

Code of Practice

TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981 AND 2006

Workforce matters in public sector service 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,¹

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 workforce², 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.

¹ 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.

Cabinet Office

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ANNEXE A

Code of Practice on Workforce Matters: Alternative Dispute Resolution Procedure

I. Introduction

This sets out a procedure for resolving disputes arising from the application of the Code of Practice on Workforce Matters. The procedure should be a last resort and all parties will make their best efforts to resolve problems by agreement. The ADR should be fast, efficient and cost-effective.

2. The need to exhaust local procedures

The parties must exhaust all normal local procedures as required by paragraph 9 and paragraph 13 of the Code before invoking the Alternative Dispute Resolution procedure (ADR) provided for in paragraph 14.

3. Who is responsible for resolving disputes?

The ADR procedure will be under the supervision of an independent person appointed from an approved list supplied by ACAS. If the parties so agree, they may appoint two “wing members” with an employer and trade union background to assist the independent person.

4. The dispute resolution process

Disputes will be resolved using the following three-stage procedure.

Stage 1: Initial reference to the independent person.

The independent person will be invited to answer three questions:

- (i) Is this a dispute about the application of the Code?
If the answer is no, the matter can proceed no further. If yes, then the independent person will move to question (ii).
- (ii) Have the parties exhausted local procedures?
If the answer is no, then the parties will be invited to make further local efforts to resolve the dispute. If yes, then the independent person will conduct an independent assessment, by answering question (i) and giving reasons for the answer.
- (iii) Do the terms and conditions of employment on offer to new employees comply with the Code?
If the answer is yes, then the matter is deemed to be concluded and the contractor can continue to offer the same package of conditions to new employees. If the answer is no, then the dispute will proceed to Stage 2.

Time limit: Twenty working days.

Stage 2: Discussions with a view to reaching an agreement on compliant terms and conditions

Stage 2 begins with the parties being invited to seek to resolve the matter through further discussions.

The independent person will make themselves available to the parties to facilitate the process. The parties also have the option of establishing other arrangements for mediation.

If the parties can reach an agreement consistent with the Code, then the matter is closed and the new package of conditions of employment will be applied both to new starters and to those employed during the dispute.

If no agreement can be reached within the allotted time, then the dispute will proceed to Stage 3.

Time limit: Ten working days, with the possibility that this might be extended by the agreement of the parties and with the consent of the independent person.

ANNEXE A

Stage 3: Final Reference to the Independent Person

The independent person invites the parties to make final submissions, If the independent person then believes it would be worthwhile, the parties may be given a short period of further discussion. If there is no value in giving the parties more time – or if during any discussion the parties were unable to agree on how to bring the matter to a successful conclusion – then the independent person will proceed to a final binding arbitration. Having heard the evidence and reached a conclusion the independent person will impose a revised package of terms and conditions applicable to each of the affected employees.

Time limit: Ten working days

Code of practice on workforce matters in public sector service contracts

Questions and answers

A. SCOPE

Q. Does the Code cover all public sector service contracts?

- A. The Code applies to public sector service contracts (subject to the exemptions listed below) which involve
- a transfer of staff from the public sector authority to the service provider, or in which
 - staff originally transferred out from the public authority as a result of an outsourcing are TUPE transferred to a new provider under a retender of a contract.

Background: Exemptions include:

- public corporations and trading funds (as it could limit the flexibility that these commercially driven organisations require to operate successfully in a competitive market);
- Independent Sector Treatment Centres (as they represent a complete transfer of function to the independent sector and are unlikely to receive TUPE transferred Nt-IS staff).
- NHS PFI contracts (as they will continue to use the Retention of Employment model recently agreed with the NHS Trades Unions).
- HE and FE institutions (as they are independent and autonomous organisations:
- employers and unions will be discussing application of the code to these sectors).
- Academies (as independent schools but staff transferring from predecessor schools will be protected by TUPE.

Q. What is the effect of the Code?

A. The Code requires that where a service provider recruits new staff to work on a public sector service contract alongside staff transferred from the public authority, 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.

The Code requires one of the following pension 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
- a stakeholder pension scheme

Background: The Code of Practice on Workforce Matters in Local Authority Service Contracts additionally offers membership of the local government pension scheme as one of the pension provision arrangements that a service provider is required to provide.

For the wider code, only two options – either membership of a good quality employer pension scheme, or a stakeholder pension as set out in the Code – are offered.

Q What is covered by the Code - pay, pension, holidays, sick pay?

A. The requirement for overall no less favourable treatment in the Code covers all pay and non-pay terms and conditions, excluding pensions. There are separate provision for pensions (see above).

Q. What date does the Code apply from?

A. The Code applies to public sector service contracts from the day of the announcement, 18 March 2005. The Code will apply to new contracts, including projects in procurement up to the Invitation to Negotiate stage, from the date of the Government's announcement. It will not apply retrospectively to existing contracts. The proposed roll out of the Code that already applies to local authority service contracts in England has long been in prospect and the Government sees no reason why the wider Code should not be applied immediately, following consultation with both the TUC and CBI.

Background: The Code of Practice on Workforce Matters in Local Authority Contracts, which applied to local authorities in England applied to contracts, which were first advertised following publication of the Code in statutory guidance on 13 March 2004. Subsequently the Code has been issued to all best value authorities.

Q. Are public sector authorities bound to follow apply the Code of Practice?

A. The Code sets out a framework to be followed by public sector organisations to implement the Government's policy on the treatment of new joiners to an outsourced workforce. It applies directly to central Government Departments, agencies, maintained schools and the NHS. The Code will form part of the service specification and conditions for all public sector service contracts, except those where the Best Value Code of Practice on Workforce Matters in Local Authority Service Contracts already applies, or where other exemptions have been announced.

Background: The Code of Practice on Workforce Matters in Local Authority Contracts which applied to local authorities in England is statutory guidance. The BV Code does not apply automatically but each authority must have regard to the Secretary of State's view that a 'two tier work force' does not achieve 'best value'. Ultimately whether or not the Code should apply, in a particular case, is a matter for the local authority to decide having had regard to the guidance.

Q. Are all staff working on existing contracts required to be given 'no less favourable' terms under the Code?

A. No. The Code does not envisage that existing staff working on the contract should have terms and conditions adjusted so that they are, overall, no less favourable than those of transferred employees. Nor, on retender, does it require existing staff to be given no less favourable terms than TUPE protected colleagues. The Code is concerned with 'new joiners' to the outsourced workforce on a public sector service contract.

B. RETENDERING CONTRACTS

Q Does the Code apply to retenders?

A Yes. The Code applies both to 'new' contracts which involve a transfer of staff from the public sector authority to the service provider and where staff originally transferred out from the public authority as a result of an outsourcing are TUPE transferred to a new provider under a retender of a contract.

Q Does the Code apply to work forces that have transferred out prior to the introduction of the Code?

A Yes. The Code will apply where staff, originally transferred out from the public authority as a result of an outsourcing, are TUPE transferred to a new provider under a retender of a contract. It will apply to 'new joiners' to that outsourced workforce.

Q Would the Code still apply to a retender situation if there are no longer ex public sector staff employed?

A No. The Code only applies to a retender situation where at least some of the original public authority transferees remain employed.

Q On retender, are all staff working on the contract required to be given 'no less favourable' terms under the Code?

A. No. The Code does not envisage that on retender existing staff should be given no less favourable terms than ex public sector transferred staff. The Code is concerned with 'new joiners' to the outsourced workforce on the retendered contract (where the Code is applying for the first time).

Illustration

On retender, TUPE transferred staff may comprise both staff that originally transferred out from the public authority and staff that have been recruited into the workforce by the outgoing contractor. The code does not apply to these 2 latter groups. It applies only to new joiners to the workforce for that contract from the date the contract is let.

Q What happens if on a retendering very few ex public sector staff remain in the contractor's workforce?

A. On a strict reading, the Code would continue to apply so long as there are in the workforce any staff that originally transferred out from the public authority as a result of an outsourcing under TUPE. However, the intention behind the Code is to end a 'two-tier workforce'. It would appear contrary to this intention if, at a retender, new staff were recruited using a very small number of ex-public sector staff as the comparator, rather than on the conditions enjoyed by the large majority of the workforce. In such circumstances, contracting bodies would be expected to apply the guidance in a common-sense way that secured the intention behind it.

Q What are the 'benchmark' terms and conditions? Do these relate to the terms and conditions of equivalent staff still employed by the public sector client?

A. The comparator is the terms and conditions of the TUPE transferred staff, not the current terms and conditions in the organisation of origin.

Q Does the Code apply on retender to situations where the ex-public authority staff's terms and condition have been harmonised with that of the contractors own staff?

A. Yes. While one would expect that contractors would seek over time to harmonise terms and conditions and would seek to hold discussions with their workforces to achieve their ends, the difficulty remains that a contractor may have harmonised the terms and conditions of transferred staff and his existing employees, but the position of new recruits remains uncertain unless the Code applies to them.

Q What happens in a retendering scenario where, whilst, on the original outsourcing of the contract public authority employees transferred to the contractor, at the re-tendering stage they are still in the workforce, but no longer on public authority terms and conditions?

A. At retendering the relevant terms and conditions are the current terms and conditions of staff that originally transferred from the public authority ie this is the 'benchmark'. If the terms and conditions of employees originally transferred from the public authority have become harmonised with the rest of the workforce over the period of the original contract then, on a retender and a transfer to a new contractor, new joiners to this transferred workforce should be covered by the Code and get no less favourable terms than the transferred workforce. The harmonised terms and conditions would be the 'benchmark' terms and conditions against which an incoming contractor could identify a package of 'no less favourable' terms and conditions.

Q The 'trigger' for application of the Code is a TUPE transfer. Does the Code apply when there is a retender followed by an award to an existing provider ie where there is no TUPE transfer?

A. Strictly speaking the Code does not apply. However, in such circumstances, given that the policy behind the Code is to prevent the development of a two tier workforce in public authority contracting, it would seem consistent to the achievement of that policy for the Code to apply. The Government's view is that there should not be a Two Tier workforce when a service provider recruits new staff to work alongside staff transferred from a public authority. It would be out of line with that policy for the Code not to apply in these circumstances.

ADDITIONAL Q & A ON RETENDERING

Q. What is the position of 'new joiners' within the first contract if that contract is terminated and the work given to another contractor?

A The existing terms and conditions of staff should be protected by TUPE transfer to the new contractor. Those staff who originally transferred from the public authority should receive a 'broadly comparable' pension to the public pension scheme they left. 'New joiners' who transfer should be offered one of the pension options in the Code if they had a right to one of these pension options under the previous contract.

In detail:

Terms and Conditions

- In relation to terms and conditions of existing staff, for the retender of a first round contract (where staff first transferred from the public sector), retendering would mean that, except in exceptional circumstances, staff working on the contract should transfer and TUPE should apply. This would protect each employees existing terms and conditions.

Pensions

Retender of a first round contract to which the Code applied

- Staff who originally transferred from the public authority should receive a pension which would at least be 'broadly comparable' with the public pension scheme they were in originally.
- New joiners' should have been given one of the pension provision arrangements laid down in the Code (viz a good quality employer pension scheme or an employer contribution to a stakeholder pension matching those of the employee up to six per cent).
- On a retender of a contract to which the 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. This will not necessarily be the same option as provided by the first contractor (ie these transferees would be treated identically as 'new joiners' to the new contract). (see paragraph 10)

Retender of a first round contract to which the Code did not apply

- Staff who originally transferred from the public authority should receive a pension which would at least be 'broadly comparable' with the public pension scheme they staff were in originally.
- Pensions of staff who did not originally work for the public authority are not protected. However, from April this year DWP legislation will provide limited pension cover for people involved in a TUPE transfer. This provides a minimum guarantee on pensions.
- 'New joiners' to the retendered contract, after it has been awarded, would be covered by the pension provision in the Code.

C. RENEWING OR EXTENDING CONTRACTS

Q Does the Code apply if a contract is renewed or extended?

A If an existing contract is being renewed or extended (using a provision for such that is built into the original contract) and this does not amount to a new contract, then strictly speaking the Code does not apply. However, in such circumstances, given that the policy behind the Code is to prevent the development of a two tier workforce in public authorities it would seem appropriate for some discussion to take place with the contractor about the terms and conditions of new joiners in the contracted out workforce.

But if the contract is in fact a new contract arrived at through renegotiation and re-awarding then, regardless of whether there was open competition or a change of provider, the Code would apply.

E. TREATMENT OF CONTRACTOR'S EXISTING STAFF

Q. If a contractor moves existing employees on to the workforce for a public sector service contract does the Code apply?

A. No. The Code does not envisage that existing staff who are asked to work on the contract should have terms and conditions adjusted so that they are, overall, no less favourable than those of transferred employees.

The Code applies only to 'new joiners' (ie new recruits) to the workforce for that contract from the date the contract is let. It does not apply to a contractor's 'historic' workforce.

F. APPLICATION OF THE CODE IN SPECIFIC SITUATIONS

Q How does the Code apply if the proportion of ex civil servants is small and there is a mobile professional type workforce that does not stay on the contract year in year out but moves from contract to contract within the contractor?

The Code forms part of the service specification and conditions for the specific contract.

As a rule of thumb, therefore, although this sort of detail is not covered in the Code, we should have thought that the Code applies to new joiners who are working wholly or mainly on a public sector service contract alongside transferred staff also working on that contract.

Where there is not that type of dedicated arrangement, it seems unlikely that the Code would apply.

G MONITORING IMPACT OF CODE

Q Will the impact of the Code be monitored?

A Yes. Departments will put in place arrangements to monitor and evaluate the impact of the Code. Departments will identify a named person who can respond to concerns raised over compliance. Key evaluation issues will be addressed in the various sectors.

Cabinet Office

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