JUDGMENT : LORD JUSTICE MANCE: CA. 3rd May 2005

1. I have taken a little time to put my thoughts in order on this application because it has raised a number of points, some of which have been highlighted for the first time only orally today, but many of which are in the documents.

2. This is an application for permission to appeal by the claimant, Alexandra Wills, at a hearing on 15th November 2004 before His Honour Judge Behrens sitting as a High Court judge. Her application for various interim orders was dismissed and she was ordered to pay costs summarily assessed at £4,265 by 30th November 2004. She has said to me frankly today that the application now is about essentially the costs order, although that is also challenged by way of challenge to the substantive decision.

3. Miss Wills is a qualified barrister and was employed from about 9th August 2004 with the defendant firm of solicitors, Mills & Co. However, she was given one month's notice to leave on 18th October 2004. She in fact served out her notice and relies on that point. The basis of her application on 15th November 2004 was that the giving of one month's notice was a breach of her contract and contrary to various statutory requirements, which she puts in the application notice as being those of the Employment Act 2002, although it may be that that is not the relevant statute. For present purposes that is not significant.

4. I note that in separate Employment Tribunal proceedings, as she has told me today, the defendant firm has in fact admitted a breach of the requirements to set out a grievance procedure in her original contract of employment, pursuant to section 1 of the Employment Rights Act 1996.

5. The contract, Miss Wills says, was on terms recorded in the defendant's letter dated 27th July 2004, but with one important alteration. Paragraph 3 of that letter read:
*"Your employment will be initially for a 6 months' trial period, terminable by us on 1 month's notice during that period, or by either party at the end of that party [*an obvious mistake for period*]. Assuming, as we hope and expect, that your appointment is confirmed, thereafter your contract will be terminable on 3 months' written notice by either party."*

6. Miss Wills said that the reference in the typed letter which I have just read to 1 month's notice during the six months did not correspond with anything that had been previously mentioned or suggested, and that, as soon as she pointed this out on the phone shortly after receiving the letter, Mr Mills of the defendant firm confirmed that she could delete the phrase. In her copy of the letter it appears deleted in her handwriting.

7. Against this defendants observe, among other things, that in an e-mail of 29th July 2004 Miss Wills confirmed that the offer was acceptable, and the only comment she then made about its terms was to say that she was not sure that she could be employed "as a solicitor", which was the phrase used in paragraph 1 of the letter.

8. The judge did not resolve the conflict between these versions of the facts and this court cannot do so either. It would require a trial, rather than the interlocutory application which was all that there was before the court on 15th November 2004. However, the judge dismissed her applications on the grounds that: (1) even on her case she could only enforce the contract for two months. Strictly he should have said nearly three months. (2) The contract was one where trust and confidence were highly relevant and both had gone, so that it would (applying **Rob v Hammersmith Borough Council** [1991] IRLR 72) ordinarily be inappropriate to enforce it specifically. (3) Despite contrary arguments put forward before him by Miss Wills (which have been repeated before me), damages would be an adequate remedy.

9. Miss Wills represents herself before me, as she did before the judge. She seeks permission to appeal on grounds set out in her notice of appeal and amplified in a skeleton argument and witness statement, as well as today orally. In her notice of appeal she refers to six parts of the judgment against which she says she appeals. The first two relate to the order regarding costs. The third and fourth relate to the judge's finding, as she describes it, that the contract of employment would come to an end after, and was for a finite period of, six months. The fifth relates to the judge's decision to

publish the judgment, and the sixth relates to and seeks a review of the judge's conduct and impression of her.

10. Starting with the third and fourth points, the judge's suggested finding about the six-month finite nature of the contract, I think that must be based on a misconception. The judge did not use any such term. What he said was that the claimant could only enforce the contract for six months. That is because, on the face of the contract, the defendant firm could on any view, as a matter of contract, have terminated her employment after six months. The claimant herself in arguing the case on 15th November said this (see the transcript of submissions at pages 5 and 12).

11. Her skeleton argument before me (page 9, paragraph 12) also refers to an initial or minimum period of six months. Of course the contract could have continued after six months, or at least a permanent contract could have been made then subject to three months' written notice, as was contemplated in the letter of 27th July, if both parties had been content at the end of six months. But any claim, whether for an injunction or for damages for breach of contract, would have to be restricted to a period of six months. Today Miss Wills has not touched on this part of her notice of appeal.

12. I turn to the reference, in the context of the sixth point, to the judge's impression of Miss Wills. It is not clear from what this derives. She refers at one point to the judge's statement in paragraph 4 in his judgment that she qualified as a barrister and has worked for a variety of people thereafter, and that:
"Attached to the very full bundle that she has produced is a CV which sets out in commendable detail her career. It is not necessary for me to say more than she did pupillage in London, she worked for the Treasury Solicitor and she was at one stage employed by a firm of solicitors in London."

13. Miss Wills also referred me today to paragraph 11, where the judge said, in relation to her employment with Mills & Co:
"There are different versions of the success with which she worked, but I do not propose to go into them."

14. It seems to me she is reading into these passages significance which they do not bear. The judge's first comments in paragraph 4 were not negative and certainly not unfair. Nor in my view were his second comments in paragraph 11. He could hardly avoid mentioning the differences in accounts as to what was happening towards the end of the period she worked at Mills & Co, and he was discreet (as I shall be) about going any further, since they raised issues which could not possibly be resolved on an application like this.

15. It is convenient next to mention the third ground given for the appeal. This is that the judge failed properly or at all to consider the evidence and material before determining the application. There is also a request in section 9 of the notice of appeal that the Court of Appeal should itself review the judge's findings, the conduct of the case and his review of the law, with particular reference to the 2002 Act. In Part C of the notice of appeal and in her skeleton argument and witness statement, Miss Wills refers to and relies on what she says was her own good performance of her contractual duties, and alleges that Mr Mills' conduct was inappropriate, unfair or unduly critical of her in various respects.

16. In paragraph 28(iv) of her skeleton argument, Miss Wills interprets words of the judge at transcript pages 14 to 15 as meaning that the judge himself thought at one point that he could and should "determine the substance of the case". But that is clearly not what he meant. The judge was at that point referring to various procedural objections raised in writing in the skeleton argument submitted by counsel for the defendant firm, and he was saying that the matter was sufficiently clear for him to determine the interim applications before him. That did not and could not mean determine the substance of the case.

17. I note in passing that although the application was for interim relief, the effect of granting interim relief would have been to determine part of the substance of the case -- namely, whether the claimant had a right to continue in employment for six months -- in a practical sense in the claimant's favour, even if at a trial subsequently it might have been determined that she should not have been allowed to continue in such employment pending any grievance procedure.

18. That was in fact a reason why the judge was bound to be cautious about the application for interim relief, because granting it would in practice determine that part of the substance of the case before and without trial. The basic point is, however, in relation to this particular aspect of the applicant's criticisms that neither the judge nor this court could be expected to determine contentious factual matters on a pre-trial application at very short notice where there was no oral evidence. What was shown by a witness statement served by Mr Mills in response to the applicant's evidence was that there were substantial issues. But the existence of such issues was itself of relevance in confirming the extent of the breakdown of relations.

19. In so far as Miss Wills may have intended to suggest that the judge could and should have determined one way or other who was right in the substantive factual dispute about the terms of the contract, I have already pointed out that that would have been impossible and inappropriate. I do not see any basis for suggesting that he formed or expressed any impression of the applicant's prospects which could give rise to any basis for an appeal. His judgment was founded on conclusions to which I will come, centering around his view that trust and confidence were at an end.

20. In so far as it is a complaint that the judge should have reached a conclusion about the application of and the defendant's breach of procedures specified in the 2002 Act (that is procedures relating to establishing and following of a complaints procedure), such a conclusion was immaterial, given that the judge's reason was clearly that, even assuming a breach, it would not be appropriate specifically to enforce the contract by interim injunction.

21. During the hearing, the transcript shows, the judge in fact examined the 2002 Act and was told that the material parts of section 30 in particular, that is sub-sections (1) and (2), which would have imposed on the defendant firm contractual duties in relation to the procedures under the 2002 Act were not in force in October 2004, and indeed still are not. On this basis, although the defendant may have acted in a way which could in some circumstances give a claim before an Employment Tribunal, it may be that there could have been no contractual breach relating to such procedures.

22. However, before me Miss Wills has referred to the Employment Tribunal case of **WA Goold (Pearmark) Ltd v McConnell** [1995] IRLR 516, where the Employment Tribunal held as a matter of fact that it was an implied term of a contract of employment that there should be grievance procedures and that they should be followed in accordance with, at that stage, the Employment Protection Consolidation Act 1978. In the light of the defendant firm's admission in separate Employment Tribunal proceedings that they have breached section 1 of the 1996 Employment Rights Act by not referring to such procedures in the letter of 27th July 2004, it may be therefore that Miss Wills could have put the matter on that basis before the judge, or indeed could now put it before this court on that basis if permitted to appeal. However, as I have indicated, the judge was prepared to assume that there was a breach, if only of the six-month contractual provision which Miss Wills was alleging, and concluded that even on that assumption the contract should not be specifically enforced and that there should be no injunction restraining the defendants in the way which Miss Wills was seeking.

23. In that light, therefore, I turn directly to the ground on which he reached that conclusion and dismissed the application for injunctions. Miss Wills accepts that the judge was right to speak of a breakdown in trust and confidence between her and Mr Mills. She says in her skeleton argument and witness statement this in paragraph 12:
"... the Judge was right insofar as trust and confidence between Mr Mills and the appellant was concerned. The Judge was further correct in his judgment if by 'workable' he meant that Mr Mills was so dominant such that the other partners would do Mr Mills' bidding, and this would result in a strained and unworkable relationship between the appellant and the other partners."

24. That is a reference to a sentence in the judgment where the judge reached the finding that:
"In my view, it would be unworkable to force Mills & Co to employ Ms Wills."

25. The skeleton argument then goes on:
"There is however a wider question, namely whether the 'trust' of an employer, who is already in breach of contract and trust, should be used as the basis for assessing 'trust and confidence' for the purposes of granting

injunctions in employment contracts."

26. In her argument before the judge, she also said, I note, at page 12, lines 17 to 18, in relation to Mr Mills: *"... he raises his voice at me, he shouts at me, all sorts of things he accepts, which are really fundamental to the relationship that he and I as employer and employee have."*

27. She now goes on to argue as stated in the last sentence of paragraph 12 which I have just read, and furthermore in paragraph 13 says this:
"Further and in any event, the contract of employment was between the firm (as a whole) and the appellant. Therefore, it is submitted that, in assessing the workability of the relationship and 'trust and confidence' for these purposes, the Judge should have made an assessment on the totality of the relationship. The Judge was informed that the appellant had continued to work, successfully, with other members of staff even after Mr Mills' letter of 18 October 2004 dismissing her. There was no evidence, before the Judge, to contradict this evidence. Moreover, no other partner or assistant had adduced evidence to the contrary."

28. As she there points out, and stressed before me, she remained in employment, working on at least one big case, from 18th October to 18th November, and so at the time of the application before the judge. Her application was brought before she ceased so to work, and it was in negative terms to restrain the defendants from ignoring what she submits were her rights.

29. In these circumstances, she refers me to and relies on the decision in ***Irani v Southampton and South-West Hampshire Health Authority [***1995] IRLR 203. In that case the court, while acknowledging the authorities in which the courts have refused to injunct employers from determining contracts of employment where there had been a breakdown of trust and confidence, said that that was not an invariable rule and gave such an injunction on the particular facts of the case. However, it did so after a careful consideration of the particular circumstances. The case concerned an ophthalmologist employed on a part-time basis at an outpatient eye clinic. He had quarrelled with the consultant in charge of the clinic and the employers has set up an *ad hoc* panel of inquiry, which had concluded that the differences were irreconcilable and that he should be dismissed. They had given him six weeks' notice of termination. No criticism was made of his conduct or professional competence. He claimed that the employers had failed to follow the disputes procedure laid down by the Whitley Councils for the Health Services conditions of service incorporated in his contract of employment. He asked for an injunction requiring his employers not to implement the dismissal notice without first exhausting the procedures laid down in the conditions of service. On behalf of the employers, it was conceded there was a triable issue as to whether they had failed to carry out the contractual procedures, but argued that the court should apply what was described as the normal rule that the court would not grant specific performance of a contract of employment or an injunction to restrain a breach of it.

30. The circumstances therefore seem to me somewhat different from the present case. That was a case where the parties were not trading criticisms of each other's conduct or professional behaviour. There was a breakdown of relations. Indeed, one notes that in the course of his judgment Warner J analysed the case of ***Hill v CA Parsons & Co Ltd*** [1972] Ch 305, which was another case where an injunction was granted, but in circumstances where there was still complete confidence between employer and employee and where it was concluded that damages would not be an adequate remedy. Warner J considered that the case before him was analogous to ***Hill v CA Parsons*** in both those respects. Firstly, it was not a case of a breakdown of confidence. There was no criticism of conduct or professional competence. Secondly, it was not a case where damages would be an adequate remedy. Indeed, there was uncontradicted evidence that, if the plaintiff lost his appointment with the defendants, he would become unemployable in the National Health Service, and it was furthermore argued that he would lose any right he had to use National Health facilities to treat his private patients.

31. So it seems to me that, although it is undoubtedly right that Warner J was also influenced by the powerful consideration that the court should not readily warm to defendants who may appear to be snapping their fingers at the rights of employees under conditions of service, nonetheless there were factors which were special to those cases, which are not necessarily present in the present, which were important in the conclusion that an injunction should be granted in those cases.

32. In the present case, I do not think that the applicant has a prospect of success in this court of disturbing the judge's judgment. This was not a case for injunctive relief. The position is that there was -- and the judge was clearly entitled to conclude that there was -- a breakdown of mutual trust and confidence. It may be that Miss Wills could work sensibly for the month's notice. However, that does not mean that it would have been sensible or appropriate in the heightened atmosphere that had arisen by 15th November, with serious allegations and seriously competing cases being put forward by the parties, to enforce the contract specifically or to grant injunctive relief which would have had the probable effect of her remaining in employment for a further three months. The judge's view that it would be unworkable to force Mills & Co to employ Miss Wills is one which I have already recited, and which seems to me unchallengeable.

33. The claimant says secondly that the dominant relationship was with Mr Mills, clearly correctly. Her argument that she had worked well with other staff or partners does not seem to me an answer to the judge's conclusions, when her primary relationship was with Mr Mills.

34. Thirdly, although not necessary to decide the present application, Mr Mills in a letter dated 20th October 2004, the contents of which were attested to in his witness statement, states that other partners were involved in the decision to dismiss and, further, that there were other matters involving staff and coming to partners' previous attention, which are at least said by him to have caused them concern, although that too is very much in issue (see for example part (B) of the letter).

35. Fourthly, as I have said, ***Irani***, and indeed ***Hill v CA Parsons***, seem to me to involve certain characteristics which in my judgment are not present in this case. They were cases of incompatibility and not breakdown of trust, and damages were not an adequate remedy. Miss Wills has repeated before her me her submissions that damages would not be adequate. But I see no reason to disagree with the judge's view that they would be.

36. In any event, of course, it is too late to do anything practical about restoring her employment now. But I appreciate that she wishes to appeal on the basis that the judgment when given was wrong, and that, if that were so, it could have and would have consequences in relation to the costs order against her. But it seems to me that, even as given, the judgment was not wrong.

37. Lastly, the judge directed himself correctly about the general rule. He found nothing to bring the case within the ***Hill v CA Parsons*** or ***Irani*** category. I do not think that there is any doubt about the law or the factors which are relevant under the various authorities, and its application to the particular facts of this case does not raise a compelling reason for an appeal.

38. I turn to certain points which are made in the notice of appeal about the fairness of or procedure at the hearing on 15th November. There is a complaint that the judge did not have or may not have read her bundle, or indeed some other papers in advance. That seems to be the case. He did adjourn briefly to enable the bundling to be sorted out, but he still did not have time for the full pre-hearing reading that one would have desired. But the question is whether this meant that there was anything wrong or unfair about his ultimate decision after hearing argument, or gives any prospect of success in this court. His judgment was in clear terms which showed that he understood the case, and the answer in my view is negative. The ultimate decision stands as a coherent and understandable decision.

39. Then there is a complaint about the judge's ruling on publicity, Part 5 of the decision appealed against. He ruled, since both parties consented, that the hearing should be private, but he ruled that the judgment should be public (see the transcript at pages 1 and 29). The transcript does not show any objection to that by the applicant. Be that as it may, I see no unfairness or breach of Articles 6 or 8 of the European Convention on Human Rights in his ruling, which reflected the usual principle in Article 6 of the Convention that judgment should be given in public. It was by way of an exception that he held the hearing in private. Further, the applicant's reason for claiming privacy in prior correspondence had to do with the confidentiality attaching to client matters (see her e-mail of 4th November at page 339). In the event the judgment does not refer to those matters at all. But whether one is talking of protecting clients or protecting the applicant's personal position or interests, there is it seems to me nothing about this judgment that could justify its being given in private.

40. The applicant also makes an allegation in writing -- another point only briefly mentioned before me orally -- that the hearing was unfair because she was ill. By a letter dated 11th November 2004 she sent to the court a medical certificate attesting to the fact that she was suffering from stress related to work environment and wrote that she was very unwell. But she made clear that she was going on with her application and not seeking any adjournment. During the hearing on 15th November the transcript shows at page 18 that, after counsel for the defendant firm had begun to analyse the legislation, she intervened and there were exchanges. She said:
"My Lord, I'm not feeling very well. I have to leave. I'm sorry. I am going to have a breakdown. I have to leave, please."

    The judge asked her when she would like to return. She repeated her position, and said there was too much strain and she could not cope, to which the judge said:
"You may go but I am going to continue with the hearing unless you say you can be back for two o'clock.

    MS WILLS: *I will endeavour to be back. I will go to the doctor.*

    JUDGE BEHRENS: *I shall resume at two o'clock."*

41. He did resume and matters then proceeded without further reference to this point, except by way of apology for what Miss Wills said, although the judge disagreed, were badly prepared bundles. She said:
"No, they are badly prepared, I have seen them, because I am very, very ill."

    But she did not ask for a further adjournment. It seems to me, reading the transcript, that the points she raised and wanted to raise were fully argued. The central point was one which the judge examined and which I am now in a position to review to see whether it could justify permission to appeal.

42. The only subsequent reference in the transcript to illness is at page 22 at the top where she said:
"I have not done myself any justice by coming here. I came here really out of respect for the court."

43. The reality is that it would not have been greatly in her interest to have an adjournment, since she was seeking interim relief and hoping to obtain it before her employment actually ceased.

44. In her written documentation, although not before me today, she says that just before the adjournment, at the point where I read the transcript, counsel and the judge displayed mirth. That is referred to in section 10, Part A, paragraph 3 of her notice of appeal, which strictly does not appear to be attested by her since she is written "N/A" (presumably meaning not applicable) beside that part of the concluding box of the notice of appeal, but I assume that to be an error. I do however note that her witness statement, while dealing with this same episode, does not mention any mirth. That suggests that no such significance is attached to it by her as to justify any conclusion that there was any unfairness evidenced by it or arising from it. Any such mirth would of course have been quite inappropriate, and there is no trace of it in the transcript. But even if one were to assume that there was mirth -- I certainly do not make any such finding -- I cannot see how it could be a justification for an appeal now, when the basis on which the judge proceeded is clear and there seems to be no real prospect of challenging the basis, even if one were to have a complete rehearing of the issue on which the judge was engaged.

45. There is a complaint that transcripts were sent to the judge for correction before release. That is not a point raised in the notice of appeal. It is common practice for judges to correct transcripts, particularly of judgments, within certain limits which it is for the good sense and discretion of the judge to observe. The judgment stands or falls on its merits as corrected. Transcripts of arguments are less often submitted, but may occasionally benefit from minor corrections of inadvertent errors in what was said or transcribed. There is nothing, reading the transcripts, to make it likely that anything untoward has here occurred. No inaccuracy is suggested. I see no ground for any appeal here.

46. I come now to the question of costs, which is linked with the question of mediation. The applicant has made much of this before me. She has even argued that it is a reason why the application for injunctions should not have been dismissed. She sought to rely on subsequent events occurring in 2005 as fresh evidence. But they relate to subsequent attempts between her and the defendant firm to

settle this or the Employment Tribunal proceedings and cannot, in my judgment, be admissible to affect the judge's decision or order of 15th November. I observe that they are also expressly marked "without prejudice", and it is not open to her unilaterally to waive without prejudice communications.

47. She complains that the costs order should not have been made on the material before the judge when it was made, because (a) she was forced to make the applications by the defendant's breaches of statutory duties, or no doubt other duties; and/or (b) the defendant firm did not pursue her suggestion of mediation; and she also complains (c) that if any costs order was made against her it should not have been for costs to be paid within 14 days, because of the financial difficulty that she says she would obviously have meeting such an order, bearing in mind her loss of employment after her move to Newcastle.

48. There is nothing in the last point to justify an appeal to this court. Far more than 14 days has elapsed and she tells me she has had temporary employment in Newcastle. Moreover, she did not even object to 14 days when it was mentioned (see transcript at page 27), and there was no evidence of means before the judge nor is there before me. Moreover, it is always open to an applicant to apply for further time to pay a costs order and/or for a stay of execution (see the Rules of the Supreme Court which appear in the White Book as sc45.6 and 45.11).

49. As to the first point, that the applicant was forced to make the applications by the defendant's breaches of duties, that assumes what was and is in issue and not resolved in the applicant's favour by the judge. But even assuming there was a breach -- and, as I pointed out, the judge appears to have been prepared to proceed on that assumption -- he concluded that the application was bound to fail. There was nothing to force the applicant to make an application that would fail, and the normal order regarding costs when an application fails is one such as the judge made.

50. That leaves the middle point, the question of mediation, which relates to the following exchange in the transcript at page 23, lines 19 to 40:
JUDGE BEHRENS: *... Is there anything you would like to say about costs?*
MS WILLS: *Except to say that I did invite the respondents to try and sort out this matter because it was obviously something I hoped that would not get to this stage, but the response I received or my solicitor received was that Mr Mills was not in the slightest interested in resolving it. Clearly there are other reasons why we are here. Except that, I am in the court's hands as to costs.*
JUDGE BEHRENS: *Thank you very much. I think you are entitled to your costs, Mr Pipe.*
MR PIPE*: I am grateful.*
JUDGE BEHRENS: *I take the view in the light of a case called* ***Halsey*** *that this is not a case where I should criticise you for not mediating, if and in so far as that submission is intended to suggest that.*
MR PIPE: *Yes. I am sure it is, my Lord."*

51. The background is set out in a letter before claim written to the defendants by solicitors informally instructed by the applicant, although never on the record, dated 1st November 2004. It reads:
"The Judge gave the following directions:-
(i) ...
(ii) the application be adjourned until 15 November 2004 to give the parties an opportunity to resolve matters either through ACAS or other alternative dispute resolution;
(iii) ...
(iv) the Applicant to issue and serve her witness statement on the Respondent."

Then over the page the letter says:
"To avert the time, costs and acrimony of litigation we propose, as recommended by the Judge, that the matter be referred to conciliation or mediation."

The letter then set out various ways, namely using the services of ACAS or of a firm of solicitors, Crutes, or of a Mr David Mason, and said:
"My client accepts in principle mediation and or conciliation subject to your agreement to the same by close of business Wednesday 3 November 2004, mediation to take place on Thursday 4 November 2004 or as soon as possible thereafter."

52. The court's actual order dated 1st November 2004 records that the applicant's witness statement was required to be served by 1st November 2004. The applicant in a letter of 5th November 2004 to the court said that this was an error which failed to record an extension to 11th November, which had been given when the hearing date was put back from the 5th to 15th November. However, the order was never corrected and the suggestion of an error was not communicated to the defendant firm's solicitors, or the defendant firm itself.

53. Furthermore, having been helpfully given today a copy of the transcript of 27th October, it seems to me that the applicant solicitors' letter of 1st November put matter too high in suggesting that the judge recommended mediation. No reference to mediation appears in the order. All that appears is that at the end of the hearing, after having fixed the return date of 15th November, the judge said:
"That will give you time to tell them and negotiate, or whatever it is, but you may, it is not for me to tell you, think it appropriate to get some form of legal advice. I know you are a lawyer yourself. It is a matter for you."

54. It seems to me that is far from a recommendation of mediation. Moreover, I do not see in that transcript any reference to the date for a witness statement being put back later than 1st November, even though the hearing date was fixed for 15th November. The date for the witness statement of 1st November is referred to in that transcript at page 5.

55. The defendant firm's response to the letter of 1st November came on 2nd November, in terms which appear in the second bundle at page 336. They said:
"Having obtained the Order on the 27 October we are, to say the least, surprised that you chose not to communicate with our clients until your fax of the 1 November. Even now all that our clients have received from you is your fax. They have still not received a copy of the Order made by Judge Behrens nor a copy of your application and your client's witness statement in support despite the fact that you were apparently ordered to serve your client's witness statement on our clients.

While our clients rights to further comment on the way that you have thus far conducted the matter are reserved, please let us have by faxed return copies of the following documents:
1. *The application.*
2. *Your client's witness statement in support.*
3. *The Order made by Judge Behrens on the 27 October 2004.*

It follows that we are quite clearly unable to take our clients proper instructions until we have received the above copy documents."

56. It seems to me that that was a natural response. The applicant relayed it to the court by her letter of 5th November, in which she made the point that the order was wrong to refer to her witness statement being required by 1st November. However, it seems she did not send a copy of that letter to the defendants, and so they did not know that she was contending that. Accordingly, on 4th November, eight days after the order of 27th October, the defendant's solicitors wrote a further letter to her solicitors (see the bundle, page 340), where they said:
"You have also confirmed to us that your client apparently made her own oral application on the 27 October and that you are unable to let us have at the moment a copy of any application notice or claim form or indeed your client's witness statement in support. You have said that your client is preparing and filing her own witness statement but you have confirmed that you will endeavour to obtain for us a copy of this and fax it to us as soon as possible.

Our clients are in the intolerable position of having been served with an Order made by the Court on the 27 October in respect of proceedings of which they have absolutely no notice at all. At the moment they are being placed under an obligation to attend the hearing in Leeds on 15 November 2004 when, apart from references made in your letter to our clients of the 1 November 2004, our clients have no knowledge of the specific relief being sought by your client and more importantly the evidence in support of her application for that relief."

57. After examining two points, the one month's notice point and the point about reasons for termination and asserting that the procedure code under the Employment Act 2002 only applies to terms of employment exceeding a qualifying period of 12 months (an assertion I need not go to), they ended up:

"In the circumstances therefore we consider from what we presently know of your client's application (in respect of which all rights are reserved), that her actions are an abuse of the process of the Court.

You have confirmed to us that you will endeavour to obtain and send to us a copy of your client's witness statement. That should have been filed with the Court before 4 p.m. on the 1 November 2004. It may well be therefore that your client is already in breach of the Order dated the 27 October 2004. When sending us a copy of your client's witness statement please confirm the time and date when it was filed with the Court."

58. On the same day at 19.53 hours (page 339 in the bundle) the applicant raised her point about client confidentiality, to which the defendants responded at 17.03 hours on the next day (page 343).

59. On 10th November the defendant firm wrote this by e-mail:
"We can confirm that we received from you by fax this morning at about 11.30 a.m. a copy of your witness statement dated 9 November 2004.

We have not received any other documents in relation to your application apart from (via our clients) a copy of the Order dated 27 October 2004.

Please let us have by return a copy of your application notice and your claim form which we assume has been filed with the Court. Notwithstanding the contents of your witness statement, at the moment we have no notice of the details of your application nor of the relief you are seeking."

60. So by then they had managed to obtain the court's order of 1st November 2004, still unamended, and on Thursday 10th November they had received the witness statement for a hearing on Tuesday 15th November. By e-mail on 11th November the applicant informed the defendant's solicitors that she would be seeking an unspecified injunction and/or declarations on 15th November, or as soon as possible thereafter. She said that a formal application notice, amended if necessary, would be served as soon as possible.

61. On the same day it appears that she served the defendant's solicitors with a copy of the original application issued on 27th October, with the title struck through and replaced by the words "application for an injunction". That application sought orders forbidding the defendants from terminating her employment without complying with alleged statutory requirements in the 2002 Act, and without the involvement of ACAS. It sought the quashing (sic) of Mills & Co's letter dated 18th October for non-compliance with the 2002 Act, and an order that the applicant be given an opportunity to pursue a grievance procedure under the Act. In other words, it seemed in terms to seek final relief, such as could, if conceivable at all, only be obtained at trial. However, it was in the event treated as a claim for interim relief.

62. Not surprisingly, the defendant's solicitors, still one may say unaware of any suggestion that the date for a witness statement was anything other than 1st November 2004, wrote a long letter on 10th November 2004 objecting to the procedure being followed. I need not read the whole of that, but in the course of it they said at page 351:
"Our clients therefore have notice of and face a hearing on the 15 November in respect of which they have no notice or information as to the nature of the case being brought against them nor of the precise nature of the relief being sought by the Claimant and we say this notwithstanding the contents of the Claimant's solicitors letter of the 1 November. That letter however simply confirms that the relief to be sought on the 15 November is an interim injunction and an interim declaration."

So that point at least was clear. The letter goes on:
"Our clients have been given no notice of the terms of the injunction and/or declaration being sought by the Claimant."

63. Miss Wills tells me there were also conversations between solicitors in which the defendant's solicitors indicated that Mr Mills was not interested in mediation. But assuming that to be so (and it does not seem to be in evidence either before the judge or before me, in any detail at least) it seems to me that the reasons for an explanation of the defendant's attitude are likely to be those gained from the correspondence.

64. Against that background, the judge had to consider whether there was anything in the failure to mediate which could justify a refusal of costs to the defendants, who won the application on 15th November. He dealt with the matter summarily. The applicant is justified in saying that it would have been not merely better, but also appropriate to give more detailed reasons. The judge had in mind the case of ***Halsey v Milton Keynes General NHS Trust*** [2004] EWCA Civ 576 in this court. In its judgment in that case this court held that it was for a losing party seeking to avoid an order for costs to show that the winning party had unreasonably refused an offer of mediation (paragraph 13). The judge was quite clearly directing his mind to this central question when he said that he could not see any basis for criticising the defendants for not mediating.

65. The court in ***Halsey*** also gave guidance by listing a number of factors which should be taken into account by a court when deciding whether there had been an unreasonable refusal. They were set out in paragraph 16, which is on page 130 of the bundles and reads relevantly as follows:
"We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success."

66. The court added that prior encouragement by the court to mediate would, where it existed, also be a relevant factor. In that regard paragraph 29 identifies that the court's encouragement may take different forms. Here, despite the suggestion in correspondence on 1st November that the court gave encouragement, it seems to me, as I have said, that it did not. If it did, it was extremely weak encouragement and so informal that it was not recorded in the order.

67. Further, it is not clear that the judge had anything very particular in mind in the passing reference which he made to the possibility of negotiation. The application was in fact in terms seeking final relief, but was understood to be one for interim relief and the case was to be relisted on 15th November. What must have been absolutely clear was that, if there was to be any hope of resolving anything by agreement, the defendants would have to be given immediate notice and documentation to enable them to consider their position. Yet, despite their repeated protests, they were only able to obtain a copy of the order between 4th and 10th November, no witness statement was served until 10th November and no form of application notice, and even then not in proper form, was served until around then. They were not given any notice of the suggested error in the order of 1st November relating to the time for the witness statement. The question of mediation was not raised further in writing after 1st November.

68. It seems to me, in the context of what was being asked for, that the prospects of reaching any sensible resolution of anything by mediation before 15th November were negligible, and also that the defendants were entitled and bound to take the view that they needed to know how the case was put before considering mediation. Once they knew, they were also entitled, in my view, to take the view that the application was bound to fail, as they in effect stated in their letter dated 10th November using the stronger word "abuse", and as it did.

69. The judge should have spelled out his reasoning on costs further, and I have debated with myself whether I should send the matter back to him for further reasons. But ultimately I have concluded that there would be no point in doing so. The factual circumstances overall are such that this is not a case where the applicant could hope to discharge the burden on her of showing that the defendants acted unreasonably in refusing mediation, or where the court ought therefore to have considered depriving them of any costs. That was the judge's instinctive reaction and more detailed examination of the material simply confirms its correctness.

70. These applications for permission to appeal will therefore be dismissed.

ORDER: Application for permission to appeal refused. (Order not part of approved judgment)
The Applicant appeared on her own behalf
The Respondent did not appear and was not represented