

Ending the Two-tier Workforce: a comprehensive solution?

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A relatively recent problem

Until 1982 there was no contract culture in our public services. There was a level playing field on investment with no “creative” off balance sheet incentives driving the process. In addition, the 1946 Fair Wages Resolution meant there were few opportunities to make savings by cutting the terms and conditions of staff. Although there was a statutory enforcement mechanism few cases were referred to the Central Arbitration Committee as the principle of the ‘going rate’ was widely accepted.

In 1983, to pave the way for the contracting out of public services to the private sector, International Labour Organisation Convention 94 was “denounced” by the Thatcher Government. This was followed by the ‘repeal’ of the Fair Wages Resolution first introduced in 1891, effectively ending almost a century of fair wages protection in public sector contracting.

1983 saw the first major privatisation initiative when Health Minister Gerard Vaughan issued circular HC(18)83 instructing Health Authorities to put catering, cleaning and laundry services out to competitive tender. Privatisation began in the local government sector with the introduction of Compulsory Competitive Tendering (CCT) in highways, but this was extended massively for ‘manual’ services in 1988 and for ‘white collar’ services two years later. There were also contracting out initiatives in other parts of the public sector.

Generally there was no floor on terms and conditions and the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) were not thought to apply to public services until the early 1990s, when trade unions won a series of TUPE employment tribunal cases. These legal victories strengthened the rights of workers to have their pay and conditions – but not pensions – protected on transfer following contracting-out.

The trade union focus in the 1980s was to campaign against contracting out and to publicise contractors’ failures to deliver efficient high quality services.

In the 1990s the focus for the unions campaigning shifted. The trade unions' priorities were:

- Continuing campaigns against contracting-out and exposing private sector failures
- Protecting transferred staff through TUPE, with a series of high profile cases
- Securing Labour Party support for a policy change once elected

Post-1997 Labour Government

In 1997 a review of market testing was announced by the then Secretary of State for Health, Frank Dobson MP. The review was in fact set in train by the previous Conservative Government but until Dobson's announcement was not widely known.

In 1999, following a number of pilot schemes, Best Value replaced CCT in Local Government in England and Wales

Both of these initiatives were partly in response to private sector concerns about the negative impact 'compulsion' had on the process of tendering and the awarding of contracts. Private contractors claimed they often found themselves chasing contracts and investing significant bid costs where the council or trust were committed to in-house services. Many argued that a voluntary approach would be less wasteful and enable the private sector to be more focussed on winnable business.

Changes were also made to Part 2 of the 1988 Local Government Act in 2001 enabling councils to take workforce matters into consideration when awarding contracts.

And other reforms were introduced. The Treasury policy *Staff Transfers from Central Government: A Fair Deal for Staff Pensions* (1999) strengthened the pension rights of transferred staff, as did the Cabinet Office's *Staff Transfers in the Public Sector: Statement of Practice* (2000). This was designed to end costly litigation and bring more certainty to contracting out in part by requiring government departments to assume – in all but exceptional circumstances - that TUPE would apply when contracting out services. Again this was in part a response to private sector demands for greater certainty of its obligations. Costly litigation with unpredictable outcomes was bad for business.

However, in the main these changes were responses to growing union hostility towards privatisation and PFI, and disillusionment with Labour's 'reform agenda'

Two-tier workforce campaign

It wasn't until 2000 that ending the two-tier workforce became an explicit UNISON objective. It emerged as a key issue for a number of reasons. These included:

- Hostility and disappointment over Labour's PPP agenda and the expansion of PFI and contracting-out.
- Irrefutable evidence of the existence of a two-tier workforce, with the lowest paid and women workers suffering most.
- Impatience and disillusionment with the voluntary approach to workforce issues such as the changes to part 2 of the 1988 Local Government Act.
- A recognition that simply enabling a fair wages approach wouldn't work when faced with the vested interests of contractors, who rely on cuts in pay and conditions, and councils and other public authorities who demand revenue savings.
- The perceived need for a more pragmatic, twin track approach in the face of a growth in private sector involvement and relatively low union membership density, and significant recruitment potential in parts of the private sector.

UNISON's campaign focussed on:

- Challenging the incorrect perception that TUPE had solved the problem and that cuts in pay and conditions were no longer widespread and that there existed a level playing field between private and public sectors.
- The track record of the private sector.
- Demonstrating a link between best employment and best value.
- Challenging the lack of evidence that informed government policy.

A review of the research revealed little. The IPPR Commission on Public Private Partnerships exposed the dearth of evidence on this hugely important issue. In 1999 UNISON presented its first report on Best Value and the two-tier workforce in local

government to the IPPR Commission. This included the results of a UNISON branch survey later supplemented by a systematic review of all the evidence it had gathered.

Gender re-emerged as an issue. It was clear that there had been no policy appraisal of the gender impact of PPP, PFI, Best Value or other policies that have led to the contracting out of thousands of jobs held by women. This was despite established civil service mechanisms and earlier Equal Opportunities Commission evidence of the adverse impact of contracting-out on women.

The IPPR report bolstered UNISON's case. Its findings came as no surprise to the unions and there was no counter-evidence of any weight from the private sector.

In response to growing concerns from the unions the then Chief Secretary to the Treasury Andrew Smith MP ordered the Office of Government Commerce to carry out research into the existence of a two-tier workforce to establish the facts. As far as we know no study was ever carried out, and certainly none was ever published.

Pressure by UNISON and other unions led to a commitment by the Prime Minister to end the two-tier workforce. Stephen Byers MP, then Secretary of State at the Department for Transport, Local Government and the Regions, said that if there was evidence of a two-tier workforce he would take steps to end it. He subsequently set up the Best Value Review to look into the matter with representatives from the CBI, TUC unions, the Local Government Association, the voluntary sector, and the Audit Commission.

Government clearly aimed to ameliorate growing hostility to the reform agenda in part by meeting union concerns about the two-tier workforce.

Best Value Review

Whilst those involved in the Best Value Review failed to agree on measures to tackle the two-tier workforce, a range of important process issues were agreed.

But the members of the Review struggled to find a consensus on the critical two-tier issue. The CBI was reluctant to acknowledge the existence of a two-tier workforce, but offered no serious challenge to the evidence submitted by the TUC unions. The CBI argued for the introduction of a voluntary code, maximum flexibility and an unworkable solution – an obligation to offer new starters 'fair terms and conditions'

The LGA was naturally concerned about the potential costs of any measures, but also whether ending the two-tier workforce would tackle the gender pay gap, a point dealt with later.

The TUC unions pressed for a statutory and enforceable scheme, and a workable definition that would end the two-tier workforce.

The lack of progress and failure to agree was reported to Byers who proposed a Code for consultation. It failed UNISON's test on three counts:

- First it proposed pay and conditions for new starters that were "overall broadly comparable"
- It proposed as a minimum a private / stakeholder pension for new starters with a 6 per cent matching employer contribution
- And it proposed a role for the Audit Commission in monitoring compliance, but no arbitration clause. Councils would effectively control the outcome of any disagreement over compliance.

Two of the three concerns were addressed by the Government following consultation. It proposed an independent Alternative Dispute Resolution mechanism that would bind all the parties if there was a dispute. And it agreed that new starters would be entitled to pay and conditions that were "overall no less favourable" than that for TUPE transferred staff.

The Code applies to all contracts advertised by local authorities in England after 13 March 2003

Is the local government scheme a model?

UNISON is committed to the roll-out of the Best Value Code of Practice to other parts of the public sector. At present it covers councils in England, and it will be extended to other Best Value authorities.

The Welsh Assembly has adopted its own very similar version of the Code which is operative for all new council contracts advertised after 2 April 2003.

It doesn't apply in Scotland but the adoption of a Code is under active consideration and we expect something similar to be introduced. In Scotland a PPP protocol was implemented in 2002. This goes further for PFI type contracts in providing new starters with membership of a broadly comparable final salary pension scheme

Some have suggested that the governments of Wales and Scotland are keen to go further, faster than the English Code.

But the Code has weaknesses.

Its scope is limited. It aims to end the two-tier workforce but does not apply to other forms of contracting that drive down pay and conditions. The Code only applies when local authorities are contracting out services and staff. So it does not apply if council staff are not transferred to contractors, for example through the use of agency workers or spot contracts. Yet these workers are doing local authority jobs and providing local services.

As expected a small number of councils are exploring avoidance opportunities.

And the pension arrangements are unacceptable. The defined benefit / final salary option in the Code is permissive. And the Local Government Pension Scheme admission arrangements, that allow contractors to join for their staff working on council contracts, are seriously under-utilised.

Cuts in pension schemes represent a major transfer of wealth from wages to profits and have long-term implications for both workers and government spending.

Making it work

Despite any shortcomings UNISON is committed to making the new Code work and making full use of the monitoring and review mechanisms agreed to secure the intended outcomes and to make the case for improvements where appropriate. Monitoring has been problematic elsewhere so we need to put effective arrangements in place.

Dialogue with Government on wider roll-out is at an early stage, and there are mixed political messages. Those in Government advocating delay must be made to realise

that any decision not to roll out the code to other parts of the public sector is politically unsustainable.

Some hope that the Code and wider roll-out will end the controversy created by the Government's promotion of greater private sector involvement in the delivery of public services. Of course it will have an impact on the debate. The way contracting out has been used to drive down pay and conditions has been at the heart of our campaigning.

But UNISON's twin-track approach will continue. The private sector's track record will remain under the spotlight. There is growing evidence of poor value for money, in-built inefficiencies, conflicts of interest, poor accountability, an absence of competition and the emergence of oligopolies. For UNISON the wider public interest has always been central to our campaigning in this critical area of public policy

The Code should of course strengthen relationships between the public sector unions and the private companies. Dialogue with the major national contractors has continued with a flurry of national agreements expected to be signed. But it is at the local level where the real implementation challenge lies.

For UNISON the critical challenge over the coming months will be:

- To use the Code and statutory guidance on Best Value to pursue in-house options as part of Best Value reviews. The headlines have been grabbed by the new Code and the revised Best Value Guidance has been overlooked. The combination of a level playing field on pay and conditions, with a new statutory duty to involve staff and unions more in Best Value and throughout the procurement process should help make Best Value reviews more meaningful. This means that councils must provide information, involve unions at the option appraisal stage, and take proper account of the views of the workforce and their representatives in the decision making process.

Previous exhortations and non-statutory guidance failed to ensure proper involvement. Evidence shows that employee and trade union involvement is a critical success factor in delivering change and improvement.

- To publicise and educate local authority managers and councillors to use the Code and the new duty to consult. A recent UNISON survey found that 40 per cent of councillors and council officers didn't know what the Code required councils to do.

- The establishment of effective trade union recognition arrangements. Those companies that agree effective procedures, put in place formal mechanisms for negotiation and representation and help build trade union capacity through effective facilities will be the most successful. The Code envisages a central and on-going role for trade unions at local level.
- To ensure compliance with the requirement to offer new starters 'overall no less favourable' terms and conditions and a pensions package. Of course a trade union objective is to negotiate the same terms and conditions for new starters as apply to TUPE transferees. That is also an objective of some contractors. It is the most practical, sensible and efficient way forward.

Many misconceptions exist about the flexibility of existing pay and grading arrangements in parts of the public sector. The Local Authority National Joint Council (NJC) single status agreement provides a flexible framework. Benefits include an equal-pay-proof Job Evaluation scheme; national pay spine with pay lines agreed locally; flexibility over a range of benefits, but applied within a rational and consistent framework.

Similar pay and grading arrangements are being developed elsewhere – a far cry from the lack of transparency that characterises much of the private sector. One thing the Code will challenge is the lack of transparency and objectivity in many private company pay structures.

So in summary the Code poses some big challenges. Many diehards in the CBI and other employer organisations lobbied hard for the status quo and are still trying to undermine the Code. The private companies themselves are likely to be more pragmatic. They understand the need to move on, and respond positively, and to show a commitment to implement the spirit and intent of the Code. And to recognise the realities of the new situation through union recognition agreements, and the development of effective consultation and bargaining structures and processes.

For too long the rhetoric of Government and employers about fair employment has not reflected the reality. The Code will challenge and help change all that.