

Activists briefing

Withdrawal of 'Two-tier Code'

At the end of 2010 the Cabinet Office Minister Francis Maude withdrew the 'Two Tier Code' in relation to staff transfers on public service contracts. The [announcement](#) was framed as removing a 'barrier' to private sector companies taking over public services and sits within the wider policy context of the Government's drive to open up as much of the public sector and services to private contractors as possible.

This briefing aims to give some background information on the announcement and answer some frequently asked questions – in particular, we aim to clarify the situation regarding the status of the 'Two Tier Code', 'Best Value', the 'Agenda for Change and NHS Contractors Staff Joint Statement' and the application of the new 'Six Principles' which are outlined below. Where relevant the briefing below points towards some more detailed resources that Unite workplace Reps can access.

About the 'Two-tier Code'

The 'Two-tier Code' arose in response to serious – and evidenced – concerns from trade unions. These concerns centred on;

- Workforce matters not being given proper attention during the process of outsourcing public services, and
- Once services were outsourced, new staff were being employed on worse pay and terms and conditions to those who had transferred out of the public sector. This is not only grossly unfair to new staff but is used to erode the pay and terms and conditions of *all* staff employed by that service over time.

The 'Two-tier Code' therefore aimed to make sure that new recruits would be employed on terms and conditions no less favourable than staff transferred to a new employer under TUPE (Transfer of Undertakings and Protection of Employment). It also covered pension arrangements and placed a duty on the public body awarding the contract to monitor its implementation by the private contractor. The code began life as the 2003 Local Government Code of Practice – also commonly known as the 'Best Value Code of Practice'. It was agreed by the local government trade unions, the TUC, CBI and Local Government Employers. In July 2005 the 'Code of Practice on Workforce Matters in Public Sector Service Contracts' was introduced, covering other public services such as the NHS, maintained schools and the civil service and government departments. The Code stated that;

*"The Code recognises that there is no conflict between good employment practice, value for money and quality of service. On the contrary, **quality and good value will not be provided by organisations who do not manage workforce issues well. The intention of the public sector organisation is therefore to select only those providers who offer staff a package of terms and conditions which will secure high quality service delivery throughout the life of the contract.** These must be sufficient to recruit and motivate high quality staff to work on the contract and designed to prevent the emergence of a two-tier workforce', dividing transferees and new joiners working beside each other on the same contracts."*¹

It should be noted that the first Local Government Code and the wider 'Two-tier Code' were introduced slightly differently. This has meant that the 'Code of Practice on Workforce Matters in Public Sector Service Contracts' could be withdrawn with immediate effect by the Cabinet Office, and was done. The Government announced in its mis-named 'Plan for Growth' that it was withdrawing the 2003 Local Government Code of Practice.

It should be noted that in respect of the NHS in England the 'Agenda for Change and NHS Contractors Staff – a Joint Statement' issued in October 2005 remains in place, but may be impacted upon. Where the Joint Statement is already in operation it has become part of the terms and conditions of staff and therefore can only be changed with agreement with employees.

At the time of writing this briefing the Government had just announced it was consulting on the future of the 'Fair Deal' policy on pensions – which is where private and not-for-profit organisations taking over public services had to provide transferring staff with a broadly comparable pension.

¹ Code of Practice on Workforce Matters in Public Sector Service Contracts 2005, paragraph 2 (our emphasis).

What has replaced the ‘Two-tier Code’?

The Government has decided to replace the Code with six ‘Principles of Good Employment’ that are supported by Government but are voluntary. These ‘Principles’ can be found at the end of this briefing. It remains entirely unclear what, if any, practical actions the Government will take to encourage business or public bodies who are outsourcing to take any notice of these ‘Principles’.

Why the Government has removed the ‘Two-tier Code’?

In explaining their decision to withdraw the Code and introduce these ‘Principles’ it was stated that “*The Coalition Government is committed to opening up government procurement and reducing costs. It has also set itself the aspiration that 25% of government contracts should be awarded to small and medium-sized businesses*”².

In announcing the end of the ‘Two Tier Code’ Francis Maude said that:

*“The two-tier code was a voluntary regulation that did little to protect staff while deterring responsible employers from delivering public service contracts. Small organisations have been particularly hard hit by this two-tier code. We should not be making it more difficult for SMEs and voluntary organisations to succeed in the public service market. The new Principles of Good Employment Practice set clear standards and give employers freedom to provide terms for staff which are motivating and affordable.”*³

The view of Unite is clear – this is a government determined to drive down the pay and terms and conditions of staff. The responsible employers cited by the government would not have been deterred by the ‘Two-tier Code’. Employers that support the Government’s belief that by squeezing workers’ conditions to make more profits a better service will ensue have now been given a green light to go ahead.

Information and Action for Workplace Reps

- The withdrawal of the ‘Two-tier Code’ and its replacement with these ‘Principles’ does not impact on the rights and duties provided under TUPE, as these are statutory. For more information on TUPE you can refer to the Unite guide on the [resources section of the Unite website](#).
- The withdrawal of the ‘Two-tier Code’ and its replacement with these ‘Principles’ does not impact on the duties placed on the public body awarding a contract under the Equality Act. These are to eliminate discrimination and harassment and promote race, gender (including gender reassignment) and disability equality. This means paying due regard and assessing the equality impact of policies, procedures and practices, including identifying methods for mitigating any adverse impact. Workplace Reps should remember to always ask for an Equality Impact Assessment to be carried out when there are plans to privatise a service or department. This Assessment should be regularly reviewed, updated and amended as appropriate. Unite reps should visit the [Equality and Human Rights Commission website](#) for practical information on Public Sector Equality Duties.
- Where the ‘Two-tier Code’ has been incorporated into an individual contract between a public body and a contractor this remains the case – the withdrawal of the Code by the Cabinet Office does not interfere with that original contracting arrangement. However, Workplace Reps should be aware of contractors - and in some cases public bodies - who may wish to re-open contract negotiations prompted by the Cabinet Office actions. This should be resisted. Where negotiations do re-open there is a number of resources available making the argument that quality services need fairly paid staff, such as from the Association of Public Service Excellence (www.apse.org.uk) and the TUC (www.TUC.org.uk).
- The withdrawal of the ‘Two-tier Code’ by the Cabinet Office does not stop public bodies incorporating the clauses of the Code into individual contracts they enter into. Unite Reps should actively push for the text of what formed the Code – such as the paragraph quoted above – to be included in the criteria that public bodies will judge tenders by when they are looking to contract out services. Such provisions

² PRINCIPLES OF GOOD EMPLOYMENT PRACTICE A statement of principles that reflect good employment practice for Government, Contracting Authorities and Suppliers

³ Francis Maude, 13th December 2010, <http://www.cabinetoffice.gov.uk/news/two-tier-code-withdrawn>

should then be incorporated into the individual contract that will be awarded. The text of the 'Two Tier Code' is included at the end of this briefing.

- Using resources such as those from APSE and the TUC about the benefits to service provision and improving the quality of services from the fair and proper treatment of staff, Unite workplace reps can argue, and should push for, contract provisions including; trade union recognition and a commitment to partnership working, policies and actions to eliminate discrimination and promote equality and a stipulation about what will happen to staff and services if a contractor goes bust. Workplace Reps should also remember that the contract should also place on-going responsibilities on the public body awarding the contract to ensure compliance by the contractor with any clauses relating to pay and terms and conditions of employment. Such provisions arguably 'make real' some of the 'Principles' that have been issued by the Government.

'Two Tier Code': Code of Practice on workforce matters in public sector contracts

1. This document sets out an approach to workforce matters in public sector service contracts which involve a transfer of staff from the public sector organisation to the service provider, or in which staff originally transferred out from the public sector organisation as a result of an outsourcing are TUPE transferred to a new provider under a retender of a contract. This Code will form part of the service specification and conditions for all such contracts, except those where the Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts applies, or where other exemptions have been announced.

2. The Code recognises that there is no conflict between good employment practice, value for money and quality of service. On the contrary, quality and good value will not be provided by organisations who do not manage workforce issues well. The intention of the public sector organisation is therefore to select only those providers who offer staff a package of terms and conditions which will secure high quality service delivery throughout the life of the contract. These must be sufficient to recruit and motivate high quality staff to work on the contract and designed to prevent the emergence of a two-tier workforce', dividing transferees and new joiners working beside each other on the same contracts.

3. Service providers who intend to cut costs by driving down the terms and conditions for staff, whether for transferees or for new joiners taken on to work beside them, will not be selected to provide services for the public sector organisation. However, nothing in this Code should discourage public sector organisations or service providers from addressing productivity issues by working with their workforces in a positive manner to achieve continuous improvement in the services they deliver.

Treatment of transferees

4. In its contracting out of services, the public sector organisation will apply the principles set out in the Cabinet Office Statement of Practice on Staff Transfers in the Public Sector and the annex to it, A Fair Deal for Staff Pensions. The service provider will be required to demonstrate its support for these principles and its willingness to work with the public sector organisation fully to implement them.

5. The intention of the Statement is that staff will transfer and that TUPE should apply, and that in circumstances where TUPE does not apply in strict legal terms, the principles of TUPE should be followed and the staff involved should be treated no less favourably than had the Regulations applied.

6. The annex to the Statement requires the terms of a business transfer specifically to protect the pensions of transferees. Transferring staff should be offered membership of a pension scheme which is broadly comparable to the public service pension scheme which they are leaving.

Exemptions include:

- public corporations and trading funds,
- Independent Sector Treatment Centres,
- transfers where the Retention of Employment Model for NHS PFI contracts applies,
- higher and further education institutions and Academies.

Treatment of new joiners to an outsourced workforce

7. Where the service provider recruits new staff to work on a public service contract alongside staff transferred from the public sector organisation, it will offer employment on fair and reasonable terms and conditions which are, overall, no less favourable than those of transferred employees. The service provider will also offer reasonable pension arrangements (as described at paragraph 10 below).

8. The principle underpinning the provisions of paragraph 7 is to consider employees' terms and conditions (other than pensions arrangements which are dealt with in paragraph 10) in the round — as a 'package'.

This Code does not prevent service providers from offering new recruits a package of non-pension terms and conditions which differs from that of transferred staff, so long as the overall impact of the changes to this package meets the conditions in paragraph 7. The aim is to provide a flexible framework under which the provider can design a package best suited to the delivery of the service, but which will exclude changes which would undermine the integrated nature of the team or the quality of the workforce.

9. The service provider will consult representatives of a trade union where one is recognised, or other elected representatives of the employees where there is no recognised trade union, on the terms and conditions to be offered to such new recruits. (References to 'trade unions' throughout this code should be read to refer to other elected representatives of the employees where there is no recognised trade union.) The arrangements for consultation will involve a genuine dialogue. The precise nature of the arrangements for consultation is for agreement between the service provider and the recognised trade unions. The intention is that contractors and recognised trade unions should

be able to agree on a particular package of terms and conditions, in keeping with the terms of this Code, to be offered to new joiners.

Pension arrangements for new joiners to an outsourced workforce

10. The service provider will be required to offer new recruits taken on to work on the contract beside transferees one of the following pension provision arrangements:

- membership of a good quality employer pension scheme, either being a contracted out, final-salary based defined benefit scheme, or a defined contribution scheme. For defined contribution schemes the employer must match employee contributions up to six per cent, although either could pay more if they wished;
- a stakeholder pension scheme, under which the employer will match employee contributions up to six per cent, although either could pay more if they wished.

On a retender of a contract to which this Code applies the new service provider will be required to offer one of these pensions options to any staff who transfer to it and who had prior to the transfer a right under the Code to one of these pension options.

Monitoring arrangements

11. Throughout the length of the contract, the service provider will provide the public sector organisation with information as requested which is necessary to allow the public sector organisation to monitor compliance with the conditions set out in this Code. This information will include the terms and conditions for transferred staff and the terms and conditions for employees recruited to work on the contract after the transfer.

12. Such requests for information will be restricted to that required for the purpose of monitoring compliance, will be designed to place the minimum burden on the service provider commensurate with this, and will respect commercial confidentiality. The service provider and the public sector organisation will also support a review of the impact of the Code, drawn up in consultation with representatives of the public sector organisations, contractors, trade unions and will provide information as requested for this purpose. Such requests will follow the same principles of proportionality and confidentiality.

Enforcement

13. The public sector organisation will enforce the obligations on the service provider created under this Code. Employees and recognised trade unions should, in the first instance, seek to resolve any complaints they have about how the obligations under this Code are being met, directly with the service provider. Where it appears to the public sector organisation that the service provider is not meeting its obligations, or where an employee of the service provider or a recognised trade union writes to the authority to say that it has been unable to resolve a complaint directly with the service provider, the public sector organisation will first seek an explanation from the service provider. If the service provider's response satisfies the public sector organisation that the Code is being followed, the public sector organisation will inform any complainant of this. If the response does not satisfy the public sector organisation it will ask the service provider to take immediate action to remedy this. If, following such a request, the service provider still appears to the public sector organisation not to be complying with the Code, the public sector organisation will seek to enforce the terms of the contract, which will incorporate this Code. In addition, where a service provider has not complied with this Code, the public sector organisation will not be bound to consider that provider for future work.

14. The contract shall include a provision for resolving disputes about the application of this Code in a fast, efficient and cost-effective way as an alternative to litigation, and which is designed to achieve a resolution to which all the parties are committed. The service provider, public sector organisation and recognised trade unions or other staff representatives, shall all have access to this alternative dispute resolution' (ADR) process (Annex A to this Code sets out the ADR mechanism).

15. Alongside this Code, the appropriate Government Department will publish contact details for employees or trade unions to seek advice in cases where they consider that the public sector organisation has failed to meet its responsibilities under paragraph 13.

Sub-contractors

16. This Code sets out procedures for handling matters between the public sector organisation and a primary service provider. Where the primary service provider transfers staff originally in the employ of the public sector organisation to a subcontractor in consequence of the terms of the primary service provider's obligations to the public sector organisation, the primary service provider will be responsible for the observance of this Code by the sub-contractor.

Operation of the Code

17. Government departments will monitor the operation of the Code, following consultation with relevant employers and trade unions.

Principles of Good Employment Practice for Government, Contracting Authorities and Suppliers

The Coalition Government has committed to opening up government procurement and reducing costs. It has also set itself the aspiration that 25% of government contracts should be awarded to small and medium-sized businesses. Government understands that value for money means securing the best mix of quality and effectiveness for the least outlay. This applies to the whole lifetime of goods or services from purchase through to disposal. In support of its aspirations, Government has developed a statement of principles of good employment practice that will form part of good practice literature and be shared with contracting authorities and suppliers.

Government wants:

- employers of all sizes and from all sectors to have the freedom and flexibility to motivate and reward their workforce, to meet business needs.
- public, private, voluntary and community organisations to learn from each other and share best practice in the spirit of continuous improvement.
- employers to be aware of the best practice that fosters employee engagement, access to skills and development whilst securing quality outcomes in the provision of public services;

Six principles

This document is a statement of principles that reflect good employment practice. These principles are supported by Government and are voluntary.

1. Government as a good client

i. Through its commissioning, procurement standards and processes, central Government should encourage contracting authorities and suppliers to promote good workforce practices in the delivery of public services. Government will ensure that the workforce practices of the supplier are considered throughout the procurement process, where appropriate.

ii. Government will use outcome-based commissioning wherever possible; this is instead of prescribing how services are to be delivered. Using outcome-based commissioning will encourage more innovative approaches to the delivery of public services.

2. Training and skills

i. In letting and managing public contracts, the procurement process of contracting organisations will recognise the importance of basic skills such as literacy, numeracy and spoken English where these skills are relevant. These skills are often required in the delivery of public services, and enable the workforce to provide better quality services, particularly those in customer facing roles.

ii. Suppliers will be able to demonstrate that staff have appropriate training, qualifications and access to continuing professional development as befits their role; and that staff are supported to develop their skills and grow their experience in line with any future roles that maybe expected of them.

iii. Where there is a recognised trade union, suppliers will consult on workforce training and development issues.

3. A commitment to fair and reasonable terms and conditions

i. Where a supplier employs new entrants that sit alongside former public sector workers, new entrants should have fair and reasonable pay, terms and conditions. Suppliers should consult with their recognised trade unions on the terms and conditions to be offered to new entrants.

4. Equality

i. Contracting organisations will ensure that supplier policies and processes are entirely consistent with the responsibilities they have as employers under the Equality Act 2010. Government will ensure it delegates relevant legal obligations when suppliers are carrying out public functions.

ii. Government expects that suppliers will be able to demonstrate how working practices support their responsibilities as good employers.

5. Dispute resolution

i. All suppliers delivering public services should have regard to good industrial relations practice on dispute resolution. This includes treating employees fairly and ensuring compliance with the law on trade union membership.

ii. Suppliers will ensure that where there is a dispute, employees are aware of and have access to clear processes for dispute resolution. Government expects suppliers to consider the services of ACAS2 as an option that is explored when disputes have not been resolved by internal support systems and processes.

iii. Where an employee has a right to be represented by a trade union, the employer will work with the employee and recognised trade union representative in resolving any dispute.

6. Employee engagement

*i. The themes identified in **Drive for Change**³ place leadership, the design and delivery of service improvements, communications and a framework for staff engagement as vital components in ensuring and enhancing employee engagement.*

*ii. **The MacLeod Review**⁴ on employee engagement cited evidence of a positive correlation between an engaged workforce and improving performance. Building on the findings of the review, Government will encourage contractors to develop effective staff engagement strategies that enable people to be the best they can be at work.*

iii. Government recognises the premise that engagement between employee, employer and a recognised trade union where appropriate can be a key to unlocking productivity and creating a motivated workforce that feels respected, involved, heard, is well led and valued by those they work for and with.

Review

The impact of these principles on employment practice will be reviewed by the Public Services Forum in January 2012. The Forum will assess how the principles contribute to good employment practices in the delivery of contracted out services.