Transformational Governance, Market Making, and Employment Rights: Current Developments in Britain’s ‘Public Services Industry’

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Overview
This paper reviews the development of employee rights and voice in the context of decisive moves towards multidimensional market provision in Britain’s public services. It synthesises public policy documentation and analysis to provide an overview of the increasing diversity of public service provision. Attention then turns to the employment rights available to workers subject to these reforms. Interview, documentary and survey data accrued from case study research in Unison (Britain’s largest public sector trade union) is explored to evaluate the impact in practice of developing employment protections.

Transformational Governance
Successive governments have determinedly increased the opportunities for private sector and voluntary sector participation in public services. Policy under Conservative administrations delivered important and defined breaches in public provision, through mandatory requirements to market test specified functions to particular criteria. Recent government policy has widened these inflows considerably, introducing multidimensionality to market reform. Though they are formally less prescriptive, current requirements significantly expand the range and reach of market mechanisms and the pressures on public organisations to engage with them.

Longstanding objectives for public service reform were asserted with increasing frequency and coherence from 2006. Government research from this point reviewed existing engagement with the private sector and identified obstacles to its further development. Following the Comprehensive Spending Review 2007, these policy imperatives were reinforced by financial pressures as authorities were pressed to find annual ‘efficiency’ savings of 2.5%. High profile reports proffered possible routes, through ‘shared services’ platforms for example, where public authorities pool parts of their administration in joint back-office functions. More recently, references to an emerging ‘public services industry,’ comprising a diverse range of independent providers alongside direct public authority provision, has been taken up by government from employers.

The consensus is that the incidence of public sector outsourcing, already significant by international standards, is set to escalate. Precise measures of this activity are impossible to find. Some estimates suggest that private sector provision of services already accounts for one third of total public expenditure (excluding purchase of goods) but this varies enormously by sector. Around one third of ‘soft facilities management’ service in the NHS is now delivered by the private sector. Expanding demand for home and residential care is being met overwhelmingly by the independent sector; in the early 1990s it provided just 2% of commissioned care hours, a figure which now stands at 75%.

Contested Markets, Tested Employment Rights
Innovation in employment rights for workers subject to transfer has been extensive in recent years. Unions have used the platform of partnership offered by Labour governments to push for the extension of standards in contracted services. Several notable concessions have resulted, offered in part at least to facilitate the further development of market reform. Significant weaknesses remain, however, stemming from the fragmented form in which they have been enacted and the consequences of this for agency in contract settings, that is the likelihood that formal rights will be enforced in practice.
Form

There is no blanket protection for workers facing employment transfers. In large parts of Europe and the USA, fair employment mechanisms ensure that contractors delivering goods and services for public authorities observe the terms and conditions of employment prevailing there. Such protection was bestowed in the UK by the Fair Wages Resolution (1946) but this was ‘denounced’ by the Conservative government in 1983 and has never been reinstated.

Instead, government has steered a course between the demands of employers and those of the union movement and provided a patchwork of protections, introduced at different times to benefit different workers. This has six key elements: Transfer of Undertakings (Protection of Employment) Regulations (2006) (TUPE); Code of Practice on Workforce Matters in Local Authority Contracts (2003)(the ‘Best Value Code’); Code of Practice on Workforce Matters (2005) (the ‘Two Tier Code’); the Retention of Employment Model (RoE); the NHS and Contractors Joint Statement on Agenda for Change (the ‘Joint Statement’); and the application of equality duties to public procurement1.

This policy development has established some important formal principles and benefits and these are discussed fully in the paper. Problems, however, stem from the scope, durability, and enforcement of these protections. Whilst they may provide important assurances to workers, and a normative basis for ‘good practice’, their reliability in extremis remains open to question.

Agency

Points about enforceability raise concerns about the capacity of actors at local level to apply and develop these protections. Partly, this is a question of procurement expertise which studies have repeatedly found to be weak in the public sector and incapable of balancing complex financial and operational pressures. This is exacerbated by the multidimensional nature of markets in two senses, horizontally and vertically. First, in circumstances which encourage fluid boundaries between services, the applicability of employment protections which are context or service specific can become unclear. Second, current reforms draw lower tier public organisations into the contracting realm, areas where management resources and expertise are spread especially thin.

These developments provide particular and fundamental challenges to employee representation, with further consequences for effective enforcement. Decentralisation of contracting activity places more stress on workplace organisation and challenges the ability of unions to monitor and to co-ordinate multiplying demands. Workplace organisations engaged previously with one or two major employers now have to deal with up to two hundred smaller ones, with members sometimes moving regularly from one to another. Local engagement with tendering and contracting processes can be less than full; the result of pragmatic calculations of organising priorities laced in some cases with ideological aversion to private contractors. Despite important examples of litigation and workplace mobilisation, the scope for formal rights to go unobserved or to be obviated is increased in such contexts.

Any meaningful commitment to balance flexibility with fairness must engage with the fragmented rendering of employment rights, relative to the range and complexity of contract cultures now encouraged. The case for universal fair employment clauses remains unanswered.

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1 Additional protections relevant to pension entitlements were introduced separately through the Pensions Act 2004 and the Transfer of Employment (Pension Protection) Regulations 2005. These are not discussed in this paper, except to note that the opportunity to integrate these within new TUPE regulations (revised 2006) was eschewed, adding still further to the tessellation in protection described here.