

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8JX

At the Tribunal  
On 1 October 2013

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**(SITTING ALONE)**

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MRS R A LANGTON (NÉE KINGHAM)

APPELLANT

THE SECRETARY OF STATE FOR HEALTH

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR J ALLSOP  
(of Counsel)  
Instructed by:  
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Rugby  
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For the Respondent

MR A MIDGLEY  
(of Counsel)  
Instructed by:  
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## **SUMMARY**

### **VICTIMISATION DISCRIMINATION – Interim relief**

Secretary of State applied successfully to be substituted as Respondent for dissolved PCT employer. Then contended Employment Tribunal had no jurisdiction to entertain Claimant's interim relief application in section 103A unfair dismissal claim. The ET declined jurisdiction. Appeal allowed. Case remitted for hearing of application on its merits.

## **HIS HONOUR JUDGE PETER CLARK**

1. This matter is proceeding in the Exeter Employment Tribunal. The parties are, presently, Mrs Langton (the Claimant) and the Secretary of State for Health (the Respondent). This is the full hearing of an appeal by the Claimant against a Judgment of Employment Judge Cresswell, promulgated with Reasons on 23 May 2013, declining jurisdiction to entertain her application for interim relief brought under section 128(1)(a)(i) of the **Employment Rights Act 1996** (ERA).

### **Background**

2. The Claimant was employed by NHS Devon, the operating name of Devon Primary Care Trust (“the Trust”) from 1 September 2000 until her dismissal by the Trust effective on 31 March 2013. She self-describes as being employed as consultant/systemic psychotherapist lead professional for CAMHS for family therapy services. On 31 December 2012 she presented her first form ET1 to the ET (case number 1700024/2013) complaining of detrimental treatment contrary to section 47B ERA by reason of having raised qualifying disclosures (the whistleblowing claim) and a complaint of victimisation contrary to section 27 of the **Equality Act 2010** following earlier complaints of sex discrimination. To those claims the Trust entered a notice of appearance; the claims were denied.

3. On 21 March 2013 the Trust gave notice of termination of the Claimant’s employment effective on 31 March. The Trust’s reasons for dismissal were said to be redundancy and the breakdown in mutual trust and confidence. On 31 March the Trust was dissolved pursuant to secondary legislation made under the **Health and Social Care Act 2012**. It is common ground that the Claimant, dismissed on that date, was not transferred with other members of staff to UKEAT/0376/13/JOJ

VH Doctors Ltd under the provisions of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (TUPE).

4. Following her dismissal, the Claimant presented a second complaint to the Tribunal (case number 1700590/2013) on 4 April 2013 making the Trust Respondent. In her Particulars of Claim she alleged that her dismissal was automatically unfair under section 103A ERA (whistleblowing dismissal; see paragraph 37) and included an application for interim relief under section 128 ERA. On 22 April 2013 the Secretary of State emailed the Tribunal saying, among other things, that the Trust was an NHS Trust that was abolished on 31 March 2013 as part of the current NHS reforms. Residual liabilities of NHS Devon now lie with the Secretary of State for Health. In these circumstances, the Secretary of State requested that the identity of the Respondent be changed to the Secretary of State for Health. Employment Judge Carstairs made an order dated 1 May 2013 stating that the title of the Respondent had been amended to “Secretary of State for Health”; he also ordered the two claims to be combined.

5. Pausing there, the Tribunal’s express power to substitute a different party for an existing Respondent was at the relevant time contained in **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** rule 10(2)(k), which provides that an order may be made under rule 10(1) that any person whom the Employment Judge or Tribunal considers may be liable for the remedy claimed should be made a respondent in the proceedings. I repeat, the order of 1 May did not add the Secretary of State as a second Respondent but substituted him for the Trust at the Secretary of State’s request.

6. It is also convenient at this point to record that I have been referred to section 70 of the **National Health Service Act 2006** (NHSA), which provides, so far as is material:

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**“(1) If a Primary Care Trust ceases to exist, the Secretary of State must exercise his functions so as to secure that all of the body’s liabilities (other than criminal liabilities) are dealt with.”**

7. The Secretary of State entered an appearance to the second complaint on 28 May 2013, adopting the Trust’s defence to the first complaint and asserting that the reasons for the Claimant’s dismissal were redundancy and a very serious and irretrievable breakdown in mutual trust and confidence, as stated in the Trust’s dismissal letter dated 21 March 2013. The section 103A inadmissible reason for dismissal was denied, and the response pleads specifically to the alleged protected disclosures relied on by the Claimant.

8. It is also relevant to note that upon dismissal the Claimant was given the right of an internal appeal. She exercised that right, and an appeal was heard and determined by or on behalf of the Secretary of State as if he were the dismissing employer; the appeal was eventually dismissed.

### **Interim relief**

9. Section 128(1) ERA provides, so far as is material:

**“An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—**

**(a) that the reason (or, if more than one, the principal reason) for the dismissal is one of those specified in—**

**(i) [...] section 103A [...]**

**may apply to the tribunal for interim relief.”**

10. Under section 129, headed “Procedure on Hearing of an Employee’s Application for Interim Relief”, subsection (1) provides:

**“This section applies where, on hearing an employee’s application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—**

**(a) that the reason (or, if more than one, the principal reason) for the dismissal is one of those specified in (i) [...] section 103A.”**

11. The section then goes on to deal with voluntary reinstatement or re-engagement by the employer with the employee’s consent and concludes with:

**“(9) If on the hearing of an application for interim relief the employer—**

**(a) fails to attend before the tribunal, or**

**(b) states that he is unwilling either to reinstate or re-engage the employee,**

**the tribunal shall make an order for the continuation of the employee’s contract of employment.”**

12. Section 130 is headed “Order for Continuation of Contract of Employment”. It provides, so far as is material, by subsection (1) that:

**“A continuation order is an order that the contract of employment continue in force—**

**(a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and**

**(b) for the purposes of determining for any other purpose the period for which the employee has been continuously employed.”**

13. I remind myself that the expressions “employee”, “employer” and “employment” have the meanings ascribed by section 230 ERA; that is to say, they include cases in which the employment has ceased.

### **The Tribunal decision**

14. The Employment Judge accepted the submission by Mr Midgeley on behalf of the Secretary of State that the Tribunal could not make a continuation order in circumstances where the employer – here, the Trust – no longer exists. Since the Secretary of State was not and

never had been the Claimant's employer, no continuation order could be made against him under section 129. Accordingly, he declined to entertain the Claimant's interim relief application on its merits; he did not decide the likelihood question posed by section 129(1). A review application by the Claimant dated 30 May was summarily rejected by the Judge by a review decision with Reasons dated 3 June.

### **Discussion**

15. Having had the advantage of full argument from counsel, my starting point is this: what is the effect of the Secretary of State's successful application to be substituted as Respondent for the Trust (see the ET order of 1 May 2013)? In my judgment, it can only be that the Secretary of State stands in the shoes of the Trust for all purposes in the litigation. He should be permitted to do so, since he is statutorily obliged by section 70 NHS Act to exercise his functions so as to secure that all of the body's – here, the Trust's – civil liabilities are dealt with. That responsibility flows from his decision to dissolve the Trust under the provisions of the 2012 Act. In these circumstances, it seems to me the Secretary of State was correctly substituted for the Trust in accordance with ET rule 10(2)(k). The Secretary of State was thereby entitled to take a full part in the proceedings, including defending the Claimant's unfair dismissal claim brought under section 103A ERA, being a claim in respect of which liability would fall on him if it is ultimately successful. He accepts that potential liability.

16. How, then, does this interim relief application fall outside his potential liability? In my judgment, it does not; first, because he must secure that all of the Trust's civil liabilities are dealt with under section 70 NHS Act, and that includes, in my judgment, the Trust's potential liability for an interim relief order on the wording of sections 128-130 ERA, to which I shall return. In my judgment, the Claimant is an employee, being an individual who worked under a UKEAT/0376/13/JOJ

contract of employment (section 230(1)) who presented a complaint to an Employment Tribunal that she had been unfairly dismissed under section 103A, and she is therefore entitled to apply for interim relief (section 128(1)). If it appears likely to the Employment Judge on hearing that application that she will succeed in her section 103A complaint at the final ET hearing, he may make one of the orders provided for in section 129. As Burton P made clear in **Dowling v ME Ilic Haulage** [2004] ICR 1176, the effect of a continuation order is not to create a new contract of employment, the old contract having necessarily ended before an interim relief application could arise, but simply to preserve the claimant's right to pay and other benefits enjoyed under the terminated contract of employment and to deal, if necessary, with the question of continuity of employment (see section 130(1)). The Judge is not, therefore, being asked to order the Secretary of State to enter into a contract of employment with the Claimant, as indeed he and the parties recognised (see Reasons, paragraph 12).

17. The sole ground on which he refused jurisdiction to entertain the Claimant's interim relief application, it seems to me, was that there was no employer against whom he could make a continuation order. That is, in essence, Mr Midgeley's submission to me on appeal. However, there is nothing in my view in sections 128-130 that prevents the Tribunal making a continuation order against a party who has chosen to substitute himself for the original Respondent but is not the employer as defined in section 230(4) ERA. As I have sought to explain, the right to interim relief will arise where it appears likely that the Claimant will succeed at trial in a properly constituted section 103A claim. Since the Secretary of State has succeeded in having himself substituted for the Trust in order to defend that claim, I can see nothing in the interim relief provisions contained in sections 128-130 ERA that will prevent him (a) from defending that claim on its merits and (b) being liable under a continuation order if it is made. He will then, in all respects, step into the shoes of the original employer, the

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Trust, as provided for in section 70 NHSA and in the same way as an insurer exercising his rights of subrogation under an insurance contract to defend a personal injury claim brought against his insurer, he will effectively take on the privileges and liabilities of the original employer.

**Disposal**

18. It follows that I shall allow this appeal and set aside the Judgment of the Employment Judge. The interim relief application will be remitted to a different Employment Judge to be heard on its merits. Having discussed the matter with counsel, it seems to me that it would not be appropriate for this Appeal Tribunal to make an initial determination on this fact-sensitive issue. Arrangements to list the interim relief application for hearing as soon as practicable may be dealt with at a case management discussion due to take place, I am told, before Regional Employment Judge Parkin on 14 October 2013.