



Northern Ireland
Assembly

Committee for Finance and Personnel

OFFICIAL REPORT (Hansard)

NICS Equal Pay Settlement: DFP Briefing

10 April 2013

It was also clear which leavers were included in that settlement. The effective date was February 2009 and leavers were included from August 2008, which was the legal position at that time. I will talk about the Abdulla decision in a moment. That settlement, which was agreed at the end of 2009, was about balance between our legal responsibility to the staff concerned while also, because it was very expensive, managing public money.

Since then, there are two issues on which I believe that you wanted an update. I will deal with the issue of leavers first. The situation with leavers has changed since that time because of the Abdulla ruling in 2012, as you are aware. In summary, the Abdulla ruling allowed for former staff to take an equal pay claim through breach of contract. They have six years in which to do that, rather than six months, which was the legal situation prior to that. That effectively gives a number of former staff the right to take an equal pay claim through a breach of contract. Therefore, former Northern Ireland Civil Service (NICS) staff could take a claim. What is important about the Abdulla ruling is that it does not put an obligation on the employer to go and find those staff. So there is no obligation that we have to go and find them and pay them where something exists. Clearly, they have a right to take a claim if they believe that they are entitled to something. We would need to respond to that.

On the back of the Abdulla judgement, which was in autumn 2012, NIPSA lodged 500 writs on behalf of former staff and members. In July 2012, it lodged 300 writs on behalf of female staff. In December, after the Abdulla judgement, it lodged another 200 on behalf of male staff. So, in effect, we are facing 500 legal claims that have been lodged by NIPSA on behalf of those former staff. I am in discussions with NIPSA about how we will resolve those claims. I will answer members' questions to the extent that I can, but those negotiations are ongoing, and I need to be careful about the extent of what I can share. I am happy to take questions, obviously.

The position with leavers is that the Abdulla judgement changed the legal landscape. It allowed former staff to take a claim when they could not do so previously. NIPSA has lodged 500 claims on behalf of those staff. We are in discussions with NIPSA about how we will resolve them and what the resolution should be. That is a brief summary of the leavers' situation.

I will now deal with the NIO/PSNI situation, and obviously I am happy to take questions on both those issues. The NIO/PSNI situation is slightly different in that, as I said, those staff were clearly excluded from the equal pay settlement in 2009. It was accepted by all parties at the time. I know that in giving evidence to the Committee in the past, Derek expressed disappointment that NIPSA took claims after that, which it did. It took a number of County Court claims on behalf of quite a few staff in the NIO and the PSNI. It took eight or nine lead claims, and it was really claiming on behalf of all staff. It took us to court believing that we should have applied the equal pay settlement to them and that we were in breach of contract. You will be aware that the court hearing was in October 2012. Around a month ago, we got the judgement, in which the judge confirmed the position that we had taken. In other words, he confirmed that the NIO and the PSNI had been lawfully excluded from the settlement. It was clear at the time that they were not in, and, in his view, he supported the Department's position not to pay those staff. NIPSA then considered what it was going to do on the back of that judgement, and, as I am sure the Committee is aware, just before Easter, NIPSA decided that it will not appeal that judgement. Effectively, it is not planning to take it any further. There is clearly an issue that some staff are feeling very disgruntled, as I am sure that you are hearing from staff, and I understand that. However, from the outset, the Department has been clear that we were trying to balance legal obligations and the public purse. Effectively, this decision has saved us over £30 million. Had it gone the other way and had we had to pay these staff, it would have cost us over £30 million. That is why they are so upset. The court has ruled, and NIPSA has decided not to appeal. We need to tie a number of loose ends, but that effectively draws a line under the NIO/PSNI situation.

The Committee asked me in correspondence for clarity on why we had offered some payments to NIO and PSNI staff. There is a bit of confusion over why some of those staff were offered payment if they were not entitled. I will clarify that for the Committee: it applied to staff who had part-service in the NIO or the PSNI and part-service in the NICS. You will remember that the settlement period for which that payment was due was from 2003 to 2009. Staff who were in the PSNI or the NIO for all that time were not offered any payment whatsoever because they were not in the NICS and were subject to a pay delegation, as per the ruling of the court.

A number of staff, however, were, for part of that period, in one of those bodies and, for part of the period, in the NICS in one of our Departments. When that occurred, we offered a payment to staff for the period that they were with the NICS: in other words, they did not have a pay delegation, and we were in control of their pay. Those part-payments were offered, and a number of staff took them up, but quite a large number of staff did not do so because they were awaiting the outcome of the County

Court case and were also waiting to find out whether NIPSA would appeal it. So we have made an offer to around 250 staff who are in this split service situation and who have not signed up to the equal pay settlement. The Committee asked what happens for those staff now. Nothing has changed with that situation in that the offer was always open to them and remains open. If they come to us now to ask for that money and sign up to the agreement, that is fine. We will honour that because they are entitled to it. Over the next number of months, I am sure that some of those will probably decide to accept the payment, but that is a matter for them, and they need to make a determination about what they want to do. Ultimately, the equal pay settlement cannot remain open for ever, and at some point, we will have to draw a line under it and close it. There is no intention to do that at the moment, and if people want to avail themselves of that offer, it will remain open to them for the foreseeable future.

That was a longer summary than I had anticipated. It is a complex issue, and I know that the Committee has been aware of it as it has progressed. You are quite familiar with the issue, but it is worth painting in at least a bit of the detail. From a departmental point of view, we believe that we have been consistent throughout. We are balancing legal obligations with cost and the public purse. The NIO/PSNI position has now been confirmed by the courts, so that starts to draw a line under it. I am hopeful that we can close that one out relatively soon. For leavers and retirees, the legal situation has changed because of the Abdulla case. They clearly have a right to take a claim; if they want to do so, they can. NIPSA has lodged 500 cases, and we are dealing with those and talking to NIPSA. That is broadly where we are at on those two issues. Hopefully, I have addressed most of the queries that were in the correspondence, but I am sure that members will have questions they want to follow up on.

The Chairperson: We received a number of pieces of correspondence from constituents about this issue. One letter refers to a business case from PSNI management: it is not talking about split service but about the PSNI aspect. According to the letter, that business case was submitted to the Finance Minister by David Ford and has been awaiting approval since January. What is the reason for that?

Mr Bailey: What is the business case for? I do not know whether I have seen that correspondence, Chair.

The Chairperson: I presume that it refers to PSNI staff rather than the split service staff whom you referred to.

Mr Bailey: Is it for payment of the equal pay settlement to PSNI staff? If it is, that is what the court has ruled on: the court ruled that they are not entitled to that payment.

The Chairperson: Are you aware of that business case?

Mr Bailey: No. I am not sure what it is.

The Chairperson: Perhaps we could seek clarification on that and get a response from Mark.

How much would it cost to settle the cases of those with split service between the NICS, the PSNI and the NIO, or how much was offered?

Mr Bailey: Some 250 remaining staff have not taken up the offer that we made. I do not have details of the total cost of that. It was included in the original agreed settlement terms, so they are included in the £130 million that was agreed and has been sitting ready to be paid out. They were included in that from the start. There is no additional cost with that group; they have not yet taken up the offer that was made to them three years ago.

The Chairperson: There have been ongoing discussions with the Treasury about the £26 million. Will some of that funding be used to meet liabilities in respect of staff with split service?

Mr Bailey: That is not required for the staff with split service because they are already budgeted for. They are included in what we had agreed as part of the equal pay settlement. You asked in your correspondence about what will happen to the £26 million: I am not in a position to answer that because it is a question for the central finance group, but I checked the position. I understand that the £26 million was originally provided, or access to it was provided, to settle the PSNI situation if it were required. The judgement from last year is that it is not required to settle that, but my understanding is

that the Department is having discussions with HM Treasury about whether that money could be used for something else. However, I do not know the detail of that because I am not directly involved.

The Chairperson: How are the discussions with NIPSA progressing?

Mr Bailey: I have spoken with NIPSA officials on a couple of occasions about the 500 leavers' writs that it has lodged. We are only in the early stages of discussion, but we recognise that there is an issue that has to be resolved. We are working with NIPSA to try to find an appropriate resolution. It is only early days so we do not have any more detail that I can provide to the Committee.

Mr Weir: I will follow up on that point, but you may not be in a position to answer my question. There will be ongoing discussions with NIPSA in which you will try to find out whether you can reach any level of agreement. However, the Abdulla case potentially shifted the goalposts significantly by widening the scope for people who could be eligible to the equal pay claim. Has the Department made any assessment about costs should the full value of those have to be met? I appreciate that the aim would be to try to reach an agreement with NIPSA and that these things are subject to legal challenge and so on, but have you done any calculations on what a potential ballpark figure would be in the worst-case scenario?

Mr Bailey: There are two issues: the number of staff and the potential cost. We certainly have the number of staff; that was relatively easy to assess. I think that there was previous correspondence with the Committee. You will be aware that people can take a claim six years back from the time they left. Today's date, for example, would take us back to April 2007, and leavers on or after April 2007 could take a claim. We are aware that around 1,000 staff are in that window, because it is from April 2007 to August 2008. Remember that we made an equal pay settlement to everyone who left on or after 1 August. My maths is not good enough, but there is only about a 17-month window there.

Mr Weir: Perhaps it is just as well that you are not responsible for the figures. *[Laughter.]*

Mr Bailey: I walked into that one.

However, it is a relatively short window. We know that around 1,000 staff in these affected grades left during that period. In addition to that group, NIPSA lodged 300 claims last July. So a pocket of staff on behalf of whom NIPSA has lodged claims are also in the frame, if that phrase is appropriate. We know the numbers, and we have done detailed costings for the NIPSA cases, but I am not in a position to share that information with the Committee because negotiations are ongoing. So we have costs. However, I do not have the details of how much it would cost to make a settlement and pay all those staff. The simple reason for that is that it would involve over 1,000 individual calculations. You would have to look at what each individual was paid in each of those two years, what they should have been paid and calculate the difference, which would require an awful lot of work. Therefore, we are responding to claims that have been lodged.

Mr Weir: May I clarify two issues concerning the numbers? Presumably, some of the 300 claims lodged by NIPSA last July fall within the window and others fall slightly before it. With a cut-off date of last July, the earliest or latest date of leaving — or whichever way around it is — would have been some time in 2006, based on working back six years. Are there any that fall before the 2007 period because they were lodged last July? Are any of those 300 within the 2007-08 figures?

Mr Bailey: Yes. Those 300 cases — or 500 including the males — lodged by NIPSA span the whole of this two-year period. They run between July 2006 and July 2008.

Mr Weir: By the same token, that window may also be starting to close bit by bit for those who have not yet lodged.

Mr Bailey: Yes.

Mr Weir: This is April 2013. Were we to be sitting here in a month's time, anybody who had left towards the end of April 2007 would have by then fallen outside from being able to claim, unless they were part of the NIPSA claim.

Mr Bailey: That is correct.

Mr Weir: We have at least a fixed number of NIPSA claims and then the figure of 1,000, which is contracting bit by bit and month by month, depending on whether anybody from that group takes a claim.

Mr Bailey: Precisely.

Mr Weir: Is there any pattern of additional claims coming in from people who see that they are potentially coming up to the time limit, or is it more or less similar to and has not gone beyond what happened with the NIPSA claims?

Mr Bailey: It is primarily with the NIPSA claims. There is a handful of individual claims that came before the NIPSA cases, but they could be counted on the fingers of one hand. There may be three or four, but I am not seeing a pattern of people lodging claims, other than the NIPSA cases.

Mr Weir: Additional claims are not coming in at this stage.

Mr Bailey: No. Although, as you said, potentially any individual can claim.

Mr McQuillan: May I clarify that the split service people would have been in service between 2003 and 2009? Is that what you said?

Mr Bailey: Yes; it was February 2003 to February 2009.

Mr McQuillan: Did the Abdulla decision, in effect, rule out those who had transferred to the NIO before then?

Mr Bailey: The Abdulla ruling confirmed that the NIO had a delegation of pay and that the PSNI, through the NIO, had a delegation of pay. Since the delegation was effected in 1996, they were in their own settlement group, so ruling out the whole of that 2003-09 period and anything from 1996 onwards because they were a separate delegated environment.

Mr McQuillan: That is fair enough; I simply wanted to clarify that.

The Chairperson: Mark, just to follow up on that point: you referred to civil servants who, for a period of time, were in the Civil Service and then moved to an arm's-length body or a non-departmental body. Can you perhaps talk briefly about the situation with NI Water (NIW) staff, given that they were civil servants prior to their transfer to that body and also in view of the fact that they were protected under the terms of the Transfer of Undertakings (Protection of Employment), or TUPE, Regulations? That has been raised with the Committee.

Mr Bailey: There are two such groups because Agri-Food and Biosciences Institute (AFBI) staff are in a similar position. Two groups of staff were transferred out, one in 2006 and the second in 2007. NI Water staff are in a similar boat, if that is not a pun — my apologies. The situation is that, because they left the NICS, from our point of view, they are an arm's-length body. Our equal pay settlement did not apply to them. Our settlement, by default, did not apply to any non-departmental public bodies (NDPBs) or any arm's-length bodies, which included NI Water and AFBI.

You are absolutely right, however, that they transferred out within this window. They had inherited TUPE rights as part of their transfer. NI Water and AFBI took legal advice on that, which was that there was a liability with regard to equal pay but that that liability started only from when AFBI and NI Water were created. In effect, those staff are not getting a settlement back to 2003. They are getting only the settlement from the day on which their organisation was created. There are processes in place whereby they are effecting a version of the settlement payment, but I have not been directly involved in that because they are a separate body. However, they are effecting payments, albeit reduced because it is a different set of circumstances, but just based on the TUPE legislation and situation.

Ms Fearon: On the back of that, I have had correspondence from constituents who are in a very similar situation to that which the Chair described. Two women had recently received a long-service award, having been in the Civil Service for 25 years — in fact, it will now be 30 years. They were

transferred to NI Water in 2007 when it was created and were told that they were covered under the TUPE regulations. Their contract repeatedly states that they are continuing in service, almost as though they had never left. The service is continuing. Their lump sum was backdated only to 2007, and they are completely outraged. They are not represented by NIPSA and have said to colleagues who were represented by NIPSA that they thought that they were let down.

Mr Bailey: I recognise that situation, but, as I said, I am neither a legal expert on TUPE nor an expert on what NI Water has finally determined. However, my understanding is that there was a TUPE liability, and they did apply the TUPE rules. You can argue about the rules around TUPE, but my understanding is that they did apply them. I accept and recognise the individuals' concerns. However, from what I can see, NI Water has taken a similar position to us, in that they are balancing cost and legal obligations. It is following the legal obligations under TUPE but is trying to minimise the cost to the public purse, which clearly has an effect on individuals who are upset about that.

Ms Fearon: They feel that, at the moment, they are being backed into a corner to sign off and accept the deal instead of fighting for what they think they are entitled to. Their feeling is that the lump sum is given to staff almost retrospectively and as an act of generosity — "Here you go, and be quiet about it" — as though it were not based on any kind of equal pay claim. They feel discriminated against.

Mr Bailey: I understand that and recognise the concerns of the staff because we had exactly the same thing. For the past two or three years, we have been talking about the equal pay settlement in Committee. At the risk of repeating myself, I will say that it was a balancing exercise between cost and obligations. We were pushed from all quarters to pay the equal pay settlement to PSNI and NIO staff. Had we done that, it would have cost over £30 million. It would have been wrong — well, it would not have been wrong, but it has been demonstrated legally that we took the correct approach, and they were not entitled to the equal pay settlement. As you said, it would have been an act of generosity.

The Chairperson: Mark, on the split service, you said that the early leavers who went to the PSNI or the NIO and are entitled to some sort of payment, but that those who moved from the Civil Service to NIW are not. Will you clarify that?

Mr Bailey: Sorry, will you clarify your question, Chair?

The Chairperson: The briefing paper states:

"eligible service in an NICS department was included in the settlement so an offer was made based on that period of service".

Why does that not apply to NIW staff who were previously part of the Civil Service?

Mr Bailey: They were transferred from the Civil Service in 2007, but effectively they were leavers. They fell into the "leaver" category rather than the "split service" category who were still civil servants. As they were leavers, we treated them as leavers from 2007 in our equal pay settlement and paid them nothing. The TUPE rights under the formation of NI Water provided them with an entitlement to some payment but only from when NI Water was created, and NI Water negotiated that reduced settlement. Does that clarify it for you?

The Chairperson: Yes.

Mr Mitchel McLaughlin: It is a most unsatisfactory set of circumstances. If you consider briefly some of the history of the issue, the use of quangos and arm's-length bodies is not a unique development in this political system, but there are particularly unique circumstances here. Those include the years of direct rule and a small number of NIO Ministers covering three or four portfolios. Naturally, there was a process of delegation to those bodies. The Executive and the Assembly have inherited that, and that will be addressed in the review of our arrangements in due course.

We have found that as much as 70% of departmental spend is administered through those bodies. They are populated by people who, at one stage, had quite specific roles in the Civil Service.

You could take a cynical view — some do — but there were obviously different perspectives when we finally grasped the nettle and decided to deal with the equal pay issue, which had been unaddressed for a number of years.

Delegated power does not necessarily mean that there was any difference in the pay negotiations. We have correspondence that indicates that even though employers, management or personnel departments were aware that they had delegated power, or delegation as it has become known, they were unable to implement it. So it did not necessarily mean that there was any uplift or redress when staff were transferred out of the mainstream Civil Service. On the evidence that we have heard over and over again, it is my view that, although people were appointed to different outside bodies, quangos or other divisions such as the police, the NIO or whatever, those were management decisions. Individuals did not make a choice, and they certainly did not make the informed choice to move to a body because it had delegation. So the equal pay issue was clearly complicated from the very beginning.

In deciding to grasp the nettle, you could adopt a very legalistic posture. I can understand why people would do that. However, some kind of humanity has to be shown. I would not argue necessarily for generosity, but I think that we should try to do right. It seems that, on a technicality, some people were excluded from equal pay even though nobody denied that they had worked in circumstances in which there was unequal pay. They were told initially — it was the perceived gospel at the time — that they had six months to register their claims. It turned out that they had other options about which they were not made aware, and it took the Abdulla case to expose that. So not even the Department got it right from the very beginning.

We have all contributed to a circumstance whereby there is, in fact, a residue of resentment, and people feel that they have not been treated fairly. The Department is perhaps hiding behind the legal position, and the outcome of the various court cases seem to indicate that it does not have to do anything. That, as far as it goes, is it, but in fact, the Assembly recognised that the people who had worked under what has also been established by law as an unjust pay arrangement have a basis for their sense of grievance.

It would not bust the bank to work it out. It might be a bit labour-intensive, and there may be unique and individual circumstances. I will give you a different example, which could be applied in this case, but we have devised solutions, for instance, for the benefits uptake campaign. You can sit down in front of a console and tick the necessary boxes that apply to you, and when you input the information, you get feedback on the benefits to which you are entitled. That approach has been mainstreamed and adopted.

We could do the same in this instance. Whatever the sum might be — there is no point in guesstimating, although you mentioned £30 million, and it might be slightly more than that — that is all that we are talking about in order to deal with people on the basis that they feel that we have gone back into this as far as we can and have tried to come up with an inclusive settlement.

The Department has dodged about behind legal findings. Had the court case in Belfast gone otherwise, you would have had to deal with it in those circumstances, and you would have dealt with it. I do not often agree with George Osborne, but in his statement he said that we do not have to do this, but we have to do what is right. Let us feed that back. The Committee should, perhaps, take a look at presenting a case or argument for the Minister to take to his Executive colleagues to see whether we can take an initiative and resolve this matter. Essentially, we are talking about people in our retired community who feel that they have badly done by.

Mr Bailey: I know that there was no specific question in there —

Mr Weir: Discuss. *[Laughter.]*

Mr Mitchel McLaughlin: I was afraid of a Sir Humphrey answer; that is why I did not ask a question.

Mr Bailey: I will make one comment if I may.

Mr Mitchel McLaughlin: Are you sure that you do not want to speak for the Minister?

Mr Bailey: No. You mentioned delegated power and said that there was not any difference, but I would take exception to that because there was clearly a difference with the NIO. The NIO had delegated power; it had different pay scales and a different negotiating and bargaining arrangement.

Mr Mitchel McLaughlin: That did not always mean that it made a difference. I know that there were exceptions, and I know that it was applied in other cases.

Mr Bailey: I understand your point because there were other arm's-length bodies that decided to follow the NICS pay scales. They were, de facto, following us, but again, through delegation, they did not have to do that. That was their decision.

You mentioned a technicality, and I understand that. Again, however, our position has been that we need some firmness about an effective date. There will always be someone who will fall on the other side of any effective date, and there will always be someone who will be upset about that. We were quite clear that we were using the legal guidelines to provide an anchor, if you like, for ring-fencing.

There will always be comments, as we have had here from the Committee over the past two or three years, that we should have chosen an earlier date. I understand that argument, but we were very much guided by the legal position. We followed that throughout, and we continue to do so. There will be differences of opinion, and I recognise that.

Mr Cree: I was listening to your parallel between Northern Ireland Water and the Policing Board. There is a subtle difference, but there is an underlying moral issue that has not been addressed.

In the correspondence that we received, there is one issue about which I would like to hear your views in order to determine whether it is correct or otherwise. It states:

"The solicitors for DFP tried to imply that the PSNI staff"

— the civilian staff who worked for the police —

"were paid on NIO pay scales since 1996."

I do not know whether that is true. The point is then made:

"Since before 1985, NIPSA have continually approached the Northern Ireland Civil Service management each year successfully to apply the pay increases to those staff working within PSNI, and since devolved policing powers to the Northern Ireland Executive, these have continued to be paid to this staff, albeit six months or more behind the mainstream Civil Service rates."

Is that true?

Mr Bailey: I will take that question in chunks. It is my understanding that prior to 1996, the staff — all of us — were part of the NICS. In 1996, the Police Authority for Northern Ireland (PANI), as it was at that time, was provided with a delegation. A comment was made that those staff were on NIO pay scales. I do not believe that that is correct. My understanding from that time is that the PSNI staff have always remained on NICS pay scales.

Mr Cree: DFP solicitors tried to assert that they were on NIO pay scales.

Mr Bailey: I have not seen that correspondence.

Mr Cree: It is in one of the letters that we received.

Mr Bailey: Right, but I have not seen it. I do not know about that correspondence. My understanding is that PSNI staff remained on and followed NICS pay scales. Given that they have been on the same pay scales, they feel particularly disgruntled. The point that I raised with another member earlier was that they had a delegation. It was their choice to follow the NICS pay scales. In law, there was a delegation that has been confirmed by the County Court judgement, so they are a separate unit and are outside our authority. They can determine their own pay. They decided to follow us in the same way that many NDPBs decide to follow us. However, that does not mean that they have a legal

entitlement to the equal pay settlement. That is what the County Court found: those staff do not have that entitlement.

Mr Cree: Do you not think that there was a moral obligation in that they were on the scale, continue to be on the scale and, therefore, should be entitled to the settlement?

Mr Bailey: The moral argument is completely separate from the legal argument: I accept that. I know that we have had discussions here previously about the moral argument and its extension. I recognise those arguments fully. However, all I can do is repeat what I said before: there was a balancing exercise between costs and obligations. The decision was taken in the Department. We believed that it was appropriate to ring-fence around the legal obligations.

The Chairperson: Thanks very much, Mark.