

2007 No. 1169

CONSTITUTIONAL LAW

DEVOLUTION, WALES

**The National Assembly for Wales (Transfer of staff to Assembly
Commission Scheme) Order 2007**

Made - - - - - *4th April 2007*

Laid before Parliament *11th April 2007*

Coming into force in accordance with article 1(2)

The Secretary of State, having consulted the Assembly in accordance with paragraph 43(10) of Schedule 11 to the Government of Wales Act 2006(a), makes the following Order in exercise of powers conferred on him by section 162(2) and (4) and paragraph 43(2) of Schedule 11 to that Act:

Citation, commencement and interpretation

1.—(1) This Order may be cited as the National Assembly for Wales (Transfer of staff to Assembly Commission Scheme) Order 2007.

(2) This Order shall come into force immediately after the 2007 election(b).

(3) In this Order—

“the Assembly” means the National Assembly for Wales constituted by the Government of Wales Act 1998(c);

“collective agreement” and “trade union” have the same meanings respectively as in the 1992 Act;

“contract of employment” means any agreement between an employee and his employer determining the terms and conditions of his employment;

“employee” means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person’s employer shall be construed accordingly;

“a listed relevant employee” means a relevant employee who is named in the staff transfer list;

“recognised” has the meaning given to the expression by section 178(3) of the 1992 Act;

“the Schedule” means Schedule 11 to the Government of Wales Act 2006;

(a) 2006 c.32.

(b) The expression “the 2007 election” is defined in section 161(1) of the Government of Wales Act 2006 as the ordinary election under section 3 of the Government of Wales Act 1998. In accordance with section 3 of the 1998 Act the election is due to take place on 3rd May 2007.

(c) 1998 c.38.

“staff transfer list” means a list produced by the Secretary of State in accordance with paragraph 43(3) of the Schedule and article 3 of this Order;

“transferred contract” means a contract of employment transferred in accordance with article 4;

“the 1992 Act” means the Trade Union and Labour Relations (Consolidation) Act 1992(a);

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

“the 1996 Tribunals Act” means the Employment Tribunals Act 1996(c).

Modifications of paragraph 43 of the Schedule

2. Paragraph 43 of the Schedule is modified as follows—

(a) In sub-paragraph (2)—

(i) for “the rights and liabilities of”, substitute “the rights, powers, duties and liabilities of the Assembly constituted by the Government of Wales Act 1998 in respect of”;

(ii) after “under”, insert “or in connection with”,

(b) In sub-paragraph (4)—

(i) for “the rights and liabilities of”, substitute “the rights, powers, duties and liabilities of the Assembly constituted by the Government of Wales Act 1998 in respect of”;

(ii) after “under”, insert “or in connection with”,

(c) In sub-paragraph (5)—

(i) for “the rights and liabilities of”, substitute “the rights, powers, duties and liabilities of the Assembly constituted by the Government of Wales Act 1998 in respect of”;

(ii) after “under”, insert “or in connection with”,

(d) In sub-paragraph (6)(a)—

(i) for “any rights or liabilities under”, substitute “any rights, powers, duties and liabilities of the Assembly constituted by the Government of Wales Act 1998 in respect of”; and

(ii) after “under”, insert “or in connection with”,

(e) In sub-paragraph (6)(b) for “at the end of”, substitute “immediately before the end of”,

(f) In sub-paragraph (7) for “any rights or liabilities”, substitute “any rights, powers, duties or liabilities”,

(g) In sub-paragraph (8) for “any rights or liabilities”, substitute “any rights, powers, duties or liabilities”,

(h) In sub-paragraph (9) for “any rights or liabilities”, substitute “any rights, powers, duties or liabilities”.

Staff transfer list

3.—(1) The Secretary of State must, before the end of the initial period, produce a staff transfer list that names relevant employees for the purposes of paragraph 43(2) of the Schedule.

(2) The Secretary of State may amend a staff transfer list.

(3) A staff transfer list must be signed by or on behalf of the Secretary of State, dated and deposited at the Wales Office, Discovery House, Cardiff Bay, Cardiff, CF99 1NA.

(4) A staff transfer list deposited in accordance with paragraph (3) must be made available for inspection at such times and on such conditions as the Secretary of State considers appropriate.

(a) 1992 c.52.

(b) 1996 c.18.

(c) 1996 c.17.

Effect of transfer of contract of employment

4.—(1) All rights, liabilities, powers and duties of the Assembly under or in connection with any contract of employment—

- (a) in force immediately before the end of the initial period; and
- (b) made between the Assembly and a listed relevant employee,

shall, subject to articles 7 and 9, transfer to the Assembly Commission at the end of the initial period.

(2) Paragraph (1) applies in relation to the contract of employment of any relevant employee who would, immediately before the end of the initial period, have been employed by the Assembly if he had not been dismissed in the circumstances described in article 12(1).

(3) For the purposes of paragraph (1), the rights and liabilities, powers and duties of the Assembly under or in connection with any contract of employment to which paragraph (1) applies include any rights, liabilities, powers and duties under an agreement whereby the Assembly agrees to lend or advance monies to, or reimburse expenses incurred by, a listed relevant employee, or to lend or advance monies to a third party on behalf of such an employee.

5. Any transferred contract shall have effect, subject to article 8 after the transfer as if originally made between the Assembly Commission and the listed relevant employee.

6. Subject to article 8, the terms and conditions of a listed relevant employee's employment with the Assembly Commission shall be (taken as a whole) no less favourable to him than the terms and conditions on which he is employed by the Assembly immediately before his contract of employment is transferred under article 4.

7. Article 4 shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

Effect of variation of contract of employment

8.—(1) In respect of a contract of employment that is, or will be, transferred by article 4, any purported variation of the contract shall be void if the sole or principal reason for the variation 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) Paragraph (1) shall not prevent the Assembly and a listed relevant employee whose contract of employment will be transferred by article 4 from agreeing a variation of that contract if the sole or principal reason for the variation is—

- (a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or
- (b) a reason unconnected with the transfer.

(3) Paragraph (1) shall not prevent the Assembly Commission and a listed relevant employee whose contract of employment is transferred by article 4 from agreeing a variation of that contract if the sole or principal reason for the variation is—

- (a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or
- (b) a reason unconnected with the transfer.

Effect of objection to transfer of contract of employment

9.—(1) Article 4 does not operate if a listed relevant employee informs the Assembly or the Assembly Commission that he objects to becoming employed by the Assembly Commission.

(2) In a case falling within paragraph (1) and subject to articles 10 and 11, the listed relevant employee's contract of employment is terminated immediately before the end of the initial period and the listed relevant employee is not, by virtue of that termination, to be treated for any purpose as having been dismissed.

Effect of substantial detrimental change to contract of employment

10.—(1) Where the transfer of a contract of employment of a listed relevant employee involves or would involve a substantial change in working conditions to the material detriment of the listed relevant employee, he may treat his contract of employment as having been terminated, and he shall be treated for any purpose as having been dismissed by the Assembly or the Assembly Commission (as the case may be).

(2) No damages shall be payable by the Assembly or the Assembly Commission (as the case may be) as a result of a dismissal falling within paragraph (1) in respect of any failure by the Assembly or the Assembly Commission to pay wages to the listed relevant employee in respect of a notice period which that employee has failed to work.

Effect on certain other employment rights

11. Articles 4, 9 and 10 are without prejudice to any right of a listed relevant employee arising apart from this Order to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by the Assembly or the Assembly Commission (as the case may be).

Dismissal because of transfer of contract of employment

12.—(1) Where any employee of the Assembly or the Assembly Commission is dismissed by the Assembly or by the Assembly Commission (as the case may be), he shall be treated for the purpose of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his 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 either the Assembly or the Assembly Commission (as the case may be) before or after the transfer of his contract of employment under article 4 .

(3) Where paragraph (2) applies—

- (a) paragraph (1) shall not apply;
- (b) without prejudice to the application of section 98(4) of the 1996 Act (test for 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 dismissal of an employee holding the position that the employee held.

(4) The provisions of this article apply irrespective of whether the employee in question is a listed relevant employee.

(5) Paragraph (1) shall not apply in relation to a dismissal of an employee if the application of section 94 of the 1996 Act to the dismissal of the employee is excluded by or under any provision of the 1996 Act, the 1996 Tribunals Act or the 1992 Act.

Pensions

13.—(1) Articles 4 and 14 shall not apply—

- (a) to so much of a transferred contract of a listed relevant employee or collective agreement as relates to an occupational pension scheme within the meaning of the Pension Schemes Act 1993(a); or
- (b) to any rights, powers, duties, or liabilities under or in connection with any such contract or subsisting by virtue of any such agreement and relating to such a scheme or otherwise in connection with that listed relevant employee's employment and relating to such a scheme.

(2) For the purposes of paragraphs (1) and (3), any provision of an occupational pension scheme which does not relate to benefits for old age, invalidity or survivors shall not be treated as being part of the scheme.

(3) A listed relevant employee whose contract of employment is transferred under article 4 shall not be entitled to bring a claim against the Assembly for—

- (a) breach of contract; or
- (b) constructive unfair dismissal under section 95(1)(c) of the 1996 Act,

arising out of a loss or reduction in his rights under an occupational pension scheme in consequence of the transfer, save insofar as the alleged breach of contract or dismissal (as the case may be) occurred prior to the date on which the Transfer of Undertakings (Protection of Employment) Regulations 2006(b) took effect.

Effect of transfer of contract of employment on collective agreements

14. Where at the time of the transfer of a transferred contract there exists a collective agreement made by or on behalf of the Assembly with a trade union recognised by the Assembly in respect of any listed relevant employee whose contract of employment is preserved by article 4, then—

- (a) without prejudice to sections 179 and 180 of the 1992 Act (collective agreements presumed to be unenforceable in specified circumstances) that agreement, in its application in relation to that employee, shall, after the transfer, have effect as if made by or on behalf of the Assembly Commission with that trade union, and accordingly anything done under or in connection with it, in its application in relation to that employee, by or in relation to the Assembly before the transfer, shall, after the transfer, be deemed to have been done by or in relation to the Assembly Commission; and
- (b) any order made in respect of that agreement, in its application in relation to that employee, shall, after the transfer, have effect as if the Assembly Commission were a party to the agreement.

Effect of transfer of contract of employment on trade union recognition

15.—(1) This article applies where after the transfer of the contracts of employment of the group of listed relevant employees whose contracts of employment are transferred under article 4, that group maintains an identity distinct from the remainder of the Assembly Commission's undertaking.

(2) Where before those contracts of employment are so transferred an independent trade union is recognised to any extent by the Assembly in respect of any listed relevant employee whose contract of employment transfers under article 4, then, after the transfer—

- (a) the trade union shall be deemed to have been recognised by the Assembly Commission to the same extent in respect of those employees; and
- (b) any agreement for recognition may be varied or rescinded accordingly.

(a) 1993 c.48.

(b) S.I. 2006/246, to which there are amendments not relevant to this Order.

Restriction on contracting out

16. Section 203 of the 1996 Act (restrictions on contracting out) shall apply in relation to this Order as if its provisions were contained in that Act, save for that section shall not apply in so far as this Order provides for an agreement (whether a contract of employment or not) to exclude or limit the operation of any provision of this Order.

4th April 2007

Nick Ainger
Parliamentary Under Secretary of State
Wales Office

EXPLANATORY NOTE

(This note is not part of the Order)

Paragraph 43(1) of Schedule 11 to the Government of Wales Act 2006 (“GOWA 2006”) provides that, subject to any order that may be made by the Secretary of State under paragraph 43(2) of that Schedule (“the Schedule”), the members of staff of the Assembly constituted by the Government of Wales Act 1998 (“the GOWA 1998 Assembly”) are to be taken to have been appointed as members of staff of the Welsh Assembly Government.

Paragraph 43(2) of the Schedule enables the Secretary of State, by order, to make a scheme providing for the transfer of listed staff of the GOWA 1998 Assembly to the employment of the Assembly Commission (“the transfer scheme”).

Article 2 of this Order modifies paragraph 43 of the Schedule so as to ensure that rights, powers, duties and liabilities of the GOWA 1998 Assembly under or in connection with a contract of employment of a listed member of staff of that Assembly transfer to the Assembly Commission.

The staff of the GOWA 1998 Assembly whose employment will transfer to the Assembly Commission will be those staff listed on a staff transfer list that is to be produced by the Secretary of State.

The provisions of this Order must be read in conjunction with the provisions of paragraph 43 of the Schedule so as to fully understand the legal effect of the transfer of the contracts of employment of the listed staff of the GOWA 1998 Assembly to the Assembly Commission.

The transfer scheme is set out in articles 3 to 16 of this Order. The transfer scheme contains provisions that are similar to provisions in the Transfer of Undertakings (Protection of Employment) Regulations 2006 to the extent that such provisions are appropriate in the context of the transfer of the employment of listed staff of the GOWA 1998 Assembly to the Assembly Commission.

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