



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Equal Pay Claims for DOJ/NIO/PSNI Staff

23 May 2013

NORTHERN IRELAND ASSEMBLY

Committee for Justice

Equal Pay Claims for DOJ/NIO/PSNI Staff

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Alex Easton
Mr Tom Elliott
Mr William Humphrey
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Patsy McGlone
Mr Jim Wells

Witnesses:

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|------------------------|-----------------------|
| Mr Glyn Capper | Department of Justice |
| Ms Karen Pearson | Department of Justice |
| Ms Louise Warde-Hunter | Department of Justice |

The Chairperson: I welcome from the Department of Justice (DOJ) Karen Pearson, deputy director of personnel and office services; Louise Warde-Hunter, deputy director in the policing policy and strategy division; and Glyn Capper, deputy director in the financial services division. I will hand over to you, Karen.

Ms Karen Pearson (Department of Justice): Thank you for the opportunity to update the Committee on equal pay issues as they relate to DOJ and to Police Service of Northern Ireland (PSNI) support staff. We provided the Committee with a short written briefing, including the County Court judgement delivered on 7 March. That judgement established that there was no entitlement to the terms of the Northern Ireland Civil Service (NICS) equal pay settlement for staff working in the former Northern Ireland Office (NIO), and now the Department of Justice, or the Police Authority for Northern Ireland (PANI) and PSNI.

We acknowledge that the judgement is, of course, a disappointment for staff in the NIO and the PSNI. However, it is clear and comprehensive, and, in those circumstances, no further action is being taken by the Department on the equal pay issue. The case was taken with the support of the Northern Ireland Public Service Alliance (NIPSA), which has advised its members that it will not be appealing the judgement.

It may be helpful if I summarise the categories of staff that the court was asked to consider. First, staff working in the NIO and now in the Department of Justice; secondly, staff who work in the PSNI; and,

thirdly, staff who worked in the NIO or the PSNI and in an NICS Department. We will call that split-service, for ease of reference.

The court found that the NIO had a legitimate pay delegation, which meant that staff in the NIO were subject to NIO pay arrangements and that those staff were outside the equal pay settlement agreed between the Department of Finance and Personnel (DFP) and NIPSA. DFP was not responsible for the pay arrangements for those staff.

The court also found that there was a pay delegation to PANI via the NIO. As such, PSNI staff also fell outside the terms of the equal pay settlement, as DFP was not responsible for their pay.

Staff with split-service were entitled to the equal pay settlement for time spent in one of the Departments. DFP has acknowledged that and has offered to make some payments for servicing NICS Departments. That offer is still on the table.

We are also aware that there is interest in whether the PSNI made a case to the Department of Justice on equal pay. I will cover that briefly, if I may. The PSNI submitted a draft business case to the Department in October 2010 that was based on an entitlement to the NICS equal pay settlement. The Department was not satisfied that the PSNI had demonstrated entitlement, so the business case was not formally submitted to DFP, although there were some discussions between the three.

It is also fair to say that the PSNI did not submit any business case to the Department to demonstrate an internal equal pay vulnerability within the PSNI. We note that NIPSA informed its members on 27 March that a challenge based on internal comparators was unlikely to succeed.

We appreciate that there is some interest in whether a business case from the PSNI could take matters in a different direction now. In the first instance, it would be for the PSNI to make that case. However, the equal pay judgement dealt with the PSNI's entitlement to the equal pay settlement, and NIPSA has advised its members that a case based on an internal comparator is unlikely to succeed. Therefore, I think that it is fair to say that it is difficult to imagine what that business case would deal with, but it is a matter for the PSNI.

We also appreciate that the Department is focused very much on whether there is a legal entitlement, and questions have been raised around fairness and whether there is a different way through for staff. It remains the Department's position that no case can be agreed without a legal entitlement. We appreciate that staff are disappointed, but, without a liability to address, there are no further plans for work on the issue in the Department.

The Chairperson: Thank you very much, Karen. I have some basic questions. The PSNI did submit a business case to the Department?

Ms Pearson: A draft came through for discussion with the Department on the PSNI's view. It believed that it had a legal entitlement to the equal pay settlement. The PSNI sent us a draft business case in October 2010 for discussions on whether it had demonstrated a legal entitlement to the NICS equal pay settlement. Yes, it is true to say that paperwork arrived, but a formal business case did not leave us to go to DFP.

The Chairperson: Why did the formal business case not leave the Department?

Ms Pearson: That followed discussions with DFP on whether the draft had demonstrated a liability, and the answer to that was that we did not believe that it had done.

The Chairperson: Obviously, there is the legal court judgement, and everyone accepts that you cannot pay something that would be illegal, but I think that some people would say that there is still a moral obligation to do what would be right in this sense. If that were to happen, it would require the PSNI to put together a business case to make that argument, and that would need to be submitted to the Department. Are you aware of whether the PSNI intends to do that?

Ms Louise Warde-Hunter (Department of Justice): I will comment on that, Chair, if I may. Very recently, I have established with the PSNI that its position is that it was not subject to the legal proceedings and, therefore, had no recourse to the courts on the broader matter. Specifically on your question, no equal pay liability has been identified within the PSNI alone. From that, I am inferring that it is not in a position.

Mr Wells: As you are aware, there is quite a lot of concern about this. You are saying that the legal judgement does not provide an entitlement, but there is nothing to stop the Department making a decision to sort this out and to treat everybody fairly. There is nothing legally stopping you doing that.

Ms Pearson: All along, we have taken the position that we need a legal liability in order to trigger our powers to make any case to DFP for the payment of this award to staff. We have come at it from the liability angle, not from the fairness angle, and I do not think that we could. We need an obligation in order to be able to make payment.

Mr Wells: Why do you need to be compelled legally to do something that is fair?

Ms Pearson: I think that we do not have a basis for spending public money.

Mr Wells: Legally, there is nothing to stop you putting up a business case to DFP and asking for the money to do this. If it grants you permission, you are entirely watertight in that decision.

Ms Pearson: We have not approached it as a legal barrier. In managing public money, we do not think that we have the basis for making such a case. I would be doubtful that we would get a case through DFP on that basis.

Mr Wells: Are you aware of the view that some people took a considerable personal risk to do that type of work in the past, in more difficult times? It seems extremely unfair to those folks that we do not seem to be giving any recognition to that whatsoever. I remember a time when people who worked as ancillary staff to various aspects of policing and justice were seen as legitimate targets, and some in fact were killed. Therefore, those who took the decision to do that type of work put themselves and their family at a considerable degree of risk.

Ms Pearson: That is not in doubt, and I think that those matters were explored in some detail in the court case. The PSNI gave evidence along exactly those lines, and the court case came out as it did.

Mr Wells: Therefore, folk who worked through the depths of the Troubles, who checked under their cars, who varied their route, who did not shop at the same supermarket more than once, and so on, they are just being totally airbrushed out of the consideration?

Ms Pearson: The issue for DFP when it began its negotiations was purely around liabilities for equal pay. Those staff were not included in the settlement because they were outside the terms of DFP's pay control, and the court has found that there is no entitlement. I do understand that the fairness argument is out there, but for our ability to spend public money, we have to start with the liability.

Mr Wells: I can certainly understand why you cannot spend money if you are instructed not to or there is a legal impediment to stop you doing it, but that judgement does not stop your Department saying, "This is grossly unfair, and we need to treat those people fairly, so we are going to put up a business case for it." If you get DFP to agree to that and the money is found, no one can take you to court for that, surely.

Ms Pearson: That is correct, but it remains our position that, without a legal entitlement, no such case should or could be prepared.

Mr Wells: "Could" or "should"? I think it is "should", because I think that it could well be done if there was the will to do it.

I must confess that I have had only a couple of constituents on to me about that matter, but they see the way in which they have been treated as being grossly unfair, and, I must say, any reasonable person looking at it would believe that that is correct. It seems that the Department is using the court judgement as a way to block something that I think most decent, reasonable people would think was the right thing to do. You are saying to me that you are not even prepared to explore that. You are not prepared to go down that route to see whether you can make a fair decision rather than one that you feel is legally watertight.

Ms Pearson: In managing public money, we just do not have a basis for putting a case together along those lines. It has to start with the liability, in our view, and we think that is where DFP is, too.

Mr Wells: As I said, I have been up hill and down dale with various constituents about this, and I must say that I have got the same reaction. You have been consistent if nothing else. There is a lot of ill will there among people who have given very loyal service to various aspects of our courts and justice service, and they feel very hard done by. I just have to say that, and they would expect me to say it. They gave a lot in difficult times, and they just want to be treated equally, but they are not being. I do not know how we crack that. That is all that I will say.

The Chairperson: What is the quantum of moneys that had been identified as to the potential liability that there could have been, had the pay claim been applicable to the PSNI?

Mr Glyn Capper (Department of Justice): The amount of money available specifically for that purpose was £26 million.

The Chairperson: I think that that figure was previously referred to and that the Department was setting it aside in the event that the court case found that there was a liability, so there had been £26 million identified and ring-fenced in case of the court judgement ruling against the Department. What is that £26 million being used for now?

Mr Capper: To clarify, the £26 million was not actually in the Department's budget. The arrangement was that £26 million was available for that purpose, as you said, if a liability was established. That would have been accessed via a Treasury reserve claim through DFP, but only in the case of a liability being established.

The Chairperson: Has the Department told the PSNI not to prepare a business case?

Ms Warde-Hunter: Sorry, will you repeat the question, just so that I am clear?

The Chairperson: Is there anything stopping the PSNI from putting together a business case? Has the Department said to the Police Service, "We do not want to have a business case cross our doorstep. Do not do this."

Ms Warde-Hunter: No. That was not the position when I last spoke to a senior executive in the PSNI, which was yesterday afternoon, to establish its position. I can assure you that that was not the position that I took with the individual. I was keen to ascertain where the PSNI now stands. As I have already volunteered to the Committee, the issue is that it has not established an internal liability to make a separate case. That is the position as it was recorded yesterday.

The Chairperson: In the House earlier in the week, the Minister of Finance and Personnel indicated that responsibility for identifying whether there is a case lay with the PSNI. It is for the police, if they identify that, to provide a business case. I am asking you whether any obstacle has been put in their way, and if they decide that they are going to do a business case, there is nothing coming from the Department to put them off doing that.

Ms Warde-Hunter: You are correct. There is no obstacle. The issue is for the PSNI to identify, if it so wishes, the basis on which it might bring forward a business case. My sense is, however, that that is not where it is right now.

Mr Elliott: Thank you very much for your presentation. I also wish to echo the disappointment and frustration that there is among staff, particularly among the Police Service civilian staff.

I want to ask about the business case that was provided to the Department by the police. You obviously chose, or decided, not to forward that to DFP. Can you explain why?

Ms Warde-Hunter: Certainly. We were presented with a business case. There had been an iterative back-and-forth between the PSNI and DOJ in the early part of 2010. We then received a draft business case in October 2010. At that point, we consulted DFP, not about submitting it, because it had not received any approvals, but rather to seek DFP's view on the issue of legal liability, which has

already been shared with the Committee, and about paying the NICS equal pay settlement to PSNI support staff.

The legal advice that came back from DFP on 22 February 2011 stated very clearly that the pay and grading delegation that had been granted to the NIO in 1996 was to include the Northern Ireland Policing Board, formerly PANI, and that that pay delegation had not been rescinded. As a result of that, the position was that there was no case to put forward the business case. It could not have gone through the legal and financial approvals. The PSNI was made aware of that advice in short order afterwards, on 1 March 2011.

Mr Elliott: What attempts were made to ascertain whether a resolution could be achieved? I assume that the legal advice received was internal departmental advice? Were any attempts made to see whether there was a mechanism that could be found to deliver the money?

Ms Warde-Hunter: My understanding, having reviewed the correspondence between my predecessor in the role that I occupy now and one of the human resources executives in the PSNI, is that they explored the issue. It was set out for them. There was a brief exchange, and, as far as I have seen, there was no further indication or formal correspondence from the PSNI requesting it to be progressed. There was an e-mail discussion of it, but it stops at that point.

Mr Elliott: So it was extremely limited?

Ms Warde-Hunter: From what I have seen — I must insert that caveat — it seems to have stopped fairly shortly after the news came back from DFP. The legal advice was the critical bit in guiding the next steps.

Mr Elliott: Would I be right in saying that, because it hit a hurdle at one stage, there were no further attempts to try to get over the hurdle?

Ms Pearson: If you are describing it as a hurdle, it was a significant one. If it was not going to demonstrate a legal liability, passing it to DFP was not something that we could contemplate. It was a fairly significant issue. That really was the crux of the issue.

Mr Elliott: I ask this because I feel it could have been resolved at a much earlier stage without going through the heartache and the process in which they found themselves. Can you explain the reasons why the business case did not progress any further? What were the specific reasons?

Ms Warde-Hunter: I am afraid that I can only reiterate what I have said already. The fundamental bit from the legal advice that came to DFP and that DFP then handed back to DOJ was that no legal liability had been established, and that that was the key preventative factor in going through what would be the normal financial approval process. That was such a significant issue.

Mr Elliott: Let us concentrate on the legal liability. Why was there no legal liability? What would it have been? What was required to have that legal liability?

Ms Pearson: I think that was explored in detail in the court case. In respect of the PSNI, the court found that there was a pay delegation to the NIO and PANI, which meant that the PSNI was subject to pay arrangements that were separate to those led by DFP. So the DFP discussions with NIPSA on the equal pay settlement could not cover the police staff or indeed DOJ staff because they were subject to different pay arrangements.

Mr Elliott: Do you think that if you had tried a little harder when that business case came forward, and provided that DFP had taken it on the basis that Mr Wells has just explained, that there was no legal liability to stop you paying it or to stop DFP from paying it, and that this could have been resolved at a much earlier stage and in a much easier fashion?

Ms Pearson: I think not, because I do not think that DFP would have accepted a business case without a legal liability.

Mr Elliott: Even though it could be paid even if there were no legal liability?

Ms Pearson: I come back to what we have said from the outset: without that liability, we see no case for making a payment.

Mr Wells: Yes, but with respect to the prison package, there was no legal liability to let prison officers go with a very attractive package, but the package was devised in the interests of fairness and equity. There was no court order ordering people to do that.

There have been many other payments through the DOJ that have been made on an almost ex gratia basis, when you do not have someone standing over you with a big stick but have decided to do it. I must say, I take it a bit ill on behalf of the couple of constituents who contacted me. You sit there, saying there was no legal liability, and you are hiding behind that without actually considering the impact that this is having on people in the real world. As far as you are concerned, it is a case of, "The answer is no, now what is the question?" As soon as you could hide behind the fact that there was no legal liability, you did not even let it go up to DFP. There was nothing to stop you doing that with a note saying, "By the way, we do not think there is a legal liability", but you did not even let the business case get that far. That is what I find so annoying; so many other decisions are made without a legal imperative, but you have decided to block this one.

Mr Capper: I think all I can do is repeat Karen's points that in order for that payment to be made, and I understand your comment about, for example, the prison service exit scheme, I think that is a very different scenario —

Mr Wells: I am getting angry. Where was the legal liability to force you to pay the money to the prison service? There was none.

Mr Capper: You are right in saying that there was not in that scenario, but I think that is a different issue. This one was about whether the NICS equal pay claim applied to a specific group of staff. In order to make payment in that scenario, a liability had to be established, and as Karen said, it could not have been. Again, to repeat Louise's point, another option for police would have been to explore their own internal comparator, but they have not been able to progress that.

Mr Wells: There was nothing to stop you overriding the lack of legal liability by making your own decision in the interests of fairness to address this issue. Nothing. Is that correct?

Mr Capper: For the Department to be content that it had complied with 'Managing Public Money' in making a payment or in setting aside quantum, it would have had to establish legal liability and be content that that was the case before it progressed the case to DFP.

Mr Wells: I am getting nowhere.

Mr Elliott: Chair, I have just one final point. Have those same staff been subject to any fluctuations in Northern Ireland Civil Service pay, and are they subject to similar terms and conditions?

Ms Pearson: Are we talking about PSNI staff?

Mr Elliott: Yes.

Ms Pearson: The PSNI follows NICS pay arrangements but is not bound by them. The pay for PSNI civilians is practically the same as it is for Northern Ireland civil servants but is provided under very different arrangements, with different employers and different terms.

Mr Elliott: So it follows them but is not bound by them?

Ms Pearson: That is correct.

The Chairperson: In respect of NIPSA's role in this, it has indicated that PSNI staff were not included in the claim that it took forward. Was that a problem? Did the fact that it did not include PSNI staff in its claim have a bearing on this?

Ms Pearson: To be fair to NIPSA, its evidence in court was that it raised the case of staff in the PSNI, NIO and others during its negotiations with DFP. Again, to be fair to NIPSA, its bulletins told staff that

although the package did not include them, it would make attempts to have that apply to them. It really was for NIPSA to set its own strategy in that respect. I am just giving you a flavour of the evidence that it gave to the court.

The Chairperson: Did it formally include PSNI staff in its claim? I hear what you are saying about its argument, but were PSNI staff formally and officially part of the 4,500 people for whom it initially made a claim?

Ms Pearson: I could not answer that for NIPSA. I think possibly not, but I would have to double-check.

The Chairperson: I know that Minister Wilson said that NIPSA has now publicly stated that, when it was negotiating on the issue and taking a tribunal, it did not include PSNI staff.

Ms Pearson: I think that you are right.

The Chairperson: So, would that have been a contributory factor in the court not applying that claim to PSNI staff?

Ms Pearson: I think that the court looked at the case as presented to it, which was that there was a breach of contract with NIPSA. NIPSA was saying that although the staff in the 10 test cases were outside the settlement, they had a contractual right to have the terms of the settlement applied to them. I think that that is probably how NIPSA would put it.

Mr McCartney: Before I ask these questions, can you give us some indication of what was in the letter from David Fell, the head of the Civil Service in 1996. The judge said that his letter was not binding. I take it that he meant that it was not legally binding because it is not a legal document. Did the head of the Civil Service then indicate that those people should have had pay conditions that would allow them to make that claim?

Ms Pearson: That was a key point in the case. NIPSA said that the correspondence from Sir David was contractually binding, but the court found that it was not. I am happy to make the correspondence available to the Committee.

Mr McCartney: I understand why it was not contractually binding, because it is not a legal document. However, that was the basis on which people made the claim that they were treated unfairly.

Ms Pearson: It is one of the issues that they pointed to in making that case.

Mr McCartney: Right.

People now accept that the issue of fairness remains unaddressed, even by the court finding. The judge said that he had sympathy. When he said that — I do not want to second-guess him — he was more or less saying, "Legally, I cannot do anything, but, morally, perhaps people should".

Ms Pearson: It was a very long judgment. I think that those were his concluding words; that is factually correct.

Mr McCartney: So, to take this in reverse, if you were tasked in the morning with making a case for these people to be treated fairly, how would you go about that?

Ms Pearson: I have to say that I do not think that we could be, but if we were tasked —

Mr McCartney: No, but Jim Wells made the point that someone was tasked with making the case for prison staff to get an enhanced package. There was no legal obligation to do that, but that case was made for a particular reason. So, if you had to make the case in the morning for those people to be treated fairly, what would you say?

Ms Pearson: No work has been done on that, so it is very difficult to answer. However, I think —

Mr McCartney: Could you make the case that money could be found for a case to be made and for people to be treated fairly?

Ms Pearson: It would be incredibly difficult to do that.

Mr McCartney: How can you do it for prison staff but not these staff?

Ms Pearson: When DFP came to an agreement with NIPSA, it was dealing with an equal pay vulnerability within the Civil Service; that is why it did it. Everything that it did was done with reference to equal pay legislation. None of those issues applies to the groups of staff that we have been talking about this afternoon. It would be incredibly difficult to find a starting point for it.

Mr McCartney: So, it is not a case of if there were a will, there would be a way.

Ms Pearson: As Glyn mentioned, with respect to 'Managing Public Money', it would be nigh on impossible to construct a case that would get us any further at this time. I want to be frank about that, because one of my concerns is that our staff may be waiting for something different to happen. I want to be clear that, at the moment, we have no plans to do anything differently.

The Chairperson: Could the Minister ask you to do it? Could the Chief Constable ask his team to go away to see whether something could be done?

Ms Pearson: The Chief Constable could certainly ask his team to do it. However, that would still come back as a business case that would have to go through us, receive the usual financial and legal approvals, and reach DFP. Some time could be spent on it; absolutely. However, I think that it would be wrong of me to give any hope that those staff could benefit.

Mr Humphrey: Thank you very much for your presentation. Members have made reference to the business case that was submitted. If I heard you correctly, Ms Warde-Hunter, you said that you met the police earlier in the week.

Ms Warde-Hunter: I spoke to the police in a telephone conversation.

Mr Humphrey: Whoever is best qualified to answer this question can answer it: given the issues that members have raised and the comparison between these staff and those in the Prison Service, do you believe that there is a will at the highest level of management of the police, including the Chief Constable, to address this issue?

Ms Warde-Hunter: From my conversation with the executive to whom I spoke yesterday, my understanding is that although they fully appreciate the great disappointment that there is, getting to the heart of whether they can make an effective business case is not there. They do not believe that that is possible.

Mr Humphrey: Do you believe that the will is there? Their making a business case can be used as flannel to explain away why they cannot do anything. From the conversations, meetings and whatever that you guys have had with the police, right up to Chief Constable level, do you believe that there is a will within the police to address this and right what, as Mr Wells said, is clearly a wrong in this society?

Ms Warde-Hunter: I will be perfectly honest: I am not aware of what is currently in the Chief Constable's mind or of what he may be minded to do. However, my reading from that senior management team member was that there was not a basis on which they could put forward a further case to go back and look at it again; that is my understanding.

The Chairperson: Has the Chief Constable formally advised the staff and had a conversation with them to talk them through why it is just not possible? Has there been proper communication with the staff concerned?

Ms Warde-Hunter: I am sorry; I could not comment on that. However, I would be very happy to go back, on behalf of the Committee, to find out the answer to that question.

Ms Pearson: I know that NIPSA has been very active in explaining issues and has been round a number of police staff groups to talk about the judgement.

The Chairperson: It is on the back of this that a number of us have received correspondence. As part of those briefings, misinformation has clearly been provided about who is responsible. Blame has been apportioned to other Departments that did not even have a business case to make a judgement on. That is why we are trying to get clarity on this issue. I ask you to take back the message to the Chief Constable and the management of the Police Service that, rather than the union briefing the staff concerned, they need to communicate with their employees on the factual positions and why they will not take forward a business case. The staff concerned need to be getting the fundamental basics of this case, because I do not believe that they have been.

Ms Pearson: That is a fair comment. We will bring that back.

Mr Elliott: I know that the draft business case is not your document as such; the PSNI provided it to you but it was never submitted. However, could it be made available to the Committee?

Ms Warde-Hunter: I cannot imagine any particular impediment to that. I will take advice on that, and if we can share it, we will do so.

Mr Elliott: Thank you.

The Chairperson: Karen, Glyn and Louise, thank you very much for coming to the Committee. I appreciate your candid nature, as it is better that we know exactly what we are dealing with. Thank you for that.