



Northern Ireland  
Assembly

Committee for Finance and Personnel

# OFFICIAL REPORT (Hansard)

Equal Pay: Departmental Briefing

23 May 2012

# 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)  
Mr Roy Beggs  
Mrs Judith Cochrane  
Mr Leslie Cree  
Mr Paul Girvan  
Mr David Hilditch  
Mr William Humphrey  
Mr Paul Maskey  
Mr Mitchel McLaughlin  
Mr Adrian McQuillan

**Witnesses:**

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

**The Chairperson:** You are very welcome. I remind witnesses that the session is being recorded and ask them to turn off electronic devices.

The Committee had requested stakeholder views on the Minister's letter that sets out the estimated cost of extending the settlement. Members have a copy of the stakeholder responses, which also refer to wider issues. Some of the responses appear to have legal documents attached. We are aware that some of these cases — we had the discussion in closed session before you came in — have been listed for hearing by the County Court, and we asked for some legal advice on that. We are aware that there is less of an element of danger of prejudice when it is being heard by a judge only, as is the case in the County Court. Nonetheless, we want to have as full and frank a discussion with you as possible. If, at any stage, you feel that you cannot answer because it may prejudice judicial proceedings, we are prepared to hold those questions and move into closed session to deal with them.

**Mr Derek Baker (Department of Finance and Personnel):** OK. Thank you, Chair.

**The Chairperson:** We want to go through all of it, or as much of it as possible, in open session because we feel that the people who have been in touch with us are entitled to hear the flavour of the discussions. However, if you are very clear that you cannot answer certain questions and members want some discussion on them, we can bank those, close the session and deal with them at the end in closed session.

I welcome Derek Baker and Mark Bailey, head of pay and policy. I ask you to make some opening remarks, and then we will try to work our way through this as best we can.

**Mr Baker:** Thank you, Chair. You mentioned that some of the cases are listed for hearing on Monday, so we may have to be circumspect in some things that we say. However, we will be as open as possible.

The Minister has written to the Committee with some estimates of the costs associated with the various groups that were excluded from the equal pay settlement. I could take you through those at this stage, explaining some nuances and throwing some shade and light on that, or, if you like, I will go straight into receiving questions from the Committee.

**The Chairperson:** Some of the questions might concern that, so it is better to deal with that information now.

**Mr Baker:** OK. I will say a little bit about the costs that have been estimated for each grouping. I will start with the staff who were formerly seconded to the PSNI, and I have an estimated figure of £22 million for that. That estimate has not been done by us or, more properly, by the Northern Ireland Statistics and Research Agency (NISRA); we have taken that figure from PSNI documents. There had been a figure in the public domain of about £26 million, but a more recent figure in PSNI documents is £22 million, which, to the best of our knowledge, includes not only the lump sum compensation payments to the affected staff but the liability in respect of income tax and national insurance. The Committee may recall that, as part of the equal pay settlement, we made arrangements to pay HM Revenue and Customs (HMRC) directly in respect of any liabilities associated with the lump sum payments. That still came out of the total cost of the equal pay settlement, but it meant that, when staff were given a figure, it was the net figure and they did not have to engage with HMRC.

The second figure relates to staff who were formerly seconded to the PSNI and who have come back into the Northern Ireland Civil Service (NICS). They may have received some element of a lump sum in respect of service that we regarded as reckonable in NICS Departments, but we regarded service when they were in the PSNI as non-reckonable. We estimate that the additional cost of extending the settlement to those staff is £1 million. We have access to their staff records, but we do not currently have access to the records of the staff who now work in PSNI and who never came back to us. PSNI has those records, but NISRA does not have access to them. So, it is £1 million for those staff, and that includes an amount for income tax and national insurance liabilities.

The third group is staff who were seconded to the then Northern Ireland Office (NIO) in the affected groups, including staff who may have been seconded to the Northern Ireland Prison Service. Our estimate for that group of staff is £4 million in respect of the lump sum. I have to apologise to the Committee. The Minister wrote to the Committee and gave that figure; that was my fault, not the Minister's. That figure did not include an amount for tax and national insurance, and that was an oversight on my part, for which I apologise. We have to add about £1.5 million on to that £4 million for tax and national insurance liabilities, assuming that HMRC is content to apply the same kind of formula that it applied to the equal pay settlement.

There are still some ambiguities around the former NIO cases. We have a bit of a problem in respect of the NIO. The equal pay settlement that we eventually agreed with the trade unions included a payment to staff in the NICS Departments at the EO2 grade. Because of the exercise of its pay and grading delegation, the NIO did not have an EO2 grade. It had something called a grade C, and the closest analogy to that grade in the NICS is an amalgam of the EO2 grade and the EO1 grade. That presents us with a conundrum on whether and, if so, how any payment could be made to EO2 equivalents in the NIO given that the EO2 grade did not exist. I have not tried to work that one out or got my head around it or concluded what a court might decide on that issue. That £5.5 million figure would increase if we had to include something for the C grades. There is nothing in there in respect of EO2s or grade Cs at this stage.

Those amounts are probably the summation of the cases that are due to be heard next week in the County Court.

In addition to those issues, there is the position of retirees and leavers — staff who have left. We have a real difficulty in providing the Committee with what I would call robust estimates. The key variable is the frame of reference for the award. For the purposes of illustration and to help the Committee, we have included staff who left during the period that is covered by the settlement. That

period is six years back from February 2009, which is the effective settlement date. Therefore, it goes back to February 2003. We would only know the precise costs when we would go into the service details of all those staff. At the outset, I say that I expect that, in the case of staff who have left, it would be quite difficult to validate that service history. It was difficult to do so even for the equal pay settlement that we did negotiate. The Committee will recall that we included people who had left back to August 2008. Mark and his team carried out that process, and Mark's experience is that it was quite difficult to track some people down, even though we had their addresses, which we had from our pension records and so forth. They just did not respond to us, even though we were telling them, remarkably, that they were entitled to a settlement. We could not get in touch with them, and those cases remain open. I imagine that it would be even more difficult if we were going back as far as 2003.

That aside, the figure is in your letter, and we estimate that the lump sum cost is about £17 million. That is a pretty crude estimate. It includes the tax and national insurance liability. It does not include any increased pension payments. A significant number of those people are in receipt of pensions and may well argue that implied higher salaries in previous years would mean that both their lump sum at the point at which they retired and their pension payments since the point at which they retired should have been higher. There is no calculation of that, and we would have to look at each and every individual case. So, that figure carries a health warning.

The figure of £17 million would reduce if we were to use a different frame of reference. We have gone back six years from February 2009. If we were to go back five years or four years or three years or two years, that £17 million figure would reduce commensurately, so it depends on which frame of reference you use.

That is all I want to say at this stage in providing clarification on the figures. Mark, have we covered most of the issues?

**Mr Mark Bailey (Department of Finance and Personnel):** Perhaps my only comment is that, with the last group that you mentioned in particular and, in fact, with all groups, we are not at all clear what a County Court might award if it were to make a judgement. We are not in a tribunal situation that we are clear on and which has case law on it. In a County Court, there is not case law on this, and it is not clear that it would necessarily declare a six-year compensation period. That adds more uncertainty around the figures.

**The Chairperson:** You have broken down the PSNI and the NIO secondees. Can you break down the estimate of £17 million between retirees and leavers?

**Mr Baker:** I cannot do that today, Chair. I do not have those figures.

**Mr Bailey:** I do not have them with me.

**Mr Baker:** Do you want us to try to come back to the Committee on that?

**The Chairperson:** It would be helpful if we had the breakdown between retirees and leavers. I am not keen to start differentiating between people and saying that certain people are entitled and some are not. That is a matter that will have to be resolved. It would be helpful to have the breakdown on what the difference is.

Was a case not put to us that, for anyone who has less than two years' service, there is no deferred pension element and no ongoing responsibility or liability on the Civil Service? Have you factored out of the figure the people who have less than two years' service?

**Mr Bailey:** Yes. Derek has commented on the uncertainty of some of the data, which has not been validated. However, to the best of our ability, based on the information that we have, we have gone through an exercise of removing those who we believed would not be entitled to the settlement. If they were casual staff or if they did not have two years' service, we have, to the best of our ability, removed them.

**The Chairperson:** OK. Fair enough.

I will open it up for some questions. Hopefully, we will be able to get through this.

**Mr McLaughlin:** I appreciate that, as well as there being a position to stand over, the passage of time adds significantly to the complexity of all this. I want to establish some information as a baseline for my own understanding. If we were to apply the terms and grades that were the outcome of the equal pay negotiation and settlement to records such as pension contributions, which would reflect, I imagine, any break in service, surely that approach would give us a reasonably accurate projection of the potential costs? The pension records would establish that the individuals or groups involved had a continuity of service. If there is no dispute about that, rather than precise or specific details of where they were at a given point in time because of secondments and movement within the Civil Service, it should be reasonably easy to establish that they had the necessary continuity of service at Civil Service or similar grades.

**Mr Baker:** Forgive me if I do not understand the question correctly. While pension records might give you information about continuity of service, I do not think that pension records of themselves would give you the kind of detailed information about the individual service and individual grade that someone was at during any given period in question that would allow us to calculate to the level of accuracy that we used in the equal pay settlement for each and every member of retired staff. Ultimately, if retirees were included in a settlement as a result of a legal judgement, we would mobilise ourselves to gather those staff records and do a calculation for each and every one of those members of staff, as we have done for those who were included in the original equal pay settlement.

In the original equal pay settlement, we engaged with each individual member of staff and asked them whether they were content with our understanding of their career history and whether they agreed with our calculation of what they were due. That was used as a quality-assurance mechanism. We would like to do that if we were going to extend this to any other group. The point that I was making is that it is going to be more difficult to have that engagement with retired people or with people whom you cannot contact. When you are dealing with members of staff, it is easier to set up IT systems, using your own internal IT network, to give staff electronic access to their records.

Mark, do you want to add to that? You went through the logistics of trying to establish the validation of records.

**Mr Bailey:** Certainly, we had problems with leavers and retirees — particularly with leavers because you do not have the same contact with them. You have more confidence that retirees' addresses are up to date, but we had significant problems with leavers, and there are still quite a few hundred who have not responded to the original letters that were sent out, presumably because they have moved house and moved on or whatever.

**Mr McLaughlin:** Sorry; we may come to that, but I am not addressing the anomalous situation that you have in having written to some people indicating that they could benefit from the settlement and they have not responded. I am trying to establish the basis on which certain groups were not included. I am also trying to address the difficulties of the calculations. If we were to take the broadest possible catchment by establishing that people were in the Civil Service as the result of their membership of the pension scheme, their contributions would reflect the pay levels in percentage terms for any given year within that record. That would allow us to establish, without dealing at this point — it may take a court decision to deal with it in any event — with people who were excluded, who was operating at particular grades and salary levels that were commensurate with those grades. The period over which they were making pension contributions to the Civil Service pension scheme would reflect, in contribution terms, the continuity of service — that is, the time span that we would have to calculate on. It would also establish where they were, whether they were secondees or retirees and at what point they became retirees. All that can be analysed and quantified.

We can then argue over — as we, obviously, are going to have to argue over — who was excluded and the reasons for excluding them. The Department of Finance and Personnel (DFP) had a very early position, and, from the evidence that we have heard from a wide range of opinion, it appears to be an anomalous position. The fact that the Social Security Agency was included in the negotiations but other groups were left out is probably something that you will have to consider your defence on. I can see an obvious area of challenge.

Just to deal with it: if we really wanted to quantify the real costs should the Department's initial position be successfully challenged, it is an important question to be established. It probably informed the original decision — whether that was a good decision or a bad decision. From the evidence that we have heard, it does not appear that anybody had taken either a forensic or a robust enough

approach to work out the actual costs and the reasons, the logic or the rationale for including some groups and excluding others.

**Mr Baker:** I disagree with that. I think that a very robust approach was taken to decide which groups should be included and which groups should not be included in the settlement, and that was on the basis of legal advice that we took at the time. We did not take those decisions on a whim; they were explored very, very thoroughly.

In terms of calculating the potential costs of extending the settlement, so far as leavers and retirees are concerned, we have given an estimate of £17 million based on going back six years from February 2009. I accept that there is a health warning around that £17 million, but I think that it is a reasonably good figure. I am not sure that using pension records would give you a better handle on it. We can do a range of options from six years right down to two years, one year or whatever the number of months is, and we could give a range of options. That is probably as good as you would get at this stage, short of doing a full validation of each individual member or former member of staff's service record.

Before we did the validation of the almost 16,000 individuals who benefited from the equal pay settlement, we did an estimate of the costs. We came out within £2 million of the estimated figure of £140 million for the lump sum payment. We are currently sitting at about £138.5 million — I forget the exact figures.

**Mr Bailey:** We have paid out around £129 million for the settlement payment. The estimate had a broad range of about 10%, but, as regards the actual estimate, we were very close in the final amount. However, it is worth saying that these records are older and include leavers, some of whom, at this stage, left almost seven, eight or nine years ago. You can understand that the further back you go, the more hazy the records become or the more inaccurate they may be.

**Mr McLaughlin:** This is my last point, and it is in relation to that issue. In the context of the decision to open negotiations, which was, in itself, a protracted negotiation and not without its difficulties, the outcome was validated by the staff and those who were represented by the Northern Ireland Public Service Alliance (NIPSA) on the staff side. Was a stop put on the destruction of personnel records, given the statutory timetable and programme for destroying documents? Have any of the employment records that could well turn out to be in dispute been lost in the time frame of the equal pay process?

**Mr Baker:** No. During the course of the process, we moved from one database to another, as the Committee knows. As part of that particular project — it was nothing to do with the equal pay issue — we archived the old records. So, hopefully, they are preserved for us. We would use those to track back the career history of any individual who might be included. I am hopeful. It will require a bit of work, but not so much for staff who are currently in employment — former PSNI or NIO secondees — because we have the processes in place. However, if a settlement were to be extended to retirees, and we are going back five, six or seven years, a very significant administrative effort would be involved. We would have to create a team to do that; it is not something that we could bolt onto the day job and hope to get by on a wing and a prayer. A team would probably have to be created to do that administration. None of those costs are in there. However, I hope that we could do that.

**Mr D Bradley:** I want to follow up on the point Mitchel made about the non-inclusion of the increased pension payments. Your figures are estimates.

**Mr Baker:** Yes.

**Mr D Bradley:** Is it not possible to estimate on an average basis what that cost might be?

**Mr Baker:** It might be so vague as to be meaningless. In the area of retirees, we are diving into the unknown. As Mark said, we have maintained the position that people beyond August 2008 should not have access to the equal pay settlement. That has not been successfully challenged in any court. If it were to be challenged, I have no idea what the nature of the court's decision would be. As Mark said, we have no precedent for that. We know what an industrial tribunal does, but we do not know what a court would do in respect of an equal pay settlement. We have no idea how far back a court might go, and we have no idea what remedy it might recommend. I have no idea — I say this honestly — whether there would be any increased pension liability arising out of an equal pay settlement. It may simply be that a court would say there should be some kind of lump sum payment but no increased

pension liabilities. That is why we have not costed it. It may be totally nugatory work to try to do that. It may not be necessary at all.

Mark, do you have anything to add to that?

**Mr Bailey:** Again, I reinforce the point about the uncertainty around it. It is a balance as to how far you go with the level of work. To do this completely accurately, as you request, you would literally have to examine every record, for not only the potential difference in pay but the impact on someone's pension and the pension lump sum that may have been taken at the time of retirement. It really is extremely complex to get a totally accurate figure.

**Mr D Bradley:** You said that hundreds of people were non-contactable in relation to the settlement itself. Do you have a precise figure for that?

**Mr Bailey:** I do not have it with me, but I do know that it is in the low hundreds. It may be around 200 or 300, but I would need to check the exact figure. A substantial number of people have not responded at all. We have written to those people at their last known address on two occasions. We have no other way of getting in contact with them.

**Mr D Bradley:** Is there no other method of trying to track them down? Have you exhausted every means of contacting them?

**Mr Baker:** I would not say that we have exhausted every means; I do not know what every means of contacting a person we cannot find is. We have written twice to the last known address. I am sure that there are all kinds of other means that could be deployed to contact people who are not responding. I would not like to give the Committee an assurance that we have exhausted every means of tracking those people down. The cases remain open. We have not pulled the shutters down.

**Mr D Bradley:** Are there any other means open to you to contact them?

**Mr Baker:** I suspect that there are, but I cannot tell you what those means are. I would have to ask people who are expert in such matters and are used to trying to track down people whom they cannot contact. I am sure that many agencies have to go through those kinds of processes, such as banks dealing with dormant accounts, and so on. We could certainly look at whether there are any other means that we could reasonably deploy at a reasonable cost to try to track down those individuals.

**Mr Cree:** On that last point, I take it that all the pensioners get a BACS statement every month that shows the payment going into their account.

**Mr Baker:** Yes. Someone in receipt of a Civil Service pension probably gets that into their bank account by electronic transfer.

**Mr Cree:** Does the statement tell them what they got for a particular month?

**Mr Baker:** Yes.

**Mr Cree:** Have any statements been sent back again because they have been sent to the wrong address?

**Mr Baker:** We are talking more about leavers than retirees. Retirees are relatively easy to track down, because, as you say, provided that they are still getting a pension, we are paying them, and the money goes into a bank account. The issue is with people who left the service.

**Mr Cree:** I accept that.

On the overall figures, it looks like this could cost anything between £45.5 million and £50 million. Will that cover it all?

**Mr Baker:** Yes. That includes leavers and retirees.

**Mr Cree:** But it does not cover your legal costs.

**Mr Baker:** No, it does not.

**Mr Cree:** Do you have a handle on that?

**Mr Baker:** We have an estimate of legal costs from the Departmental Solicitor's Office, which engages counsel. Its current estimate of our legal costs is about £70,000. That is based on the work being done. We have engaged senior counsel and junior counsel on the cases that are due to go to the County Court next week. That estimate is based on the work being carried out to date and the work that might be involved in the County Court cases.

There is a health warning on that, too. The cases are listed for three days next week. If they last longer than that or go to appeal, the costs increase. If we lose those cases and have to pay the claimants' costs, those are additional costs. If we win the cases and the claimants have to pay our costs, the costs decrease. My personal view, based on previous cases — obviously, I have been involved in previous legal cases, particularly at the industrial tribunal — is that the costs are more likely to be in the region of £100,000 at the end of the day. That is the territory we are talking about.

**Mr Cree:** I have just one final point. You mentioned the County Court. I do not remember the figure, but there is a level at which the County Court is permitted to operate. Do you know what that figure is?

**Mr Baker:** I would not like to give you a figure, because I am sure that it would be wrong. I have a notion in the back of my head.

**Mr Bailey:** I do not know the precise figure, but I think that it is around £15,000. I am getting a nod, so I think that that is right.

**Mr Cree:** So it would not be competent to handle compensation or payments that are higher than that.

**Mr Bailey:** Again, I am not a legal person, but my understanding is that part of the reason why these cases are in the County Court is that, of all the claims, none individually exceeds the maximum for the County Court. Obviously, they exceed the maximum when they are all put together.

**Mr McQuillan:** I am looking for some clarification on the figure of £22 million for the PSNI staff. When they came here to give evidence, they told us that they had a budget of £22 million and that it was DFP that was holding up payment. Why is that?

**Mr Baker:** It is my understanding, too, that an amount of money has been ring-fenced to deal with any potential liabilities arising from, among other things, equal pay cases in the overall Department of Justice budget.

**Mr McQuillan:** When they were here, we talked about equal pay.

**Mr Baker:** I want to be clear on the point about DFP holding up payment. There is a bit of smoke and mirrors around this. To the best of my knowledge, the PSNI has never formally submitted a formal business case to DFP requesting payment of this. Quite some time ago, the PSNI submitted a draft business case, and we, in corporate HR, were asked to take a look at the legal arguments presented in that business case in respect of paying out an amount of money. We were asked specifically to express our view on whether the legal arguments stacked up and were in tune with the legal position that we have taken on the equal pay settlement. We said that we disagreed with the legal arguments presented in the case, because we were of the view — we maintained this position right throughout the equal pay negotiations with NIPSA — that there had been a pay delegation given to what was called the NIO pay group, which at that time included the Police Authority for Northern Ireland (PANI). That pay delegation had never been rescinded, and, because of that, the seconded staff to the NIO, PANI and, subsequently, the PSNI were not eligible. They were not entitled to the equal pay settlement, and we could not accept the arguments presented in that draft business case. That was the view we expressed back to the PSNI via the Department of Justice. I am not fully aware of whether a formal business case has been submitted by the PSNI, but, to the best of my knowledge, it has not been. If that is DFP holding up the payment of that, that is the origins of that statement.



**The Chairperson:** The PSNI has £26 million ring-fenced, as you say, if they were authorised to pay it out. If that does not come to pass, what happens to that £26 million? Can it be spent by the Department of Justice in other areas? Or, does it go back to the Treasury?

**Mr Baker:** I think that it would be spent by the Department of Justice in other areas. I am getting a little bit outside of my comfort zone in talking about finances, but my understanding is that there was a transfer of money for a variety of issues to the Northern Ireland Executive at the point of the devolution of policing and justice. Within that, an amount of money was ring-fenced for potential equal pay liabilities. If it is not spent on equal pay, I suspect that it will not go back to the Treasury. It could be redeployed on other issues by the Department of Justice.

**The Chairperson:** Would it be possible to confirm that in correspondence?

**Mr Baker:** I will try to confirm that. As I say, the finances of that issue is a little bit outside my direct area of responsibility.

**The Chairperson:** There are no more questions. Thank you for attending this morning's meeting.