

The two-tier workforce: an ippr briefing



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1. What is the two-tier workforce?

A two-tier workforce is created when workers transfer from the public sector to the private sector and are joined by new recruits with different pay and conditions. This may happen in outsourcing contracts, in public private partnerships (PPPs) such as the private finance initiative (PFI) or after privatisation.

Controversially, some argue that pay and conditions for new recruits are frequently worse than those of their transferred colleagues, an argument that some private sector employers contest. Having workers performing the same tasks but being treated differently is alleged to be bad for morale, for the quality of services and may drive down the wages of workers who are already low-paid.

Business has strongly disputed these allegations, arguing that different pay and conditions for new recruits need not mean worse pay and conditions. Employer's organisations also make a case for flexible management practices, including the freedom to alter pay and conditions, in order to deploy staff more efficiently than the public sector and offer improved value for money. They argue also that the private sector may offer advantages such as better promotion prospects than the public sector or better training opportunities for staff.

This has become a sensitive issue for this government. Many have ideological concerns about private sector involvement in public services. This issue blends those concerns with practical issues: critics argue that the private sector can only offer value for money services by cutting worker's pay and conditions.

2. What evidence is there?

There is little evidence about the extent of the two-tier workforce. Most of the evidence is simply claim and counterclaim from trade unions or the private sector. However, the few available studies suggest that:

- There is a serious issue to be tackled: some workers seem to be worse off but it is not clear how many
- Women seem to be more adversely affected than men
- Low-paid workers such as cleaners seem to be more seriously affected than skilled professionals such as IT staff

3. Why does this happen?

This situation is made possible because of the differing rights given to staff who transfer and to new recruits. Also, involving the private sector in delivering public services creates a number of new pressures. The main new pressures on the workforce are the need to show value for money in a competitive tendering process and the need for flexibility in the deployment of staff.

How employees' rights differ

Workers transferring from the public sector have their pay and conditions protected by regulations known as TUPE (Transfer of Undertakings, Protection of Employment Regulations, 1981.) Private sector employers should not be able to alter their pay or change their conditions of employment without their agreement. Although TUPE does not cover pensions, guidance from government now ensures that transferees are either allowed to stay in state pension schemes or are offered an alternative broadly comparable pension. In contrast new recruits traditionally have had no such protection: their pay and conditions have

usually been a matter for their private sector employer. They also have not had the same pension rights as transferees and it is argued that this leads to poorer pensions.

Value for money

The private sector is under pressure to deliver services that are a better combination of cost and quality than traditional public services. Firms also usually need to win a competitive tendering process. These pressures create an incentive to cut pay and conditions for new recruits in order to make savings and win business. This should be unnecessary: PPP schemes offer a variety of routes to improved value for money without having to resort to transferring value away from low-paid public service staff.

The potential to offer value for money through reorganising staff also varies from contract to contract. Where there are few staff performing manual work, such as caretakers in a PFI school, there are likely to be fewer opportunities to use new management techniques to make large savings. In contrast, with a large, staff intensive service delivery contract such as an information technology PPP, the potential for savings is likely to be larger.

Flexibility

Private sector employers need the freedom to manage employees in a different manner to the public sector. If this is not possible then it is less worthwhile to engage the private sector in delivering public services. Some flexibility in working practices or staff deployment may be achieved, though, without changes in pay and conditions. Where changes in pay and conditions are necessary, to introduce shift work or to remove counterproductive sick pay arrangements, pay and conditions can be treated as a “package.” This allows pay and conditions to be cut in one area provided that losses are balanced in another, the intention being that employees should not lose out overall.

4. Potential Solutions

Government signalled its intention to end the two-tier workforce in local government at the Labour party conference in 2001, a commitment implicitly extended by Tony Blair to the whole public sector the following year. During this time different solutions have been proposed to the same problem across government departments and in the devolved administrations.

Local Government

The solution negotiated in local government offers one way to resolve the issue. This solution was slowly teased out after Labour’s 2001 party conference commitment to end the two-tier workforce. The resulting Code of Practice on Workforce Matters was agreed in February 2003. Under the code:

- Pay and conditions for new recruits should be “overall, no less favourable” than those of former public sector staff. They will be treated as a package
- New recruits are offered membership of the local government pension scheme or a broadly comparable equivalent
- It includes a binding dispute resolution system. If fair terms and conditions are not offered then problems can be quickly resolved, without going through the courts
- It is a universal solution: it applies equally to outsourcing contracts as well as PPPs

NHS

The NHS has developed a system called retention of employment (RoE) for use in new PFI hospitals. Under RoE staff are retained as NHS employees but are seconded to work for the private sector in the new PFI hospital. New staff are recruited by the NHS and seconded also. Staff:

- Keep NHS pay, conditions and pension rights
- Remain employed by the NHS, important both for maintenance of employment rights and also the psychological benefit of remaining within the NHS team

But the system is highly complex. Some argue that it cannot work in practice because the system through which private sector workers will manage public sector staff is too

complicated. There are also unexplored legal issues with RoE, which could yet undermine it. These may only emerge once it has been put into practice. Equally importantly RoE does not protect all staff affected by PFI, only five set groups: domestics, security staff, porters, caterers and laundry workers, nor does it cover staff in non-PFI outsourcing contracts.

Scotland

The Scottish executive negotiated a deal with the Scottish Trade Union Congress. This provided for no less favourable pay and conditions for new recruits in PPP deals. It is similar to the deal struck in English local government but it does not place the same emphasis on the need for flexibility in pay and conditions. It also only applies to PPP deals, not to contracting out or other forms of private involvement in public service delivery.

TUPE Plus

TUPE plus is the colloquial term for an augmented form of TUPE that applies also to new recruits to an outsourced workforce. There are a few formal boundaries for TUPE plus agreements but often they share common characteristics, set out below. TUPE plus is being applied in a small number of projects where there are very few staff who transfer to the private sector and few new recruits, typically in PFI schools. Under TUPE Plus new recruits:

- Have the same pay and conditions as transferred staff, pay and conditions are not treated as a package
- May have the same pension provision as transferred staff
- All staff have the right to the pay increases they would receive if they were working directly for the public sector
- But there is less flexibility than in other approaches

Fair Wages Resolution

Several unions including UNISON and the GMB have proposed a new fair wages resolution as a solution to the two-tier workforce. A fair wages resolution could set national collectively bargained rates of pay for different types of work. These would apply to the public sector and to private sector contractors working with government. Similar resolutions existed in Britain between 1891 and 1983. Its reintroduction would advance union bargaining power considerably but it conflicts with the Government's desire for flexible labour markets.

5. A Way Forward?

We need a solution that balances the need to protect low-paid workers against the need of employers to sensibly manage and deploy staff. There is no need for a one size fits all solution to be applied across government but if different solutions are implemented they must all ensure equal outcomes. It is illogical and unfair for workers in local government to have better protection than those who work for central government. A good deal should:

- End the incentive for firms to win contracts by giving new recruits worse pay and conditions than transferred staff
- Balance the need to protect pay and conditions with the need for the private sector to deploy staff sensibly
- Ensure "overall, no less favourable" pay and conditions for new employees, but treat pay and conditions as a package
- Remove over-reliance on case law: TUPE is now well understood and accepted but it took years of difficult legal judgements to become fully effective. A good deal should be workable from the start
- Be comprehensive: it needs to cover PPPs, outsourcing contracts and all types of staff
- Be simple: a system that is transparent and easy to understand is more promising than a complicated model such as Retention of Employment. Staff and employers need to know where they stand.

Currently the deal struck in local government seems to offer a good balance between the rights of workers and the needs of employers. Government should use the local government agreement and the above criteria as a basis to resolve the two-tier workforce across the rest of Government.