Neutral Citation no. [2007] NIQB 12 | *Ref:* **STEC5757**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **26/02/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

ALISON MILLER

Plaintiff;

-v-

NORTHERN IRELAND OFFICE

Defendant.

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STEPHENS J

Introduction

[1] The plaintiff, Alison Miller, brings this action seeking damages from her employer, the Northern Ireland Office, on the basis that it should, but has failed, to pay her an "emergency allowance" at the higher rate as opposed to the lower rate.

[2] An emergency allowance is an allowance to civilian employees who by virtue of the fact that they work in a prison establishment in Northern Ireland come into contact with individuals who have been convicted of criminal offences and who have been sentenced to imprisonment. Its name is misleading in that it is not an allowance which was caused by an "emergency." It has been paid since 1971. It is not "danger money." It is intended to compensate staff who are employed in prisons in Northern Ireland who have direct contact with prisoners. The allowance is paid at a higher or lower rate depending on the amount of contact which the member

of staff has with prisoners. It is an allowance to compensate members of staff for the "environment" in which they are required to work with the underlying thesis being that contact with prisoners need not necessarily, but can on occasions, lead to an unpleasant working environment. The more contact that a member of staff has with prisoners the more likely it is that the member of staff's working environment will be adversely affected.

[3] It is common case that the plaintiff has contact with prisoners and that she is entitled to and has been paid the allowance at the lower rate. What is in issue between the parties is whether the plaintiff is entitled to the higher rate of allowance and this leads onto the question as to what are the appropriate contractual criteria that distinguish between the level of contact with prisoners that entitle some employees to the higher rate and others to the lower rate. In order to address these issues it is necessary to consider the plaintiff's employment history, the contractual terms that apply as between the plaintiff and the defendant, and the amount of contact that the plaintiff has with prisoners during the course of her employment.

[4] The plaintiff was represented in these proceedings by Mr Bentley QC and Mr Ferran, while Mr Ringland QC and Mr McLaughlin represented the defendant. I am indebted to both sets of counsel for the way in which the case was presented and for their submissions.

The Plaintiff's Employment History

[5] The plaintiff was first offered employment as a Typist by the Northern Ireland Civil Service by letter dated 20 December 1984. However on 1 September 1986, and keeping her status as a civil servant, she was posted to HM Prison Magilligan ("Magilligan"). She has been and remains employed since that date by the Northern Ireland Office as a Civil Servant but working at Magilligan. She is not a prison officer but rather in her capacity as a Civil Servant she works in the Education Department in Magilligan. She is a Typist and Secretary. She is involved in the preparation of lists of prisoners who attend classes, the arranging of interviews of prisoners by teaching staff and with general secretarial and administrative duties. These duties were performed in two distinct locations within Magilligan. From 1 September 1986 to September 2005 she worked in an office in the Education Centre. Her Line Manger during that period of time was Mr Dominic Henry. Since September 2005 she worked in the Education Annex. Her Line Manger in the Annex was and remains Mr Thomas McKeever.

The Contractual Terms

[6] The task of determining what are the correct contractual terms has been complicated by a number of factors.

[7] The first factor is the loss of all documentation dating back to 1971 when the allowance was introduced. The emergency allowance has been payable to civilian employees working within prison establishments within Northern Ireland since 1971. Unfortunately all the documents that were in existence in 1971 when the emergency allowance was introduced have been lost or destroyed. It is not now possible to determine the criteria that were in existence in 1971 to distinguish between those civilian employees who were entitled to the higher rate and those who were entitled to the lower rate.

[8] The second factor that complicates the task of determining what are the correct contractual terms is that the defendant has failed to give any written particulars to its employees as it is required to do by employment law. On being posted to Magilligan the plaintiff received the allowance at the lower rate. She knew by virtue of her payslip that she was in receipt of the lower rate payment. She also at that time knew that civilian instructors or teachers did receive the higher rate but she did not know that the higher rate was also potentially available to office staff in her position. She had never been informed by her employers of the criteria upon which the lower or higher rates were paid. She was not, and indeed no employee, was provided with any contractual terms which included reference to the emergency allowance.

[9] It was accepted on behalf of the defendant at the trial of this action that this omission to provide written particulars amounted to a failure to comply with the requirements of Section 4 of the Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965 which imposes a duty on an employer to give his employees written particulars of the terms of their employment and of changes to those terms. This requirement is now to be found in Part III of the Employment Rights (NI) Order 1996. This breach by the defendant of the duty to provide written particulars is remediable only by recourse to an Industrial Tribunal as provided by Section 5 of the Contracts of Employment and Redundancy Payments Act (Northern Ireland) 1965 and confers no civil right of action on an employee in damages see Scally v Southern Health and Social Services Board [1991] 4 All ER 563. In this case after the plaintiff had instructed her solicitors, for the purposes of enquiring into whether she was entitled to receive the allowance at the higher rate, they wrote to the defendant seeking written particulars of her contract of employment. In response the defendant did not provide any particulars in relation to the emergency allowance and nor did it provide any particulars of the criteria which were to be applied in making a distinction between the higher and lower rate.

[10] This continued failure by the defendant to provide written particulars is perhaps in part explained by the evidence of one of the defendant's witnesses, Mr William Gribben. He joined the Northern Ireland Civil Service on 2 September 1974 and for 22 out of 33 years he has worked for the Northern Ireland Prison Service. He moved to the "Efficiency Service Unit" in the Prison Service in May 2000 and he along with a Mr Gorman, of the same unit, were involved in assessing the plaintiff in or about 2004 to determine whether she was entitled to the allowance at the higher rate. Mr Gribben interviewed the plaintiff and her Line Manger. During the course of his evidence Mr Gribben pointed out that the plaintiff at interview kept referring to other civilian staff who received the higher allowance and whom she said were undertaking comparable duties to the ones that she undertook, rather than concentrating on her own role and duties. This could not of course be a criticism of the plaintiff. She was perfectly entitled to draw to the attention of those persons whom the defendant choose to assess whether she was entitled to the higher allowance, the identity of other people who were in fact in receipt of the higher allowance and who the plaintiff considered were undertaking tasks similar to her own. Mr Gribben concluded that the plaintiff was not entitled to the higher allowance as she did not demonstrate any supervision of prisoners and did not have contact with them for more than two and a half hours per day. Mr Gribben conceded in cross-examination in answer to a question put to him by Mr Ferran, on behalf of the plaintiff, that if he was asked by the responsible minister to state what the criteria were to distinguish between the higher and lower rate of allowance he would be unable to do so. In the short that he was unaware of exactly what were the criteria to make this distinction. This lack of knowledge on behalf of a member of the defendant's Efficiency Unit provides in part an explanation as to why the defendant did not provide its employees with written particulars of the relevant criteria.

[11] The effect of this failure to provide written particulars can be illustrated as follows:-

> (a) It of course makes it extremely difficult for employees, if they are not informed of what the criteria are, to carry out their own independent assessment as to whether their employers are correctly applying the criteria to them.
>
> (b) The plaintiff has been employed at Magilligan since 1 September 1986 and she never received any written particulars of the criteria. She first realised that she might be eligible for the higher rate of allowance in 2003. The difference between the higher and lower allowance is presently approximately £1,000 per annum. If the plaintiff was entitled to the higher allowance then she would have lost a not inconsiderable amount over the years since 1986. The defendant in this action has relied on the

limitation period so that any part of the plaintiff's claim which arose outside the six year limitation period is statue barred and not recoverable. If the plaintiff is entitled to the higher allowance then the defendant's failure to provide the plaintiff with information about the criteria over the whole period from 1986 to date could have been causative in restricting her claim to the non-statue barred losses.

[12] The continued failure by the defendant to give written particulars of the criteria in relation to the emergency allowance is also in part explained by the defendant's acceptance at the trial of this action that the criteria distinguishing the higher and lower allowance "are loose." That is that they are ambiguous.

[13] Mr Bentley in opening the case on behalf of the plaintiff submitted that the contractual criteria to distinguish between the lower and higher rate of allowance were to be found in a letter dated 28 October 1991 from the Employment Division of the Northern Ireland Office to the Assistant Secretary of the Northern Ireland Public Service Alliance. The letter is headed "Emergency Allowance Review." It is apparent from that letter that in 1991 the Northern Ireland Public Service Alliance was pressing the Northern Ireland Office for a single rate of emergency allowance at the higher rate for all civilian staff working in prisons. This was rejected by the Northern Ireland Office. However the letter contains a paragraph dealing with the criteria for payment of the emergency allowance. I have broken the paragraph into two parts and in order to distinguish between the parts I have italicised the first part:

> "Criteria for payment.
>
> > 3. *The criteria against which eligibility for the current allowances are assessed are based on the amount of contact which the member of staff has with prisoners: for the Higher Rate the definition is 'regular contact' and for the Lower Rate 'minimal contact'. We have all acknowledged that these definitions are fairly loosely defined and are therefore open to interpretation.* I would therefore propose that the revised definitions be as follows:
> >
> > <u>Higher Rate</u> – payable to those civilian staff working within NI prison establishments who have regular and frequent face-to-face contact with prisoners.

> Lower rate – payable to those civilian staff working within NI prison establishments who have minimal, sporadic contact with prisoners."

[14] Mr Bentley submitted that the first part of that paragraph, which I have italicised, was an acknowledgment by the defendant of the contractual criteria that applied on 28 April 1991 and that the second part of the paragraph was a proposal or offer by the defendant to the Northern Ireland Public Service Alliance to revise the definition. That there was no evidence that the proposal or offer had ever been accepted and accordingly that the contractual criteria to distinguish between the amounts of contact remained as a distinction between "regular contact" for the higher rate and "minimal contact" for the lower rate. The plaintiff gains support for that proposition from the last paragraph of the letter dated 28 October 1981 which is in the following terms:

> "5. I am conscious that in your letter of 11 June 1991 you had indicated in closing that you would be writing to me again on this subject when you had had time to consult with colleagues. You will, therefore, no doubt wish to consult further following this offer before now coming back to me."

This emphasises that the proposal was an offer to be considered and either accepted or rejected.

[15] It was accepted on behalf of the defendant at the trial of this action that there was no evidence of an express acceptance of the proposal contained in the letter dated 28 October 1991. However it was contended that the amended definition was incorporated into the employee's contracts of employment by way of custom and practice. I was referred to the case of Henry and Others v London General Transport Services Limited [2001] IRLR 132. That was a case in which a question arose as to what terms applied to the individual employee's contracts where there was only one union representing the employees, the Transport and General Workers Union, and that union had negotiated with the employer. The question arose as to whether the changes negotiated by the Union had been incorporated into individual contracts. The Employment Appeals Tribunal held that the terms had been incorporated by custom and practice. However it is quite apparent from the judgment in that case that before a term can be incorporated by custom and practice it has to be reasonable, certain and notorious. Once the reasonableness, certainty and notoriety of the custom and practice is sufficiently proven, it must be presumed that the term thus supported represents the wishes and intentions of all relevant parties. If one turns to the facts of this case applying those principles the defendant is unable to establish

any custom and practice in relation to the proposed amended criteria, let alone that the custom and practice was notorious. The defendant's own witness, Mr Gribben, did not know the exact criteria when giving evidence. This was despite being the person who was asked to and did assess the plaintiff in relation to the question as to whether she was entitled to the higher rate of allowance. Accordingly I accept the plaintiff's contention that the contractual criteria are to be found in the first part of paragraph 3 of the letter dated 9 October 1991 namely that part of the paragraph which is in the following terms:

> "3. The criteria against which eligibility for the current allowances are assessed are based on the amount of contact which the member of staff has with prisoners: for the Higher Rate the definition is 'regular contact' and for the Lower Rate 'minimal contact.'"

[16] The next question that arises is what is the correct construction of those criteria. The distinction between the two levels of contact is not immediately apparent. For instance one can have "regular minimal contact." Does this entitle an employee to the higher rate of allowance on the basis that the contact is "regular contact"? In opening the case Mr Bentley submitted that any ambiguity in the definition should be construed against the Northern Ireland Office. However it is only if ambiguity exists and other rules of construction fail, that one goes on to consider whether to construe against the person who put forward the relevant wording. In this case I have come to the decision that other rules of construction do not fail to bring definition to the contractual criteria.

[17] In Sirius International Insurance Co (Publ) v FAI General Insurance Ltd and others [2005] 1 All ER 191 the House of Lords considered a question of construction in relation to a Tomlin Order. The facts of the case do not relate to these present proceedings but the approach to be adopted in relation to construction is set out at paragraph 18 of Lord Steyn's speech in which he said:

> "The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene."

[18] Lord Steyn also emphasised a shift away from literal methods of construction at paragraph 19 of his speech. Lord Steyn said:

> "There has been a shift from literal methods of interpretation towards a more commercial approach. In *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201, Lord Diplock, in an opinion concurred in by his fellow Law Lords, observed:
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> > '… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'
>
> In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352 at 372, [1997] AC 749 at 771, I explained the rationale of this approach as follows:
>
> > 'In determining the meaning of the language of a commercial contract … the law … generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.'
>
> The tendency should therefore generally speaking be against literalism. What is literalism? It will depend on the context. But an example is given in *The Works of William Paley* (1838 edn) vol III, p 60. The moral philosophy of Paley influenced thinking on contract in the nineteenth century. The example is as follows. The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process. This

> approach was affirmed by the decisions of the House in the *Mannai Investment* case [1997] 3 All ER 352 at 376, [1997] AC 749 at 775 per Lord Hoffmann and in *Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons* (*a firm*), *Alford v West*
> *[2005] 1 All ER 191 at 201*
>
> *Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98 at 115, [1998] 1 WLR 896 at 913 per Lord Hoffmann."

[19] Turning them to the present proceedings I hold that a reasonable person, circumstanced as the actual parties were, would have understood the parties to be drawing a distinction between a minimal amount of contact on the one hand and regular contact on the other in the sense of being contact which is sufficiently often both in the number of occasions on which it occurs and in the length of contact, so as not to be minimal.

[20] During the trial of this action it became apparent that the defendant had also introduced a qualitative test in its assessment of whether an employee was entitled to the lower or higher rate. For instance that contact with low risk prison orderlies was a criterion that should be considered. That is not a part of the contractual test which relates to the amount of contact with any prisoner. Furthermore the defendant contended that there was a requirement that there be an element of supervision of prisoners by an employee before there was an entitlement to the higher rate of allowance. Again that is not a part of the contractual criteria. The defendant also suggested that there had to be "two and a half hours" contact with prisoners per day before an employee would be entitled to the higher level of allowance. The contractual criteria does not have a lower limit on the number of hours before an employee is entitled to receive the higher allowance. It is when the contact with prisoners is minimal that an employee is only entitled to the lower rate of allowance.

The Amount of Contact between the Plaintiff and Prisoners

[21] The plaintiff works in her own office undertaking typing and secretarial duties. She had also to undertake secretarial duties in a prison hospital which was for half a day per week every second week. The plaintiff accepted that there was no contact with prisoners when she worked in the prison hospital. Accordingly the contact with prisoners is confined to the time spent either in her office in the Education Centre or in her present office in the Education Annex.

[22] In or about 2004 the plaintiff approached the Governor of Magilligan, namely Governor Alan Craig, in relation to the question as to whether she

was entitled to the higher rate of emergency allowance. He asked her to keep a record of all the contacts that she had with prisoners during the course of her working day. The plaintiff kept such a record for the period 20 April 2004 to 7 May 2004 and she gave this record to Governor Craig. He in turn sent it to Mr Stanley Robinson of Pay and Allowances at Prison Service Headquarters. It was sent by Governor Craig under cover of a memorandum dated 28 May 2004. That memorandum was in the following terms:

> "I attach a letter from Alison Miller in respect of the above. This has arisen because she and I discussed her previous application for payment of the allowance at the higher rate and I was aware that no one had taken any measures to accurately quantify the degree of contact, and on that basis I asked her to carry out the monitoring exercise which is attached hereto.
>
> I am aware that there is no specific threshold at which someone should move from the lower to higher allowance, however I would strongly argue that Mrs Miller's claim should be reviewed in light of this additional information and in comparison with Stores staff at Magilligan and the D1 in the Education Department at Maghaberry."

[23] As I have indicated a review was then carried out of the plaintiff's contact with prisoners. This review was initially carried out by Mr Gribben and Mr Gorman. However they were then withdrawn from the review procedure as it was considered that the matter should more properly be dealt with by the Pay and Allowance Branch. The review became the responsibility of Mr Robinson. He reviewed not only the degree of contact which the plaintiff had with prisoners but also the degree of contact that other employees had not only at Magilligan but also at other prison establishments in Northern Ireland. In relation to the plaintiff Mr Robinson concluded

1. That she was on the lower rate of allowance.
2. That her case was subject to court proceedings.
3. That she should be kept on the lower rate in the interim.

It is incumbent on the defendant to form its own view as to the plaintiff's entitlement to the higher or lower rate of allowance. However it became apparent during the evidence that the defendant had formed a view and that the view was the plaintiff should be on the lower rate. The reference in the schedule prepared by Mr Robinson that the plaintiff was to be kept on the lower rate in the interim I take to be an appropriate reference to that decision being capable of challenge in court. It is however a matter of regret that Mr

Robinson destroyed some papers in relation to his review at the conclusion of that review and at a time when court proceedings were in existence. Those documents would have been discoverable and should have been discovered in these proceedings. They would have had a bearing not only on the defendant's assessment of the plaintiff but also on the defendant's assessment of employees with levels of contact with prisoners comparable to the plaintiff and yet who were on the higher allowance.

[24] A memorandum dated 14 December 2005 from Mr Robinson to Mr Ellis of the Crown Solicitor's Office was made available to the court during the trial, legal professional privilege having been waived. In that memorandum Mr Robinson concludes:

> "Alison Miller was found to have a lot of casual contact – seeing a number of prisoners briefly in the course of the working day and dealing with ad hoc simple requests. However, she was found not to have interactive/instructional contact and not to have sole charge of prisoners in a classroom or workshop scenario for prolonged periods. As a result, she was assessed to fall short of the contact needed to qualify for the higher rate."

Mr Bentley on behalf of the plaintiff submitted that this was persuasive evidence that the plaintiff had "a lot of casual contact" with prisoners. That by definition a "lot of casual contact" is more than "minimal contact" and accordingly that the plaintiff should be on the higher rate of allowance. That Mr Robinson's findings that the plaintiff did not have interactive/instructional contact and that she did not have sole charge of prisoners in a classroom or workshop scenario for prolonged periods were irrelevant as the criteria did not require any particular qualitive element to the contact between the employee and the prisoner before the employee was entitled to the higher rate of allowance. I accept that Mr Robinson's reference to the nature of the contact that the plaintiff has with prisoners is irrelevant and that that the contractual criteria relates solely to the amount of contact. I consider that Mr Robinson's view that there was a lot of casual contact is evidence that I should take into account but it is not determinative of that issue.

[25] In cross-examination by Mr Ringland the plaintiff was referred to the record that she had prepared for Governor Craig. In a covering letter sending the record to Governor Craig the plaintiff had described the details as:

> "Representative of the daily contact I have with prisoners."

The first entry on that record is for Tuesday morning 20 April 2004. She sets out the names and identification numbers of eight prisoners and then describes how she came into contact with each prisoner. For instance four of the prisoners were reporting to her office in relation to interviews that they were to have with teaching staff. The plaintiff was acting as a Receptionist and no substantive business needed to be conducted by her in relation to these contacts with prisoners. The record continues in a similar way for the whole period that it covers. The plaintiff accepted in cross-examination that every contact with prisoners as set out in the record was "momentary contact." That each contact was for "seconds only." Accordingly if one takes both the morning and afternoon of the 20 April 2004 as an example, the plaintiff had contact on ten separate occasions with prisoners. Nine of those contacts were with one prisoner at a time. One of them was a contact with a group of three prisoners. Even if on each occasion momentary contact for seconds was interpreted as being one minute for each contact this would only amount to ten minutes out of a total working day. I hold that that level of contact is minimal contact.

[26] The plaintiff also gave evidence as to other contacts that she would have had with prisoners. There are orderlies in the Education Centre who are prisoners. Her office is cleaned on a daily basis by a prison orderly and on occasions the orderlies would ask her to undertake photocopying. I consider that her evidence in relation to photocopying was somewhat overstated. I do not consider that this additional contact takes the amount of contact out of the category of minimal. In essence the plaintiff undertakes an office based job which requires only minimal contact with the prisoners.

[27] In arriving at that conclusion I have taken into account the comparators to which the plaintiff referred in her evidence. None of the comparators persuade me that the plaintiff was entitled to the higher rate of allowance. I illustrate this by reference to two comparators. It is apparent that civilian employees in the tuck shop work alongside prisoners and have a far higher level of contact with prisoners. This was eventually accepted on behalf of the plaintiff. The civilian employees in the tuck shop are paid and clearly are entitled to be paid the higher allowance on the basis of that contact. It is more difficult to understand how the civilian employees in the stores department are entitled to the higher allowance. They also are office based. There was a conflict of evidence as to the amount of contact which they had with prisoners. If the defendant's evidence was accepted then they had a greater degree of contact with prisoners than the plaintiff and would have been entitled to the higher allowance which they have in fact been paid. If the defendant's evidence was rejected then the level of contact was equivalent to the plaintiff's. However this did not on its own mean that the plaintiff's contact with prisoners would thereby become more than minimal. Mr Bentley conceded that if the payment that was being made to the civilian employees in the stores was being incorrectly paid then this was of no

assistance to the plaintiff. In view of that concession I do not consider it necessary to resolve that conflict of evidence because even if the level of contact with prisoners by civilian employees in the stores was at the level indicated by the plaintiff then I consider that such a level would be minimal and that they would not be entitled to the higher rate of allowance.

[28] I have also considered the plaintiff's present duties in the Education Annex. The Annex deals only with literacy and numeracy. The Education Centre deals with a range of subjects. The evidence was to the effect that there were fewer prisoners coming into the Annex to sign on for or enquire about courses due to the fact that there were fewer courses in the annex. That in this respect the plaintiff has less contact with prisoners in the annex. This drop in the level of contact was however off-set by the fact that the plaintiff assists in the task of checking the prisoners names as they come into the Education Annex. In broad terms I consider that the level of contact with prisoners in the Education Annex is similar in amount to that in the Education Centre. Accordingly I hold that the level of contact with prisoners is also minimal in the Education Annex.

[29] In conclusion the plaintiff has not established that she is entitled to the higher rate of emergency allowance and accordingly I dismiss the plaintiff's claim.

[30] I will hear submissions in relation to the question of costs particularly bearing in mind a number of matters including the defendant's failure to give sufficient written particulars to its employees as to the terms of their contracts of employment, the lack of any substantial contemporary documentation in relation to the review carried out by the defendant of the assessment as to whether the plaintiff was entitled to the higher rate of allowance, and the subsequent unfortunate loss of some documents whilst proceedings were in existence. In addition I express a degree of concern as to the remark by Mr Robinson to the plaintiff at the end of one of his interviews with her that he "did not want any more letters from her solicitors." This was said to have been a joke but it certainly was not taken that way. Everyone is entitled to receive legal advice. This is particularly so when an employer has not brought matters to the attention of its employees which it is required to do by law and is then unable to state exactly what are the relevant contractual criteria.