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STATUTORY INSTRUMENTS

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**2004 No. 2333**

**TERMS AND CONDITIONS OF EMPLOYMENT**

**The ACAS (Flexible Working) Arbitration  
Scheme (Great Britain) Order 2004**

<i>Made</i>	- - - -	<i>6th September 2004</i>
<i>Laid before Parliament</i>		<i>9th September 2004</i>
<i>Coming into force</i>	- -	<i>1st October 2004</i>

Whereas—

(1) Under section 212A(1) of the Trade Union and Labour Relations (Consolidation) Act 1992<sup>(1)</sup> (“the 1992 Act”) the Advisory, Conciliation and Arbitration Service (“ACAS”) may prepare a scheme providing for arbitration in the case of disputes involving proceedings, or claims which could be the subject of proceedings, before an employment tribunal arising out of a contravention or alleged contravention of section 80G(1) or section 80H(1)(b) of the Employment Rights Act 1996<sup>(2)</sup>;

(2) In pursuance of sections 212A(1) and (3) of the 1992 Act, ACAS has prepared a revised version of an arbitration scheme for flexible working cases;

(3) In pursuance of section 212A(3) of the 1992 Act, ACAS has submitted a draft of the revised scheme to the Secretary of State and the Secretary of State approves the scheme:

Now, therefore, the Secretary of State, in exercise of the powers conferred upon her by sections 212A(3), (6) and (7) of the 1992 Act hereby makes the following Order:

**Citation, commencement, interpretation and extent**

1.—(1) This Order may be cited as the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 and shall come into force on 1st October 2004.

(2) In this Order—

“the 1996 Act” means the Employment Rights Act 1996;

“English/Welsh arbitration” means an arbitration under the Scheme which the parties have agreed shall be determined under the laws of England and Wales;

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(1) 1992 c. 52. Section 212A was inserted by section 7 of the Employment Rights (Dispute Resolution) Act 1998 (c. 8) and amended by paragraph 22 of Schedule 7 to the Employment Act 2002 (c. 22).  
(2) 1996 c. 18. Sections 80G and 80H were inserted by section 47 of the Employment Act 2002.

“the Scheme” means the arbitration scheme set out in the Schedule to this Order, with the exception of paragraphs 52EW, 108EW, 135EW, 138EW, 145EW, 151EW, 156EW, 160EW, 163EW, 174EW and 175EW thereof;

“Scottish arbitration” means an arbitration under the Scheme which the parties have agreed shall be determined under the laws of Scotland.

(3) This Order extends to Great Britain.

(4) Paragraphs in the Schedule marked “EW” apply only to English/Welsh arbitrations.

(5) Paragraphs in the Schedule marked “S” apply only to Scottish arbitrations.

(6) Paragraphs in the Schedule not marked “EW” or “S” apply to both English/Welsh arbitrations and Scottish arbitrations.

### **Commencement of the Scheme**

2. The Scheme shall come into effect on 1<sup>st</sup> October 2004.

### **Revocation**

3. Subject to article 6, the ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003<sup>(3)</sup> is revoked.

### **Application of Part I of the Arbitration Act 1996**

4. The provisions of Part I of the Arbitration Act 1996<sup>(4)</sup> referred to in paragraphs 52EW, 108EW, 135EW, 138EW, 145EW, 151EW, 156EW, 160EW, 163EW, 174EW and 175EW of the Schedule and shown in italics shall, as modified in those paragraphs, apply to English/Welsh arbitrations conducted in accordance with the Scheme.

5.—(1) Section 46(1)(b) of the Arbitration Act 1996 shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modification.

(2) For “such other considerations as are agreed by them or determined by the tribunal” in section 46(1)(b) substitute “the Terms of Reference in paragraph 18 of the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004”.

### **Transitional provision**

6.—(1) The Scheme has effect in any case where the appropriate date falls on or after 1<sup>st</sup> October 2004.

(2) In a case where the appropriate date falls before 1<sup>st</sup> October 2004, the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 continues to apply.

(3) In this article—the

“appropriate date” means the date of signature of the Arbitration Agreement. Where the parties sign the Arbitration Agreement on different dates, the appropriate date is the date of the first signature.

“Arbitration Agreement” means an agreement to submit the dispute to arbitration, as defined in paragraph 26 of the Scheme.

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(3) S.I. 2003/694.

(4) 1996 c. 23

6th September 2004

Gerry Sutcliffe,  
Minister for Employment Relations, Competition  
and Consumers,  
Department of Trade and Industry

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## PART I

### INTRODUCTION

1. The ACAS (Flexible Working) Arbitration Scheme (“the Scheme”) is implemented pursuant to section 212A of the Trades Union and Labour Relations (Consolidation) Act 1992<sup>(5)</sup>.

2. The Scheme provides a voluntary alternative, in the form of arbitration, to the employment tribunal for the resolution of disputes arising out of an employee’s application for a change in his terms and conditions of employment made under section 80F of the Employment Rights Act 1996<sup>(6)</sup>.

3. Resolution of disputes under the Scheme is intended to be confidential, informal, relatively fast and cost efficient. Procedures under the Scheme are non-legalistic, and far more flexible than the traditional model of the employment tribunal and the courts. For example (as explained in more detail below), the Scheme avoids the use of formal pleadings and formal witness and documentary procedures; strict rules of evidence will not apply. Arbitral decisions (“awards”) will be final, with very limited opportunities for parties to appeal or otherwise challenge the result.

4. The Scheme also caters for requirements imposed as a matter of law (eg, the Human Rights Act 1998<sup>(7)</sup>), devolution issues, existing law in the field of arbitration and EC law).

5. The Scheme accommodates certain differences between the law of Scotland and the law of England and Wales relating to arbitrations generally. It does so by providing, to the extent necessary to accommodate those differences, separate provisions applicable to Scottish arbitrations on the one hand and to English or Welsh arbitrations on the other. For convenience, paragraphs that apply only to Scottish arbitrations are marked “S” and paragraphs that apply only to English or Welsh arbitrations are marked “EW”.

<sup>(5)</sup> 1992 c. 52.

<sup>(6)</sup> 1996 c. 18. Section 80F was inserted by section 47 of the Employment Act 2002.

<sup>(7)</sup> 1998 c. 42.



## PART II

### THE ROLE OF ACAS

**6.** As more fully explained below, cases enter the Scheme by reference to ACAS, which appoints an arbitrator from a panel (see paragraphs 41-43 below) to determine the dispute. ACAS provides administrative assistance during the proceedings, and may scrutinise awards and refer any clerical or other similar errors back to the arbitrator. Disputes are determined, however, by arbitrators and not by ACAS.

#### **Routing of communications**

**7.** Unless in the course of a hearing, all communications between either party and the arbitrator shall be sent via the ACAS Arbitration Section.

**8.** Paragraph 169 below sets out the manner in which any document, notice or communication must be served on, or transmitted to, ACAS or the ACAS Arbitration Section.

## PART III

### TERMS AND ABBREVIATIONS

**9.** The term “Employee” is used to denote the claimant, including any person entitled to pursue a claim arising out of a contravention, or alleged contravention, of section 80G(1) or 80H(1)(b) of the 1996 Act (flexible working)(**8**).

**10.** The term “Employer” is used to denote the respondent.

**11.** The term “devolution issue” means a devolution issue as defined in paragraph 1 of Schedule 6 to the Scotland Act 1998(**9**) or a devolution issue as defined in paragraph 1 of Schedule 8 to the Government of Wales Act 1998(**10**).

**12.** The term “EC law” means:

- (i) any enactment in the domestic legislation of England and Wales or of Scotland giving effect to rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties, and
- (ii) any such rights, powers, liabilities, obligations and restrictions which are not given effect by any such enactment.

**13.** The term “English/Welsh arbitration” means an arbitration under this Scheme which the parties have agreed shall be an English/Welsh arbitration.

**14.** The term “Flexible Working Claim” means a claim by the Employee that his Employer has failed to deal with an application made under section 80F of the 1996 Act 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.

**15.** The term “Scottish arbitration” means an arbitration under this Scheme which parties have agreed shall be a Scottish arbitration.

**16.** With the exception of paragraphs 26 (“Requirements for entry into the Scheme”) 111EW (“Form of the award: English/Welsh arbitrations”) and 114S (“Form of the award: Scottish

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(8) 1996 c. 18. Section 80G and section 80H were inserted by section 47 of the Employment Act 2002 (c. 22).

(9) 1998 c. 46.

(10) 1998 c. 38.

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arbitrations”), references to anything being written or in writing include its being recorded by any means so as to be usable for subsequent reference.

## PART IV

### APPLICATION OF THE SCHEME

17. Paragraphs 46EW, 47EW, 48EW, 49EW, 50EW, 51EW, 52EW, 53EW, 108EW, 111EW, 112EW, 113EW, 129EW, 135EW, 138EW, 145EW, 151EW, 156EW, 160EW, 163EW, 168EW, 174EW, 175EW and 177EW below shall apply only to English/Welsh arbitrations. Paragraphs 54S, 55S, 56S, 57S, 58S, 59S, 109S, 110S, 114S, 115S, 116S, 130S, 134S, 136S, 139S, 140S, 141S, 142S, 143S, 144S, 146S, 147S, 148S, 149S, 150S, 152S, 153S, 154S, 155S, 157S, 158S, 159S, 161S, 162S, 164S, 176S and 178S below shall apply only to Scottish arbitrations.

## PART V

### ARBITRATOR'S TERMS OF REFERENCE

18. Every agreement to refer a dispute to arbitration under this Scheme shall be taken to be an agreement that the arbitrator decide the dispute according to the following Terms of Reference:

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

- have regard to relevant provisions of the Flexible Working (Procedural Requirements) Regulations 2002<sup>(11)</sup> 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.

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## PART VI

### SCOPE OF THE SCHEME

#### Cases that are covered by the Scheme

19. This Scheme only applies to disputes involving proceedings, or claims which could be the subject of proceedings, before an employment tribunal arising out of a contravention, or alleged contravention, of section 80G(1) or section 80H(1)(b) of the 1996 Act.

20. The Scheme does not extend to other kinds of claim which may be related to, or raised at the same time as, a Flexible Working Claim. For example, sex discrimination cases are not covered by the Scheme.

21. If a Flexible Working Claim has been referred for resolution under the Scheme, any other claim, even if part of the same dispute, must be settled separately, or referred to the employment tribunal, or withdrawn. In the event that different aspects of the same dispute are being heard in

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(11) S.I. 2002/3207.

the employment tribunal as well as under the Scheme, the arbitrator may decide, if appropriate or convenient, to postpone the arbitration proceedings pending a determination by the employment tribunal.

### **Waiver of jurisdictional issues**

**22.** Because of its informal nature, the Scheme is not designed for disputes raising jurisdictional issues, such as for example:

- whether or not the claimant is an employee of the Employer;
- whether or not the Employee had the necessary period of continuous service to bring the claim;
- whether or not time limits have expired and/or should be extended.

**23.** Accordingly, when agreeing to refer a dispute to arbitration under the Scheme, both parties will be taken to have accepted as a condition of the Scheme that no jurisdictional issue is in dispute between them. The arbitrator will not therefore deal with such issues during the arbitration process, even if they are raised by the parties, and the parties will be taken to have waived any rights in that regard.

### **Inappropriate cases**

**24.** The Scheme is not intended for disputes involving complex legal issues. Whilst such cases will be accepted for determination (subject to the Terms of Reference), parties are advised, where appropriate, to consider applying to the employment tribunal or settling their dispute by other means.

## **PART VII**

### **ACCESS TO THE SCHEME**

**25.** The Scheme is an entirely voluntary system of dispute resolution: it will only apply if parties have so agreed.

### **Requirements for entry into the Scheme**

**26.** Any agreement to submit a dispute to arbitration under the Scheme must satisfy the following requirements (an “Arbitration Agreement”):

- (i) the agreement of each party (which may be expressed in the same or in separate documents) must be in writing;
- (ii) the agreement must concern an existing dispute;
- (iii) the agreement must not seek to alter or vary any provision of the Scheme;
- (iv) the agreement must have been reached either:
  - (a) where a conciliation officer has taken action under section 18 of the Employment Tribunals Act 1996<sup>(12)</sup> or
  - (b) through a compromise agreement, where the conditions regulating such agreements under the 1996 Act are satisfied;
- (v) the agreement must be accompanied by a completed Waiver Form for each party. Parties applying for English/Welsh arbitrations should complete Appendix A; parties applying for Scottish arbitrations should complete Appendix B.

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(12) 1996 c. 17 Section 18 was amended by paragraph 23 of Schedule 7 to the Employment Act 2002.

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27. Where an agreement fails to satisfy any one of these requirements or where the parties are unable to agree whether the arbitration should be an English/Welsh arbitration or a Scottish arbitration, no valid reference to the Scheme will have been made, and the parties will have to settle their dispute by other means or have recourse to the employment tribunal.

28. Where:

- (i) a dispute concerning a Flexible Working Claim as well as other claims has been referred to the employment tribunal, and
- (ii) the parties have agreed to settle the other claims and refer the Flexible Working Claim to arbitration under the Scheme,

a separate settlement must be reached referring the Flexible Working Claim to arbitration which satisfies all the requirements listed above (although it may form part of one overall settlement document).

#### **Notification to ACAS of an Arbitration Agreement**

29. All Arbitration Agreements must be notified to ACAS within two weeks of their conclusion, by either of the parties or their independent advisers or representatives, or an ACAS conciliator, sending a copy of the agreement and Waiver Forms, together with IT1 and IT3 forms if these have been completed, to the ACAS Arbitration Section.

30. For the purposes of the previous paragraph, an 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.

31. Where an Arbitration Agreement is not notified to ACAS within two weeks, ACAS will not arrange for the appointment of an arbitrator under the Scheme, unless notification within that time was not reasonably practicable. Any party seeking to notify ACAS of an Arbitration Agreement outside this period must explain in writing to the ACAS Arbitration Section the reason for the delay. ACAS shall appoint an arbitrator, in accordance with the appointment provisions below, to consider the explanation, and that arbitrator may seek the views of the other party, and may call both parties to a hearing to establish the reasons for the delay. The arbitrator shall then rule in an award on whether or not the agreement can be accepted for hearing under the Scheme.

32. Any such hearing and award will be governed by the provisions of this Scheme.

#### **Consolidation of proceedings**

33. Where all parties so agree in writing, ACAS may consolidate different arbitral proceedings under the Scheme.

## **PART VIII**

### **SETTLEMENT AND WITHDRAWAL FROM THE SCHEME**

#### **Withdrawal by the Employee**

34. At any stage of the arbitration process, once an Arbitration Agreement has been concluded and the reference has been accepted by ACAS, the party bringing the Flexible Working Claim may withdraw from the Scheme, provided that any such withdrawal is in writing. Such a withdrawal shall constitute a dismissal of the claim and the arbitrator shall upon receipt of such withdrawal in writing issue an award dismissing the claim.

### **Withdrawal by the Employer**

35. Once an Arbitration Agreement has been concluded and the reference has been accepted by ACAS, the party against whom a claim is brought cannot unilaterally withdraw from the Scheme.

### **Settlement**

36. Parties are free to reach an agreement settling the dispute at any stage.

37. If such an agreement is reached:

- (i) upon the joint written request of the parties to the arbitrator or the ACAS Arbitration Section, the arbitrator (if appointed) or the ACAS Arbitration Section (if no arbitrator has been appointed) shall terminate the arbitration proceedings;
- (ii) if so requested by the parties, the arbitrator (if appointed) may record the settlement in the form of an agreed award.

38. An agreed award shall state that it is an award of the arbitrator by consent and shall have the same status and effect as any other award on the merits of the case.

39. If the agreement settling the dispute includes an agreement that one party (the “paying party”) shall pay a sum of money to the other (the “receiving party”) the arbitrator shall (unless the parties have agreed that the said agreement shall not be the subject of an award) draft an award ordering the paying party to pay the agreed sum to the receiving party together ( if the parties have agreed that interest shall run on the agreed sum) with interest thereon at such rate or rates as the parties may have agreed and from such date or dates as the parties may have agreed until payment. The arbitrator shall send a copy of the said award in draft to each party and invite each party to confirm that the draft award accurately reflects the agreement between them. Upon receiving confirmation to that effect the arbitrator shall issue an award in terms of the agreed draft.

40. Subject to paragraph 39, in rendering an agreed award, the arbitrator:

- (i) may only record the parties' agreed wording;
- (ii) may not approve, vary, transcribe, interpret or ratify a settlement in any way;
- (iii) may not record any settlement beyond the scope of the Scheme, the Arbitration Agreement or the reference to the Scheme as initially accepted by ACAS.

## **PART IX**

### **APPOINTMENT OF AN ARBITRATOR**

#### **The ACAS Arbitration Panel**

41. Arbitrators are selected to serve on the ACAS Arbitration Panel on the basis of their practical knowledge and experience of employment issues in the workplace. They are recruited through an open recruitment exercise, and appointed to the Panel on the basis of standard terms of appointment. It is a condition of their appointment that they exercise their duties in accordance with the terms of this Scheme. Each appointment is initially for a period of two years, although it may be renewed by ACAS, at the latter’s discretion. Payment is made by ACAS on the basis of time spent in connection with arbitral proceedings.

#### **Appointment to a case**

42. Arbitral appointments are made exclusively by ACAS from the ACAS Arbitration Panel. Parties will have no choice of arbitrator.

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**43.** Once ACAS has been notified of a valid Arbitration Agreement, it will select and appoint an arbitrator, and notify all parties of the name of the arbitrator so appointed.

#### **Arbitrator's duty of disclosure**

**44.** Immediately following selection (and before an appointment is confirmed by ACAS), every arbitrator shall disclose in writing to ACAS (to be forwarded to the parties) any circumstances known to him or her likely to give rise to any justifiable doubts as to his or her impartiality, or confirm in writing that there are no such circumstances.

**45.** Once appointed, and until the arbitration is concluded, every arbitrator shall be under a continuing duty forthwith to disclose to ACAS (to be forwarded to the parties) any such circumstances which may have arisen since appointment.

#### **Removal of arbitrators: English/Welsh arbitrations**

**46EW.** An arbitrator in an English/Welsh arbitration may only be removed by ACAS or the court (under the provisions in paragraphs 47EW to 52EW below).

**47EW.** Applications under the Scheme to remove an arbitrator on any of the grounds set out in sections 24(1)(a) and (c) of the Arbitration Act 1996 or on the basis that such removal has been agreed by both parties, shall be made in the first instance to ACAS (addressed to the ACAS Arbitration Section).

**48EW.** At the same time as an application is made to ACAS to remove an arbitrator a copy of the application shall be sent to the other party to the arbitration and to the arbitrator.

**49EW.** ACAS shall, following receipt of an application under paragraph 47EW, give the other party to the arbitration and the arbitrator such opportunity as ACAS in its sole discretion may consider appropriate to comment on the application.

**50EW.** ACAS may, after such procedures as ACAS in its sole discretion may consider appropriate, remove the arbitrator.

**51EW.** If ACAS refuses an application made under paragraph 47EW, a party may thereafter apply to the court.

**52EW.** *Sections 24(1)(a) and (c), 24(2), 24(3), 24(5) and 24(6) of the Arbitration Act 1996(13) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications —*

(13) 1996 c. 23. Sections 24(1)(a) and (c), (2), (3), (5) and (6) of the Arbitration Act 1996 provide as follows:

“**24.—**(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds —

(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;

...

(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;

...

(2) If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person.

(3) The arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

...

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- (i) *In subsection (1) for “(upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court” substitute “(upon notice to the other party, to the arbitrator concerned and to the Advisory, Conciliation and Arbitration Service (“ACAS”)) apply to the High Court or Central London County Court”.*
- (ii) *In subsection (2)—*
  - (a) *omit “If there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator,”;*
  - (b) *for “that institution or person” substitute “ACAS”.*

**53EW.** The arbitrator may continue the proceedings and make an award while an application to ACAS (as well as the court) to remove him or her is pending.

### **Removal of arbitrators: Scottish arbitrations**

**54S.** An arbitrator in a Scottish arbitration may be removed by ACAS under the provisions in paragraphs 55S-58S below.

**55S.** An application under the Scheme to remove an arbitrator shall be made to ACAS (addressed to the ACAS Arbitration Section). At the same time as the application is sent to ACAS a copy of the application shall be sent to the other party to the arbitration and to the arbitrator.

**56S.** ACAS shall, following receipt of an application under paragraph 55S, give the other party to the arbitration and the arbitrator such opportunity as ACAS in its sole discretion may consider appropriate to comment on the application.

**57S.** ACAS may, after such procedure as ACAS in its sole discretion may consider appropriate, remove the arbitrator if it is satisfied:

- (i) that both parties to the arbitration agree that the arbitrator should be removed; or
- (ii) that circumstances exist that give rise to justifiable doubts as to the impartiality of the arbitration; or
- (iii) that the arbitrator is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his or her capacity to do so.

**58S.** A decision of ACAS made under paragraph 57S shall be final.

**59S.** The arbitrator may continue the proceedings and make an award while an application to ACAS to remove him or her is pending.

### **Death of an arbitrator**

**60.** The authority of an arbitrator is personal and ceases on his or her death.

### **Replacement of arbitrators**

**61.** Where an arbitrator ceases to hold office for any reason, he or she shall be replaced by ACAS in accordance with the appointment provisions above.

**62.** Once appointed, the replacement arbitrator shall determine whether and, if so, to what extent the previous proceedings should stand.

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(5) The arbitrator concerned is entitled to appear and be heard by the court before it makes any order under this section.

(6) The leave of the court is required for any appeal from a decision of the court under this section.”

*Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.*

## PART X

### GENERAL DUTY OF THE ARBITRATOR

**63.** The arbitrator shall—

- (i) 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
- (ii) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.

**64.** The arbitrator shall comply with the general duty (see paragraph 63 above) in conducting the arbitral proceedings, in his or her decisions on matters of procedure and evidence and in the exercise of all other powers conferred on him or her.

## PART XI

### GENERAL DUTY OF THE PARTIES

**65.** The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings. This includes (without limitation) complying without delay with any determination of the arbitrator as to procedural or evidential matters, or with any order or directions of the arbitrator, and co-operating in the arrangement of any hearing.

## PART XII

### CONFIDENTIALITY AND PRIVACY

**66.** Arbitrations, and all associated procedures under the Scheme, are strictly private and confidential. This rule does not prevent a party to the arbitration taking any step reasonably necessary for the purpose of any application to the court or enforcement of an award.

**67.** Hearings may only be attended by the arbitrator, the parties, their representatives, any interpreters, witnesses and a legal adviser if appointed. If the parties so agree, an ACAS official or arbitrator in training may also attend.

## PART XIII

### ARRANGEMENTS FOR THE HEARING

#### **Initial arrangements**

**68.** A hearing must be held in every case, notwithstanding any agreement between the parties to a purely written procedure.

**69.** Once an arbitrator has been appointed by ACAS, a hearing shall be arranged as soon as reasonably practicable by him or her, with the administrative assistance of the ACAS Arbitration Section.



70. The arbitrator shall decide the date and venue for the hearing, in so far as an agreement cannot be reached with all parties within 28 days of the initial notification to ACAS of the Arbitration Agreement.

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

### **Expedited hearings**

72. On the application of any party, the arbitrator may, at his or her discretion, expedite the hearing.

### **Venue**

73. Hearings may be held in any venue, provided that the hearing will only be held at the Employee's workplace, or a similarly non-neutral venue, if all parties so agree.

74. Where premises have to be hired for a hearing, ACAS shall meet the reasonable costs of so doing.

### **Assistance**

75. Where a party needs the services of an interpreter, signer or communicator at the hearing, ACAS should be so informed well in advance of the hearing. Where an arbitrator agrees that such assistance is required, ACAS shall meet the reasonable costs of providing this.

### **Travelling expenses / loss of earnings**

76. Every party shall meet their own travelling expenses and those of their representatives and witnesses.

77. 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 a sum to cover reasonable travelling expenses and loss of earnings incurred by the Employee personally in attending the hearing.

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

78. Any application for a postponement of, or a different venue for, an initial hearing must be made in writing, with reasons, to the arbitrator via the ACAS Arbitration Section within 14 days of the date of the letter notifying the hearing arrangements or, where this is not practicable, as soon as is reasonably practicable. Such applications will be determined by the arbitrator without an oral hearing after all parties have received a copy of the application and been given a reasonable opportunity to respond.

79. If the application is rejected, the initial hearing will be held on the original date and/or in the original venue.

80. This provision does not affect the arbitrator's general discretion (set out below) with respect to postponements after an initial hearing has been fixed, or with respect to other aspects of the procedure. In particular, procedural applications may be made to the arbitrator at the hearing itself.

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## PART XIV

### NON-COMPLIANCE WITH PROCEDURE

**81.** If a party fails to comply with any aspect of the procedure set out in this Scheme, or any order or direction by the arbitrator, or fails to comply with the general duty in Part XI above, the arbitrator may (in addition to any other power set out in this Scheme)—

- (i) adjourn any hearing, where it would be unfair on any party to proceed; and/or
- (ii) draw such adverse inferences from the act of non-compliance as the circumstances justify.

## PART XV

### OUTLINE OF PROCEDURE BEFORE THE HEARING

**82.** Once a hearing has been fixed, the following procedure shall apply, subject to any direction by the arbitrator.

#### **Written materials**

**83.** At least 14 days before the date of the hearing, each party shall send to the ACAS Arbitration Section (for forwarding to the arbitrator and the other party) one copy of a written statement of case, together with—

- (i) any supporting documentation or other material to be relied upon at the hearing; and where appropriate
- (ii) a list of the names and title/role of all those people who will accompany each party to the hearing or be called as a witness.

**84.** Written statements of case should briefly set out the main particulars of each party's case, which can then be expanded upon if necessary at the hearing itself. The statement should include an explanation of the events which led to the Flexible Working Claim being brought including an account of the outcome of any relevant meetings.

**85.** Supporting documentation or other material may include (without limitation) copies of—

- (i) the Employee's application under section 80F of the 1996 Act;
- (ii) contracts of employment;
- (iii) notes of meetings held between Employee and Employer to consider the application under section 80F;
- (iv) letters of appointment;
- (v) written statement of particulars of employment;
- (vi) time sheets;
- (vii) written reasons for refusing the Employee's application under section 80F, where these have been given;
- (viii) company handbooks, rules and procedures;
- (ix) any other written information which may assist the arbitrator in deciding the Flexible Working claim;
- (x) any information which will help the arbitrator to assess compensation, including (without limitation) pay slips, P60s or wage records;

(xi) signed statements of any witnesses or outlines of evidence to be given by witnesses at the hearing.

86. The parties must also supply details of any relevant awards of compensation that may have been made by any other tribunal or court in connection with the subject matter of the claim.

87. Legible copies of documents must be supplied to ACAS even if they have already been supplied to an ACAS conciliator before the Arbitration Agreement was concluded.

88. No information on the conciliation process, if any, shall be disclosed by an ACAS conciliator to the arbitrator.

#### **Submissions, evidence and witnesses not previously notified**

89. Written statements of case and documentary or other material that have not been provided to the ACAS Arbitration Section prior to the hearing (in accordance with paragraph 83 above) may only be relied upon at the hearing with the arbitrator's permission.

90. All representatives and witnesses who have been listed as accompanying a party at the hearing should be present at the start of the hearing. Witnesses who have not been included in a list submitted to the ACAS Arbitration Section prior to the hearing may only be called with the arbitrator's permission.

#### **Requests for documents**

91. Any party may request the other party to produce copies of relevant documents which are not in the requesting party's possession, custody or control. Although the arbitrator has no power to compel a party to comply, the arbitrator may draw an adverse inference from a party's failure to comply with a reasonable request.

#### **Requests for attendance of witnesses**

92. Although the arbitrator has no power to compel the attendance of anybody at the hearing, the arbitrator may draw an adverse inference if an employer who is a party to the arbitration fails or refuses to allow current employees or other workers (who have relevant evidence to give) time off from work to attend the hearing, should such an employer be so requested.

#### **Preliminary hearings and directions**

93. Where the arbitrator believes that there may be considerable differences between the parties over any issue, including the availability or exchange of documents, or the availability of witnesses, the arbitrator may call the parties to a preliminary hearing to address such issues, or he or she may give procedural directions in correspondence.

94. In the course of a preliminary hearing or in correspondence, the arbitrator may express views on the desirability of information and/or evidence being available at the hearing.

## PART XVI

### OUTLINE OF PROCEDURE AT THE HEARING

#### **Arbitrator's overall discretion**

**95.** Subject to the arbitrator's general duty (Part X above), and subject to the points set out below, the conduct of the hearing and all procedural and evidential matters (including applications for adjournments and changes in venue) shall be for the arbitrator to decide.

#### **Language**

**96.** The language of the proceedings shall be English, unless the Welsh language is applicable by virtue of the Welsh Language Act 1993<sup>(14)</sup> (as amended from time to time). Reference should be made to paragraph 75 above if the Welsh language is to be used.

#### **Witnesses**

**97.** No party or witness shall be cross-examined by a party or representative, or examined on oath or affirmation.

#### **Examination by the arbitrator**

**98.** The arbitrator shall have the right to address questions directly to either party or to anybody else attending the hearing, and to take the initiative in ascertaining the facts and (where applicable) the law.

#### **Representatives**

**99.** The parties may be accompanied by any person chosen by them to help them to present their case at the hearing, although no special status will be accorded to legally qualified representatives. Each party is liable for any fees or expenses incurred by any representatives they appoint.

#### **Strict rules of evidence**

**100.** The arbitrator will not apply strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material (oral, written or other) sought to be tendered on any matters of fact or opinion.

#### **Non-attendance at the hearing**

**101.** If, without showing sufficient cause, a party fails to attend or be represented at a hearing, the arbitrator may—

- (i) continue the hearing in that party's absence, and in such a case shall take into account any written submissions and documents that have already been submitted by that party; or
- (ii) adjourn the hearing.

**102.** In the case of the non-attendance of the Employee, if the arbitrator decides to adjourn the hearing, he or she may write to the Employee to request an explanation for the non-attendance. If the arbitrator decides that the Employee has not demonstrated sufficient cause for the non-attendance, he or she may rule in an award that the claim be treated as dismissed.

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(14) 1993 c. 38.

### **Post-hearing written materials**

**103.** No further submissions or evidence will be accepted after the end of the substantive hearing without the arbitrator’s permission, which will only be granted in exceptional circumstances. Where permission is granted, any material is to be sent to the ACAS Arbitration Section, to be forwarded to the arbitrator and all other parties.

## **PART XVII**

### **QUESTIONS OF EC LAW, THE HUMAN RIGHTS ACT 1998 AND DEVOLUTION ISSUES**

#### **Appointment of legal adviser**

**104.** The arbitrator shall have the power, on the application of any party or of his or her own motion, to require the appointment of a legal adviser to assist with respect to any issue of EC law or the Human Rights Act 1998 or any devolution issue that, in the arbitrator’s view and subject to paragraph 18 above (Arbitrator’s Terms of Reference), might be involved and relevant to the resolution of the dispute.

**105.** The legal adviser will be appointed by ACAS, to report to the arbitrator and the parties, and shall be subject to the duty of disclosure set out in paragraphs 44 and 45 above.

**106.** The arbitrator shall allow the legal adviser to attend the proceedings, and may order an adjournment and/or change in venue to facilitate this.

**107.** The parties shall be given a reasonable opportunity to comment on any information, opinion or advice offered by the legal adviser, following which the arbitrator shall take such information, opinion or advice into account in determining the dispute.

#### **Court determination of preliminary points: English/Welsh arbitrations**

**108EW.** *Section 45 of the Arbitration Act 1996(15) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications.*

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(15) 1996 c. 23. Section 45 of the Arbitration Act 1996 provides as follows:

“**45.**—(1) Unless otherwise agreed by the parties, the court may on the application of a party to arbitral proceedings (upon notice to the other parties) determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties. An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.

(2) An application under this section shall not be considered unless –

(a) it is made with the agreement of all the other parties to the proceedings, or

(b) it is made with the permission of the tribunal and the court is satisfied –

(i) that the determination of the question is likely to produce substantial savings in costs, and

(ii) that the application was made without delay.

(3) The application shall identify the question of law to be determined and, unless made with the agreement of all the other parties to the proceedings, shall state the grounds on which it is said that the question should be decided by the court.

(4) Unless otherwise agreed by the parties the arbitral tribunal may continue the arbitral proceedings and make an award while an application to the court under this section is pending.

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- (i) *In subsection (1)—*
  - (a) *for “Unless otherwise agreed by the parties, the court” substitute “The High Court or Central London County Court”;*
  - (b) *for “any question of law” substitute “any question (a) of EC law, or (b) concerning the application of the Human Rights Act 1998”, or (c) any devolution issue;*
  - (c) *omit “An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.”.*
- (ii) *Omit sub-paragraph (i) from subsection (2)(b);*
- (iii) *Omit subsection (4); and*
- (iv) *After subsection (6), insert—*
  - “(7) In this section “EC law” means –*
    - (a) *any enactment in the domestic legislation of England and Wales giving effect to rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties, and*
    - (b) *any such rights, powers, liabilities, obligations and restrictions which are not given effect by any such enactment.*
  - (8) In this section “devolution issue” means a devolution issue as defined in paragraph 1 of Schedule 6 of the Scotland Act 1998 or devolution issue as defined in paragraph 1 of Schedule 8 to the Government of Wales Act 1998.”*

### **Court determination of preliminary points: Scottish arbitrations**

**109S.** The arbitrator may make a reference to the Court of Session for determination as a preliminary point—

- (i) of any question of EC law,
- (ii) of any question concerning the application of the Human Rights Act 1998, or
- (iii) of any devolution issue,

which substantially affects the rights of one or more of the parties to the arbitration.

**110S.** The arbitrator shall not make a reference under paragraph 109S unless—

- (i) both parties have applied for or have agreed to the making of the reference; or
- (ii) if an application for the reference has been made by one party and opposed by the other party, the arbitrator is satisfied that the application has been made without delay.

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(5) Unless the court gives leave, no appeal lies from a decision of the court whether the conditions specified in subsection (2) are met.

(6) The decision of the court on the question of law shall be treated as a judgment of the court for the purposes of an appeal.

But no appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal.”

## PART XVIII

### AWARDS

#### **Form of the award: English/Welsh arbitrations**

**111EW.** The award in an English/Welsh arbitration shall be in writing, signed by the arbitrator.

**112EW.** The award in an English/Welsh arbitration (unless it is an agreed award) shall—

- (i) state the decision(s) of the arbitrator;
- (ii) contain the main considerations which were taken into account in reaching the decision(s);
- (iii) where an award is made, state the remedy awarded, together with an explanation;
- (iv) state the date when it was made.

**113EW.** If the award contains an order for payment of money the award shall—

- (i) order the Employer to pay the Employee the amount of the award of compensation; and
- (ii) order the Employer to pay interest thereon in accordance with paragraph 137 of the Scheme.

#### **Form of the award: Scottish arbitrations**

**114S.** The award in a Scottish arbitration shall—

- (i) be in writing;
- (ii) state the date upon which it was made;
- (iii) specify the arbitrator's order;
- (iv) be signed by the arbitrator;
- (v) be signed by a witness to the arbitrator's signature; and
- (vi) specify the name and address of the witness.

**115S.** If the award contains an order for the payment of money the award shall—

- (i) ordain the Employer to pay the Employee the amount of the award of compensation; and
- (ii) ordain the Employer to pay interest thereon in accordance with paragraph 137 of the Scheme.

**116S.** The arbitrator shall issue with his award (unless it is an agreed award) a Note, which shall—

- (i) state the decision(s) of the arbitrator;
- (ii) contain the arbitrator's reasons for his decision;
- (iii) state any remedy or remedies awarded;
- (iv) contain the arbitrator's reasons for the award of any remedy;
- (v) state the date when the Note was issued; and
- (vi) be signed by the arbitrator.

#### **Remedies**

**117.** In the event that the arbitrator upholds the Employee's Flexible Working Claim, the arbitrator may make an award ordering—

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- (i) the reconsideration of the application made under section 80F of the 1996 Act; and/or
- (ii) compensation (subject to the limits provided for below) to be paid by the Employer to the Employee.

## PART XIX

### AWARDS OF COMPENSATION

**118.** Subject to paragraph 119 below, when an arbitrator makes an award of compensation in respect of any contravention of section 80G(1) or 80H(1)(b) of the 1996 Act, whether or not in conjunction with an award for reconsideration, such compensation shall be such an amount, not exceeding 8 weeks' pay, as the arbitrator considers just and equitable in all the circumstances.

**119.** When an arbitrator makes an award of compensation in respect of breaches of Regulation 14(2) or (4) of the Flexible Working (Procedural Requirements) Regulations 2002<sup>(16)</sup> such compensation shall be such an amount, not exceeding 2 weeks' pay, as the arbitrator considers just and equitable in all the circumstances.

**120.** In calculating the amount of a week's pay of an Employee, the arbitrator shall have regard to Chapter II of Part 14 of the 1996 Act, as amended from time to time, or any other relevant statutory provision applicable to the calculation of a week's pay.

## PART XX

### ISSUE OF AWARDS AND CONFIDENTIALITY

**121.** The arbitrator's award shall be sent by ACAS to both parties.

**122.** Subject to any steps which may be reasonably necessary for the purposes of any application to the Court or enforcement of the award the award shall be confidential, and shall only be issued to the parties or to their nominated advisers or representatives. Awards will not be published by ACAS, or lodged with the employment tribunal by ACAS, although awards may be retained by ACAS for monitoring and evaluation purposes, and, from time to time, ACAS may publish general summary information concerning cases heard under the Scheme, without identifying any individual cases.

## PART XXI

### CORRECTION OF AWARDS

#### Scrutiny of awards by ACAS

**123.** Before being sent to the parties, awards may be scrutinised by ACAS to check for clerical or computational mistakes, errors arising from accidental slips or omissions, ambiguities, or errors of form. Without affecting the arbitrator's liberty of decision, ACAS may refer the award back to the arbitrator (under the provisions below) in order to draw his or her attention to any such point.

#### Correction by the arbitrator

**124.** The arbitrator may, on his or her own initiative or on the application of a party or ACAS—

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(16) S.I. 2002/3207.



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- (i) correct the award so as to remove any clerical or computational mistake, or error arising from an accidental slip or omission, or to clarify or remove any ambiguity in the award, or
- (ii) make an additional award in respect of any part of the claim which was presented to the arbitrator but was not dealt with in the award.

**125.** In so far as any such correction or additional award involves a new issue that was not previously before the parties, this power shall not be exercised without first affording the parties a reasonable opportunity to make written representations to the arbitrator.

**126.** Any application by a party for the exercise of this power must be made via the ACAS Arbitration Section within 28 days of the date the award was despatched to the applying party by ACAS.

**127.** 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 by the arbitrator on his or her own initiative, within 28 days of the date of the award.

**128.** Any additional award shall be made within 56 days of the date of the original award.

**129EW.** Any additional award in an English/Welsh arbitration shall so far as relevant comply with paragraphs 111EW, 112EW and 113EW.

**130S.** Any additional award in a Scottish arbitration shall so far as relevant comply with paragraphs 114S, 115S and 116S. Any correction to an award shall be issued on a memorandum of correction which shall—

- (i) specify the correction;
- (ii) be signed by the arbitrator;
- (iii) be signed by a witness to the arbitrator's signature;
- (iv) state the name and address of the witness; and
- (v) state the date upon which it was signed by the arbitrator.

**131.** Any correction of the award shall form part of the award.

## PART XXII

### EFFECT OF AWARDS, ENFORCEMENT AND INTEREST

#### Effect of awards

**132.** Awards made by arbitrators under this Scheme are final and binding both on the parties and on any persons claiming through or under them.

**133.** This does not affect the right of a person to challenge an award under the provisions of the Arbitration Act 1996 as applied to this Scheme.

**134.** This does not affect the right of a person to challenge an award under Part XXIII below.

#### Enforcement

**135EW.** *Section 66 of the Arbitration Act 1996(17) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications.*

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(17) 1996 c. 23. Section 66 of the Arbitration Act 1996 provides as follows:

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- (i) In subsection (1) for “tribunal pursuant to an arbitration agreement” substitute “arbitrator pursuant to the Scheme”.
- (ii) In subsection (3) for “(see section 73)” substitute “(see Part XXIV of the Scheme)”.
- (iii) After subsection (4) insert—
  - “(5) In this section—
    - “the court” means the High Court or a county court; and
    - “the Scheme” means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004.”

**136S.** In a Scottish arbitration any award (including any additional award, any correction of an award or any variation to an award) requiring the payment of money may be registered for execution.

### Interest

**137.** Awards of compensation that are not paid within 42 days of the date on which the award was despatched by ACAS to the Employer will attract interest on the same basis as for employment tribunal awards.

## PART XXIII

### CHALLENGING THE AWARD

#### Challenges on grounds of substantive jurisdiction: English/Welsh arbitrations

**138EW.** Section 67 of the Arbitration Act 1996<sup>(18)</sup> shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications.

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“**66.**—(1) An award made by the tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, judgment may be enforced in terms of the award.

(3) Leave to enforce an award shall not be given where, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award.

The right to raise such an objection may have been lost (see section 73).

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.”

<sup>(18)</sup> 1996 c. 23. Section 67 of the Arbitration Act 1996 provides as follows:

“**67.**—(1) A party to the arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –

- (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
- (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

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(i) *In subsection (1)—*

- (a) *for “(upon notice to the other parties and to the tribunal) apply to the court” substitute “(upon notice to the other party, to the arbitrator and to ACAS) apply to the High Court or the Central London County Court”;*
- (b) *for “(see section 73)” substitute “(see Part XXIV of the Scheme)”;* and
- (c) *after “section 70(2) and (3)” insert “as modified for the purposes of the Scheme”.*

(ii) *After subsection (1) insert—*

*“(1A) In this section—*

*“Arbitration Agreement” means an agreement to refer a dispute to arbitration in accordance with, and satisfying the requirements of, the Scheme;*

*“the Scheme” means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004; and*

*“substantive jurisdiction” means any issue as to—*

- (a) *the validity of the Arbitration Agreement and the application of the Scheme to the dispute or difference in question;*
- (b) *the constitution of the arbitral tribunal; or*
- (c) *the matters which have been submitted to arbitration in accordance with the Arbitration Agreement.”*

### **Challenges on grounds of substantive jurisdiction: Scottish arbitrations**

**139S.** A party to a Scottish arbitration may appeal to the Court of Session—

- (i) challenging any award of the arbitrator as to his or her substantive jurisdiction; or
- (ii) on the ground that an award made by the arbitrator on the merits is of no effect, in whole or in part, because the arbitrator did not have substantive jurisdiction.

**140S.** A party may lose the right to appeal under paragraph 139S in accordance with Part XXIV below.

**141S.** Appeals under paragraph 139S are subject to the provisions of paragraphs 157S, 158S and 159S below.

**142S.** For the purposes of paragraph 139S, “substantive jurisdiction” means any issue as to—

- (i) the validity of the arbitration agreement and the application of the Scheme to the dispute or difference in question;
- (ii) the constitution of the arbitral tribunal; or
- (iii) the matters which have been submitted to arbitration in accordance with the Arbitration Agreement.

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(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

- (a) confirm the award,
- (b) vary the award, or
- (c) set aside the award in whole or in part.

(4) The leave of the court is required for any appeal from a decision of the court under this section.”

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**143S.** The arbitrator may continue the arbitral proceedings and make a further award while an appeal to the Court under paragraph 139S is pending in relation to an award of the arbitrator as to his substantive jurisdiction.

**144S.** On the appeal under paragraph 139S the Court may (without prejudice to any other power which it may exercise or remedy which it may grant)—

- (i) confirm the award;
- (ii) vary the award;
- (iii) declare the award to be of no effect in whole or in part; or
- (iv) reduce the award in whole or in part.

### **Challenges for serious irregularity: English/Welsh arbitrations**

**145EW.** *Section 68 of the Arbitration Act 1996(19) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications.*

(i) *In subsection (1) –*

(a) *for “(upon notice to the other parties and to the tribunal) apply to the court” substitute “(upon notice to the other party, to the arbitrator and to ACAS) apply to the High Court or Central London County Court”;*

(19) 1996 c. 23. Section 68 of the Arbitration Act provides as follows:

**“68.—(1)** A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

- (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
- (d) failure by the tribunal to deal with all the issues that were put to it;
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
- (f) uncertainty or ambiguity as to the effect of the award;
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
- (h) failure to comply with the requirements as to the form of the award; or
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

- (a) remit the award to the tribunal, in whole or in part, for reconsideration;
- (b) set the award aside in whole or in part; or
- (c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.”

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- (b) for “(see section 73)” substitute “(see Part XXIV of the Scheme)”;
  - (c) after “section 70(2) and (3)” insert “as modified for the purposes of the Scheme”.
- (ii) In subsection (2)—
- (a) in paragraph (a) for “section 33 (general duty of tribunal)” substitute “Part X of the Scheme (General Duty of the Arbitrator)”;
  - (b) in paragraph (b) after “see section 67” insert “as modified for the purposes of the Scheme”; and
  - (c) in paragraph (c) for “agreed by the parties” substitute “as set out in the Scheme”;
  - (d) in paragraph (e) for “any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award” substitute “ACAS”;
  - (e) omit paragraph (h);
  - (f) in paragraph (i) for “any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award” substitute “ACAS”.
- (iii) In subsection (3)—
- (a) in paragraph (b) insert “vary the award or” before “set the award aside”;
  - (b) omit “The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.”.
- (iv) After subsection (4) insert—
- “(5) In this section, “the Scheme” means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004.”

### **Challenges for serious irregularity: Scottish arbitrations**

**146S.** A party to a Scottish arbitration may appeal to the Court of Session against an award in the proceedings on the ground of serious irregularity affecting the arbitrator, the proceedings or the award.

**147S.** A party may lose the right to appeal under paragraph 146S above in accordance with section XXIV below.

**148S.** Appeals under paragraph 146S are subject to the provisions of paragraphs 157S, 158S and 159S below.

**149S.** For the purpose of paragraphs 146S “serious irregularity” means an irregularity of one or more of the following kinds which the Court considers has caused or will cause substantial injustice to the appellant—

- (i) failure by the arbitrator to comply with Part X above (General Duty of Arbitrator);
- (ii) the arbitrator exceeding his or her powers (otherwise than by exceeding his or her substantive jurisdiction as defined in paragraph 142S above);
- (iii) failure by the arbitrator to conduct the proceedings in accordance with the procedure set out in the Scheme;

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- (iv) failure by the arbitrator to deal with all the issues put to him or her;
- (v) ACAS exceeding its powers;
- (vi) uncertainty or ambiguity as to the effect of the award;
- (vii) the award having been obtained by fraud or the way in which it was procured being contrary to public policy; or
- (viii) any irregularity in the conduct of the proceedings or in the award which is admitted by the arbitrator or ACAS.

**150S.** If there is shown to be serious irregularity affecting the arbitrator, the proceedings or the award, the Court may (without prejudice to any other power which it may exercise or remedy which it may grant)—

- (i) remit the award to the arbitrator, in whole or in part, for reconsideration;
- (ii) vary the award;
- (iii) declare the award to be of no effect in whole or in part; or
- (iv) reduce the award in whole or in part.

#### **Appeals on questions of EC law, the Human Rights Act 1998 and devolution issues: English/Welsh arbitrations**

**151EW.** *Section 69 of the Arbitration Act 1996(20) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications.*

(20) 1996 c. 23. Section 69 of the Arbitration Act 1996 provides as follows:

“**69.**—(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section.

- (2) An appeal shall not be brought under this section except—
  - (a) with the agreement of all the other parties to the proceedings, or
  - (b) with the leave of the court. The right to appeal is also subject to the restrictions in section 70(2) and (3).
- (3) Leave to appeal shall be given only if the court is satisfied—
  - (a) that the determination of the question will substantially affect the rights of one or more of the parties,
  - (b) that the question is one which the tribunal was asked to determine,
  - (c) that, on the basis of the findings of fact in the award—
    - (i) the decision of the tribunal on the question is obviously wrong, or
    - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
  - (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.
- (4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.
- (5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.
- (6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.
- (7) On an appeal under this section the court may by order—
  - (a) confirm the award,

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- (i) *In subsection (1)—*
- (a) *omit “Unless otherwise agreed by the parties”;*
  - (b) *for “(upon notice to the other parties and to the tribunal) appeal to the court” substitute “(upon notice to the other party, to the arbitrator and to ACAS) appeal to the High Court or Central London County Court”;*
  - (c) *for “a question of law” substitute “a question (a) of EC law, or (b) concerning the application of the Human Rights Act 1998, or (c) any devolution issue”;*
  - (d) *omit “An agreement to dispense with reasons for the tribunal’s award shall be considered an agreement to exclude the court’s jurisdiction under this section”.*
- (ii) *In subsection (2) after “section 70(2) and (3)” insert “as modified for the purposes of the Scheme”.*
- (iii) *In subsection (3)—*
- (a) *omit paragraph (b);*
  - (b) *in paragraph (c) after the words “on the basis of the findings of fact in the award” insert “, in so far as the question for appeal raises a point of EC law, the point is capable of serious argument, and in so far as the question for appeal does not raise a point of EC law”.*
- (iv) *In subsection (7) omit “The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration”.*
- (v) *After subsection (8) insert—*
- “(9) *In this section—*
- “*EC law*” *means –*
- (a) *any enactment in the domestic legislation of England and Wales giving effect to rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties, and*
  - (b) *any such rights, powers, liabilities, obligations and restrictions which are not given effect by any such enactment; and*
- “*devolution issue*” *means a devolution issue as defined in paragraph 1 of Schedule 6 of the Scotland Act 1998 or a devolution issue as defined in paragraph 1 of Schedule 8 of the Government of Wales Act 1998; and*
- “*the Scheme*” *means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004.”*

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- (b) vary the award,
  - (c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court’s determination, or
  - (d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.”

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### **Appeals on questions of EC law, the Human Rights Act 1998 and devolution issues: Scottish arbitrations**

**152S.** A party to a Scottish arbitration may appeal to the Court of Session—

- (i) on a question of EC law,
- (ii) on a question concerning the application of the Human Rights Act 1998, or
- (iii) on a devolution issue

arising out of an award made in the arbitration .

**153S.** An appeal shall not be brought under paragraph 152S except—

- (i) with the agreement of all the other parties to the proceedings; or
- (ii) with the leave of the Court.

**154S.** Leave to appeal shall be given only if the Court is satisfied—

- (i) that the determination of the question will substantially affect the rights of one or more of the parties;
- (ii) that on the basis of the findings of fact in the Note issued with the award, insofar as the question for appeal raises a point of EC law, the point is capable of serious argument, and insofar as the question for appeal does not raise a point of EC law—
- (iii) the decision of the arbitrator on the question is obviously wrong, or
- (iv) the question is one of general public importance and the decision of the arbitrator is at least open to serious doubt, and
- (v) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all circumstances for the Court to determine the question.

**155S.** On an appeal under paragraph 152S the Court may (without prejudice to any other power which it may exercise or remedy which it may grant)—

- (i) confirm the award;
- (ii) vary the award;
- (iii) remit the award to the arbitrator, in whole or in part, for reconsideration in light of the Court's determination;
- (iv) declare the award to be of no effect in whole or in part;
- (v) reduce the award in whole or in part; or
- (v) recall the award in whole or in part.

### **Time limits and other procedural restrictions on challenges to awards: English/Welsh arbitrations**

**156EW.** *Section 70 of the Arbitration Act 1996(21) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications—*

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(21) 1996 c. 23. Section 70 of the Arbitration Act 1996 provides as follows—

“**70.**—(1) The following provisions apply to an application or appeal under section 67, 68 or 69.

(2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—

- (a) any available arbitral process of appeal or review, and
- (b) any available recourse under section 57 (correction of award or additional award).



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- (i) In subsection (1) after “section 67, 68 or 69” insert “(as modified for the purposes of the Scheme)”.
- (ii) In subsection (2)—
  - (a) omit paragraph (a);
  - (b) in paragraph (b) for “section 57 (correction of award or additional award)” substitute “Part XXI of the Scheme (Correction of Awards)”.
- (iii) In subsection (3) for “of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process” substitute “the award was despatched to the applicant or appellant by ACAS or, if an application for a correction or additional award under paragraph 124 has been made and declined, the date on which the arbitrator’s decision was despatched to the applicant or appellant by ACAS”;
- (iv) Omit subsection (5).
- (v) After subsection (8) insert—

“(9) In this section, “the Scheme” means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004.”

#### **Time limits and other procedural restrictions on challenges to awards: Scottish Arbitrations**

**157S.** An appeal under paragraphs 139S, 146S or 152S may not be brought if the appellant has not first exhausted any available recourse under Part XXI of the Scheme (Correction of Awards).

**158S.** An appeal under paragraphs 139S, 146S or (where parties have agreed under paragraph 153S(i)) 152S or an application for leave to appeal under paragraph 153S(ii) shall be lodged within 28 days of whichever is the later of—

- (i) the date on which the award was despatched to the appellant by ACAS;

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(3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

(4) If on an application or appeal it appears to the court that the award—

- (a) does not contain the tribunal’s reasons, or
- (b) does not set out the tribunal’s reasons in sufficient detail to enable the court properly to consider the application or appeal, the court may order the tribunal to state the reasons for its award in sufficient detail for that purpose.

(5) Where the court makes an order under subsection (4), it may make such further order as it thinks fit with respect to any additional costs of the arbitration resulting from its order.

(6) The court may order the applicant or appellant to provide security for the costs of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

The power to order security for costs shall not be exercised on the ground that the applicant or appellant is –

- (a) an individual ordinarily resident outside the United Kingdom, or
- (b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

(7) The court may order that any money payable under the award shall be brought into court or otherwise secured pending the determination of the application or appeal, and may direct that the application or appeal be dismissed if the order is not complied with.

(8) The court may grant leave to appeal subject to conditions to the same or similar effect as an order under subsection (6) or (7).

This does not affect the general discretion of the court to grant leave subject to conditions.”

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- (ii) where a correction or additional award has been made in accordance with Part XXI above, the date on which a memorandum of correction or additional award under Part XXI above was despatched to the appellant by ACAS; and
- (iii) where a party has applied for a correction or additional award under paragraph 124 above but the arbitrator has declined to make any correction or additional award, the date on which intimation of the arbitrator’s decision was despatched to the appellant by ACAS.

**159S.** If on an appeal under paragraph 139S, 146S or 152S it appears to the Court that the award and the arbitrator’s Note

- (i) do not contain the arbitrator’s reasons, or
- (ii) do not set out the arbitrator’s reasons in sufficient detail to enable the court to properly consider the application or appeal,

the Court may order the arbitrator to state the reasons for his or her award in sufficient detail for that purpose.

### **Common law challenges and saving**

**160EW.** *Sections 81(1)(c) and 81(2) of the Arbitration Act 1996(22) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme.*

**161S.** Nothing in this Part of the Scheme shall be construed as excluding the operation of any rule of law as to the refusal of recognition or enforcement of an arbitral award in a Scottish arbitration on grounds of public policy.

### **Exclusion of stated case procedure**

**162S.** Section 3 of the Administration of Justice (Scotland) Act 1972(23) shall not apply to an arbitration under the scheme.

### **Challenge or appeal: effect of order of the court**

**163EW.** *Section 71 of the Arbitration Act 1996(24) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications—*

(22) 1996 c. 23. Sections 81(1)(c) and 81(2) of the Arbitration Act 1996 provide as follows—

“**81.**—(1) Nothing in this Part shall be construed as excluding the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to —

...

(c) the refusal of recognition or enforcement of an arbitral award on grounds of public policy.

(2) Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award.”

(23) 1972 c. 59.

(24) 1996 c. 23. Section 71 of the Arbitration Act 1996 provides as follows—

“**71.**—(1) The following provisions have effect where the court makes an order under section 67, 68 or 69 with respect to an award.

(2) Where the award is varied, the variation has effect as part of the tribunal’s award.

(3) Where the award is remitted to the tribunal, in whole or in part, for reconsideration, the tribunal shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the court may direct.

(4) Where the award is set aside or declared to be of no effect, in whole or in part, the court may also order that any provision that an award is a condition precedent to the

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- (i) In subsection (1) after “section 67, 68 and 69” insert “(as modified for the purposes of the Scheme)”;
- (ii) After subsection (3) insert—

“(3A) In this section, “the Scheme” means the arbitration scheme set out in the Schedule to the ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004”
- (iii) Omit subsection (4).

**164S.** The following provisions have effect where the Court makes an order under paragraph 144S, 150S or 155S of the Scheme with respect to an award—

- (i) Where the award is varied, the variation has effect as part of the arbitrator’s award;
- (ii) Where the award is remitted to the arbitrator in whole or in part for reconsideration the arbitrator shall make a fresh award in respect of the matters remitted within three months of the date of the order for remission or such longer or shorter period as the Court may direct.

## PART XXIV

### LOSS OF RIGHT TO OBJECT

**165.** If a party to arbitral proceedings under this Scheme takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitrator or by any provision in this Scheme, any objection—

- (i) in an English/Welsh arbitration that the arbitrator lacks substantive jurisdiction as defined in paragraph 138EW above or in a Scottish arbitration that the arbitrator lacks substantive jurisdiction as defined in paragraph 142S above;
- (ii) that the proceedings have been improperly conducted;
- (iii) that there has been a failure to comply with the Arbitration Agreement or any provision of this Scheme; or
- (iv) that there has been any other irregularity affecting the arbitrator or the proceedings;

he or she may not raise that objection later, before the arbitrator or the court, unless he or she shows that, at the time he or she took part or continued to take part in the proceedings, he or she did not know and could not with reasonable diligence have discovered the grounds for the objection.

## PART XXV

### IMMUNITY

**166.** An arbitrator under this Scheme is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator unless the act or omission is shown to have been in bad faith. This applies to a legal adviser appointed by ACAS as it applies to the arbitrator himself or herself.

**167.** ACAS, by reason of having appointed an arbitrator or nominated a legal adviser, is not liable for anything done or omitted by the arbitrator or legal adviser in the discharge or purported discharge of his or her functions.

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bringing of legal proceedings in respect of a matter to which the arbitration agreement applies, is of no effect as regards the subject matter of the award or, as the case may be, the relevant part of the award.”

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## PART XXVI

### MISCELLANEOUS PROVISIONS

#### Requirements in connection with legal proceedings

**168EW.** Sections 80(1), (2), (4), (5), (6) and (7) of the Arbitration Act 1996(25) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modification—

*In subsection (1) for “to the other parties to the arbitral proceedings, or to the tribunal” substitute “to the other party to the arbitral proceedings, or to the arbitrator, or to ACAS”.*

#### Service of documents and notices on ACAS or the ACAS Arbitration Section

**169.** Any notice or other document required or authorised to be given or served on ACAS or the ACAS Arbitration Section for the purposes of the arbitral proceedings shall be sent by pre-paid post to the address stipulated in the ACAS Guide to the Scheme.

*or* transmitted by facsimile, addressed to the ACAS Arbitration Section, at the number stipulated in the ACAS Guide to the Scheme,

*or* by electronic mail, at the address stipulated in the ACAS Guide to the Scheme.

**170.** Paragraph 169 does not apply to the service of documents on the ACAS Arbitration Section for the purposes of legal proceedings.

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(25) 1996 c. 23. Sections 80(1), (2), (4), (5), (6) and (7) of the Arbitration Act 1996 provide as follows:

“**80.**—(1) References in this Part to an application, appeal or other step in relation to legal proceedings being taken “upon notice” to the other parties to the arbitral proceedings, or to the tribunal, are to such notice of the originating process as is required by rules of court and do not impose any separate requirement.

(2) Rules of court shall be made—

- (a) requiring such notice to be given as indicated by any provision of this Part, and
- (b) as to the manner, form and content of any such notice.

...

(4) References in this Part to making an application or appeal to the court within a specified period are to the issue within that period of the appropriate originating process in accordance with rules of court.

(5) Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement.

(6) Provision may be made by rules of court amending the provisions of this Part –

- (a) with respect to the time within which any application or appeal to the court must be made,
- (b) so as to keep any provision made by this Part in relation to arbitral proceedings in step with the corresponding provision of rules of court applying in relation to proceedings in the court, or
- (c) so as to keep any provision made by this Part in relation to legal proceedings in step with the corresponding provision of rules of court applying generally in relation to proceedings in the court.

(7) Nothing in this section affects the generality of the power to make rules of court.”

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### **Service of documents or notices on any other person or entity (other than ACAS or the ACAS Arbitration Section)**

**171.** Any notice or other document required or authorised to be given or served on any person or entity (other than ACAS or the ACAS Arbitration Section) for the purposes of the arbitral proceedings may be served by any effective means.

**172.** If such a notice or other document is addressed, pre-paid and delivered by post—

- (i) to the addressee’s last known principal residence or, if he or she is or has been carrying on a trade, profession or business, his or her last known principal business address, or
- (ii) where the address is a body corporate, to the body’s registered or principal office,

it shall be treated as effectively served.

**173.** Paragraphs 171 and 172 (above) do not apply to the service of documents for the purposes of legal proceedings, for which provision is made by rules of court.

### **Powers of court in relation to service of documents: English/Welsh arbitrations**

**174EW.** Section 77 of the Arbitration Act 1996(26) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications.

- (i) In subsection (1) omit “in the manner agreed by the parties, or in accordance with provisions of section 76 having effect in default of agreement,”;
- (ii) In subsection (2) for “Unless otherwise agreed by the parties, the court” substitute “The High Court or Central London County Court”.
- (iii) In subsection (3) for “Any party to the arbitration agreement may apply” substitute “ACAS or any party to the Arbitration Agreement may apply”.

### **Reckoning periods of time**

**175EW.** Sections 78(2), (3), (4) and (5) of the Arbitration Act 1996(27) shall apply to English/Welsh arbitrations conducted in accordance with the Scheme, subject to the following modifications to subsection 2 of that section—

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(26) 1996 c. 23. Section 77 of the Arbitration Act 1996 provides as follows:

“77.—(1) This section applies where service of a document on a person in the manner agreed by the parties, or in accordance with provisions of section 76 having effect in default of agreement, is not reasonably practicable.

(2) Unless otherwise agreed by the parties, the court may make such order as it thinks fit—

- (a) for service in such manner as the court may direct, or
- (b) dispensing with service of the document.

(3) Any party to the arbitration agreement may apply for an order, but only after exhausting any available arbitral process for resolving the matter.

(4) The leave of the court is required for any appeal from a decision of the court under this section.”

(27) 1996 c. 23. Sections 78(2), (3), (4) and (5) of the Arbitration Act 1996 provide as follows:

“78.—(2) If or to the extent there is no such agreement, periods of time shall be reckoned in accordance with the following provisions.

(3) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.

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- (i) omit “If or to the extent that there is no such agreement,”;
- (ii) after “periods of time” insert “provided for in any provision of this Part”.

**176S.** Except as otherwise specified in the Scheme, periods of time shall in Scottish arbitrations be reckoned in accordance with the following provisions—

- (i) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.
- (ii) Where an act is required to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date.
- (iii) Where the period is a period of seven days or less which would include a Saturday, Sunday or public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded.
- (iv) In relation to Scotland a “public holiday” means a day which under the Banking and Financial Dealings Act 1971(28) is to be a bank holiday in Scotland and in relation to England and Wales or Northern Ireland a “public holiday” means Christmas Day, Good Friday or a day under which the Banking and Financial Dealings Act 1971 is to be a bank holiday in England and Wales or Northern Ireland as the case may be.

## PART XXVII

### GOVERNING LAW, ETC

**177EW.** The seat of an English/Welsh arbitration shall be in England and Wales. The arbitrator may nevertheless hold any meeting or hearing or do any act in relation to the arbitration outside England and Wales.

**178S.** The seat of a Scottish arbitration shall be Scotland. The arbitrator may nevertheless hold any meeting or hearing or do any act in relation to the arbitration outside Scotland.

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(4) Where the act is required to be done a specified number of clear days after a specified date, at least that number of days must intervene between the day on which the act is done and that date.

(5) Where the period is a period of seven days or less which would include a Saturday, Sunday or a public holiday in the place where anything which has to be done within the period falls to be done, that day shall be excluded.

In relation to England and Wales or Northern Ireland, a “public holiday” means Christmas Day, Good Friday or a day which under the Banking and Financial Dealings Act 1971 is a bank holiday.”

(28) 1971 c. 80.

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## APPENDIX A

### WAIVER OF RIGHTS: English/Welsh 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 Part 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, 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.

There are differences between the law of England and Wales on the one hand and the law of Scotland on the other. The Scheme accordingly makes separate provision for English/Welsh arbitrations and Scottish arbitrations. This form confirms the parties' agreement that the arbitration between them shall be an English/Welsh arbitration.

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

1.	Unlike proceedings in the employment tribuna., all proceedings under the Scheme, including all hearings, are conducted in <i>private</i> . 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 are 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 <ul style="list-style-type: none"><li>▪ arbitrators will conduct proceedings in an informal manner in all cases;</li><li>▪ 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);</li><li>• there will be no oaths or affirmations, and no cross-examination of witnesses by parties or their representatives;</li><li>• 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;</li><li>• the arbitrator's decision will only contain the main considerations that have led to the result; it will not contain full or detailed reasons.</li></ul>

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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 and devolution issues).
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.
8.	The arbitration shall be an English/Welsh arbitration.

SIGNED:

DATED:

IN THE PRESENCE OF

Signature:

Full Name:

Position:

Address:



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## APPENDIX B

### 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 Part 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, 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.

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 shall be an Scottish arbitration and (as permitted in Scots law) that any award may be enforced by registration.

**I, ....., the Applicant / Respondent / Respondent's representative duly authorised to sign on the Respondent's behalf [delete as appropriate] confirm my/the Respondent's 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 <i>private</i> . 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 are 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— <ul style="list-style-type: none"> <li>• arbitrators will conduct proceedings in an informal manner in all cases;</li> <li>• 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);</li> <li>• there will be no oaths or affirmations, and no cross-examination of witnesses by parties or their representatives;</li> <li>• 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;</li> <li>• the arbitrator's decision will only contain the main considerations that have led</li> </ul>

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	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) and devolution issues.
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. The provisions of section 3 of the Administration of Justice (Scotland) Act 1972 (which provides for arbiters to state a case for the opinion of the Court of Session) shall not apply to this arbitration.
8.	The party by or on behalf of whom this form is signed consents to registration for execution of the arbitration agreement, this waiver form and any award (including any additional award, any correction to an award and any variation of an award) requiring the payment of money which may be made in this arbitration.
9.	The arbitration shall be a Scottish arbitration

SIGNED:

DATED:

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IN THE PRESENCE OF

Signature:

Full Name:

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Position:

Address:

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### EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order sets out a revised scheme, submitted to the Secretary of State by ACAS pursuant to section 212A of the Trade Union and Labour Relations (Consolidation) Act 1992, providing for

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arbitration in the case of disputes involving proceedings, or claims which could be the subject of proceedings, before an employment tribunal arising out of a contravention or alleged contravention of sections 80G(1) or 80H(1) (b) of the Employment Rights Act 1996 (flexible working). The Order revokes and replaces a previous Order which extended to England and Wales only (the “ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003”). This Order extends to Great Britain. The Order provides for the Scheme to come into effect on 1<sup>st</sup> October 2004. The Scheme will provide from that date a voluntary alternative to the employment tribunal for the resolution of claims arising out of an application for flexible working made under section 80F(1) of the 1996 Act by arbitration where both parties agree. The Order contains a transitional provision under which arbitration agreements signed before 1<sup>st</sup> October 2004 will continue to be determined under the Scheme set out in the 2003 Order.

The Order also provides for certain provisions of the Arbitration Act 1996, as modified by the Order, to apply to arbitrations conducted in accordance with the Scheme, where the parties have agreed that the arbitration will be determined according to the law of England and Wales.

No regulatory impact assessment has been prepared in relation to this Order. The revised Scheme offers arbitration of flexible working disputes to employers and employees in Scotland, an option already available to employers and employees in England and Wales under the previous Scheme. The impact of the previous Scheme has been low, and the revised Scheme is expected to have a similar impact.