

## **RE PROTECTED DISCLOSURES BY POSTGRADUATE TRAINEES**

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### **DRAFT TERMS OF AGREEMENT BETWEEN HEALTH EDUCATION ENGLAND AND NHS BODY EMPLOYING TRAINEES**

**31 AUGUST 2016**

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- (1) This agreement (“the Agreement”) is made between Health Education England and ... (“the Counterparty”) to vary and supplement the existing arrangements (“the Existing Arrangements”) between those parties. Notwithstanding the date of signature of the Agreement the Agreement shall take effect and grant rights hereunder from 00:00 3<sup>rd</sup> August 2016 but not before that time.
- (2) The provisions of the Agreement are intended to reflect and provide Postgraduate Trainees (defined below) with equivalent rights and protections against Health Education England to those provided for by section 47B of the Employment Rights Act 1996, as if the Postgraduate Trainee was a worker, within the meaning of section 43K of the Employment Rights Act 1996, of Health Education England.
- (3) A “Postgraduate Trainee” is defined for the purpose of this Agreement only as a doctor or dentist in postgraduate training:
  1. Holding:
    - (i) an employment contract for doctors and dentists in training in England, being a contract applying the Terms and Conditions of Service for NHS Doctors and Dentists in Training (England) or the Terms and Conditions of Service NHS Medical and Dental Staff (England) 2002 as amended; or
    - (ii) a contract of employment with a NHS Foundation Trust in England for the purpose of foundation or specialty training (not being a contract falling under subparagraph 1.(i)); or
    - (iii) in the case of doctors in a GP Foundation Training Programme or GP Specialty Training Programme, a contract of employment in England for

the purpose of GP Foundation or Speciality Training (not being a contract falling under subparagraph 1.(i)); or

- (iv) in the case of junior dentists, a contract of employment in England as a Foundation Dentist,

And:

- (a) having been appointed by or through Health Education England's (or its predecessors') processes in England; or

- (b) appointed by way of transfer into Health Education England's Training in England,

And retaining a Training Number with Health Education England.

Or

2. A person seeking to commence or recommence training in a training programme approved by the General Medical Council or an approved training programme for foundation training or specialty training as a dentist, which would, on appointment under such a programme as a Postgraduate Trainee, meet the requirements of (3)1 above, which for the avoidance of doubt is intended to include a Postgraduate Trainee taking time out of their training programme so long as he or she retains a Training Number with Health Education England.

- (4) Health Education England agrees that the Postgraduate Trainee has the contractual right to enforce, as against Health Education England, the provisions of Part IVA of the Employment Rights 1996 ("Part IVA") and the provisions of Section 47B of the Employment Rights Act 1996 ("Section 47B"), save for section 43KA and subsection 47B(2), in the High Court or the County Court of England and Wales, as if those provisions were terms of this Agreement, subject to the provisions and limitations of Part IVA and Section 47B and as if the Postgraduate Trainee is a worker within the extended meaning of "worker" in Section 43K(1) of the Employment Rights Act 1996 and as if Health Education England is within Section 43K (2) of the Employment Rights Act 1996 in relation to the Postgraduate Trainee.

(5) Pursuant to the Contract (Rights of Third Parties) Act 1999 the Postgraduate Trainee subjected to a detriment in contravention of Section 47B as applied by paragraph (4) above shall be entitled;

(i) to enforce the provisions of this Agreement as against Health Education England; and

(ii) if successful to the remedies provided for by Section 49 of the Employment Rights Act 1996 in the High Court or the County Court of England and Wales,

subject to all of the provisions and limitations of Section 49, as if that Section applied to a claim under this Agreement, with any reference to section 48(1A) to be read as a reference to a claim made under this Agreement and any reference to an employment tribunal read as a reference to the High Court or the County Court of England and Wales. For the avoidance of doubt no Postgraduate Trainee shall have the right to claim injunctive or equitable relief or to any relief or remedy which is not provided for by Section 49 of the Employment Rights Act 1996 against Health Education England in respect of the third party rights granted under this Agreement.

(6) In making any award of compensation and assessing any liability of Health Education England to pay compensation or give any other remedy in accordance with paragraph (5) above the court shall take account of and reduce the amount of any award(s) of compensation otherwise payable to the Postgraduate Trainee, as it sees fit, or in the grant of any other remedy the court shall take account of, as it sees fit, any other awards or payments of compensation or other remedy made or granted to the Postgraduate Trainee, howsoever and by whomsoever made or granted, in respect of:

(a) The detriment falling within paragraph (5) above, to which the Postgraduate Trainee is subjected; or

(b) Any matter related to the detriment falling within paragraph (5) above, to which the Postgraduate Trainee is subjected; or

(c) Any other matter related to the act(s) or failure(s) to act to which the Postgraduate Trainee's claim under this Agreement relates.

(7) Any claim brought by a Postgraduate Trainee against Health Education England under paragraph (5) above must be commenced by the issue of proceedings in the High Court or the County Court, in England and Wales:

(a) within a period of six calendar months beginning with the date of the act or failure to act to which the proceedings and claim relate or, where that act or failure is part of a series of similar acts or failures, the last of those acts or failures; or

(b) within such further period as the court considers reasonable, but only where the court is satisfied that it was not reasonably practicable for the Postgraduate Trainee to have issued proceedings within the period specified in subparagraph (a) above,

and in default of subparagraph (a) above, the Postgraduate Trainee's claim and the remedy claimed shall automatically and absolutely be barred by the effluxion of time and shall be waived by the Postgraduate Trainee, unless the court makes an order to the contrary pursuant to subparagraph (b) above.

(8) For the purposes of Paragraph (7) above—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on, and, in the absence of evidence establishing the contrary, Health Education England shall be taken to decide on a failure to act when it does an act inconsistent with doing the failed act or, if it has done no such inconsistent act, when the period expires within which it might reasonably have been expected to do the failed act if it was to be done.

(9) Save where it is not reasonably practicable to do so, the Postgraduate Trainee shall send a letter before action or other document to the relevant Postgraduate Dean in Health Education England at least two months before the end of the period of six months provided for in paragraph (7)(a) above complying with the Practice Direction

on Pre-Action Conduct and in particular setting out full details of the claim(s), the basis of the claim(s) and the relief sought.

- (10) Save in respect of any claims under the provisions of Paragraphs (4)-(9) of the Agreement in respect of which proceedings have been issued or a cause of action has accrued before the expiry of this Agreement a Postgraduate Trainee's entitlement and right to enforce the provisions of the Agreement as against Health Education England and to claim compensation or other remedy under the Agreement shall cease and come to an end and these provisions shall be varied so that they forthwith lapse in the event that:

(a) the protection provided for by section 47B of the Employment Rights Act 1996 is repealed or revoked; or

(b) the Employment Rights Act 1996 is amended to permit the Postgraduate Trainees who benefit from the Agreement to make such or similar claims against Health Education England, for compensation or other remedy for being subjected to any detriment by any act, or any deliberate failure to act, by Health Education England on the ground that the Postgraduate Trainee has made a protected disclosure, on the date any amended, further or equivalent legislation is brought into force,

and the Postgraduate Trainee's entitlement and right to enforce the provisions of the Agreement against Health Education England shall cease and come to an end and these provisions shall be varied so that they forthwith lapse without any requirement for the Postgraduate Trainee(s) to consent to that variation.

- (11) Save in respect of any claims under the provisions of paragraphs (4)-(9) of the Agreement in respect of which proceedings have been issued or a cause of action has accrued before the expiry of this Agreement the Postgraduate Trainee's entitlement and right to enforce the provisions of the Agreement as against Health Education England and to claim compensation or other remedy under paragraphs

(4)-(9) above shall cease and come to an end and these provisions shall be varied so that they forthwith lapse, in the event that the courts of England and Wales make a final determination or ruling which is binding on Health Education England that the Postgraduate Trainee(s) are entitled to and may bring proceedings in respect of such matters under the Employment Rights Act 1996 in the Employment Tribunal against Health Education England, on the date of that determination or ruling; and the Postgraduate Trainee's entitlement and right to enforce the provisions of the Agreement against Health Education England shall cease and come to an end and these provisions shall be varied so that they forthwith lapse without any requirement for the Postgraduate Trainee(s) to consent to that variation. A determination or ruling will be final where there is no right for Health Education England to appeal, or where Health Education England does not appeal the determination or ruling and gives notice to the British Medical Association and the British Dental Association that it will not appeal and that it intends to be bound by the determination or ruling.

(12)

- (a) The Counterparty shall be under no obligation to indemnify and keep indemnified Health Education England in respect of any claims, liabilities, compensation and legal costs that Health Education England reasonably agrees, or is ordered, to pay to a Postgraduate Trainee pursuant to paragraph (5) of this Agreement, or of an agreement in the same terms made between Health Education England and a different counterparty ("Another Agreement"), to the extent that any such liability, compensation and legal costs arises or would arise under this Agreement, Another Agreement or the provisions of the Employment Rights Act 1996 (or further legislation amending, supplementing or replacing the Employment Rights Act 1996) and arises as a result of the Postgraduate Trainee being subjected to any detriment by any act, or any deliberate failure to act of Health Education England, its employees or agents, done on the ground that the Postgraduate Trainee has made a protected disclosure.
- (b) Save as described at subparagraph (a) above, the Counterparty herein agrees to indemnify and keep indemnified and hold harmless Health Education England in

respect of any claims, liabilities, compensation and legal costs that Health Education England reasonably agrees, or is ordered, to pay to a Postgraduate Trainee pursuant to paragraph (5) of this Agreement, or of an agreement in the same terms made between Health Education England and a different counterparty (“Another Agreement”), to the extent that any such liability, compensation and legal costs arises or would arise under this Agreement, Another Agreement or the provisions of the Employment Rights Act 1996 (or further legislation amending, supplementing or replacing the Employment Rights Act 1996) and arises as a result of the Postgraduate Trainee being subjected to any detriment by any act, or any deliberate failure to act of the Counterparty, its employees or agents, done on the ground that the Postgraduate Trainee has made a protected disclosure.

- (c) Further in the event of any dispute between the Counterparty and Health Education England the court shall determine the extent to which both parties are to pay a contribution, or provide a complete indemnity to each other, as may be just and equitable, having regard to the extent of that party’s responsibility for the detriment suffered by the Postgraduate Trainee, referred to in paragraph (5) above, in respect of which either party has paid, or is liable to pay, compensation and /or costs.
  - (d) This paragraph (12) will survive expiry or termination of this Agreement for any reason.
- (13) To the extent that the provisions of the Agreement conflict with or are inconsistent with the provisions of the Existing Arrangements the provisions of the Agreement shall prevail in so far as they relate to the rights granted or reserved under the Agreement to the Postgraduate Trainees or to Health Education England.
- (14) The third party rights granted by this Agreement to the Postgraduate Trainees may be varied and amended by the parties hereto by agreement with and the consent of the British Medical Association and the British Dental Association acting for and on behalf of the Postgraduate Trainees.