Neutral Citation No: [2013] NICty 1 | *Ref:*

Judgment: approved by the Court for handing down | *Delivered:* **7/3/13**
*(subject to editorial corrections)**

IN THE RECORDER'S COURT FOR THE DIVISION OF BELFAST

_____

BETWEEN:

CORRINNE DONALDSON, TARA HUGHES AND LOUISE McFARLAND

Plaintiffs

and

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant

BETWEEN:

SHARON SHARVIN

Plaintiff

and

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant

BETWEEN:

MARTINA McKERNAN, JODIE HINDS AND LISA HOY

Plaintiffs

and

DEPARTMENT OF FINANCE AND PERSONNEL

Defendant

BETWEEN:

OONAGH REILLY AND CATHERINE O'NEILL

Plaintiffs

and

DEPARTMENT OF FINANCE AND PERSONNEL AND NORTHERN IRELAND POLICING BOARD

Defendants

_____

His Honour Judge Babington

Background

[1] I heard evidence in this case for 10 days. Opening legal statements took a further day and closing submissions lasted for 2 days. These 4 groups of cases were heard together as the principal factors at play are common to all. I will return to the details surrounding each of the 4 plaintiff groups in due course but it is first important to understand the context in which these claims arise. In or about the start of 2009 a large number of equal pay claims were lodged with the Industrial Tribunal. There were some 4,500 claims lodged and they concerned Northern Ireland Civil Service (NICS) staff who worked at grades within the Civil Service having job titles of Administrative Assistant (AA), Administrative Officer (AO) and Executive Officer II (EOII). They were alleging that they were being treated differently than male comparators working at the same grades within their relevant departments. It is important to note that the relevant departments related to the 11 Northern Ireland Civil Service departments.

[2] During 2009 and over the course of many meetings the Department of Finance and Personnel (DFP) and the Northern Ireland Public Service Alliance (NIPSA) reached agreement on how these claims would be resolved. It was also agreed between DFP and NIPSA that the agreement would cover other employees who were in a similar position to those about whom agreement had been reached. The agreement was at times described as a settlement agreement and at times as a collective agreement. There were further descriptions that could be and were attributed to it during the course of the evidence. The agreement was accepted by NIPSA's Executive Committee and subsequently agreed in a ballot by its relevant members.

[3] In broad terms the agreement provided that those employees affected would have their salaries revised upwards, and in addition a lump sum was to be paid to those same employees which it said was to represent loss of salary during the six year period prior to the agreement. In consideration of these matters the individual employees would either sign compromise agreements or enter into conciliated agreements. The overall cost of the agreement to the NICS was in the region of £120m.

[4] Mr O'Donoghue QC and Mr Wolfe appeared on behalf of all the plaintiffs in these cases. All of the plaintiffs were backed by NIPSA. The case had been opened on the basis that there were 3 different groups of plaintiffs but during the evidence this was refined and enlarged to 4 groups as can been seen from the title to the proceedings.

[5] The first group which I will refer to as "Donaldson and others" had all been appointed to the Northern Ireland Civil Service as Civil Servants. They were then seconded to the Police Authority for Northern Ireland (PANI) for part of the period from their appointment until 1 February 2009. 1 February 2009 was the date of the agreement to which reference has already been made and was a date which triggered various matters relating to the agreement. The plaintiffs in this group were however all employed in the Northern Ireland Civil Service as at 1 February 2009 having transferred back from PANI to one of the 11 NICS departments. This group's claims related to not receiving what they considered to be their total entitlement in some cases by way of salary adjustment or lump sum or more usually in respect of both matters. This was because their full period of service was not taken into account in the calculations as a period of service in PANI was disallowed.

[6] The second group of plaintiffs, represented by Sharon Sharvin, were in a slightly different situation. Sharvin was appointed to the NICS as a Civil Servant in 2001 and she was seconded to the Northern Ireland Office for part of the period 1 February 2003 to 1 February 2009. At the time of the agreement on 1 February 2009 she was working in an NICS department having transferred back in 2005 to DOE Planning Service. She alleged, similarly to the Donaldson Group, that she had not had the full benefit of either limb of the agreement due to her period of secondment with the NIO, as opposed to PANI for Donaldson. That period is the 6 year period during which loss was calculated and represented in the lump sum due to people under the agreement. Sharvin had transferred back into one of the NICS departments at the date of the agreement on 1 February 2009.

[7] The third group of plaintiffs which I will refer to as "McKernan and Others" were all appointed as Civil Servants with the NICS. They were all seconded to the Northern Ireland Office and remained on secondment with the NIO at the date of the settlement on 1 February 2009. On 12 April 2010, following the devolution of policing and justice, they then transferred back into the Northern Ireland Civil Service to work in the new Department of Justice. This group appeared to have received what is in effect the first limb of the agreement, namely a new salary scale, although it is uncertain as to when this was applied, but they have not received the lump sum due to the fact that they were on secondment in NIO throughout the entirety of the 6 year period ending 1 February 2009.

[8] The fourth group of plaintiffs which I will refer to as "Reilly and Another" were appointed as Civil Servants and then seconded to PANI. They remained at PANI until 1 October 2008 when their employment transferred to the Northern Ireland Policing Board (NIPB). This transfer took place under the ambit of The Police Support Staff (Transfer of Employment) Regulations (Northern Ireland) 2008 which was, in effect, a statutory transfer of undertakings procedure. This Group

appear to have received a new salary scale as from 1 February 2009 but have not received the lump sum payment as they were on secondment to PANI throughout the entirety of the 6 year period.

[9] There were a number of other applications to the Industrial Tribunal which did not fit into any of the four categories and it was agreed between the parties that they stood outside of any of the matters with which these cases were concerned.

[10] All of the plaintiffs have suffered by non-payment of the lump sum to which I have referred and which was set out in the agreement. DFP did make offers of lump sum payments to some of the plaintiffs but these were rejected because the lump sum did not represent the totality of the period that those Civil Servants felt they were entitled to receive. In addition some of the plaintiffs allege that they are not being paid on the appropriate new salary scale again because some of the period over which that was to be reflected has not been taken into account. It was agreed that the detailed losses due in respect of each of the plaintiffs should be something that was left to the conclusion of this litigation.

The Plaintiffs' Case

[11] The plaintiffs' case is set in contract. Mr O'Donoghue contended that there were certain terms which could be implied into each individual Civil Servant's contract. He contended and indeed it was never really disputed otherwise, that a Civil Servant does not have a definitive Contract of Employment to which he or she could refer but rather that their Contract of Employment could be found in various documents. It was contended by Mr O'Donoghue that each individual had –

(a) A contractual right to have their pay reviewed periodically by NICS.

(b) To be represented at that review.

(c) If the review was conducted as a collective bargain and led to agreement the normative effect would apply and the employer and the individual would be bound by the agreed outcome of the collective bargain.

[12] If however the review, referred at paragraph [11] above was not conducted as a collective bargain between employer and employee, Mr O'Donoghue's case was that terms and conditions existed that served to bind that employer and the employees as to the way in which pay was to be reviewed. Furthermore custom and practice had established an implied term that the employer and employees agreed to be bound by the outcome of what would then be a parallel collective bargain and accordingly that a term prohibiting the employer and employee from refusing to be

bound had been established. This would of course relate to those employed within PANI and NIO.

[13] In other words the case being made by those plaintiffs in PANI and NIO was that as they were not negotiating expressly or directly under the auspices of the Whitley Council arrangements they could still benefit from what was termed, by Mr O'Donoghue, as a parallel collective bargain and further that both employer and employee were bound by the outcome of it whether it was advantageous or disadvantageous.

[14] It was said that the agreement purporting to settle these claims was a collective agreement and that it should and did mean that it applied to those employed at the time of the agreement in the NICS departments.

[15] The plaintiffs further contended that assurances given by Sir David Fell in 1996, when he was Head of the NICS, were relevant to the extent that there should be no real difference between those Civil Servants employed within NICS and those employed within Departments which may have had a delegation. A great deal of evidence was given to the court on what was known as "the Fell Assurances" and also the associated matter of pay delegation.

[16] All of the plaintiffs were claiming damages in respect of their lump sum payments and also in respect of losses by being on the wrong pay scale. In respect of the third group of plaintiffs – "McKernan and Others", it was suggested that it might be more appropriate if the relief was amended and the court made a declaration to hold a pay review.

DFP's Case

[17] DFP was represented by Mr Adrian Lynch QC and Ms Simpson. Their case was that they stood by the terms of the agreement to which reference has been made and in particular the fact that the terms of the agreement were confined to those working in and/or service within one of the NICS departments. Furthermore the agreement excluded those working in Northern Ireland in NIO or PANI. In the alternative their case was that both NIO and PANI were subject to valid and continuing pay delegations, which also would exclude those working in these organisations from the benefits of the agreement.

NIPB's Case

[18] Mr McGleenan QC and Mr McAlister, who appeared for NIPB, supported the contractual observations made on behalf of DFP. If however they were not correct in those matters their case was that there were no valid or effective delegations from

DFP to PANI and that DFP was at all material times the organisation responsible for determining the pay and grading of those staff now employed by NIPB.

History

[19] All the plaintiffs in these cases are or were Civil Servants in the Northern Ireland Civil Service (NICS). All joined the NICS and all had, for differing times, periods on secondment. Those periods were with the NIO or with PANI.

[20] The situation has arisen due to history to a degree in that until Stormont was prorogued in 1972 what was then the Northern Ireland Parliament was responsible for policing and the justice system. However once direct rule commenced a Home Civil Service Department was created – in other words a Westminster Department, and this was known as the Northern Ireland Office (NIO). It was staffed by Home Civil Servants but the vast majority, especially at the lower grades, were Northern Ireland Civil Servants who were seconded to the NIO. The higher echelons of the NIO were predominantly Home Civil Servants which tended to leave some uncertainty in the minds of the trades unions. I will return to this point at a later stage. The NIO was responsible for various matters relating to political development, policy, justice, policing and security. The NIO continued to be responsible for these matters until relatively recently when policing and justice were devolved to the Northern Ireland Executive and Assembly.

Implied terms

[21] The plaintiffs contend that there should be certain terms implied into their contracts of employment and reference has already been made to those terms commencing at paragraph [11] above. One of the difficulties in the NICS for a Civil Servant is to actually identify his or her contract of employment. This might sound surprising in that one might have expected the NICS to set an example for other employers but it seems that in all probability it is because of its size and complexity that the present situation ensues. Where does a Civil Servant look for his or her contract of employment?

[22] Lengthy evidence in this case was given by Derek Baker who is Director of Corporate Human Resources in the Department of Finance and Personnel (DFP). It is important to understand DFPs position in the NICS structure. DFP is responsible for the management of all NICS departments and as will be seen later represents NICS in discussion with the trades unions on such matters as pay and grading. Mr Baker agreed that Civil Servants have a difficulty in putting their hands, so to speak, on a document so far as their contract of employment is concerned. He did say however that there was a Civil Service Handbook which contained various terms and conditions and this handbook was updated periodically. He agreed that the

handbook had nothing contained within it that would assist in these particular cases. He also said that a Civil Servant would have documents relating to various groups which would be either unique to the department in which they were working or containing personal information. He agreed that the court would have to look at a number of documents to identify an individual Civil Servant's contract of employment.

[23] As already mentioned Mr O'Donoghue contends that the court should imply to each contract of employment three terms in respect of pay. He says that although there is nothing in writing regarding them it is clear that they plainly exist and form part of an individual's contract. This was on the basis of an established practice over many years and a common acceptance of how the pay process is governed. He contends for the following terms:

(a) A contractual right to have pay reviewed periodically by NICS.

(b) When that review occurs the individual has a contractual right to be represented at the review.

(c) If the review is conducted as a collective bargain and agreement is reached both employer and the individual are bound by the agreed outcome. It then follows that the terms and conditions of the individuals' contract are amended in line with the terms of that collective agreement.

[24] Mr O'Donoghue further contends that as there can be no review for those employed outside of the NICS – in other words in PANI or NIO, they should have a term inferred into their contracts that they would be bound by what is in effect a parallel collective bargain. He also says that those in PANI would have a legitimate expectation that this would be the case.

[25] Neither of the defendants accept that such terms can be inferred and thus incorporated into an individual's contract of employment. Indeed Mr Lynch submits that such a claim is without foundation and that there is no basis on which to imply any such right to a review as, inter alia, it is not a characteristic of the employment relationship. Furthermore it cannot be implied on the grounds of custom and practice and that the normal grounds of such implication, namely that it be fair, notorious and certain are not made out.

[26] There may now be some debate as to whether the "fair, notorious and certain" test is all that should be considered. In Garratt v MGN Limited (2011) EWCA Civ. 425 Lord Justice Leveson appeared to prefer a broader test of the length, time, frequency and extent to which a practice was followed as routine together with

the understanding and knowledge of the employees and employer, together with what might be in writing. In this case Mr O'Donoghue contends that there is a contractual right attaching to each individual to have their pay reviewed periodically by NICS. There has been no evidence placed before the court that this review has ever happened before. It is clear that what is contended for is something different than an annual pay round or increase which would be dealt with within the normal Whitley Council procedures. Mention was made that each Civil Servant had an entitlement to this but again no evidence has been placed before the court as to where this entitlement is either set out or where it has originated from. I therefore come to the conclusion that the first term contended for, namely to have pay reviewed periodically, is not well known, has never happened before and significantly no evidence was given as to it ever occurring before. I do not see how such a term can implied into each Civil Servants contract of employment. It follows that the other two terms, being dependent on the first, are also not implied into the contracts of employment.

Interpretation of the Agreement

[27] An agreement was reached between the negotiating teams of DFP and NIPSA in November 2009. Mr Bannon, who effectively led the NIPSA team, said there had been some 24 meetings throughout that year leading up to this agreement. It had quite clearly been a complex and difficult process. This agreement was then considered by the Executive on behalf of DFP and by the Executive Committee of NIPSA. The actual document which is headed, "Outline Terms for Settlement of Equal Pay Claims" was sent by Mr Baker to John Corey, the General Secretary of NIPSA, with an accompanying letter dated 23 November 2009. Mr Corey replied by letter dated 10 December 2009 indicating that the Executive Committee of NIPSA had decided to recommend that members should accept "… the proposals as a basis to settle the equal pay claims submitted" and that the matter would be balloted on by their members in the relevant grades. On 21 December Mr Corey wrote again to Mr Baker and confirmed the ballot had been successful. He said:

> "We asked members that they agree to give NIPSA authority to proceed to settle the equal pay claims on the basis of the Department's outline terms of settlement … The outcome is that members have voted overwhelmingly to proceed to settlements …"

[28] It is this agreement, that was sent to Mr Corey by Mr Baker on 23 November 2009, that is the centrepiece of these cases. The plaintiffs say that it is a collective agreement – in other words negotiated between a trade union and an employer and that its terms should be incorporated into an individual's contract of employment. DFP accepted that it is a collective agreement and further that it is to be so

incorporated. The difference between the plaintiffs and the defendants is in relation to the meaning of the agreement and in particular who it covers and to what degree.

[29] Turning to the agreement Mr O'Donoghue takes the view that the agreement is clear and unequivocal and that no aids to interpretation of it are needed. In broad terms his case is that the agreement sets out clearly that NICS staff in the various grades set out at paragraphs 2.1 and 2.2 should benefit from the agreement as they are employed in the 11 NICS departments. This of course must be read subject to the terms which Mr O'Donoghue says should be implied into an individual's contract of employment. In relation to the agreement he says that there are no words of limitation.

[30] Mr Lynch, for his part, says that the agreement is confined to those who are working in the 11 NICS departments and further confined to service in them. In particular his case, in stark contrast to that of the plaintiffs, is that the agreement does not extend to service in other bodies such as NIO or PANI. Furthermore although he would say that this view is clear he says it is reinforced by other matters such as the negotiations, the bulletins issued by NIPSA and the FAQs (Frequently Asked Questions). Before a complete analysis of these documents can be undertaken it is necessary to consider the present legal position relating to interpretation of written agreements.

[31] Courts have always been prepared to admit and use extrinsic evidence to assist in the interpretation of contracts and agreements. There has been a general move towards consideration of any matter that can be of assistance, the test being to ascertain the meaning that a word or words would convey to a reasonable person against the available background of the matter under examination. However it is important to be aware that extrinsic material must not in any way contradict, vary, add to or subtract from the terms of the document in question. It is only to be used as an aid to or assistance in interpretation.

[32] The purpose of this is to place the court in the same factual matrix as that in which the parties were. In Reardon Smith Line Limited v Yngvar Hansen Tangen (1976) 1 WLR 989 Lord Wilberforce said this at page 974:

> "No contracts are made in a vacuum; there was always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the surrounding circumstances but this phrase is imprecise; it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn

> presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

And later in the same case also at page 974 he went on to say:

> "… When one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."

[33] Difficulties can arise as to the type and number of matters that a court should consider. It could be said that the high watermark was reached by Lord Hoffmann in Investors Compensation Scheme Limited v West Bromwich Building Society (1998) 1 WLR 896 when he said:

> "Subject to the requirement that it should have been reasonably available to the parties … it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."

But he did row back from this in a later case, BCCI Limited v Ali (2001) UKHL 8 when he said:

> "I did not think it necessary to emphasise that I meant anything which a reasonable man would have regarded as relevant. I was merely saying that there was no conceptual limit to what can be regarded as background … I was certainly not encouraging a trawl through background which could not have made a reasonable person think that the parties must have departed from conventional usage."

[34] It is however clear that generally courts are not entitled to consider the negotiations leading up to the disputed document. The exception to this general rule is where there is consensus between the parties on a particular point. This is encapsulated in an extract from the headnote in Chartbrook Limited v Persimmon Homes Limited (2009) UKHL 38:

> "Where the evidence establishes that, objectively, the parties reached a consensus on a particular point, that

> is helpful, and if interpreted objectively, in no way represents a departure from the objective approach."

[35] Mr Lynch says that such an approach can be utilised here because, as he puts it, there was a shared fact between the parties – the limit of DFP's negotiating remit in that it did not extend beyond the 11 NICS departments to NIO, PANI or other non-departmental bodies. In addition there was a shared object that being that the whole process was undertaken so as to reach a settlement of the equal pay claims involving comparisons by staff of male colleagues in the 11 NICS departments.

[36] Mr O'Donoghue, for his part, accepts that exceptionally extrinsic matters can be admitted – even as I understand his submission – negotiations. But he says that it could never have been the common intention of the parties to exclude people like the plaintiffs Donaldson or Sharvin. He says that the background is the equal pay dispute and a political imperative to get the claims settled but that the outcome went well beyond the settlement of those claims.

[37] In order to see whether the negotiations can be of assistance and used in this case an examination of the evidence of the persons involved is necessary together with an examination of the minutes of those meetings.

The Negotiations

[38] The negotiations leading up to the agreement reached between DFP and NIPSA were lengthy, prolonged and complex. Detailed minutes covering 24 meetings between June 2008 and November 2009 were placed before the court. Negotiations took place under the ambit of the Whitley Council arrangements by which employment matters in respect of Civil Servants are dealt with by management and trades unions. The minutes of the negotiations which were conducted within the Whitley Pay, Allowances and Grading Committee were agreed by both sides and it seems clear that this was after careful scrutiny of the drafts. The only relevance of these minutes can be if both sides agree on a particular point. Otherwise the general rule that negotiations are not to be considered will apply.

[39] Mr Lynch raised two matters in this regard firstly that both parties agreed on the objective of the negotiations – that being that they were being undertaken with the intention of resolving and settling the equal pay claims lodged by members of NIPSA. As early as 8 September 2008 the minutes record at paragraph 9:

> "From a trade union perspective, the situation was that TUS (Trade Union Side) were ready to negotiate a settlement on the equal pay issue and wanted it put

> on record that they were ready to get on with the process of a negotiated resolution."

[40] On 30 January 2009 the minutes record at paragraph 11:

> "Management side stated that their intention was to work through the various items listed in the TUS response to the draft framework paper for progressing a settlement to the equal pay claims."

And later at paragraph 12 in the same minutes:

> "TUS agreed to that approach and reminded management side that they were in the process of lodging a number of tribunal cases. However TUS emphasised they remained wholly committed to seeking to negotiate a settlement of the equal pay claims and that these negotiations must proceed urgently."

[41] On 5 June 2009 it is recorded at paragraph 4 that:

> "Both sides tabled their respective frameworks for the draft proposed negotiated settlement and management side suggested that an agenda for going forward should be agreed. TUS proposed that both sides should individually talk through their client documents and explain that they had produced a number of headings and sub-headings they thought could be used in an overarching framework document."

[42] Finally the minutes for the meeting held on 4 November 2009 state at paragraph 2.18:

> "The meeting resumed and TUS made clear their intentions to continue negotiations and expressed their determination to find a resolution of the equal pay claims."

[43] There is no doubt to my mind that both parties did enter and undertake these negotiations with a view to resolving the equal pay claims and not for any other reason.

[44] It has also been suggested that both parties knew that DFP had a restricted remit in that their negotiating position was restricted to the 11 NICS departments and did not extend to other bodies such as the NIO, PANI or other NDPBs (Non-Departmental Public Bodies). An analysis of the minutes in relation to this is not quite so straightforward in that NIPSA clearly wanted NDPBs, NIO and PANI to be within the settlement.

[45] The following extracts from the minutes set out the position. In the minutes from the meeting of 30 January 2009 at paragraph 24 under the sub-heading **– "Who would be included/excluded"** it is recorded:

> "Management side indicated that NICS AAs, AOs, EOIIs and analogous grades would be included in any equal pay settlement. However they had no mandate to consider NDBPs or other bodies outside of the NICS, which were outside the NICS remit for addressing equal pay. TUS maintained however that NDBPs were covered by NICS pay settlements as confirmed by the CSC circulars."

The minutes of the meeting on 5 March 2009 record at paragraphs 20 and 21 under the sub-heading **"Non-Departmental Public Bodies"** the following:

> "TUS argued that non-departmental public bodies (NDPBs) should be included in the equal pay settlement as they applied NICS pay terms, in keeping with Civil Service circulars. They suggested that it would be remiss of the NICS sponsoring departments not to raise with the NI Executive the issue of cost implications for NDPBs emanating from the equal pay issue.
>
> Management side stated that they were not negotiating on behalf of the NDPBs nor had they factored those bodies into the NICS expenditure for equal pay. They also said that there had been discussions with some of the outside bodies and they were aware of the equal pay situation within the NICS."

The discussion is polarised between the two sides and the minutes of 5 June 2009 reflect this. At paragraph 6 it is recorded:

> "TUS added that other issues would need to be considered such as the inclusion of NDPBs and potential claims from dependents of deceased members."

And DFP's reply at paragraph 9:

> "As part of the on-going discussion management side stated that they had not intended to include NDPBs in the process and that equal pay consideration would only be given to NI Civil Servants."

Despite the difference between the parties that being that NIPSA wanted the inclusion of NDPBs etc. and DFP saying that their negotiating remit did not extend to them the discussions continued to the final meeting on 11 November 2009. At paragraph 3.5 of those minutes the trade union side raised matters for clarification including the exclusion of NIO, PANI and Court Service from the equal pay issue:

> "Management side said they were not prepared to negotiate on behalf of NIO, PSNI or Court Service. TUS stated that these bodies covered either NICS staff or staff who attracted NICS rates of pay under annual CSC provision. There was further discussion around the TUPE issue and other fringe bodies that were potentially affected by the equal pay issue. Management side agreed to further consideration to the wording of paragraphs 5.5, 5.7 and 5.8 of the draft outline terms of settlement document."

[46] It is difficult, to my mind, to say that a consensus has been reached between the parties. It may be that NIPSA was prepared to negotiate subject to the agreed remit suggested by Mr Lynch but I think it would be wrong to say that NIPSA had reached a consensus with DFP on the remit of DFP's bargaining position.

The Agreement

[47] This document was produced in its final form by management following the final negotiating meeting between the parties on 11 November 2009. It was sent to NIPSA under cover of letter dated 23 November 2009. Their Executive Committee approved it and Mr Corey wrote to Mr Baker on 10 December 2009 informing him that the matter would proceed to a ballot of their members and that the Executive Committee was recommending acceptance of the proposal.

[48] The document is headed "Outline Terms for Settlement of Equal Pay Claims" and paragraph 1.1 emphasises this as follows:

> "This document outlines a proposal for settlement of all equal pay claims lodged by NIPSA on behalf of Administrative Assistant, Administrative Officer, Executive Officer II and analogous grades."

It is therefore a proposal to settle the equal pay claims relating to various grades in the Civil Service these being Administrative Assistant (AA), Administrative Officer (AO), Executive Officer (EOII) and analogous grades. It is also only proper to say that it is clear that the proposal was made with the intention of settling potential claims as well – in other words those that had not yet been lodged by NIPSA but which came within the confines of the agreement. There were essentially two aspects to the settlement – firstly a new pay scale and secondly a lump sum compensation payment representing losses for the six years up to the effective date of the settlement which was 1 February 2009.

[49] Paragraph 2 in its three sub-paragraphs then sets out the revised payscales for the three grades of AA, AO and EOII and how those affected will be assimilated onto the new scales. In relation to AAs at 2.1 and AOs at 2.2 there is reference to "reckonable service" which is something that I will later return to. EOIIs were dealt with in a slightly different manner as set out in paragraph 2.3.

[50] Paragraph 3 then deals with what is called the settlement payment for AAs and AOs. It sets out the potential payments based on length of service at 3.1 and then at 3.2 says that the payments will be subject to certain adjustments, which are termed as non-reckonable service. Again I will return to this aspect of the agreement.

[51] Paragraph 4 deals with settlement payments to EOIIs again subject to similar adjustments.

[52] Paragraph 5 of the agreement deals with a variety of matters and is entitled "Other Provisions". Included in this are matters such as casual appointments, pension entitlements, retired and deceased staff and gender.

[53] Sub-paragraph 5.5 is sub-headed "NICS Departments" and reads:

> "This proposal applies to the Northern Ireland Civil Service departments."

By this we can understand it is a reference to the 11 Northern Ireland departments thus making an immediate distinction between them and the one Home Civil Service Department which is relevant to this matter that being the Northern Ireland Office (NIO).

[54] The remaining sub-paragraph, 5.6, deals with the proposal that there will be a comprehensive pay and grading review to cover all grades within the NICS, and within that review examination of EOIIs would be given priority. This prioritisation was given as DFP did not accept that the EOIIs had a valid comparator within the NICS in relation to equal pay.

[55] The remainder of the agreement consists of three annexes which do not assist in the interpretation of the agreement itself.

[56] At this stage it is clear that the agreement is to apply to those working within the NICS departments and those in certain grades are to receive a salary revision and lump sum payment. It is also clear that the period that is relevant is the six years prior to the effective date of 1 February 2009. References are made in the agreement to adjustments and the terms "reckonable" and "non-reckonable" service are used. Whilst there is a definition of sorts in relation to non-reckonable there is really nothing to assist us as far as reckonable service is concerned.

NIPSA Bulletins

[57] During the period of negotiations and after their conclusion NIPSA issued bulletins to their members. It appears that bulletins were issued routinely and whenever the need arose so as to inform members on matters of interest which of course at the relevant time did concern the equal pay topic. It would seem wrong to take anything from bulletins prior to November 2009 when negotiations were on going. However it is clear from a bulletin issued on 4 February 2009 that NIPSA saw "the need to engage urgently in serious and detailed negotiations on the equal pay claims".

[58] On 23 November 2009, the day the proposal was sent by Mr Baker to NIPSA, a bulletin was issued as follows:

> "NIPSA has now received management side's proposal for potential settlement of the equal pay claim submitted on behalf of Administrative Assistants, Administrative Officers, Executive Officer IIs and all their analogous/related grades.

> As reported in many previous NIPSA bulletins, these proposals are the product of extensive negotiations with management side in recent months and after many years campaigning for equal pay issues to be addressed in the Northern Ireland Civil Service."

[59] On 25 November 2009 a further bulletin is issued and at the top of the second page of that bulletin it is stated:

> "In the prolonged and intensive negotiations with management side, and with successive Ministers NIPSA pressed for proposals to provide a resolution of these equal pay claims without the need for members to have to go through protracted legal processes."

[60] The bulletin then sets out the proposals and later the Executive Council's recommendations:

> "The Executive Committee appreciates that members have had to wait a long time to reach the point of securing this offer to settle the equal pay claims initiated by NIPSA many years ago. As advised previously however equal pay claims give rise to complex and difficult issues which have required extensive and prolonged negotiations over the last 18 months."

[61] In a separate section of the same bulletin under a heading – **"Northern Ireland Office (NDPBs etc.)"** the following is stated:

> "The management side offer received from the Department of Finance and Personnel (DFP) applies to the equal pay claims submitted to NI Civil Service Departments. NIPSA will be seeking to ensure that the terms of a settlement of those NICS equal pay claims will be applied to staff in the equivalent grades for example, in NIO, Court Service, PSNI, NI Water Limited, INI, AFBI, etc and NDPBs such as the Equality Commission, LRA, etc.

> NIPSA will be contacting directly all of the relevant bodies, NDPBs etc to commence discussions on the issues involved and extending the settlement to those areas."

[62] A further bulletin was issued on 26 November primarily dealing with ballot and road show arrangements but also stating under a heading of **NIO/NDPBs etc:**

> "As advised in the last NIPSA bulletin the offer received covers members in NI Civil Service departments. NIPSA will be seeking to ensure the terms of a settlement in the NI Civil Service if agreed will be applied to staff of the equivalent grades in NIO, Court Service, PSNI, NDPBs, etc. Members in these areas will not be included in the above ballot."

[63] A further bulletin bearing date 7 December 2009 deals with various matters including some that have been raised by members in relation to the proposals. In particular those related to EOIIs. The bulletin towards the bottom of the first page states:

> "To start with it is important members understand that the union is not engaged in a process of normal pay negotiations. For example 2009 pay negotiations are being dealt with separately. Instead the purpose of the equal pay negotiations with management side has been to seek to obtain a potential settlement of the equal pay claims that are subject to litigation. Consequently what can be achieved in this process is dictated entirely by the strengths of the equal pay claims under equal pay law. In that context the EOIIs equal pay claim is on a different footing from those of the AAs and AOs."

A further paragraph headed **"NIO, PSNI, Court Service, NDBPs and Other Bodies"** states:

> "Members in the NIO, PSNI, NDPBs and other bodies have queried why they are not included in this ballot even though they are NI Civil Service staff on secondment or covered by NI Civil Service pay and grading arrangements. The NI Court Service is a separate employer and therefore also not included.

> Members have been concerned as well that the offer received applies only to NICS departments.
>
> NIPSA had pressed for an offer to cover all of the above areas. However the powers of the Minister of Finance and Personnel in the devolved administration are limited to authorising proposals for an equal pay settlement for NICS departments only. At this time the NI Assembly and Executive Ministers do not have ministerial responsibility for the NIO, Court Service, PSNI etc.
>
> NIPSA will be seeking to ensure that a settlement of the equal pay claims in the NICS will be extended to cover members in the AA, AO, EOII and/or comparable grades in all these areas. However as the current offer received applies only to NICS departments, we do need to confine this ballot to the members covered by the offer."

[64] Bulletins in February 2010 speak of the union's wish that the terms of settlement be applied to NIO and other bodies. On 6 May 2010 a bulletin states:

> "Contrary to some of the rumours and misleading statements made by certain individuals I can assure that NIPSA has consistently argued that PSNI staff, both former and current should be covered by the equal pay settlement terms and should have received payments along with their other NICS colleagues."

Further bulletins in August 2010 state that it is the union's intention to pursue legal action and indeed on 10 February 2011 a letter states that cases (these cases) have been lodged in the County Court.

The FAQ's

[65] FAQs or Frequently Asked Questions are a feature of many aspects of life. There is no doubt that various sets of FAQs were compiled and issued in relation to the agreement. What is their standing in these cases and how are they to be used? One first has to consider what their purpose was, how they came about and how they were used.

[66] The FAQs were drafted by a team led by Mark Bailey whose job title was at that time HR Manager in Corporate HR. He reported directly to Mr Baker and described himself as effectively Project Manager of the management side of the equal pay settlement. He said that the purpose of the FAQs was to put flesh on the bones of the settlement and to deal with queries and clarify issues. He said that the process of FAQs was common practice and is still in use. In relation to this matter he said that NIPSA were aware of this process. He told that they always received sight of the FAQs and commented on them. Mr Bailey said it was important because it was essential that the agreement be robust and contained no surprises for anyone. He described his relationship with Mr Bannon as very positive and open and said that generally NIPSA had had a very positive input into the FAQs.

[67] Mr Baker, for his part, explained the purpose of the FAQs in the following way. He described the settlement as being very complex and that was why the agreement could only be described as "outline terms". He said that both management and NIPSA realised that issues would arise with interpretation and the practical application of it as it was dealing with many thousands of employees, and that it was not possible to cover every eventuality. He said that the agreement itself did aim to set out clear principles for the settlement. He said that an equal pay mailbox was set up in anticipation of demands for further information and FAQs were also developed to help. Those FAQs were placed on the website and updated as necessary.

[68] There was no dispute that the person dealing with the FAQs on behalf of NIPSA was Mr Bannon. When asked about the FAQs in his direct evidence he said they were a management document and that NIPSA had opportunity to provide some comments. He said the FAQs did not form part of the settlement. When recalled to give evidence he said that the need for FAQs had not been discussed either in the Whitley Council Forum or in the bilaterals. It was, he said, the general practice for him to have sight of the FAQs before they were issued and that if he had comments he made them, on the other hand if he had no comments to make he did not say anything. Any comments that he made were either face to face with Mr Bailey or by telephone to Mr Bailey. When cross-examined on his recall he said that it was generally recognised that the NIPSA bulletins and the FAQs from management would allow a better understanding of the agreement for his members. His evidence was to a degree self-contradictory as it is difficult to square the obvious need for members to understand the agreement with the assertion the FAQs had nothing to do with the agreement.

[69] A time line of events is helpful in reaching a conclusion as to the purpose of the FAQs.

11 November 2009 – Final negotiating meeting

23 November 2009	-	Letter to NIPSA with proposals
24 November 2009	-	First batch of FAQs ("revised" and "agreed" today)
24 November 2009	-	Above FAQs placed on website
9 December 2009	-	Revised and amended FAQs
9 December 2009	-	FAQs updated on website
10 December 2009	-	Letter to Baker indicating attitude of NIPSA's Executive Committee
21 December 2009	-	Letter to Baker with result of ballot

[70] It is clear from an examination of the draft FAQs and substantive FAQs contained within the e-mail trail between Mr Bailey and Mr Bannon that comment was being made by Mr Bannon which indeed he accepts, and that the FAQs were being produced so as to meet queries and give clarification on the agreement. It is further clear that there appears to have been a desire on behalf of both management and trades union to have information available on the website prior to the ballot. This can be seen by two e-mails in particular. On 4 December 2009 Mr Bailey e-mailed Mr Bannon as follows:

> "Kieran I know you have been busy with EOIIs this week hence why we have not been chasing the FAQs. I am off on Monday but I wanted to get your feedback on these as I am keen to get them on the website asap next week to help us with our staff queries. The attached document is a full set (it is already on the web with the additional ones marked as NEW in the index) I know you have issues with some of these but I am not sure which ones. Can you please review and advise early next week (Paul will be here on Monday) so that we can get the web updated. Many thanks. Kind regards Mark Bailey"

Later on 9 December 2009 he emailed Mr Bannon again:

> "Kieran I have attached the revised FAQs following your comments yesterday. These are being added to the web this afternoon. There are only two of your suggestions which have not been fully reflected:
>
> Q. 1.7 - We are not content to add 'direct' to the responsibility so this remained unchanged.

> Q. 4.5 - I have amended the wording but have not adopted your exact wording.
>
> Kind regards Mark Bailey."

[71] It is clear that the comments made by Mr Bannon were taken on board with the exception of the two matters neither of which relate directly to the matters in issue. It is also clear that the suggestions made by Mr Bannon reflect careful consideration on his part as changes were made in at least six of the draft FAQs at 1.1, 1.6, 2.11, 4.7, 5.5 and 6.1 and it would seem that these changes were more than likely to have been made at NIPSA's suggestion rather than management.

[72] Although the court was referred to a number of versions of FAQs and draft FAQs the relevant one is that which was placed on the website on 9 December – the day prior to the letter sent by NIPSA to Mr Baker indicating that the Executive Committee of NIPSA was recommending the offer to its members and that a ballot would be held. Certain of those FAQs are of critical importance to readers of them particularly members of staff on long term secondment and NIPSA representatives.

[73] The first section of the FAQs deals with Eligibility and 1.1 sets out who is eligible for payment under the agreement. As in 2.1 of the outline terms it confirms that to be eligible an individual must be employed in one of the NICS departments on the relevant date 1 February 2009. The remaining paragraphs of 1.1 in the FAQs deal with retirees and promotions but the latter also requires employment in NICS on the relevant date.

[74] FAQ 1.5 deals with secondment – it has been reproduced from the earlier set of FAQs published on the website on 24 November at FAQ 1.6. It is as follows:

> "**I am or have been on secondment/loan outside the NICS, am I also included in the settlement?**
>
> If you are or were on secondment or on loan to another employer and the NICS remained responsible for your pay negotiation, then you will be included in the settlement provided you meet the other eligibility criteria.
>
> If you are or were on secondment/loan to another employer and they were responsible for your pay negotiation, you will not be included in the settlement for that period."

[75] This deals with the matter common to several of the plaintiffs – the split service situation in particular. First it makes clear to a reader that if one was on secondment or loan eligibility for the settlement only occurs if NICS remained responsible for your pay negotiation – in other words the body responsible for your terms and conditions relating to pay and salary. If that was not the case you would not be eligible for the settlement for that period.

[76] FAQ 1.6 sets out that those working in the NIO are not to be included in the settlement. It does however set out that NIPSA were seeking discussions with NIO on the subject.

[77] FAQ 1.8 relates to those not now working in the NICS but who did work there during the six years prior to the effective date. It sets out that they do not qualify for payment.

[78] FAQ 2.11 deals with the definition of non-reckonable service for which there was no definition in the outline terms apart from the words "career breaks" at paragraphs 3.2 and 4.2. It has now been a definite meaning relating to four matters – unpaid leave, career breaks, pension rate of pay or unpaid sick.

[79] Readers of the FAQs and particularly those who were to vote on the ballot were being made aware of the outline terms and FAQs both of which were on the website and to which they all had access. Indeed members of staff were being directed to the NICS pay website by generic e-mails sent out by IT Assist. One of these generic e-mails was sent on 9 December 2009 at 15.08 hours in relation to the amended FAQs referred to above. Members and staff also had the benefit of NIPSA bulletins to which the outline terms were attached. There was a mailbox and NIPSA ran road shows. It was clear NIPSA were proud of their achievements after some 18 months of negotiation and both they and management went to great lengths to put before those affected details of what they were to vote on. At no time prior to the ballot was any objection raised by NIPSA to the contents of any document or documents. It was only at a much later stage that objections were raised in relation to the legal application of the agreement. The members who were affected should have been in no doubt as to what the outline terms meant and they had various ways of asking questions or raising queries.

[80] The reading of the FAQs by NIPSA representatives, who of course were one of the parties to the agreed outline terms, should have made clear that the terms were confined to not only those working in NICS departments at the affected date but further that periods of service outside the NICS departments did not count towards the payments due under the agreement.

[81] Consideration of the negotiations, subject to the limitations stated, together with the NIPSA bulletins and FAQs make it absolutely clear, in my view, that the outline terms were restricted to those working in the NICS departments at the relevant time. Furthermore it is clear beyond any doubt that the agreement did not extend to those in the NIO, PANI/PSNI and indeed other NDPBs. This is what the NIPSA bulletins were telling members and it is further amplified by the fact that NIPSA knew this as it said it was seeking discussions with management in those bodies to have the settlement extended. Furthermore those persons were not included in the NIPSA ballot. It is equally clear that once the FAQs are considered, 1.6 in particular, it is clear that those who were on secondment to another employer who was responsible for their pay negotiation would not have those periods taken into account as far as the settlement was concerned.

The Fell Assurances

[82] One discrete matter that was raised by the plaintiffs was what can be termed "The Fell Assurances". These relate to three letters written by Sir David Fell, then Head of the NICS, to NIPSA in June, July and October 1996. They form part of a correspondence trail with NIPSA and also included two meetings between Fell and NIPSA. These arose because of concerns raised by NIPSA about the policy of delegation that was being introduced by the Government following the publication of their White Paper, "Continuity and Change" – in 1995. Delegation effectively means that pay and associated matters would not be negotiated centrally but would be done on a departmental or agency basis. This was introduced for all Government departments and as NIO was a Westminster Department it got "delegation almost automatically" as Sir David said in his evidence before the court.

[83] The plaintiffs' case concerning the so-called assurances was that NIPSA's concerns, as mentioned above regarding delegation, could mean that individuals might have their pay reduced or that illegal deductions might be made. Indeed during his opening of the cases Mr O'Donoghue had mentioned potential liability under the Wages Order and Employment Rights (NI) Order 1996. Following the discussions and correspondence already mentioned it was said that the comments in Sir David's letter amounted to a contractual right that individuals would suffer no detriment as a result of delegation. Mr O'Donoghue described what Sir David said in the following way:

> "… They were hard hitting assurances with contractual force."

[84] Sir David gave evidence at some length to the court and it is important to understand his position at the time. He was head of the NICS from April 1991 to September 1997 and also second Permanent Under-Secretary in the Northern Ireland

Office. This latter position did not give him any Executive role in the NIO but it meant he was a member of the NIO's Senior Management Board. This put him in a unique position. Although 80% of NIO's complement of some 2500 employees were NICS members on secondment, the top 20% of posts were filled primarily by Home or Westminster Civil Servants. This caused some concern as far as NIPSA was concerned.

[85] There was no doubt that Sir David understood NIPSA's concerns both on the concept of delegation on it and on NIO management. The NIO was given a delegation by Westminster but, as that covered only its Home Civil Servants, it also got a delegation from DFP in relation to its Northern Ireland Civil Servants. Sir David described this as a dual delegation with the Treasury at the pinnacle dictating the parameters.

[86] Sir David said that although DFP gave this delegation it did have some reservations about it in terms of morale across the NICS, mobility of Civil Servants and potentially equal pay concerns. He therefore tried in his words "to square the circle by assurances" to the effect that delegation meant differences but did not necessarily mean significant disadvantages. NIPSA were not content with this and wanted, at that time, something that was concrete and binding. Sir David said that this was not in his power to give and it was never in his mind to give such an assurance. In his letter of 12 June 1996 he wrote of his wish that there be no detriment in the following terms:

> "Obviously we are anxious to ensure that change does not result in detriment and we interpret this as meaning that there will be no erosion of current entitlement."

He said, in his evidence to the court, that this should be read as to what should occur during the first year of delegation.

[87] A second letter dated 4 July 1996 arose because of NIPSA's dissatisfaction that he would not give the assurances they wanted. Sir David said that in the second letter, he dealt with the main thrust of the argument that while it was almost impossible to compare the impact on an individual, his intention was that taken as a group, there should be no significant disadvantage or less favourable treatment when taken in the round.

[88] Sir David's third letter dated 25 October 1996 came about following a meeting which in turn resulted from NIPSA's continuing unease and unhappiness. NIPSA's position was that they wanted "no detriment" at an individual level rather than at a group level. Sir David said he was conscious of NIPSA's opposition to the policy

itself. He felt that the assurances he had given were the maximum he could give and felt further that assurances at an individual level, which was what NIPSA wanted, would run counter to the very essence of delegated powers.

[89] Mr O'Donoghue pressed Sir David on the type of assurance given but Sir David said that an individual assurance was not in his power to give and secondly if given was tantamount to him flouting Government policy. He said he always had in his mind that NIPSA had total opposition to delegation as a policy and felt that this was perhaps upper most in their minds during these discussions.

[90] The case being made by the plaintiffs was that Sir David's correspondence gave each civil servant, subject to a delegation, some contractual right – presumably through an implied term in their contracts, that they should be entitled to the benefits of the settlement agreement. Sir David clearly had a very full knowledge of the events surrounding the introduction of delegation and understood completely the effects it could have especially in relation to those subject to delegation vis a vis those not subject to delegation. One matter that could not be ignored was that delegation was Government policy and therefore had to be implemented. It was not surprising that Sir David made it clear firstly that it would happen and secondly that differences in pay and grading would probably result. In his first letter he made it clear there would be no detriment but that related only to the first year of the policy. Thereafter it was his hope that significant differences would not emerge but that was as far as it went. Any suggestion that he was giving or indeed able to give some sort of individual commitment was wrong for the reasons he gave – namely, he could not do it and secondly, it would be contrary to Government policy and totally contrary to the whole ethos of delegation. His use of the phrase "in the round" is something that one would not expect to see in a legally enforceable statement. I am quite satisfied that what he was trying to do was, as Mrs Moore, who held various positions in DFP's Central Personnel Group, said in her evidence, was to give some comfort to NIPSA who were totally opposed to delegation as such. It was never his intention to create some sort of implied term which would allow individuals a contractual right to have the same benefits as those not subject to delegation.

Delegation

[91] The court heard considerable evidence about delegation that is delegation of powers relating to pay, grading and other matters. The importance of this is that there were frequent references to it in the outline terms and other documents. DFP said that it largely shapes the settlement terms. NIPB queried whether there had ever been delegations, were they effective and who they included or applied to. As far as the plaintiffs were concerned, when Mr O'Donoghue opened the case he appeared to suggest that the delegations could be unlawful or ultra vires but that

matter did not appear to be pursued by him. Matters however did concern whether there had been delegations, were the allegations effective, were they valid, were they in existence, when were they in existence etc.

[92] Delegation has already been touched in this judgment in relation to Sir David Fell's evidence to this court but no real consideration has as yet been given to it. There is no dispute as to what a delegation is. It is the giving of authority to one department from another department which presently has it of authority over particular matters. In this case we are concerned about pay and grading of a department's staff. The power to delegate such matters as this is contained in the Civil Service (Management Functions) (NI) Order 1994.

[93] Delegation was Government policy, as emphasised by Sir David Fell, and it was firstly introduced in England for Home Civil Service Departments before being applied in Northern Ireland. There were three delegations referred to in this case taking place in 1995, 1996 and 1997. The first one dated 28 November 1995 delegated to Sir John Chilcot as the PUS (Permanent Under Secretary) in the NIO as from 1 April 1996 responsibility for the pay and grading of all non-industrial Northern Ireland Civil Servants in the NIO group. This delegation states that no changes to pay and grading are to be made without the written consent of DFP. The letter from Sir John Semple dated 28 November 1995 which sent the delegation to Sir John Chilcot states that this delegation covers all NICS staff employed in NIO, including PANI and agencies. That point is then reinforced in an annex attached to a letter from Chilcot to Semple on 22 December 1995 which sets out the organisations within the NIO pay group, amongst which are the NIO itself and PANI.

[94] A second delegation took place by letter of 19 December 1996 and related to "… the conditions of service relating to shift disturbance and night duty allowances and other allowances in the nature of pay". It was given to Chilcot in respect of NICS Civil Servants in the NIO group.

[95] A third delegation took place on 24 July 1997 relating to "… hours and attendance, annual leave, special leave, sick absence etc. …". This covered all members of the NIO group but specifically excluded PANI.

[96] DFP's case is that these delegations remained in place and were not revoked until 1 October 2008 when civilian staff working in PANI/PSNI became employees of the Northern Ireland Policing Board, and again on 12 April 2010 when policing and justice were devolved to the Northern Ireland Executive and Assembly when those members of staff working within NIO and the Court Service became employees of the Department of Justice.

[97] Mr McGleenan suggests that any delegation to PANI in 1996 was for one year only. That was a conclusion suggested by him after pursuing certain documents and in particular a letter to Mr Heasley of NIPSA from PANI dated 28 September 1995. That is not what that letter, in particular, says. That letter says that for that year – 1996/97 the Authority has decided to negotiate locally in partnership with the NIO. The letter then sets out three alternatives for future years, to continue that practice, to return to central DFP negotiations or to negotiate in its own right. The rest of the correspondence details how discussions about PANI's own request for delegation proceeded and came to nothing mainly over concerns as to who the delegated officer could or should be.

[98] Reference was made to various DFP pay circulars. These are documents sent out each year after pay negotiations. They are sent out by the Central Personnel Group to the departments affected by them. A collection of these covering the period 1997-2007 were produced to the court. At the start of each there is a heading indicating that the document excludes the NIO pay group. That pay group is stated to include PANI and it is suggested that the pay group's exclusion was clearly as a result of it being subject to delegation which continued on as time went by.

[99] Mr McGleenan suggested PANI staff were not part of the NIO pay group. In this regard he refers to a series of documents dealing with what are called "Pay Remits". These are documents coming from the NIO and going to the Treasury in London seeking authority for monies to finance the pay bill for the forthcoming year. These documents cover the years 1999, 2000 and 2003. There is also an undated business case relating to similar type matters which is thought to have originated in October or November 2007. These documents in each case set out the details of the "Bargaining Unit" – in other words who is to be covered by this remit and perhaps significantly who is to be excluded. In each of these documents PANI is excluded and it is stated that PANI:

> "… will follow the settlement agreed by the Department of Finance and Personnel."

[100] The counter argument from Mr Lynch is that this is very different from saying that PANI is not part of the NIO pay group. Indeed he says that this is powerful evidence to suggest that PANI is part of the NIO pay group because if it is not, why mention it at all. Mr Baker was asked about this by Mr McGleenan in terms of the series of documents having one consistent theme that being that PANI was not part of the NIO pay group. Mr Baker disagreed with the proposition being put forward by Mr McGleenan for two reasons. The first was that the documents had to be seen in the context of pay negotiations in particular years, as what was being referred to in each document was a specific pay remit for a particular year. Mr Baker said that NIO's pay arrangements differed to that of NICS in that NIO had

to seek approval of the Treasury for its pay arrangements and at the same time had to inform the Treasury of PANI's intention and that therefore the references to PANI demonstrated that PANI was very much part of the NIO pay group. Secondly, he said that he did not believe that the references to PANI changed in any way what he called the very clear definition of the NIO pay group.

[101] The position of the staff in the Child Support Agency (CSA) and the Social Security Agency (SSA) was considered as they had all received the benefit of both limbs of the settlement set out in the outline terms of agreement document. It was suggested by Mr McGleenan that was inconsistent with staff in PANI as these two agencies (CSA and SSA) had received delegations. There is no doubt that they had both received delegations in 1996. The CSC circulars excluded these agencies in the same way that they excluded the NIO pay group. The exclusion for the agencies was during the period 1997 to 2002, in other words they were not excluded in 2003 onwards. Mr Baker said this was because they had decided to follow DFP's line. It was suggested to him by Mr McGleenan that as the agencies had a delegation there was really "not a sheet of paper" between CSA/SSA and PANI. Mr Baker disagreed saying that in DFP's view there was a very significant difference to staff seconded to PSNI and the staff in these agencies. Mrs Moore in her evidence said that although the agencies had received delegations they had always shadowed DFP and had never activated the delegations. It was the introduction of a single pay agreement in about 2003 that brought them back fully into the DFP fold.

[102] Reference was also made to a delegation given on 9 December 2008 by DFP to NIAUR (Northern Ireland Authority for Utility Regulation). Mr McGleenan suggested that the terms of this delegation went very much further than the delegations to the NIO group in that, although made under the same legislation, paragraph 7 of the NIAUR delegation stated:

> "This authorisation takes effect from 9 December 2008. For the avoidance of doubt from 9 December 2008 NIAUR shall exercise its powers as to numbers and terms and conditions of service of all Civil Servants employed by it without the approval of the Department."

[103] Mr McGleenan suggested to Mr Baker, who was personally in charge of this delegation, that this delegation was framed in this way as the other delegations were flawed. Mr Baker had described the Utility Regulator delegation as being "fuller, deeper and more comprehensive". He said that he honestly could not recall if the decision of the Industrial Tribunal in McCann ("see later at paras 110 et seq") had been in his thinking, but was sure that legal advice had been taken on the drafting of the delegation from the Departmental Solicitor's Office. He said that NIAUR was a

slightly odd body employing all sorts of people and he wanted it as far away as possible from DFP. He also said that this was some ten years on from the NIO delegations, which were the first in Northern Ireland and that matters were always being refined and circumstances changed over the course of time.

[104] Mr McGleenan referred to staff working at NIPB Headquarters on secondment from DFP, who had received both limbs of the settlement. This was in contrast to the staff who had previously been in PANI/PSNI and now employed by NIPB who had not received any benefit from the settlement. These staff numbered some 30 persons or so. The consequences, he said, of this was that no distinction could be drawn between these two groups, lending credence to his case that there was no delegation or no effective delegation. Although there was no doubt that these payments had been made, DFP said that they had been made by mistake.

[105] It appears that following the settlement of the equal pay claims approaches had been made to DFP by the NIPB, particularly in the person of Sam Hagen, then Director of Corporate Services, that this group of employees should be paid the lump sum part of the equal pay settlement. NIPB had already paid them the appropriate salary adjustment. The issue really turned on whether these persons were covered by a pay delegation or not. NIPB maintained that these staff had always been paid at the NICS pay settlement figure and that a pay delegation had never been granted by DFP. NIPB were asked to provide further information and supporting documentation to DFP, including the legal advice that they had received, contracts of employment for the staff concerned and the pay delegations. This was done by letter dated 29 April 2010, but it seems that Mr Hagen only supplied a copy of the third delegation to NIO, that being the one dated 24 July 1997. Furthermore, it seems that he only provided the first two pages of the document which was a covering letter and had not sent the actual delegation nor the annexes referred to on the third page which ran to some 15 pages. When he gave evidence Mr Hagen said that he had sent what documents he had and never realised that the document was incomplete.

[106] It is then clear that Mr Hagen attended a meeting with Mr Bailey and Noel Kelly, the Department's legal advisor from the Departmental Solicitor's Office, on 22 June 2010 and at that meeting Hagen was asked to provide a number of further items for consideration and in particular he contended that this group could be and should be treated differently from the PANI seconded staff. This further information, when received, was e-mailed on to Mr Kelly who was asked to confirm the view reached at the aforesaid meeting that they were pure secondees from DFP and should be included in the settlement. Mr Kelly confirmed by e-mail that it appeared that their pay arrangements were determined by DFP and were not delegated. These staff then received payment of the lump sum on signing individual compromise agreements.

[107] This "extension" of the settlement to the 30 or so HQ staff in NIPB prompted a re-examination of how DFP had treated the PANI staff. A full review of the situation took place involving legal advisors from DFP and PSNI. This review revealed that the information supplied by Mr Hagen was incomplete and that PANI had delegations that were still in place. It also became apparent that the full text of the 1997 delegation that Mr Hagen sent to DFP was restricted to peripheral matters such as overtime and did not affect the earlier delegations in 1995 and 1996. It followed that the decision to pay the 30 odd staff was a mistake and was wrong. The monies could not be recovered as they had been paid on the basis of individual compromise agreements.

[108] The purported delegations to PANI were through NIO and these same delegations, with the exception of the 1997 one which excluded PANI and included NIO, applied to NIO itself. Two of the four classes of plaintiffs spent either part of their time at the NIO before transferring back to an NICS department or spent their entire time at NIO before transferring back on the devolution of policing and justice to what became the new Department of Justice.

[109] A great deal of the evidence in these cases had looked at how the alleged delegations affected PANI and how PANI handled them. The situation regarding NIO was different. NIO was a Westminster department and as such the delegations were given to it. Evidence was put before the court by Mr Baker and Mrs Moore that almost immediately NIO began making changes particularly in relation to its grading system. In 1995 Mrs Moore took over responsibility for pay and grading in the central personnel group of DFP. She said that once delegation was in place there were no negotiations with NIPSA regarding the NIO group as far as DFP was concerned and that the 1996 pay award resulted in slightly different pay arrangements for the NIO group. As time went by a number of differences arose and her feeling was that at first NIO staff were doing better but this turned around after a while. It was also said that NIO developed a new grading system the effect of which was to reduce the number of grades in NIO from that in NICS Departments.

[110] Reference was made by Mr McGleenan to a decision of an Industrial Tribunal that Desmond McCann v NIO, DFP and NICS (Ref: 111/07) which had considered the question of whether a solicitor in the Compensation Agency could compare himself to a solicitor in the Department Solicitor's Office for the purposes of an equal pay claim. He was an NICS employee seconded to the NIO whereas the proposed comparators were employed in DSO which is part of DFP. This, Mr McGleenan says, goes to the heart of the point as to whether there is a delegation and involved an examination by the Tribunal of whether there was a single source of pay. The Tribunal came to the conclusion that in effect there was a single source of pay and

that the applicant therefore in that case could compare himself to those in DSO. The crux being in effect that this showed that there was no delegation or no real effective delegation in place.

[111] Mr Lynch submitted that McCann was fact specific and indeed a different Tribunal in the case of Brian Joseph Grant v DFP, NIO and DPP for NI (Ref: 2007/04 or 309/04 FET) had come to the opposite conclusion. Grant, also a solicitor based in NIO, had sought to compare himself to female senior legal assistants in DFP.

[112] An examination of the facts found in these decisions clearly indicates that whereas McCann concerned itself with the position regarding delegation in 1996 following on from the delegation given by Sir John Semple to Sir John Chilcot in November 1995, the Tribunal in Grant had placed before it details of the delegations not only in 1995 but also in 1997. It (Grant) also considered how delegation actually worked in practice over a period of time. Both the decisions can be said to be fact specific and it is not the task of this court to say whether one is right or one is wrong. Both came to decisions on facts which were different. One thing is absolutely clear that is that neither Tribunal had before it the evidence that has been put before this court. It is interesting that following McCann, the Permanent Secretary of the NIO (Jonathan Phillips) wrote to his counterpart in DFP (Leo O'Reilly) on 5 August 2008. He expressed his concerns about the decision in McCann in terms that it did not reflect the norm of what actually occurred post-delegation. He said:

> "As you know the Tribunal's findings are considerably out of step with the realities of the practices in place today between DFP and NIO on pay and grading issues. Indeed I think it is arguable that the relationship described within the Tribunal findings did not reflect the practice from the point of delegation."

It is clear that the evidence put before the two Tribunals was very different.

[113] The whole question of delegation in the equal pay sphere was considered by the Court of Appeal in England in DEFRA v Robertson and Others. Article 141 of the EC Treaty is the base point and the single source approach emanated from Lawrence. Paragraph 13 of Robertson refers to the single source approach and says that the focus is:

> "… on the location of the body responsible for making decisions on the levels of pay in the relevant employment or establishment rather than on the

identification of the relevant legal source of that decision-making power."

[114] Paragraph 35 of Robertson discussed how delegation worked and how responsibility for negotiating pay was delegated to departments and agencies. It is clear that such delegation was subject to the provisions of the Management Code and overall budgetary control by the Treasury. However neither the Treasury nor Cabinet Office was involved in the actual negotiations which were left to the delegatee departments and agencies. One matter that does become clear is that controls and/or restraints are not necessarily inconsistent with delegation.

[115] The matter was taken further in Armstrong v Newcastle upon Tyne NHS Hospital Trust (2006) IRLR 124 where the Court of Appeal recognised that porters in a merged hospital Trust could not compare themselves to other porters in this new entity in order to benefit from a bonus paid to another group of porters who had received this bonus from a different employer prior to the merger. The court said that not only must the employer be the same but so must be the body responsible for setting the terms of both sets of employees.

Conclusions on Delegation

[116] It is clear that the delegations to NIO and PANI/PSNI were made. It is also clear that there is no evidence that these were at any time revoked in part or in whole. It was suggested that the delegation to PANI was for one year only – see paragraph [97] above. That to my mind is a misreading of the letter referred to by Mr McGleenan as the letter clearly sets out what PANI is doing in that pay year (1996/97) and sets out its alternatives for future years, all of which showed that it considered it had a choice as a delagatee organisation.

[117] Reference was made to the DFP pay circulars. These clearly show that the NIO pay group is excluded from their application. Mr McGleenan's argument is that PANI was not part of that group and in that regard refers to Pay Remits which excluded PANI and stated that PANI would follow the DFP settlement. I accept Mr Baker's evidence on this to the effect that the reference was made because PANI was part of the pay group, and that NIO had a duty to inform the Treasury of its intentions. It follows therefore that the DFP pay circulars are a strong indicator that PANI was subject to an active delegation.

[118] It was suggested that a contrary position could be seen from the position of CSA and SSA who were the subject of delegations between 1997 and 2002 and was similarly excluded from the pay circulars. I accept Mrs Moore's evidence that these delegations were never acted upon and that from 2003 onwards they returned, at their own request, to the DFP group and were no longer excluded as above.

[119] It was suggested that the Utility Regulator delegation demonstrated that the earlier delegations to NIO were ineffective as this was very much wider and subject to no constraints. In this matter I accept the explanation put forward that the Utility Regulator was a very different body and that it was the wish of DFP that it be as far away as possible from DFP itself.

[120] The situation regarding the NIPB headquarters staff suggested that perhaps all the seconded staff to PANI/PSNI could be considered to be subject to DFP control and not subject to delegation. The facts of the matter are set out in paragraphs [104] to [107] and it is rather unsatisfactory to say the least. I accept the evidence of Mr Bailey, Mr Baker and Mr Hagen. I find it very strange however that Mr Hagen did not seem to know the full details of the delegations and on what was a very important and sensitive matter sent incomplete documents to DFP. His letter accompanied the documentation and the document itself could not have been properly read and/or checked by him and his staff. It also does not say much for DFP that it did not have copies of the relevant documents as they must have been in DFP's files. It was a sequence of mistakes that led to Mr Kelly giving legal advice on incomplete documentation and this group of employees receiving the lump sum element of the settlement. I am however satisfied that the payment was an honest mistake and that the other mistakes by Mr Hagen and DFP were also honest mistakes. It is also clear that DFP only acted on receipt of legal advice. There was also a clear explanation given to the Committee from Finance and Personnel by letter dated 6 December 2011. What had happened was less than satisfactory I accept the evidence that I was given to the effect that these payments were made in error.

[121] In relation to the Industrial Tribunal cases I am satisfied that both McCann and Grant are fact specific and that different evidence was given to two different Tribunals on essentially the same points. I am also satisfied that the cases of Robinson and Armstrong both show that delegation is not inconsistent with controls and restraints. This in many way mirrors what Mrs Moore said in her evidence that the policy was "… one of delegation not abdication".

Conclusions

[122] In summary these cases were all framed in contract. Mr O'Donoghue said that there should be implied in each individual's contract various implied terms all relating essentially to a right to have one's pay reviewed periodically. I do not accept those submissions for the reasons I have set out. Furthermore I do not accept that the so-called Fell assurances create any right, however it might be framed, for these individuals to obtain the benefits of the settlement agreement.

[123] I have carefully considered the outline terms and the other documents I have already referred to above. I am quite satisfied that the agreement reached between DFP and NIPSA is limited to those who have worked and/or are working in the NICS departments and have excluded those working in NIO and PANI/PSNI. It also excluded for the settlement calculations those who had service in NIO and PANI/PSNI during the relevant periods.

[124] Having reached the conclusions regarding the plaintiffs' claims as set out above it is not strictly necessary for me to go further but I have considered the evidence relating to delegation. I am satisfied that there were proper delegations to NIO and through it PANI/PSNI. I have referred to matters concerning delegation in the preceding paragraphs and I am satisfied that although PANI effectively shadowed DFP this does not mean that there was no delegation. The position regarding NIO was somewhat different in that NIO did go its own way perhaps along the route foreseen by Sir David Fell.

[125] The conclusions reached apply to each of the four groups of plaintiffs albeit in slightly different ways. I do have some sympathy for the predicament of the plaintiffs but having come to the conclusions that I have already set out I have no alternative but to dismiss the plaintiffs' claims.

7 March 2013