



Northern Ireland  
Assembly

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**COMMITTEE FOR  
FINANCE AND PERSONNEL**

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**OFFICIAL REPORT  
(Hansard)**

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**Key NICS HR Issues**

7 September 2011

**NORTHERN IRELAND ASSEMBLY**

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**Members present for all or part of the proceedings:**

Mr Conor Murphy (Chairperson)  
Mr Dominic Bradley (Deputy Chairperson)  
Mrs Judith Cochrane  
Mr Leslie Cree  
Mr Paul Girvan  
Mr David Hilditch  
Mr Ross Hussey  
Mr Mitchel McLaughlin  
Mr Adrian McQuillan

**Witnesses:**

Mr Derek Baker	)	Department of Finance and Personnel
Mr Mark Bailey	)	

**The Deputy Chairperson:**

You are very welcome, Mark and Derek. Without any further ado, I ask you to make a presentation to the Committee.

**Mr Derek Baker (Department of Finance and Personnel):**

Thank you very much, Chair. Good morning. I note that the Committee has added a number of items to the agenda. Originally, this session was a carry-over from a session in June when we did not quite complete all the business. There were a couple of outstanding issues on sickness

absence levels in the Civil Service and the pay and grading review. However, I note that the Committee has added a number of items to the agenda. Obviously, I am at the disposition of the Committee on those items, so I am happy to try to help in whatever way I can if there are questions or issues to be raised.

**The Deputy Chairperson:**

OK. Are you going to make an opening statement on those matters?

**Mr Baker:**

Not on any of those issues, Chair. I had not intended to. I am happy to talk about sickness absence or the pay and grading review if the Committee wishes, but, on the other issues to do with accountability arrangements, the code of ethics, public interest disclosure and the handbook, I am at the disposal of the Committee.

**The Deputy Chairperson:**

OK. I will start with a question, and then other members can ask questions if they wish. From our examination of the Northern Ireland Civil Service handbook, there seem to be fairly clear and definite disciplinary procedures in relation to civil servants at the lower grades. However, there does not seem to be the same detail or clarity in relation to disciplinary issues concerning civil servants at the highest grade. Can you shed any light on why that might be the case?

**Mr Baker:**

I do not think that that is the case, Chair. All of the arrangements for disciplinary procedures that apply to civil servants in the handbook apply equally to all civil servants. However, the handbook specifically singles out permanent secretaries and states that, in cases in which disciplinary cases involve a permanent secretary, the head of the Civil Service will be the decision-making authority. The only reason why permanent secretaries are singled out is for the obvious reason that when we reach that level of seniority, it is very difficult to find a higher level of seniority because the protocol would normally be that the decision-making authority is more senior than the officer who is being disciplined. The procedures that are set out in the policy document apply to everybody equally. All the disciplinary penalties that are potentially available and are listed in the handbook apply to all civil servants equally. There is no differentiation

among any grades.

**The Deputy Chairperson:**

I will ask you some questions that arose from a research paper that the Committee commissioned, about which we have just had a presentation. One of the questions that arose was how a board of inquiry into the misconduct of higher-level civil servants is established.

**Mr Baker:**

In my recollection, in my current job, there has been only one instance of that and it is the case with which the Committee is familiar. It is a case of moving from the specifics of that to the general.

The board of inquiry is mentioned in the HR code as a required process that will be followed where disciplinary action is considered against a permanent secretary. For other grades, the role of a board of inquiry, if I may use that term, will just be taken by staff in a Department. However, when a permanent secretary is involved, the inquiry is at a very senior level. Given that the head of the Northern Ireland Civil Service would be the decision-making authority, it was deemed appropriate to include a facility for an independent group of people to look at the disciplinary case and to make a recommendation to the decision-making authority. That is because, often, when a disciplinary case at any level is taken forward, the decision-maker may ask an independent individual in the Department — perhaps someone in HR or another Department — to look at the case.

In this case, the head of the Northern Ireland Civil Service considered that he needed to constitute a board of inquiry, which comprised people with adequate seniority; people experienced in public sector accountability issues at the highest level; and people who brought to bear expertise on employment matters, particularly from a legal perspective. On that basis, the board of inquiry constituted by the head of the Civil Service was chaired by a former head of the Northern Ireland Civil Service, Sir John Semple, and included solicitor Margaret Elliott, who also happens to be a former Civil Service commissioner. The significance of that is that the Civil Service commissioners are the custodians of the Civil Service code of ethics, so they have a particular interest in conduct issues. The final member was Sir Patrick Haren, a senior individual

from the private sector. They were deemed by the head of the Civil Service to have the necessary expertise to consider a matter of such seriousness.

**The Deputy Chairperson:**

Is there a requirement for that board to be made up of people who are independent of the Civil Service and Ministers?

**Mr Baker:**

That is not specified in the HR handbook. It does not say in the handbook that the board of inquiry should be independent, but I am sure that the head of the Civil Service decided that there was great value in having independence so that his judgement as the decision-making authority could not be compromised in any way and he would get genuinely independent recommendations as to disciplinary action.

**The Deputy Chairperson:**

Does the board of inquiry have a role in recommending the appropriate disciplinary penalty or does it merely establish whether there has been misconduct?

**Mr Baker:**

The board of inquiry's role is, first, to recommend to the decision-making authority whether an individual is guilty of a disciplinary offence, and, secondly, to recommend what the disciplinary penalty should be, bearing in mind the menu, so to speak, of disciplinary penalties that are available in the handbook. In this instance, that is what the board of inquiry did.

**The Deputy Chairperson:**

If memory serves, after the independent board of inquiry reported back, a senior member of the Scottish Civil Service became involved.

**Mr Baker:**

Yes. I can explain that to the Committee. On receipt of the board of inquiry's report, the head of the Northern Ireland Civil Service decided on the case and communicated that decision to the individual. As is his right under the terms of the HR handbook and the dispute resolution

regulations in law, the individual appealed that decision. Once again, we are in a difficult position when we are dealing with that level of seniority because the normal protocol is that any appeal against a decision will be taken by somebody who is totally independent of the original decision and is normally at a more senior level, but we ran out of headroom in the Northern Ireland Civil Service because the head of the Civil Service was taking that decision. For that reason, the head of the Northern Ireland Civil Service invited his opposite number in the Scottish Civil Service to hear the appeal from the individual, which he did. Again, under the terms of our HR policies, the appeal decision is final, and there is no further right of appeal to any authority in the Civil Service.

**The Deputy Chairperson:**

Could it not be argued that since the head of the Civil Service in Scotland is a civil servant, he is not a properly independent person?

**Mr Baker:**

I do not think so. The head of the Civil Service in Scotland has absolutely no connection to the Northern Ireland Civil Service, and he had no knowledge of the individual who was the subject of the disciplinary action. I think that that individual was as independent as one could get. I know that this is all getting a bit complicated but, in Civil Service seniority terms, the only higher authority in the whole of the United Kingdom is Sir Gus O'Donnell, who is the Cabinet Secretary in London. In theory, that was a possibility, but, as you can imagine, it is very difficult to get hold of Sir Gus O'Donnell.

**The Deputy Chairperson:**

What are the procedures for dealing with disciplinary cases involving the head of the Northern Ireland Civil Service?

**Mr Baker:**

I cannot answer that question because our HR policies run out of road — we do not go to that level of seniority. However, if any case were to arise involving the head of the Northern Ireland Civil Service, we would have to engage with Whitehall, and we would have to engage directly with Sir Gus O'Donnell to take that forward. In Civil Service terms, Sir Gus O'Donnell could be

the only disciplinary authority in such a case, but we have not actually written that into our policy.

**The Deputy Chairperson:**

OK. Are there any procedures for communicating and/or explaining the outcome of the proceedings to the Assembly and to Ministers?

**Mr Baker:**

The HR handbook does not include any such procedures. That said, when a very senior civil servant of permanent secretary rank is involved, it is inconceivable that the head of the Civil Service would not engage with the departmental Minister to explain the outcome of the disciplinary process, but that is not written down specifically.

So far as the Assembly is concerned, there are no procedures written into the HR handbook, but, once again, I know that the head of the Civil Service has engaged in correspondence with the Committee for Regional Development and the Public Accounts Committee. As for informing the Assembly at large through statements to the Assembly and so forth, that is a matter for Ministers. However, it is not prescribed in the Northern Ireland Civil Service (NICS) HR handbook, which, de facto, is a contract of employment between employer and employee, and I do not think that it is the kind of document through which we would look to prescribe what Ministers should or should not do by way of communicating with the Assembly.

**Mr McLaughlin:**

I will return to an issue that I dealt with in the previous session. In the democratic foundations of the Assembly, MLAs are elected on behalf of the electorate, and, from within their number, Ministers are appointed and there is engagement with the permanent Government structure, or the permanent Government, as some have come to understand themselves. It obviously has to be recorded that it has only been a very good thing that there is so little case history in the circumstances of senior civil servants at principal secretary level stepping outside the boundaries. It appears that the procedures came to a conclusion based on hard evidence. That has gone through an appeals procedure, and I do not see any particular complaint about the manner in which that was taken forward. I do, however, have a clear sense that, in public opinion terms, a

less senior civil servant would have been dealt with much more seriously, given the circumstances that applied. The issue of the sanction that is applied to the Senior Civil Service is a serious one for the Assembly and for people's confidence in it.

Therefore, if there is a process that, at each stage, represents the rights of the person who is subject to the disciplinary procedures and the integrity of the Civil Service, and the Assembly itself, that has to apply also to the outcome and, in this case, the sanction. Has any consideration been given to whether the sanction was appropriate, satisfying a genuine concern that, in this instance, the sanction was not proportionate and appropriate? In that circumstance, the accountability of the Senior Civil Service was not reaffirmed.

**Mr Baker:**

That is a very difficult question for me to comment on.

**Mr McLaughlin:**

Because you are a senior civil servant?

**Mr Baker:**

No. De facto, you are asking me to comment on the appropriateness of a decision that was taken by the head of the Northern Ireland Civil Service on a disciplinary case.

**Mr McLaughlin:**

No, I am asking whether the same kind of misgivings at Senior Civil Service level have led us to a position where we can be told that there will be a review of the handbook, the disciplinary procedures and the sanctions.

**Mr Baker:**

That is a different question altogether.

**Mr McLaughlin:**

No, it is not.



**Mr Baker:**

I do not want to comment, and I will not comment, on a decision that has been taken by the head of the Northern Ireland Civil Service on this case. It would be entirely inappropriate for me to do so or to express any opinion. He was the decision-making authority, and, throughout the whole process, he obtained the best, most robust and most independent input that he could, as per our policies. The answer to the question of whether there is a concern in the Civil Service that this case requires a review of our disciplinary procedures is no. As far as I am concerned, as custodian of the policy and of the policy document, the disciplinary process ran appropriately. I acknowledge that our investigation probably ran a bit more slowly than everyone would have liked. I suppose that that is a function the seniority of the individual and of the people who were involved in the independent element, and getting them on board and available. We went through a process of investigation, disciplinary hearing, decision and appeal. That is a good and robust process and, as you said, it protects the rights of the individual and deals with the responsibilities of the employer.

I am not aware of anything particularly wrong with the disciplinary processes. We do not have a schedule of offences that says that you get a particular penalty for being guilty of something. As I am sure members are aware, we have a list of potential sanctions that can be applied to anyone, depending on the individual circumstances of the case. They are all set out and range from an oral reprimand right through to dismissal. I do not think that there is anything missing in that range of potential sanctions or that we need to add anything to them. There is every option in between the two that I mentioned such as demotion, a bar on promotion, a written warning and remedial action. It is not an issue of reviewing the list of sanctions. Your question keeps coming back to the appropriateness of the decision that was taken and whether that raises concerns, and I am not going to second-guess the head of the Civil Service on that point. I cannot do that.

**Mr McLaughlin:**

Can I pursue that in this way? We had the disciplinary procedures initiated on the basis of the handbook. That process continued; you indicated that it took a bit longer than people thought it would, but it was a very serious issue and had to be thorough and fair. The process came to a conclusion and a finding. That finding was appealed, the appeal was dismissed and, at that point,

the head of the Civil Service decided on the sanction.

**Mr Baker:**

Things did not happen quite in that order. The head of the Civil Service decided on the sanction on receipt of the recommendation from the board of inquiry. The individual appealed that, and the appeal was not upheld. The head of the Civil Service did not have to take any further decision.

**Mr McLaughlin:**

So it is just a question of chronology, but the sanction itself was not the subject of the appeal.

**Mr Baker:**

I hesitate there because I was not party to that process or to the appeal. Obviously, I did not have access to the documentation and was not party to any of those meetings. I do not know whether, as part of the appeal, the individual raised the seriousness, as he perceived it, of the sanction that was being applied or whether he raised issues about the proportionality of the sanction. I honestly do not know. I was not on the inside of that process, so I cannot answer that question for sure.

**Mr McLaughlin:**

Fair enough. I am not saying that I have any better information. My understanding is that the finding itself was the subject of the appeal and that the initial decision was upheld.

**Mr Baker:**

Yes.

**Mr McLaughlin:**

I am making the point, which I think I can substantiate, that there is significant concern at the nature of the sanction where you went through the full process and came to a conclusion that was re-examined and upheld. So you are left with the conclusion. The sanction, in theory anyway, means that, in a period of two or possibly three years, this person could be promoted back to his position. Stretching that, he could end up becoming the head of the Civil Service.

**Mr Baker:**

In theory, yes.

**Mr McLaughlin:**

The facts are established, so it is not controversial to say that this was a case of one of the most senior civil servants interfering with the political process and the work of one of the senior Committees. Those facts have been established. That has to give rise to a question as to whether we need to have a re-examination not just of the handbook, and particularly disciplinary procedures within it, although it is very good to do that every now and again, but of whether the circumstance that I described is regarded, in the strict interpretation of the code of the handbook and the ethos of the Civil Service, as gross misconduct.

If it is gross misconduct, that has been established, has been appealed and a decision has been reaffirmed, the possibility that this individual could emerge as the head of the Civil Service is very hard to explain to the public.

There is an urgent need for those procedures to be examined. I am not saying that that case should be reopened and that the whole process should be run all over again, but let us accept that we have not satisfied people's perception that the Assembly is in charge of its own house and has recognised the need to respond.

**Mr Baker:**

I still think what you are saying comes back to a questioning of the decision that was taken, rather than of the process that was followed.

**Mr McLaughlin:**

That is exactly what I am doing. I am clear in making that distinction. The process was OK and came to the right conclusion. I just cannot get my head around the sanction that was applied. I am fairly certain that, had a less senior person been involved, the sanction would have been much more severe.

**Mr Baker:**

I cannot comment on that, but we are agreeing on the point that the issue at stake is the decision that was taken. I will not comment on the appropriateness or otherwise of that decision. I simply cannot do that, because I was not the decision-maker in the first place.

**The Deputy Chairperson:**

Is the only solution to the point that Mitchel raises for there to be a menu, as it were, of offences, with penalties attached?

**Mr Baker:**

That would make things administratively neat, and I can see the value of that. The menu of offences would be difficult to draw up. There are a whole range of offences. It is possible to conceive of such a schedule. On the other hand, if you draw up a schedule of offences, you box yourself into a given outcome and constrain your ability to take account of the individual circumstances of each case. It would make life very easy. For example, if you are guilty of fraud —

**The Deputy Chairperson:**

Judges have sentencing guidelines.

**Mr Baker:**

They have guidelines, and I am sure that, within a framework, they can veer up or down. Is the Committee suggesting that there should be a schedule of offences and a schedule of penalties against those?

**The Deputy Chairperson:**

Maybe something along the lines of sentencing guidelines, but not called that.

**Mr Cree:**

You need to have a law in existence to have that. However, we do not have anything at the moment. You could have any number of offences and still leave some out.

**Mr McLaughlin:**

The caveat is in the disciplinary code anyway, notwithstanding those that are codified or when there are other circumstances. Perhaps there is a solution to the issue. There could in fact be a codified statement to say that actions that are designed to interfere with the political process will lead to instant dismissal or summary dismissal. Why not say that? That is what was happened. The Committee was carrying out an investigation, and a principal secretary of a Department was advising — I do not want to rehearse the whole case — people who were outside the Assembly to complain about Assembly Members.

**The Deputy Chairperson:**

We need to keep to the general principles and not delve too far into the facts of that case.

**Mr McLaughlin:**

If we do not respond, it can happen again.

**The Deputy Chairperson:**

Yes, but we should deal with the general essence of it.

**Mr McLaughlin:**

To boil it down, Chair, I am trying to establish that when a senior civil servant attempts to interfere with the political process of the Assembly, it should be a dismissible offence.

**The Deputy Chairperson:**

It is very serious.

**Mr McLaughlin:**

It appears not to be at present. The message that has been sent out is that, for a limited period, you will have a reduction in status or a demotion, but you can move back up to your original position if you hang about long enough, and, ostensibly, you could end up as head of the Civil Service.

**The Deputy Chairperson:**

There is a list of actions that constitute gross misconduct. Perhaps political interference could be added to that.

**Mr Baker:**

I am more than happy to examine that issue.

**Mr McLaughlin:**

I understand the sensitivities, so that is a satisfactory response.

**The Deputy Chairperson:**

Before the Chairperson comes back to deal with the equal pay settlement, I want to wrap up this part of our proceedings. We are slightly ahead of schedule.

Our concern was focused on the disciplinary procedures for the behaviour of permanent secretaries in particular, and the Civil Service handbook deals with that issue in paragraph 2.7 of section 6.03. The paragraph says:

“The Head of the Northern Ireland Civil Service will deal with any cases if you are a Permanent Secretary ... In such cases, the normal practice, after consultation with the Minister of the Department concerned and with the Secretary of State for Northern Ireland, will be to set up a board of inquiry that will report to the Head of the Northern Ireland Civil Service.”

Page 6 of the research paper contains five points that have been raised by the researcher and which I put to Mr Baker this morning. In addition, there are gaps in existing procedures; for example, the handbook does not appear to specify an appeals procedure in respect of cases involving permanent secretaries or the head of the Civil Service. As well as that, we may need clarification on whether provision for summary dismissal, which is covered at section 5 of the disciplinary procedures, operates in respect of permanent secretaries and the head of the Civil Service in the same way as it operates in relation to ordinary members of the Civil Service. We need clarification on that.

Finally, on the point of detail, it might be helpful to receive clarification on why the Secretary of State for Northern Ireland is mentioned in paragraph 2.7.

My concluding point is the one raised by Mitchel and the offer made by Mr Baker to explore the possibility of including interference in the political system here as a part of the gross misconduct section of the handbook. Are members content to request that the Department prepare a revised draft paragraph 2.7 of the handbook that addresses those identified gaps and issues and which can be further considered at a future date by the Committee?

**Mr Cree:**

I have concerns about the issue of the Secretary of State. I think that that is a bit petty, because he does have a function.

**The Deputy Chairperson:**

We are just asking for clarification on why he has a function.

**Mr Cree:**

Perhaps we should ask what the function is.

**The Deputy Chairperson:**

That is what we are asking, yes.

**Mr Baker:**

That is an overhang from the direct rule days. There is nothing more scientific than that. It will probably be deleted at the next revision of that paragraph.

**The Deputy Chairperson:**

Are members content to proceed in the way that I have outlined?

*Members indicated assent.*

**The Deputy Chairperson:**

I will vacate the Chair now. The Chairperson will resume the Chair and continue with consideration of the Civil Service equal pay settlement and comprehensive pay and grading review.

*(The Chairperson [Mr Murphy] in the Chair)*

**The Chairperson:**

I thank the Deputy Chairperson for minding the house. We have had a briefing from the Northern Ireland Public Sector Alliance (NIPSA) on the equal pay issues. Members might want to pick up on some questions. The primary focus of questions and discussions with NIPSA was on getting an accurate assessment of the numbers involved in the equal pay issues and some assessment of the amounts that may be involved in the settlement. We have not been able to tie that down with you either. The figures the unions are suggesting vary significantly from the figures that the Department is suggesting. I imagine that the Department is in a better place to make an assessment because the people were employees of the Civil Service at some stage.

**Mr McQuillan:**

You are talking about the seconded members and organisations.

**The Chairperson:**

Yes; this is the terms of the presentation on equal pay that was made to us by NIPSA. We want to ask the Department a number of questions on the basis of that presentation. I am suggesting that the big difference between the evidence given by the Department and that given by the unions relates to the quantity of people involved. No assessment has been made, as yet, of what figures may be involved. Various figures have been bandied about. I understand that you may not be able to answer that now, but it is something that the Committee wants to interrogate further in order to make an assessment. We are hearing evidence from you and from the unions, and we are going to hear further evidence from people who are affected by the equal pay issue. However, we do not have an accurate assessment of the figures that are involved, and that does not allow us to come to a particular view on the matter.

**Mr Baker:**

Do you want me to respond to that, Chairperson?

**The Chairperson:**

If you could, yes.



**Mr Baker:**

I was not here for the NIPSA presentation, so I do not know exactly what the witnesses said. I do not know what they said about figures.

**The Chairperson:**

The figures that were originally given by the Department showed that about 8,700 people were involved. NIPSA, I think, figure that it would be less than 50% of that at best.

**Mr Baker:**

OK. What are we talking about here? Are we talking about people who left the relevant grades between the dates of August 2003 and August 2008? Are we talking about leavers, or people in the Northern Ireland Office (NIO), or people in the Police Service of Northern Ireland (PSNI)? Are we talking about people in non-departmental public bodies?

**The Chairperson:**

I think that NIPSA are talking about the entirety of that. They represent people who have left; they are talking about people who were transferred forcibly or instructed to be transferred forcibly into or out of the NIO and the PSNI. However, the problem for the Committee in dealing with those issues is that, whether it is a matter of an agreement between yourselves and the unions, we have an inaccurate figure and a ballpark assessment of the finances involved in making such a settlement.

**Mr Baker:**

I have to say that neither have we. We have not done that work. As we discussed at the previous meeting, there are a number of groups of individuals or staff who are remaining issues as part of the equal pay settlement, or, perhaps, would like to claim to have access to that settlement. Within those groups there are people who retired prior to August 2008. I do not know how far back that goes. I do not know whether we have a time limit on that. We have not calculated accurately what that number would be. We have a notion. The rough figure of 8,760 that you referred to was based on the number of staff who left those grades over that six-year period back to August 2003. However, in addition to leavers, there are staff who served in the NIO and Civil Service

staff who served in the PSNI and the Police Authority during that period. There are other staff, some of whom may wish to have access to the settlement, who worked in what are now non-departmental public bodies such as the Agri-Food and Biosciences Institute (AFBI) or bodies that have moved into a different sector, such as the former Water Service. There is a whole raft of those people. For our part, we have not done an accurate assessment of the numbers of such staff or, indeed what the liabilities might be if we were to apply the NICS equal pay settlement to those people.

Quite simply, the reason for that is that during all the negotiations with NIPSA we were focusing only on staff in the NICS Departments, and the settlement applied only to those people. A lot of number crunching had to be done to come up with the settlement figures. We have very accurate figures on the liabilities for the staff on whose behalf we negotiated the settlement, but not for the other members of staff. We have not done that work. I do not think that NIPSA has done that work either, to tell you the truth.

I am not able to help the Committee today as to what the financial liability would be. For example, in the case of the retirees, we would have to nail down some parameters on how far back we would go to apply the settlement. As I explained to you before — I know that it gets a bit tedious for the Committee to listen to me going on and on about this — if we set aside the legal framework, we could go back to the Equal Pay Act 1970, and anyone who has ever worked in the Civil Service in any of those grades might be entitled to the payment. Once we step outside the strict legal framework, we open the door to all kinds of people being potentially eligible for the settlement.

**The Chairperson:**

That may be the case. Ballpark assessments have been bounced around as part of this discussion, yet you have said that no work has been done to ascertain the numbers of people involved. As a consequence, there is no available assessment of how much this might involve. On what basis can you advise a Minister that that is something that he or she should not consider getting involved in settling, given that you have no assessment of how many people or what sort of amounts are involved?

**Mr Baker:**

Before I close that issue down, Chair, I will ask Mark, who has been closely involved in all the detailed figure work, to explain whether we have a better assessment of the potential liability for any of those groups.

**Mr Mark Bailey (Department of Finance and Personnel):**

We do not have information on the liability or the cost if the NICS settlement were to be applied. Some information was provided on potential numbers of staff in various groups, and obviously some information was provided on the number of leavers. In the early days, we also completed an approximation of the number of staff in arm's-length bodies, and we knew that there was a certain number, of hundreds of staff, in certain bodies. However, there has been absolutely no attempt to try to calculate settlement payments for those staff members. In the example of the arm's-length bodies, we would not be able to do that anyway. We do not have access to the staff records, and those bodies would need to do the calculations themselves. Therefore, some information has been provided on the numbers, but not on the potential liability if the NICS settlement were to be applied.

**Mr Baker:**

Chair, to pick up on the point that you made on advising Ministers, the advice that was given to Ministers on the applicability or otherwise of the equal pay settlement was very much couched in the legal framework and liabilities and who legally should or should not have access to the settlement. That was the kernel of the advice to Ministers on the issue. The advice was not pitched in such a way that we told Ministers that it would cost a certain amount if they were to extend the settlement to all the groups that we believe should not have legal access to it. That work was not done, and it was not presented to Ministers.

**The Chairperson:**

That work may be helpful for our deliberations going forward. The arm's-length bodies are not employing millions of people, and it should not be a huge exercise for them to try to get some figures. We are not looking for figures down to the last shilling, but if the Committee is to hear further evidence from others who claim that they should be legally entitled to that settlement and weigh up the consequences for the Executive if that was to be entertained, that type of work must

be done. I would assume that that type of work would also be helpful to the Ministers who are making those decisions.

**Mr Hussey:**

In your presentation, you referred to the wider Civil Service staff. It is like the question that I asked earlier of the representatives from NIPSA about when a civil servant is not a civil servant, and it seems that whenever they are transferred to certain parts of the Civil Service they are no longer civil servants. When is a pawn not a pawn? It really is as difficult as that to understand.

At one point, you said that you have accurate figures, but you clearly do not have accurate figures for those who I would consider to be civil servants. There is also a difference between a legal and a moral responsibility. There are people who were and are civil servants, who were employed as civil servants and who were moved by the Civil Service from one branch to another whether they wanted to go or not. In some instances, people were transferred from the Northern Ireland Civil Service to positions in the Police Service of Northern Ireland and may have returned, so that they were behind the door, in front of the door and back on the other side of the door.

I cannot get my head around it. If you are a civil servant, you are a civil servant, but it seems that a cloak of secrecy is thrown around those who transfer to the Police Service of Northern Ireland, the Prison Service or the Court Service, and I cannot see the logic in that. If you were a civil servant when you started, and you go behind that door for a couple of years and then come back from behind the door into another Department, you are still in the Civil Service.

To me there is a lot of fudging going on, particularly for those who are involved. They are clearly civil servants and there is no distinction between you as a civil servant and someone who has been working with the Courts Service, the Police Service or the Prison Service. They are also civil servants, and they have been treated abysmally. They must be included in the figures and cannot be left out in the cold. They have come back into the Civil Service, and it seems to depend on where they were placed on a given date. I cannot see the logic in that or the moral argument, and, as far as I am concerned, those individuals have won the moral argument. There is a legal and a moral liability on the Northern Ireland Civil Service to treat its entire staff on the

basis of the same terms and conditions.

**Mr Baker:**

I can fully accept the difficulty in getting your head around the question of when a civil servant is not a civil servant; however, the issue is not whether they are civil servants. There are all kinds of people out there who are civil servants. For example, those who work in Her Majesty's Revenue and Customs (HMRC) in premises in Northern Ireland are civil servants, but they have absolutely nothing to do with the Northern Ireland Civil Service or any of its pay arrangements. People who work in the Passport Office in Northern Ireland are civil servants, and similarly —

**Mr Hussey:**

No. I am dealing specifically with those who were employed by the Northern Ireland Civil Service and are still civil servants and can be moved by the Northern Ireland Civil Service. HMRC is a stand-alone body, and I am not going down that line, nor will I allow you to do so. I am dealing specifically with those who are part of the Northern Ireland Civil Service and can go in and out of it.

**Mr Baker:**

I am coming to that point. The key issue in determining equal pay liabilities and legal liabilities — I am sticking to the legal liability here — is not whether an individual is a civil servant. The key issue in equal pay legislation is who the determining authority is for the purposes of pay: what is the source of decisions on pay? The position that the Department of Finance and Personnel (DFP) has adopted, on the basis of the legal advice that it has obtained in respect of the equal pay settlement, is that DFP was the decision-making authority and the source of pay for civil servants working in the NICS Departments. In 1996, pay was delegated to what we call the Northern Ireland Office pay group, which includes the NIO, the Public Prosecution Service, the Policing Board and the PSNI, or the predecessors of the PSNI.

When pay is delegated, you operate within that circle. An individual working within one pay group cannot cite an individual working in another pay group as a comparator for the purposes of an equal pay settlement. There is a simple question — I do not know whether it was raised at the NIPSA presentation, or whether NIPSA made this point. There is a tried and tested method of

pursuing an equal pay claim, and NIPSA has cracked that. NIPSA lodged equal pay claims with an industrial tribunal on behalf of AA and AO staff, citing technical grade staff as their comparators in the Northern Ireland Civil Service Departments, and that succeeded. It led to a negotiation and an equal pay settlement.

It is an interesting fact that, to the best of my knowledge, NIPSA has not similarly lodged a class action on behalf of NIO staff or PSNI staff at AA and AO grade with an industrial tribunal, citing technical grade staff in the NICS as a comparator. Why has it not done that? That is for NIPSA to answer, but it could just be that NIPSA also accepts that there was a pay delegation and that, therefore, under the terms of equal pay law, there is not a valid equal pay claim.

**Mr Hussey:**

Is it not the case that there are now cases being put to the County Courts?

**Mr Baker:**

Not equal pay claims.

**Mr Cree:**

Breach of contract.

**Mr Baker:**

Those are claims for breach of contract; that is totally different.

**Mr Cree:**

Following on from that — we discussed this at some length at our last meeting — I find the PSNI issue particularly difficult to get my head around. I think that, at the last meeting we had, we agreed that they were civil servants. The reason that they are not currently succeeding with equal pay claims is because of the pay delegation. Will you tell me why the Social Security Agency, which also had a delegation, actually did achieve the full terms of the settlement?

**Mr Baker:**

Yes; that is quite simply explained. I have been in my current post for over four years now, and I

have gone through three pay negotiations with NIPSA on behalf —

**Mr Cree:**

You are sticking it well.

**Mr Baker:**

You would not think that I am only 26 years old. In those negotiations, it is very explicitly understood, both by management side — me and my colleagues — and by NIPSA that, for the purposes of the pay negotiations, I am negotiating on behalf of a certain set of staff. All of the documentation around the pay negotiation, the outcomes and the pay circulars reflect that reality. In the decisions on the pay awards that we eventually conclude, those circulars explicitly say that, even though the Social Security Agency in theory has a pay delegation, the negotiation has been conducted on behalf of the staff in the Social Security Agency, because management in the Social Security Agency has explicitly said that it accepts that we are negotiating on their behalf. That is not the case with PSNI and NIO staff, who are, and always have been, explicitly excluded from the ambit of those negotiations. In negotiations between me and NIPSA, it has always been understood that I do not negotiate on behalf of anybody in the NIO pay group. However, if the PSNI, of its own volition, decides to piggyback on what we, in NICS, negotiate with NIPSA, it does so at its discretion, but there is no obligation on it to do so. It still has a pay delegation, but it exercises it in a way that says that it has piggybacked on the NICS pay award. Although that saves it the bother of engaging in its own negotiations, it is not explicitly included in our negotiations. That is the difference between the Social Security Agency and the PSNI, and if you look at pay circulars that come out, which are all on the DFP website, you will see explicit reference to Social Security Agency staff but none to PSNI staff.

**Mr Cree:**

Would you not stand back and look at it objectively? It is a ridiculous situation.

**Mr Baker:**

I have no axe to grind on this issue, and I have no axe to grind with regard to PSNI staff. I have discussed the issue with PSNI colleagues, and I told them that if there is an equal pay liability in the PSNI — or, for that matter, in what was the NIO, the DOJ — and it is settled, I am totally

agnostic on the point. If a settlement is made, is affordable and benefits staff, that is wonderful. I have no difficulty with that whatsoever, but I cannot justify hitching an equal pay settlement in PSNI to the negotiated settlement for NICS staff, because the legal justification is simply not there. You are getting into the territory of ministerial direction, because, if I were to say, “That’s no problem. I think that PSNI is part of the NICS settlement”, given that all the legal advice presented to us says that it is not part of the settlement and cannot be justified, I would be taken to the cleaners by the Northern Ireland Audit Office. Until that position changes — and it could be challenged in a court of law or tribunal, which might find contrary to the DFP position — I cannot move away from it. I simply cannot do it. A Minister or Ministers might decide to move away from that position and decide that something should happen notwithstanding the advice that a Minister gets from me, as an official, or from legal advisers, but that is the prerogative of Ministers.

**Mr Cree:**

So why try to hide behind the delegation issue? That is how it comes across to me: you cannot touch it. I am not referring to you in particular, but the general stance is that, because there was a pay delegation, it cannot be touched, in the full knowledge that the Social Security Agency (SSA) had a similar delegation but got the full settlement.

**Mr Baker:**

As I explained to you, the SSA set aside its delegation and very explicitly told us to negotiate on its behalf and to record explicitly in our decisions that it would participate in our pay settlement. That was not the case with the PSNI, and that is the difference.

**Mr Cree:**

That is OK. Thank you very much.

**Mr McLaughlin:**

I find that very interesting. The fact that the SSA set aside its delegation indicates that there was a prior awareness of an issue, so it came up with a solution, but it did that in isolation from a lot of other groups, including people who were seconded to the police or to the Court Service. There are also retired civil servants who fall outside the arrangement, so that is another set of



circumstances.

I think that the arrangement made for the SSA is perfectly acceptable, but I wonder whether somebody counting numbers and doing sums just decided not to broaden it out to include everybody, and reference has been made to whether people have a moral right to be included. I think they have won that moral argument. We may get to the point when, collectively, the Executive may decide that we need to address that. It would appear that there is no great appetite for moving to that position at the moment. However, if that was properly and objectively assessed and presented, then Ministers could say, “We can’t afford it”, “We don’t accept the argument” or “The legal advice we are operating under is sound”. However, that would be on an informed basis. It would appear that what we had was almost a propaganda argument that this would bring the Budget down around our ears, and we would not be able to afford schools, hospitals or the rest, and who knows where it would start or end because you could go back to 1970.

You did not have to go back to 1970 in the settlement that was arranged. There was a pragmatic formula that people signed up to and which provides the parameters to address the issue of those who, for one reason or another, were left out of the arrangement. It is that objective assessment and costing that allows us to close the gap between the moral and legal positions. It is sometimes a case of be careful what you ask for; that may be the guidance that is coming from your Minister, and I am not going to push you in that direction. However, that is what you will have to do at some stage.

**Mr Baker:**

Just to be clear, the Social Security Agency’s setting aside of the pay delegation was not some recent device to include them in the equal pay settlement. When the Social Security Agency was created as a Next Steps agency, as such bodies were known in those days — then they became known as executive agencies — many, many years ago, I forget when it was created, at that point it was offered the option of a pay delegation. That was written into the relationship statement between its parent Department and the agency. That was because it was thought that it was a different business and may have to operate in a different way and have a different pay and grading structure. From day one, the Social Security Agency opted not to exercise that

delegation. It never activated it. It took the stance that it was more trouble than it was worth to negotiate its own pay.

**Mr McLaughlin:**

But did you not earlier tell us, Derek, that they, in the context of the discussions about the settlement, asked you to make an explicit reference to them?

**Mr Baker:**

No.

**Mr McLaughlin:**

Does that not indicate that there was an awareness that there were going to be gaps in this deal, and they were being careful that they did not fall into the gaps? Last year you specifically wrote that into the —

**Mr Baker:**

Apologies. Specifically, I was citing the example of our normal annual pay negotiations. In the documentation that flows from the annual pay negotiations we explicitly write the Social Security Agency into that, and we have done so every year since the year dot, since the agency was brought into existence. This did not come into operation just in the context of the equal pay negotiations. If you look back over all our pay circulars that pre-date the equal pay settlement, you will see that we always explicitly referred to the Social Security Agency. That is what I was referring to.

The settlement that we negotiated with NIPSA was obviously not negotiated on a whim. It was negotiated on the back of very hard legal advice and the legal framework. I understand what the Committee is saying about moral arguments and so forth. When we get into moral arguments, we get into the territory of Ministers taking decisions as to what they believe is the art of the possible or the impossible. To date, we have worked on the basis of a strict legal framework, and that has driven our decisions about the applicability of this settlement to other bodies and groups that might wish to be included.

**Mr McLaughlin:**

Yes, but if, in the light of the settlement, the parameters on which it depends were being applied now to the information that is coming from different individuals or groupings of former civil servants who are left feeling aggrieved and left out of the arrangement in which they genuinely think they should be included, does that not allow you to give more precise information to Ministers, who should be considering what they can do on an ongoing basis?

It is not done and dusted by any means: it is going to keep coming back. We have a new set of parameters, including the six-year one, which will allow for a recasting of the costs to achieve a truly inclusive and fair arrangement. We still might be in a position where the Executive may say that they really cannot cope with it, particularly in light of the current budgetary settlement. However, at least it is not the 1970s, and we are not talking about the spectre of hundreds of millions of pounds. It would actually be a quantified cost. Can we do anything about it?

**Mr Baker:**

I come back to the point that I will take my lead on the issue from my Minister; I have to. There is a fair amount of work involved in what you suggest, much of which would have to be undertaken by bodies outside DFP, because we do not have access to their records.

**Mr McLaughlin:**

Pensions branch could probably help you.

**Mr Baker:**

Pensions branch in Derry?

**Mr McLaughlin:**

It will have that information. It will know exactly.

**Mr Baker:**

Are you talking about the retirees?

**Mr McLaughlin:**

Yes.

**Mr Baker:**

But there are lots of other bodies involved.

**Mr McLaughlin:**

It also has information on the people who have not yet retired. It knows who was in the Civil Service, when they were there and at which point they left, as well as whether people are still there.

**Mr Baker:**

Ultimately, those issues come down to political decision and direction. I think that the Committee and even NIPSA acknowledge that.

**Mr McLaughlin:**

I have to say that you have been very fair.

**Mr Cree:**

I just seek clarification from Mr Baker. In response to my colleague's questions, you made the point that the SSA had, in fact, never implemented the delegation; it simply accepted the negotiations. Surely the PSNI was no different in that respect? The police were the very same.

**Mr Baker:**

They were not exactly the same. The SSA explicitly asked us to negotiate on its behalf, and the SSA staff were explicitly included in the outcome of those negotiations. We were never —

**Mr Cree:**

The police never asked you to do that?

**Mr Baker:**

No, never. When we were negotiating with NIPSA, it was clearly and explicitly understood by management side and NIPSA that we were not negotiating on behalf of anybody within the NIO pay group. That is the difference.

**Mr Cree:**

Do you understand that the PSNI did not negotiate with NIPSA or anyone else? It simply mirrored the settlements.

**Mr Baker:**

That was the PSNI's prerogative, but it did have a pay delegation.

**Mr Cree:**

Just for completeness.

**The Chairperson:**

I am sure that we will return to that. I appreciate what you are saying about the difficulty in getting that type of information. For the Committee and Ministers to be able to consider the issue further, we will have to zero in and get some type of hard facts and figures rather than having an abstract, legal discussion about who is and is not entitled. Although there may be some legal restrictions to entitlement, there is certainly a strong view here and no doubt round the Executive table that there are people who have fallen out of this, through no choice of their own, because they were moved as part of their Civil Service duties to other duties that then excluded them from pay settlements. As members here said, that is a moral argument that is hard for people to counter. Nonetheless, we will come back to it. We will be posing further questions in writing to the Department about some of those issues.

You were down on the agenda to speak on sickness absence, but I think that the meeting has probably extended well beyond your time and ours. So, if possible, could we get you to come back at a further date to discuss those issues?

**Mr Baker:**

That is fine, Chair. In fact, it might be more appropriate for me to come back at a further date. I am saying that because the latest report that the Committee has on sickness absence in the Civil Service relates to the 2009-2010 financial year, whereas the 2010-11 annual report from the Northern Ireland Statistics and Research Agency should be available within the next month, so the Committee would have much more up-to-date information to look at by then. It is hoped that the Committee will have access to that annual report within a month.

**The Chairperson:**

OK. It makes sense then to postpone the briefing beyond that. Thank you very much for that. No doubt we will be talking to you again about these matters.