

SCHEDULE

Regulation 2

Code of Practice on 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 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.

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).

(1) Exemptions include: public corporations and trading funds, Independent Sector Treatment Centres, transfers where the Retention of Employment Model for NHSPFI contracts applies, higher and further education institutions and Academies.

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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:

- (a) 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 6%, although either could pay more if they wished;
- (b) a stakeholder pension scheme, under which the employer will match employee contributions up to 6%, 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 sub-contractor 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.

Code of Practice on Workforce Matters: Alternative Dispute Resolution Procedure

Introduction

1. 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.

The need to exhaust local procedures

2. 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.

Who is responsible for resolving disputes?

3. 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.

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The dispute resolution process

4. 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 (iii) 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.

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.