



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107403/2024**

**Held in Edinburgh via Cloud Video Platform on 2 April 2024**

**Employment Judge Sutherland**

**Lesley McMillan**

**Claimant  
In Person**

**Eskmills Limited**

**Respondent  
Represented by:  
Mr I Burke, Solicitor**

## **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claimant does not have title to sue and the claim is accordingly dismissed.

## **REASONS**

### **Introduction**

1. The claimant made complaints of automatically unfair constructive dismissal by reason of whistleblowing, unlawful deduction from wages and holiday pay. She brought these complaints “on behalf of my deceased partner Grant Fleming”.

2. An open preliminary hearing was listed for today by CVP (video) to determine the issue of title to sue.
3. The claimant gave evidence on her own behalf and parties made oral submissions.

5 **Findings in fact**

4. The tribunal makes the following findings in fact –
5. The claimant was Grant Fleming's life partner (but not spouse or civil partner) at the time of his death on 17 August 2024 and had been so for 14 years. Her partner was employed by the respondent from 18 December 2023 to 7 May 2024.  
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6. Her partner was unwell from about April and became extremely unwell in August and tragically died before they could reach A & E on 17 August 2024. His death was sudden and unexpected and she was devastated by it. There is an ongoing investigation by the Procurator Fiscal in relation to his death.  
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7. Her partner did not leave a will. He had no property or assets of any value and no executor has been appointed. He has no children and his mother is his closest living relative.
8. Her partner had wanted to bring tribunal proceedings once he was well enough to do so and he wanted the claimant's help with this given her professional background in construction design management. He arranged for her to return his PPE equipment to the respondent. In June he forwarded to her some information he had received from ACAS.  
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9. The claimant had wanted to honor his wishes and had presumed that she would be permitted to do so given the nature of their longstanding relationship. She had also spoken to his mother who had authorized her to proceed with the claim.  
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10. The claimant's understanding was that any award of compensation would be paid to his mother.

11. The claimant commenced ACAS Early Conciliation on 10 October 2024 and this concluded on 7 November 2024. Tribunal proceedings were lodged 11 November 2024. The tribunal service initially understood that the claimant was Grant Fleming's personal representative. The claimant confirmed on 13 December she was not. Following a Case Management Hearing held on 22 January 2025 an open preliminary hearing was listed for today to determine the issue of title to sue.

### The law

12. Under Section 206 of the Employment Rights Act 1996 where an employee has died, any tribunal proceedings to which this section applies, may be instituted or continued by a personal representative of the deceased employee. The section applies to complaints for unfair dismissal under Part X but does not apply to complaints for unlawful deductions under Part II. Personal representative is understood to mean an executor. If there is no personal representative any such tribunal proceedings may be instituted or continued on behalf of the estate of the deceased employee by any appropriate person appointed by the employment tribunal. An appropriate person is a person who is—

*“(a) authorised by the employee before his death to act in connection with the proceedings, or*

*(b) the widow or widower, surviving civil partner, child, parent or brother or sister of the deceased employee”*

13. The complaint for unlawful deduction from wages could alternatively be brought as a claim for breach of contract. Such a complaint may be brought by the executor of the deceased estate.

14. The complaint for holiday pay may be brought as a complaint for unlawful deduction from wages, under the Working Time Regulations 1998 or for breach of contract. The latter complaints may be brought by the executor of the deceased estate.

**Discussion and decision**

15. The respondent submitted that this tribunal claim was a nullity in reliance upon the Employment Appeal Tribunal decision of *Fox v British Airways plc UKEAT/33/2012* “the appointment [of the claimant as an appropriate person] must logically precede the institution of the proceedings. If there is no entitlement to institute proceedings, then any proceedings instituted must be a nullity, subject only to any appointment having retrospective effect. Nothing in section 206 provides for any such retrospectivity” (per Mr Justice Langstaff).
16. An Employment Tribunal only has jurisdiction that is conferred upon it by virtue of legislation. An Employment Tribunal is established in relation to any proceedings and such proceedings are started by the making of a claim (Section 3 and 12 of the Employment Tribunal Regulations 2013). The Tribunal Rules of Procedure regulate proceedings before an Employment Tribunal and they do not provide any mechanism for a claimant to make an application for appointment prior to the commencement of such proceedings. It is not clear how the tribunal would have jurisdiction to determine an application for appointment unless a claim has first been instituted.
17. The respondent submitted in response that the application could be made at the same time as the claim (which they submit was not done in this case) but the EAT in *Fox* also described such proceedings as a nullity.
18. In any event, it is apparent from the facts as found that her partner did not authorize her to act in connection with the institution of these proceedings. The fact that he wanted to institute these proceedings and he wanted her help in doing so, does not amount to him authorizing her to do so.
19. It would be open to her partner's mother to be appointed as executor (for all complaints) or be appointed as an appropriate person (for the complaint of unfair dismissal only) without need for prior authorization by her son but any tribunal proceedings which were then instigated would be affected by the statutory time limits. As noted in *Fox*, it may be relevant to determination of

those time limits if it was not reasonably practicable to bring the complaint sooner because of the time required for making the application. It would be open to his mother to appoint to the claimant (Lesley McMillan) to act as her representative in relation to those proceedings.

- 5     20.     However in respect of the current proceedings, the claimant does not have title to sue and the claim is accordingly dismissed.

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**Entered in register: 7 April 2025  
and copied to parties**