

2013 No. 260

NATIONAL HEALTH SERVICE, ENGLAND

**The National Health Service Trust Development Authority
(Establishment and Constitution) Amendment Order 2013**

Made - - - - *11th February 2013*
Laid before Parliament *13th February 2013*
Coming into force - - *1st April 2013*

The Secretary of State for Health makes the following Order in exercise of the powers conferred by sections 28(1), (2) and (4), 272(7) and (8) and 273(1) of the National Health Service Act 2006(a).

In accordance with section 28(7) of that Act, the Secretary of State has consulted such bodies as the Secretary of State recognises as representing officers who in the Secretary of State's opinion are likely to be transferred or affected by transfers in pursuance of this Order.

Citation, commencement, and interpretation

1.—(1) This Order may be cited as the National Health Service Trust Development Authority (Establishment and Constitution) Amendment Order 2013 and comes into force on 1st April 2013.

(2) In this Order—

“the Establishment Order” means the National Health Service Trust Development Authority (Establishment and Constitution) Order 2012(b).

Amendment of article 1 of the Establishment Order

2. In article 1 of the Establishment Order (citation, commencement and interpretation), in paragraph (2)—

(a) before “the Act” insert—

““the 1996 Act” means the Employment Rights Act 1996;”(c);

(b) after the definition of “the Act” insert in the appropriate position in alphabetical order the following definitions—

““employing authority” means the Secretary of State, a Strategic Health Authority, a Primary Care Trust or the NHS Institute;”;

(a) 2006 c.41. The powers of the Secretary of State under the provisions of the Act under which this Order is made are exercisable only in relation to England by virtue of section 271(1) of the National Health Service Act 2006. Section 28 was amended by section 55(1) of, and paragraph 13 of Schedule 4 to, the Health and Social Care Act 2012 (c.7), with effect from 1st October 2012.

(b) Established by S.I. 2012/901, amended by S.I. 2013/235.

(c) 1996 c. 18.

““NHS Institute” means the National Institute for Improvement and Innovation established as a special health authority by the NHS Institute for Innovation and Improvement (Establishment and Constitution) Order 2005(a);”;

““second transfer date” means 1st April 2013;”.

Transfer of property

3. After article 5 of the Establishment Order (transfer of property), insert—

“**5A.**—(1) The property of the Secretary of State identified as property to transfer to the Authority in the document entitled “The Department of Health Property to Transfer to the National Health Service Trust Development Authority Schedule 2013(b)” and signed on behalf of the Department of Health on 5th February 2013, and on behalf of the Authority on 6th February 2013, is to be transferred to the Authority on the second transfer date.

(2) All liabilities of the Secretary of State relating to the property referred to in paragraph (1) are to be transferred to the Authority on the second transfer date.

(3) Any right relating to the property of the Secretary of State referred to in paragraph (1) that was immediately before the second transfer date enforceable by or against the Secretary of State is, on or after the second transfer date, to be enforceable by or against the Authority.”.

Transfer of staff

4. After article 6 of the Establishment Order (transfer of staff), insert—

“**6A.**—(1) This paragraph applies in relation to any person who—

(a) immediately before the second transfer date, is employed by an employing authority; and

(b) has, before the second transfer date, been notified in writing by the employing authority that employs that person that they are to be transferred to the Authority on the second transfer date.

(2) Any person to whom paragraph (1) applies is, on the second transfer date, to be transferred to the employment of the Authority.

(3) The contract of employment of a person whose employment has transferred to the Authority under paragraph (2)—

(a) is not terminated by the transfer; and

(b) has effect from the second transfer date as if originally made between that person and the Authority.

(4) Without prejudice to paragraph (3)—

(a) all the rights, powers, duties and liabilities of the employing authority under, or in connection with, the contract of employment of any person whose employment has transferred to the Authority on the second transfer date under paragraph (2), are to transfer to the Authority on the second transfer date; and

(b) any act or omission before the second transfer date of or in relation to the employing authority, in respect of that person or that person’s contract of employment, is deemed to have been an act or omission of or in relation to the Authority.

(a) Established by S.I. 2005/1446, abolished by the Health and Social Care Act 2012 (c. 7) on 1st April 2013 *see* S.I. 2013/160.

(b) The Department of Health Property to Transfer to the National Health Service Trust Development Authority Schedule 2013 is not a published document. It can be obtained from the Department of Health, Quarry House, Quarry Hill, Leeds LS2 7UE on request.

(5) Paragraphs (2) to (4) do not operate to transfer the contract of employment of a person to whom paragraph (1) applies, or any rights, powers, duties and liabilities under, or in connection with, that contract, if, before the second transfer date, that person informs the Authority or the employing authority that they object to becoming employed by the Authority.

(6) Where a person to whom paragraph (1) applies has objected to the transfer of that person's contract of employment to the Authority as described in paragraph (5), the transfer operates so as to terminate that person's contract of employment with the employing authority.

(7) Subject to paragraph (8), a person whose contract of employment is terminated in accordance with paragraph (6) is not to be treated, for any purpose, as having been dismissed by the employing authority.

(8) Where the transfer involves or would involve a substantial change in the working conditions to the material detriment of a person whose employment is or would have transferred under paragraph (1), that person may treat the contract of employment as having been terminated, and that person shall be treated for any purpose as having been dismissed by the employer.

(9) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (8) in respect of any failure by the employer to pay wages to a person in respect of a notice period which the person has failed to work.

(10) Paragraphs (2), (3) and (5) to (8) are without prejudice to any right of a person arising apart from this article to terminate that person's contract of employment without notice in acceptance of a repudiatory breach of contract by the employer.

Dismissal of employee because of transfer

6B—(1) Where a person whose employment has been transferred by article 6A is dismissed by the Authority during the period starting with the second transfer date and ending on 31st March 2015, that person is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as having been unfairly dismissed if the sole or principal reason for the dismissal is—

- (a) the transfer itself; or
- (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of the Authority after the second transfer date.

(3) Where paragraph (2) applies—

- (a) paragraph (1) does not apply;
- (b) without prejudice to section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) Paragraph (1) does not apply in relation to a dismissal of an employee if the application of section 94 of the 1996 Act (the right) to the dismissal of the employee is excluded by or under any provisions of the 1996 Act, the Employment Tribunals Act 1996(a) or the Trade Union and Labour Relations (Consolidation) Act 1992(b).

(a) 1996 c. 17.

(b) 1992 c. 52.

(5) Paragraph (1) does not prevent the Authority and a person whose contract of employment has been transferred by virtue of article 6A from agreeing a variation of that contract for a reason specified in that paragraph.”.

Signed by the authority of the Secretary of State for Health.

Earl Howe
Parliamentary Under-Secretary of State,
Department of Health

11th February 2013

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the National Health Service Trust Development Authority (Establishment and Constitution) Order 2012 (the Establishment Order).

Article 3 of this Order amends the Establishment Order to provide for the transfer of property and liabilities from the Secretary of State to the Authority.

Article 4 provides for the transfer of staff from the Secretary of State for Health, Strategic Health Authorities, Primary Care Trusts and the National Institute for Improvement and Innovation, to the Authority, and gives some post transfer employment protection to those staff in the event the Authority proposes to dismiss any of them between 1st April 2013 and 31st March 2015.

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