arrangements for the hearing regarding the date or the venue, you should apply to the arbitrator in writing via the Acas Arbitration Section (see paragraph 131), setting out why you feel the arbitrator should review the arrangements. 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 in writing, following which the arbitrator will make a decision as to whether the application should be allowed. If the application is rejected the original arrangements will stand.

56. 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.

57. 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

58. 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. 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

59. 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.

### 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 rules that a dismissal was unfair, he or she may include in the calculation of any compensation a 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 Code of Practice Disciplinary and grievance procedures and the Acas Handbook Discipline and Grievances at Work, which the arbitrator will have regard to in reaching a decision. Copies of these documents can be obtained from the Acas website.
62. The parties should send written statements of case (see paragraph 65) and any supporting documentation or other material on which they wish to rely at the hearing to the Acas Arbitration Section (see paragraph 131) so that they are received by Acas at least 14 days prior to the hearing. These will be in addition to the ET1 and ET3 forms. All written submissions received will be sent to the arbitrator and copied to the other party. If for some reason a party is unable to produce a written statement before the hearing, the fact that they have not done so will not count against them when the arbitrator makes their decision. 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.
63. Exceptionally, arbitrators at their discretion may permit additional papers to be introduced at the hearing itself, although these should never seek to introduce completely new points or



arguments, and will need to be made available to the other party as well as to the arbitrator. **It is not consistent with the spirit of arbitration for one side to seek advantage over the other through the last-minute submission of papers. Attempts to do so may only result in adjournments or undue delays whilst the other party is given time to study the papers.**

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 dismissal, including an account of the sequence and outcome of any relevant meetings, interviews or discussions. Copies of relevant documents/supporting documentation may include:
- letters of appointment
  - contracts of employment
  - written statement of particulars of employment
  - company handbooks, rules and procedures
  - time sheets and attendance records
  - performance appraisal reports(SCOTLAND)
  - warning letters/dismissal letters/written reasons for dismissal
  - evidence of, either attempts to seek new employment or, of earnings in new employment and social security payments (where applicable).
65. In addition, information which will help the arbitrator to assess compensation, if it is awarded, should also be included (see paragraph 82).

### 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 ET1 and ET3, 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 dismissal;

70. speak about their role in the disciplinary proceedings; 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 cooperate by allowing current employees time off from work should the dismissed employee wish to call them to speak at 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 Summary note at beginning of this guide). The arbitrator also has the power to adjourn a hearing.

75. The language of the proceedings will be English.
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, if they wish, bring 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, the Human Rights Act 1998 or any devolution issue being relevant a legal adviser may also attend the hearing (see paragraphs 84-86). The arbitrator will normally open the hearing by explaining his or her role and then confirm that he or she will be deciding whether the dismissal was fair or unfair and if unfair then 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 summary note at the beginning of this guide). 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 the dismissal was fair or unfair, he or she will explain to the employee what orders for re-instatement/re-engagement may be made and in what circumstances, and ask the employee whether he or she is seeking such a remedy.
81. If the employer believes that it would not be practicable to re-employ the former employee, he or she must produce evidence to support that argument. Likewise, if the employee argues that it is practicable for them to be re-employed, they should provide supporting evidence.
82. The parties will also be asked to agree the details provided concerning the

employee's income which will be used to calculate any award of compensation, should the dismissal be found to have been unfair. 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: the employee's date of birth, date employment began, the date from which the dismissal took effect, gross weekly pay, weekly take home pay, pay slips, P60s or wage records, notice entitlement, termination payments (redundancy, pay in lieu of notice, ex gratia awards) details of benefits paid to the employee such as company car, pension, travelling expenses and free or subsidised accommodation, and, guidance about, and if available, actuarial assessments of pension entitlements. This information should refer both to the job from which the employee was dismissed, and any jobs they have had since. Details should also be provided concerning any net earnings or welfare benefits the employee has received since the dismissal, and of attempts that they have made to find work and if they have been unable to find work what they consider their job prospects to be. Where a party requires the assistance of an expert witness, for example to deal with pension issues, all costs for that witness must be met by the relevant party.

83. 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 131) 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 EU law, the Human Rights Act 1998, or any devolution issue

84. The Scheme is not intended for cases which involve issues of EU 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 or any devolution issue, 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 42) 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.
85. Where such issues of EU law, the Human Rights Act 1998 or any devolution issue 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.
86. 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 adopt an inquisitorial approach.

## Court determination of preliminary points

87. In cases where EU law and/or the Human Rights Act 1998 and/or any devolution issue are relevant, the arbitrator may apply to the Court of Session for the determination of a preliminary point of law. The arbitrator may only make such an application if both parties agree or, if one party opposes the application, if the arbitrator is satisfied that the application has been made without delay. 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

88. 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 having 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 guidance given in the Acas Code of Practice on Disciplinary and Grievance Procedures and the Acas Handbook Discipline and Grievances at Work and make use of their own experience of accepted standards in the workplace. Where an arbitrator uses specific experience in determining a case he or she will afford the parties the opportunity to comment upon it. The arbitrator will not base any decision on legal tests or

precedent except in cases where EU law and/or the Human Rights Act 1998 and/or any devolution issue 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

Where the arbitrator is determining the remedy in a case which does not involve points of EU law and/or any devolution issues, he or she will apply the provisions of the Scheme. However, where an arbitrator is determining a remedy in a case in which the dismissal was unfair by reason of the operation of EU law and/or any devolution issue, he or she will also apply the provisions of the relevant statute(s) and case law.

### Automatic unfairness

89. In deciding whether a dismissal is fair or unfair in a case which does not involve EU law, the arbitrator will take account of, but not necessarily follow, the provisions for automatic unfairness in Part X (Unfair Dismissal) of the Employment Rights Act 1996. However, where they are deciding a case where EU law applies, the arbitrator must apply the relevant statutory provisions for automatic unfairness.

### Re-instatement/re-engagement

90. In all cases where the arbitrator decides that a dismissal is unfair, if the employee so wishes, the arbitrator may order reinstatement or re-engagement. The arbitrator will first consider reinstatement. An order for reinstatement is an order that the employer shall treat the employee in all respects as if he or she had not been dismissed. In deciding whether to make such an order, the arbitrator will take into consideration the employee's wishes; the

practicability of complying with an order for reinstatement; and, in cases where the employee was partly to blame for the dismissal, whether or not it would be just to make such an award.

91. If the arbitrator awards re-instatement, the order for re-instatement will specify any compensation due to the employee for arrears of pay (or other benefit) for the period between the date of dismissal and the date of reinstatement, any rights such as seniority/ pension rights which must be restored to the employee and the date by which these must be complied with. The employee must also benefit from any improvements to their terms and conditions made during the period following dismissal e.g. a pay increase/ increased holiday allowance. When assessing the compensation due to the employee the arbitrator will deduct any wages in lieu of notice or ex gratia payments the employee has received from the employer, any payments received in respect of employment with another employer since their dismissal and any other benefits which the arbitrator considers appropriate.
92. If the arbitrator decides not to award reinstatement he or she will consider awarding re-engagement and, if so, on what terms this should be. An order for re- engagement, which like any other remedy, must be made in the form of an award, is an order that the employee be re-engaged by the employer, a successor of the employer or an associated employer, in employment comparable to that from which he or she was dismissed (or other suitable employment).
93. Again, in making such an award the arbitrator will take into consideration the employee's wishes; the practicability of the employee returning to work for the employer, or a successor or associated employer; and, in cases where the employee was partly to blame for the dismissal, whether or not it would be just

to make such an award. If ordering re-engagement the arbitrator will, so far as is reasonably practicable, do so on terms which are as favourable as an order for re-instatement, unless the employee was partly or wholly to blame for the dismissal, in which case the arbitrator will take this factor into account.

94. An order for re-engagement will specify the terms on which it is to take place, including: the identity of the employer, the nature of the employment, the remuneration for the employment, any compensation due to the employee for arrears of pay (or other benefit) which the employee might reasonably be expected to have had for the period between the date of dismissal and the date of re-engagement, any rights such as seniority/ pension rights which must be restored to the employee and the date by which these must be complied with. When assessing the compensation due to the employee the arbitrator will deduct any wages in lieu of notice or ex gratia payments the employee has received from the employer, any payments received in respect of employment with another employer since the dismissal and any other benefits which the arbitrator considers appropriate.

#### **Permanent replacement**

95. If the employer has replaced the dismissed employee with a permanent replacement the arbitrator can only take account of this when considering ordering re-instatement/re-engagement if a) it was not practicable for the employer to arrange for the employee's work to be done without engaging the replacement, or b) a reasonable period of time had elapsed before the employee had indicated that they were seeking to be re-employed and by the time the replacement was engaged it was no longer reasonable for the employee's work to be done except by a permanent replacement.

### **Continuity of employment**

96. Where the arbitrator awards reinstatement or re-engagement the employee's continuity of employment will be preserved in the same way as it would be under an employment tribunal award.

### **Awards of compensation**

97. Where reinstatement or re-engagement are not sought by the former employee, or are not considered appropriate by the arbitrator, he or she can award compensation to be paid by the employer to the employee.

98. Where compensation is awarded it will consist of a basic amount, a compensatory amount and, in some circumstances, a supplementary amount. These largely reflect the basic award, compensatory award and supplementary award which employment tribunals may order.

### **The basic amount**

99. The basic amount will be based on the employee's age, length of service and weekly pay. The way in which the arbitrator will make this calculation is set out in the Scheme and summarised in Appendix 3 to this Guide.

### **Minimum basic amounts**

100. Minimum basic amounts, subject to the same criteria and limits as those awarded by employment tribunals, will be awarded in cases where the arbitrator has found the dismissal unfair and the reason or principal reason for the dismissal or selection for redundancy was one of the following: being a designated health and safety representative, an employee representative or a candidate for election as such for the purposes of consultation on redundancy or transfers of undertakings, workforce representatives/ candidates in an election under the Working Time Regulations, employee trustees of occupational pension Schemes

and dismissals related to trade union membership or activities.

101. Before any reductions to the basic amount can be taken into account (see Appendix 3) the minimum basic amount in such cases shall not be less than the amount specified in the relevant statute.

### **Basic amount of two weeks pay in certain circumstances (Sections 138 and 141 Employment Rights Act 1996)**

102. If an employee has been dismissed because of redundancy and he or she is not entitled to a redundancy payment by virtue of section 141 of the Employment Rights Act 1996 or is not regarded as dismissed by virtue of section 138 of that Act, the basic amount will be limited to two weeks pay.

### **Limits on the basic amount**

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

### **Reductions to the basic amount**

104. The ways in which the arbitrator may reduce the basic amount are set out in the Scheme and summarised in Appendix 3.

### **Compensatory amount**

105. The compensatory amount will be calculated to reflect what the arbitrator considers is just and equitable in all the circumstances and will take account of the employee's financial loss insofar as it is attributable to the action taken by the employer. Employees are however, under a duty to reduce this loss by, for example, seeking suitable new employment.

### **Reductions to the compensatory amount**

106. Once the calculation has been made, the arbitrator may reduce the amount by a

proportion that he or she finds just and equitable if he or she finds that the dismissal was to any extent caused, or contributed to, by any conduct of the employee.

### Limits on the compensatory amount

107. The compensatory amount cannot exceed the employment tribunal statutory limit, which is reviewed from time to time, except in certain Health and Safety cases and in cases where the employee made a protected disclosure (whistleblowers).

### Internal appeals procedures

108. Where an employee has failed to use an internal appeals procedure provided by the employer to appeal against a dismissal, the Scheme provides for the arbitrator to reduce the compensatory amount by an amount he or she considers just and equitable, up to a maximum of two weeks pay. The Scheme provides for a supplementary amount, which will be an amount the arbitrator considers to be just and equitable up to a maximum of two weeks pay to be payable in certain circumstances where the employer prevented an employee from appealing against dismissal under the organisation's appeals procedure.

### Double recovery

109. 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 claim of unfair dismissal as he or she relies on in a claim before an employment tribunal under the Equality Act 2010, the arbitrator cannot award compensation in respect of any loss which has already been taken into account by the tribunal.

### Insolvency of employer

110. In cases where the employer has become insolvent, the basic amount awarded by the arbitrator may be paid by the Secretary of State for Business, Innovation and Skills on the same basis as employment tribunal awards.

## The form of the arbitrator's award (decision)

111. 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 specifying the arbitrator's order. The arbitrator's award will be in writing and will be signed and dated by the arbitrator and by a witness, whose name and address will be specified in the document. If the order is for the payment of compensation, the award will order the employer to pay this to the employee together with any interest awarded by the arbitrator. Together with the award, the arbitrator will issue a Note, identifying the reason for the dismissal and referring to the main considerations which were taken into account in reaching the decision that the dismissal was fair or unfair. The Note must be signed by the arbitrator, and it must state the decision of the arbitrator; details of the remedy awarded, together with an explanation; and the date the Note was issued.

112. 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 dismissal was unfair but due to lack of information available at the hearing on the employees' losses 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 action 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.)

113. The arbitrator's award will be issued simultaneously by Acas to both parties. This will be done within three weeks of the award having been signed and dated by the arbitrator. 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.

114. 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. Any correction to an award shall be issued on a memorandum of correction which must specify the correction; be signed by

the arbitrator; be signed by a witness to the arbitrator's signature; state the name and address of the witness; and state the date upon which it was signed by the arbitrator.

## Confidentiality of awards

115. 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 lodged at an employment tribunal by a party who is enforcing an award of re-instatement or re-engagement which has not been honoured by the other party.

## Effect of awards

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

## Enforcing awards

117. Awards for the payment of compensation may be registered for execution.

118. Where an arbitration award for reinstatement or re-engagement has been made and not complied with, the employee may refer the matter to an employment tribunal for enforcement as if the decision had been made by the tribunal itself.

## Interest

119. 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.

the award or declare the award to have no effect, either in whole or part, or reduce the award, in whole or in part.

## Appeals

120. 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 EU law, the Human Rights Act 1998, or any devolution issue (see paragraphs 127-128).

## Challenging the arbitrator's award

121. 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

122. A party to an arbitration may challenge an arbitrator's award on the grounds of substantive jurisdiction. Such a challenge could relate to the validity of the Arbitration Agreement 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.

123. Challenges should be made to the Court of Session 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

### Challenges on grounds of serious irregularity

124. 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.

125. Challenges should be made to the Court of Session 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.

126. The limited categories of serious irregularity on which a challenge may be brought are set out in the Scheme. 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 EU law, any devolution issue or the Human Rights Act 1998

127. Where a point of EU law, a matter under the Human Rights Act 1998, or any devolution issue has been considered by

the arbitrator, a party may appeal to the Court of Session on such 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 EU law or any devolution issue, 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.

128. If the Court upholds an appeal on a question of EU law, any devolution issue, 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

129. 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.
130. 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

131. 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 National  
22nd Floor  
Euston Tower  
286 Euston Road  
London NW1 3JJ  
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

132. The Scheme is to operate throughout Scotland. In England and Wales a parallel version of the Scheme applies. For detail on the Scheme as it operates in England and Wales you should consult the Acas website.

## Further information

133. If parties to an arbitration under the Scheme require any further information about the arbitration process, they should contact the Arbitration Section at Acas National (see paragraph 131) rather than the appointed arbitrator for their case or the Acas conciliator who had previously dealt with the employment tribunal claim.

# Appendix 1

## Employment tribunals and Acas arbitration: a comparison

Unfair dismissal/key process areas	Employment tribunal	Arbitration
Decision (fair or unfair dismissal) based on	Statute and case law/ "test of reasonableness"	Acas Code of Practice and Handbook and general principles of fairness and good conduct
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 for unfair dismissals may include a sum for cost of attending hearing
Remedies/Awards	Statutory provisions/interim relief available	As specified in the Acas Scheme/Interim relief not available
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 EU law, issues related to the Human Rights Act, or any devolution issue) 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 unfair dismissal of (name of employee) to arbitration in accordance with the Acas Arbitration Scheme having effect by virtue of the Acas Arbitration Scheme (Great Britain) 2004 (S.I. 2004 No 753)”

## Appendix 3

### Matters an arbitrator considers when calculating basic amounts

#### Basic amount

##### 1. Calculations

The basic amount is calculated by first determining the length of the employee's continuous employment, ending with the effective date of termination of employment. Up to 20 years can count. The arbitrator then calculates the following for each of those years and adds them together –

1.5 weeks gross pay for each year aged 41 or over

1.0 weeks gross pay for each year between ages 22-40

0.5 weeks gross pay for each year up to and including age 21

(there is a reduction by one-twelfth for each complete month of

service following the 64th birthday)

The maximum number of weeks' pay that the basic amount can comprise is 30.

The Scheme directs the arbitrator to have regard to a number of statutory definitions when determining the basic amount including the statutory maximum on a week's pay.

##### 2. Reduction of basic amount

The Scheme provides for reductions in the basic amount to take account of:-

- unreasonable refusal of reinstatement (the arbitrator can reduce the amount by such proportion as they consider just and equitable);
- conduct prior to dismissal (the arbitrator can reduce the award by such proportion as they consider just and equitable); The arbitrator will not/cannot reduce a basic amount due to the employees' conduct in a redundancy case unless the reason for selecting the employee for dismissal was one referred to in paragraph 102 and in such circumstances can only apply the reduction to the minimum basic amount. In assessing conduct which might reduce the basic amount, the arbitrator will not take account (if relevant) of those matters set out in section 155 of the Trade Union and Labour Relations (Consolidation) Act 1992 – relating to trade union membership and activities.
- an award to an employee under a dismissal procedures agreement
- a redundancy payment having been made to the employee.

# Waiver of rights

## Scottish Arbitrations

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 VII 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 Scheme (“the Acas 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 EU 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.

There are differences between the law of Scotland on the one hand and the law of England and Wales on the other. The Scheme accordingly makes separate provision for Scottish arbitrations and English/Welsh arbitrations. This form confirms the parties’ agreement that the arbitration between them will be a Scottish arbitration and (as permitted in Scots law) that any award may be enforced by registration rather than by application to the Court.

I, .....,  
the Claimant / 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 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);
  - here 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;
  - the arbitrator has no power to order interim relief.
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 or not the dismissal was fair or unfair, the arbitrator shall have regard to general principles of fairness and good conduct in employment relations (including, for example, principles referred to in any relevant Acas "Disciplinary and Grievance Procedures" Code of Practice or "Discipline at Work" Handbook). Unlike the employment tribunal, the arbitrator will not apply strict legal tests or rules (eg court

decisions or legislation), with certain limited exceptions set out in the Scheme (see eg paragraph 17). Similarly, in cases that do not involve EU law, the arbitrator will calculate compensation or award any other remedy in accordance with the terms of the Scheme, instead of applying strict legal tests or rules.

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 EU law and, aside from procedural matters set out in the Scheme, questions concerning the Human Rights Act 1998 and devolution issues. The provisions of section 3 of the Administration of Justice (Scotland) Act 1972 (which provides for arbitrators to state a case for the opinion of the Court of Session) shall not apply to this arbitration.
7. Unlike the employment tribunal, in agreeing to arbitration under the Scheme, parties agree that there is no jurisdictional argument, i.e. no reason why the claim cannot be heard and determined by the arbitrator. In particular, the arbitrator will assume that a dismissal has taken place, and will only consider whether or not this was unfair. This is explained further in the Scheme and in the Acas Guide.
8. The arbitration shall be a Scottish arbitration.
9. The parties consent to registration for execution of any award requiring the payment of money which may be made under the Scheme.

Signed: .....

Dated: .....

In The Presence Of

Signature: .....

Full Name: .....

Position: .....

Address: .....

.....

.....



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