

THE INDUSTRIAL TRIBUNALS

CASE REFS: 1384/13
1385/13
1386/13
1387/13
1388/13
1389/13
1433/13

CLAIMANTS: Deborah MacLynn and Others

RESPONDENTS: 1. Census Financial Planning (NI) Ltd
2. J H Financial Planning Ltd,
t/a Premier Financial Planning

DECISION

The unanimous decision of the tribunal is that there was not a transfer of an undertaking between the first-named respondent and the second-named respondent by virtue of the Regulations referred to in paragraph 6 of this decision. All claims against the second-named respondent are dismissed and this respondent is therefore dismissed from the proceedings.

Constitution of Tribunal:

Chairman: Mr S A Crothers

Members: Mrs S Butcher
Mrs E Gilmartin

Appearances:

The claimants appeared and represented themselves.

The first named respondent did not appear and was not represented. The second named respondent was represented by Mr M Mason of Collective Business Services.

The Claims

1. (1) As appears from the records of Case Management Discussions dated 13 September 2013 and 7 October 2013, (annexed to this decision), there are

seven claimants namely Deborah MacLynn, Julie Cunningham, Natasha Metcalfe, Jemma McCracken, Gail Black, Zoe Anyon and Lisa Clarke.

- (2) Julie Cunningham, Jemma McCracken, Natasha Metcalfe and Deborah MacLynn withdrew their claims against the second named respondent (“JHFP”) in the course of the tribunal hearing. The claimants however maintained their claims against the first respondent (“Census”), for notice pay, holiday pay and a redundancy payment, except for Zoe Anyon, who made claims for notice pay and holiday pay only against the first respondent. Gail Black and Lisa Clarke also made transfer of undertaking (TUPE) unfair dismissal claims against JHFP.
- (3) Census, which was not represented or in attendance at the Case Management Discussions or at the tribunal hearing, contended that there had been a transfer of an undertaking between Census and JHFP. JHFP denied that any such transfer had taken place. The tribunal received, (at a late stage), correspondence and a bundle of documents from Tracey Girvan one of the Directors of Census together with a witness statement from Paul Nevin of Census. As hearsay evidence, the tribunal gave such weight to this statement as it considered appropriate.
- (4) The title of the second respondent is amended to that shown above.

Procedure

2. (1) The tribunal proceeded to dispose of the proceedings in accordance with Rule 27 of the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005, as amended, which provides as follows:-

“(5) If a party fails to attend or to be represented (for the purpose of conducting the party’s case at the hearing under Rule 26) at the time and place fixed for such hearing, the tribunal may dismiss or dispose of the proceedings in the absence of that party or may adjourn the hearing to a later date.

(6) If a tribunal wishes to dismiss or dispose of proceedings in the circumstances described in paragraph (5), it shall first consider any information in its possession which has been made available to it by the parties.

(7) At a hearing under Rule 26, a tribunal may exercise any powers which may be exercised by a chairman under these Rules”.

The tribunal was assisted in dealing with the matter by considering Harvey on Industrial Relations and Employment Law (‘Harvey’) at Division P1, paragraphs 827-830.01, under the heading of “**Failure to Appear**”.

- (2) The parties present at the hearing agreed that the transfer of an undertaking/service provision change issue only should be addressed during the hearing and, that after the decision was issued, the claimants’ claims should be dealt with at a further hearing.

Issue

3. The issue before the tribunal was whether there had been a transfer of an undertaking between Census and JHFP, or a service provision change.

Sources of Evidence

4. The tribunal heard evidence from Jim Hughes, the principal of JHFP and Paul Dixon, self-employed financial advisor. The tribunal was also assisted by relevant documentation.

Findings of Fact

5. Having considered the evidence and information in accordance with Rule 27 of the rules, insofar as same related to the issue before it, the tribunal made the following findings of fact, on the balance of probabilities:-

- (1) At the material time Census and JHFP were appointed representatives of Sesame Bankhall Group which, as the largest distributor of financial services in the UK, provides support to financial advisors. Sesame is authorised and regulated by the Financial Conduct Authority ("FCA"). Sesame and JHFP were both members of the Sesame network and it was through Sesame that they were authorised and regulated to provide financial services. Several self-employed financial advisors, including Paul Dixon, were registered with Census and through this registration they were authorised and regulated to provide financial services. JHFP later became a directly authorised firm with the FCA. The self-employed advisors provided advice to clients across a range of financial matters including mortgages and pensions. They paid a percentage of their commission to Census in return for the provision of Sesame registration and office facilities, including administrative support.
- (2) On 30 May 2013, Paul Dixon had a meeting with Paul Nevin at the Wellington Park Hotel, Belfast. During this meeting, Paul Nevin disclosed that he was having discussions with several financial firms, including JHFP. It was clear to the tribunal that Census were in considerable difficulties. At that stage, Paul Nevin and Jim Hughes were on amicable terms. Paul Nevin intimated to Paul Dixon that Census would be going into liquidation and that staff would be told at 4.00 pm that they were being made redundant. The tribunal is satisfied that the claimants were in fact made redundant on 30 May 2013 and told not to turn up for work the following day. Census ceased to trade on 30 May 2013. After that date, the self-employed advisors could not use the Census Office on the Lisburn Road, were not in a position to provide advice, and could not obtain any commission until the suspension of commission payments imposed later in June 2013, was lifted. Furthermore, as a financial advisor could only be registered with one member firm of the Sesame network, the four self employed advisors had to resign their registration with Census and apply to Sesame to transfer their registration to JHFP. Paul Dixon resigned from Census on 2 August 2013 and registered with JHFP on 27 September 2013. He had been afforded office facilities by JHFP together with the three other self-employed financial advisors, Maxine Wardlow, Simone Hull and Clement Kernaghan, who were registered with JHFP on 16 September 2013.

- (3) The tribunal was shown correspondence from Skandia showing that Paul Dixon's plan was transferred from Census to S Hill and Company Investment Advisors LLP as part of a bulk transfer request received on 23 September 2013.
- (4) Correspondence from Census to one of the claimants, Jemma McCracken, dated 11 July 2013 states as follows:-

"Dear Jemma

Your letter of 18th June 2013 refers. As previously stated in my email to you of 26th June 2013 we had sent a new proposal to Sesame. This was agreeable to 3 out of the 4 parties concerned, however as of today's date we still do not have a unilaterally acceptable proposal. This has an effect for all concerned as Census FP (NI) and all advisers are currently suspended and unable to provide any advice. The commission account has also been suspended until the matters have been resolved.

This is causing a delay in handing all matters pertaining to Census Financial planning (NI) Ltd, including redundancy arrangements, to Darren Bowman of McLean and Company.

In the meantime I have spoken to Natina Burns of Redundancy Payments Service, Department for Employment and Learning. I have informed her of the current impasse with Sesame and the knock on that this has with our ability to address redundancy matters. She acknowledged the situation and asked me to keep former employees and her department abreast of the situation at regular intervals.

I will be in touch in due course once we have resolution with Sesame.

Kind regards

Tracey Girvan"

- (5) There was no evidence before the tribunal that Census had in fact gone into liquidation. The tribunal was referred to correspondence dated 10 September 2013 from Census to one of Paul Dixon's clients which includes the following:-

"I am proud to inform you that, as of 10 September 2013 Census Financial has joined with the Belfast based company of S Hill and Company Investment Advisors LLP. This move signifies the coming together of two of the most respected names in Northern Ireland's financial services sector. I believe, that in terms of professionalism, rigour and ethics, we each share an ingrained desire to deliver the very best performance for our clients".

Similar correspondence to various individuals alerted clients of Paul Dixon to contact him and enquire as to what was happening. In this way he made contact with clients and re-established his income.

- (6) Tracey Girvan's email to the tribunal dated 2 October 2013, on behalf of Census, asserts that financial legal heads of terms were agreed between

Census, JHFP, and Sesame Bankhall Group. Paul Nevin also asserts in a statement furnished to the tribunal that there was a transfer from Census to JHFP of four self-employed advisors, two self-employed introducers and three of the claimants ie Natasha Metcalfe, Julie Cunningham, and Jemma McCracken. Following an interview with JHFP these three claimants commenced employment with JHFP on 12 June 2013. The tribunal accepts that Jim Hughes had a business need leading him to interview and employ these individuals.

- (7) The tribunal is satisfied from the evidence before it, that there were no financial and legal heads of terms agreed between Census and JHFP as asserted by Tracey Girvan. Furthermore, there was no documentary evidence placed before the tribunal to substantiate such an assertion. It is also clear to the tribunal that during discussions taking place between JHFP and Census in relation to the self-employed advisors and members of staff, Jim Hughes became very concerned about potentially serious issues which had arisen within Census. This led to the collapse of the discussions between the two firms within approximately a week after Natasha Metcalfe, Jemma McCracken and Julie Cunningham commenced employment with JHFP. The tribunal is further satisfied that the employment of the three claimants was not conditional upon a transfer of business from Census to JHFP or on the registration of the self-employed advisors with JHFP. It is also satisfied that this registration did not constitute a transfer of an undertaking within the meaning of the relevant legislation, or a service provision change. In any event these registrations did not take place until 16 and 27 September 2013 which was after the apparent merger between Census and S Hill and Company on 10 September 2013.
- (8) In areas of conflict between the information provided by Census to the tribunal (including Paul Nevin's statement) and the evidence provided by JHFP, the tribunal, also in the absence of direct evidence from Census, prefers the evidence of JHFP. It is also clear to the tribunal, that a considerable degree of animosity has arisen between Census and JHFP. This is reflected in a number of potentially serious allegations, and by the absence of anyone from or on behalf of Census at the two Case Management Discussions and to prove its case at the tribunal hearing.
- (9) Contrary to the assertion made by Tracey Girvan in her correspondence to the tribunal of 2 October 2013, Natasha Metcalfe, Jemma McCracken and Julie Cunningham did not commence employment with JHFP on their existing salaries with Census, but were afforded better contractual terms and conditions. Furthermore the tribunal does not accept that Jim Hughes stated that he had to give Pamela Fleeton, a member of his staff, a salary increase as the three claimants were paid more than her. The tribunal accepts that Pamela Fleeton received a salary increase to reflect her assumption of additional responsibilities.
- (10) In relation to events on 30 May 2013, the response documentation from Census states:-

“On 30th May 2013, the claimants were advised that the company was to cease trading with immediate effect.

This meant that all staff (employed) were to be made redundant.

Furthermore they were advised that all staff would be fully paid their salaries the next day, which they were.”

The response continues by referring to

“the process of finalising a deal between Census Financial Planning NI Ltd and Premier Financial Planning to transfer all self employed advisors and four of the employment staff across to Premier Financial Planning.

We had arranged for all employed staff (the claimants above) to be interviewed in the intervening three days by the principal of Premier. He was however refusing to transfer any of the employed staff under TUPE”.

- (11) The fact that the staff were to be interviewed, and in fact were interviewed before commencing employment on 12 June 2013, points away from any assertion or suggestion that a transfer of an undertaking or a service provision change in terms of the relevant legislation was being contemplated or that Jim Hughes refused to transfer any of the employed staff under TUPE which, if applicable, would mean that they would have to transfer on their existing terms and conditions, irrespective of interviews. The response, presented to the tribunal on 2 September 2013, also asserts that it is still the intention of Census to enter into a members’ voluntary liquidation, notwithstanding the fact that a short time after the response was presented, Census joined with S Hill and Company Investment Advisors LLP and wrote to clients of the self employed advisors to announce this development indicating that “Tracey, Michael, or Paul, shall contact you within the next ten days to arrange a review of your investment portfolio and to address any queries you may have”.

The Law

6. (1) The tribunal considered the relevant provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”), as modified by Schedule 1 in relation to Northern Ireland, together with the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006, (“SPC”), (which should be read in conjunction with TUPE). Under Regulation 2(1) of both TUPE and SPC a contract of employment is defined as “any agreement between an employee and his employer determining the terms and conditions of his employment”. Employee is defined as “any individual who works for another person whether under a contract of service of apprenticeship or otherwise but does not include anyone who provides services under a contract for services and reference to a person’s employer shall be construed accordingly”.
- (2) Regulation 3 of TUPE provides:-

“A relevant transfer

3. (1) These Regulations apply to –

- (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity; ...
 - (2) In this regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary”.
- (3) Regulation 4 of TUPE provides:-

“Effect of relevant transfer on contracts of employment

Regulation 4

- (1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
- (2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer –
 - (a) all the transferor’s rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee and
 - (b) an act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
- (3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping or resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

- (4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is -
 - (a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or
 - (b) a reason unconnected with the transfer.
- (5) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is -
 - (a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or
 - (b) a reason unconnected with the transfer.”
- (4) Regulation 7 of the TUPE governs the dismissal of an employee because of a relevant transfer and Regulations 11-16 relate to notification of employee liability information, the remedy for failure to notify employee liability, the duty to inform or consult representatives, the election of employee representatives, and the failure to inform or consult respectively.
- (5) Regulations 3 and 4 of SPC provides:-

“Service provision change

3.—(1) These Regulations apply to a service provision change, that is situation in which—

- (a) activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”);
- (b) activities cease to be carried out by a contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client’s behalf; or
- (c) activities ceased to be carried out by a contractor or a subsequent contractor on a client’s behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (2) are satisfied.

- (2) The conditions referred to in paragraph (1) are that—

- (a) immediately before the service provision change—
 - (i) there is an organised grouping of employees situated in Northern Ireland which has as its principal purpose the carrying out of the activities concerned on behalf of the client;
 - (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and
- (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

Effect of service provision change on contracts of employment

4. - (1) Except where objection is made under paragraph (7), a service provision change shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the service provision change, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a service provision change -

- (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of his regulation to the transferee; and
- (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph(1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a service provision change, is a reference to a person so employed immediately before the change, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the change is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is -

- (a) the transfer itself; or
- (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(5) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is -

- (a) a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or
- (b) a reason unconnected with the transfer.

(6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor of the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the service provision change shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, where a service provision change involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to

terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.”

- (6) Regulation 7 of SPC governs the dismissal of an employee because of Service Provision Change and Regulations 11-16 relate to notification of employee liability information, the remedy for failure to notify employee liability, the duty to inform or consult representatives, re-election of employee representative, and the failure to inform or consult respectively.
- (7) The tribunal considered, insofar as relevant, a number of authorities relating to TUPE and SPC. The case of **Rynda (UK) Ltd v Rhijnsburger (UK EAT/0570/12/LA)** – judgment given on 14 May 2013, held that the definition of “organised grouping of employees” should focus on the activities of employees and the intention of the employer. The tribunal has to focus on the stage immediately prior to the alleged transfer and direct itself to the question of whether at that point there was an organised grouping of employees with the “principal purpose” of carrying out the activities concerned.
- (8) In the earlier case of **Lorne Stewart PLC v Hyde and Others (UK EAT/0408/12/GE)** – judgment given on 6 February 2013, the EAT held that the essential questions as derived from the case of **Metropolitan Resources v Churchill Dulwach (UK EAT/02800/08)**, and **Enterprise Management v Connect-Up (UK EAT/0462/10)**, focused attention on what was actually being done before and after the service provision change, and if there was such a service provision change, whether the relevant employees were assigned to an organised grouping of employees.
- (9) As pointed out by Lord Justice Elias in paragraph 37 of his judgement in the Court of Appeal case of **McCarrick v C T Hunter (2012) EWCA Civ 1399**:-

“The language of Regulation 3(1)(b) is only consistent with the situation where there is the same client throughout; and Regulation 3(3), which focuses on the intention of the client, is premised on that same assumption”.
- (10) In the Court of Session case of **Ceva Freight (UK) Ltd v C Well Ltd (2013) CSIH 59 XA118/12** the difficulties in satisfying the precondition of any service provision change that there must be an organised grouping of employees whose principle purpose is carrying out activities on behalf of the client, is illustrated. It is possible for a single employee to constitute an organised grouping in his/her own right but only where activities are wholly carried out by a single employee on behalf of a client. Furthermore paragraph 31 of the judgement states that:-

“... we agree with the view expressed by the Employment Appeal Tribunal at paragraph 18 of its judgement in **Eddie Stobart Ltd v Moreman** that the concept of an organised grouping implies that there be an element of conscious organisation by the employer of his employees into a grouping – of the nature of a “team” – which has as its principal purpose the carrying out *de facto* of the activities in issue”.

- (11) In relation to TUPE, Harvey at Vol. 2 Para 47.01 comments in relation to the case of **Longden v Ferrari Ltd and Kennedy International Ltd [1994] IRLR 157, [1994] ICR 443, EAT:-**

'F experienced financial difficulties and called in administrative receivers on 7 March 1991. On 14 March negotiations with K began for the purchase by K of part of F's undertaking. The receivers sent a draft contract to K on 26 March and, to maintain the operation while negotiations continued, K agreed to pay the receivers sufficient funds to keep the business 'ticking over' for a further week. On 27 March, K notified to the receivers which of F's management they thought it was essential to retain in employment pending further negotiations. Mrs Longden and Mr Paisley were identified as non-essential and, on 28 March, were dismissed by the receivers. Negotiations finally led to a sale on 10 April and the undertaking was transferred to K on that date. The issue for the tribunal to consider was whether Mrs Longden and Mr Paisley were employed by F 'immediately before the transfer' (relevant for the purposes of reg 5(3) of the 1981 Regulations—and now in relation to reg 4(3) of TUPE 2006) either by virtue of the fact they were employed immediately before one of a series of transactions effecting in the sale or, alternatively on the basis that their dismissal was by reason of the transfer and therefore automatically unfair with the consequence that their employment was deemed to continued up to the date of transfer and liability for claims arising from the dismissal transfer to the transferee. As to the first of these issues, the EAT held that it was not sufficient that there were two or more transactions linked in a series of events. Regulation 5(3) of the 1981 Regulations (the relevant part now being in reg 3(6) of TUPE 2006) required that the transfer of the undertaking be 'effected' by a series of two or more transactions and, although the events in the case could be considered as causally linked to one another and to the ultimate conclusion of the sale agreement, the transfer was not effected by the earlier transactions and only took place on completion of the sale on 10 April. The EAT also held that the tribunal was right to conclude that neither the transfer nor the reason connected with it was the reason, or principal reason, for the employee's dismissal. The tribunal found that the receivers dismissed the employees because of financial pressures not because they had been requested or instructed to do so by the ultimate purchasers. It is true that the purchasers had identified the employees whom they considered to be essential to be retained but there was no evidence on which the tribunal could find that K had, by this process of identification, requested that other employees should be dismissed.'

Submissions

7. The tribunal carefully considered the helpful submissions made by Mr Mason in which he referred to the cases of **McCarrick, Ceva Freight UK Ltd and Metropolitan Resources Ltd** together with the section from Harvey in the

Longden case. He urged the tribunal to find that there could not have been a relevant transfer under TUPE or SPC from Census to JHFP.

Conclusions

8. (1) Having applied the relevant principles of law to the findings of fact, the tribunal concludes that there has not been a transfer of an undertaking under TUPE from Census to JHFP as there is no persuasive evidence that there has not been a transfer of an economic entity which retained its identity.
- (2) The tribunal also concludes that there has not been a service provision change under SPC. Apart from the difficulty in identifying a client for the purposes of SPC, there is insufficient evidence to demonstrate that before any supposed service provision change there was an organised grouping of employees which had as its principal purpose the carrying out of the activities concerned on behalf of the client, or that the client intended that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration.
- (3) The tribunal does not consider it necessary to consider any further provisions either under TUPE or SPC as, on the facts as found, the fundamentals do not exist to constitute a transfer or a service provision change.
- (4) JHFP is therefore dismissed from the proceedings. Furthermore, any claims by the claimants against JHFP are also dismissed. The cases will therefore be relisted against Census only.

Chairman:

Date and place of hearing: 21 and 22 November 2013, Belfast.

Date decision recorded in register and issued to parties:

**THE INDUSTRIAL TRIBUNALS
CASE MANAGEMENT DISCUSSION**

CASE REF: 1384/13 & Others

CLAIMANT: Deborah MacLynn & Others
RESPONDENT: Census Financial Planning (NI) Ltd
DATE OF HEARING: 7 October 2013

REPRESENTATIVES OF PARTIES:

CLAIMANT BY: The claimants were self-represented.
RESPONDENT BY: N/A.

Record of Proceedings

1. This is the record of a Case Management Discussion ("CMD") in respect of the cases of the following claimants:

| | |
|------------------|-----------|
| Zoe Anyon | (1389/13) |
| Deborah MacLynn | (1384/13) |
| Gail Black | (1388/13) |
| Natasha Metcalfe | (1386/13) |
| Gemma McCracken | (1387/13) |
| Julie Cunningham | (1385/13) |
2. This record, in respect of the CMD which took place on 7 October, should be read in conjunction with the record of proceedings of a CMD which took place on 13 September 2013.
3. Mr Jim Hughes, of JH Financial Planning Ltd ("JHFP"), was present throughout this CMD.
4. During the course of this CMD, I noted assertions which had made in an email of 2 October 2013 from Ms Tracey Girvan. I also noted that, according to the above claimants, four out of five self-employed people who had worked for Census Financial Planning Ltd ("Census") were now working for JH Financial Planning Limited.
5. It was clear that Census is contending that there has been a TUPE transfer to JHFP. Against that background, the claimants named above ("the above claimants") and Mr



Hughes were all agreed that it was best that the TUPE issue was addressed during the course of any main hearing.

6. Accordingly, the main hearings of the cases of all of the claimants who are listed above, was postponed.
7. The above claimants asked that JHFP be joined as a respondent to these proceedings so that the TUPE issue can be resolved. On behalf of that company, Mr Hughes told me that there was no objection to that course of action.
8. Each of the claimants, with the exception of Ms Anyon, has asked me to grant her leave to amend her claim so as to add a "TUPE" unfair dismissal claim against JHFP (a claim that her dismissal was an unfair dismissal of one of the types which are described in Regulation 7 of the TUPE Regulations). On behalf of JHFP, Mr Hughes made it clear that that firm had no objection to that course of action. Accordingly, in each of the above cases, with the exception of Anyon, and also in the Lisa Clarke (1433/13) case, I have granted the claimant leave to amend her claim form so as to incorporate a TUPE unfair dismissal claim against JHFP; accordingly, from now onwards, in each of those cases, the claim form is deemed to include a TUPE dismissal claim.
9. The main hearings of all the above cases, and of the Lisa Clarke case, will take place on Thursday 21 November. That date has been agreed by the above claimants in relation to their respective cases and Mr Hughes has also agreed that date.
10. It has also been agreed by those claimants and by Mr Hughes that, if the main hearing is not finished on 21 November, it will continue on 22 November.
11. It was also agreed and directed that the main hearing will deal with liability issues only.
12. Accordingly, any remedies issues (any issues relating to the amount of any compensation which might be payable) would be left to be resolved by subsequent agreement between the parties, or to be the subject some subsequent remedies hearing.
13. It is noted that the main purpose of the main hearing (on 21 and 22 November) will be to resolve the TUPE issue once and for all.

Chairman:

Date: 9 October 2013

**THE INDUSTRIAL TRIBUNALS
CASE MANAGEMENT DISCUSSION**

CASE REF: 1384/13

CLAIMANTS: Deborah MacLynn and Others
RESPONDENT: Census Financial Planning (NI) Ltd

DATE OF HEARING: 13 September 2013

REPRESENTATIVES OF PARTIES:

CLAIMANTS BY: The claimants were self-represented.

RESPONDENT BY: N/A.

Record of Proceedings

1. The purpose of this Case Management Discussion ("CMD") was to consider the best procedural way forward in this case.
2. Ms Tracey Girvan, of Census Financial Planning Ltd ("Census"), had been planning to participate by telephone in this CMD. However, at the last minute, she declined to do so, apparently because of the fact that representatives of JH Financial Planning Ltd ("JHFP") would be present.
3. This was a CMD in respect of the cases of all of the claimants who are currently pursuing litigation against Census ("the relevant claimants"). Their names, and their case reference numbers are as follows:

Zoe Anyon (1389/13)
Deborah MacLynn (1384/13)
Lisa Clarke (1433/13)
Gail Black (1388/13)
Natasha Metcalfe (1386/13)
Gemma McCracken (1387/17)
Julie Cunningham (1385/13)
4. Census ceased to operate on 30 May 2013. As a result Census purported to dismiss all of the relevant claimants.

5. All of them were paid their wages up to date. All of them claim that they are due holiday pay and notice pay. All of the claimants, apart from Ms Anyon, claim redundancy pay.
6. Some of the claimants, in their claim forms as originally presented, made claims in respect of unfair dismissal. Anyone who has made a claim for unfair dismissal has now withdrawn that claim (during the course of this CMD). The normal, standard, dismissal orders, whereby a Chairman dismisses a claim upon its withdrawal, will be issued as a consequence of the unfair dismissal claim withdrawals.
7. Three of the staff who were sacked by Census were taken on by JHFP. Accordingly, there clearly is a TUPE (Transfer of Undertakings) Protection of Employment) issue in this case. All of the claimants had the opportunity to consult with the Labour Relations Agency, during a break in these proceedings. After the resumption of this CMD, Ms Anyon, Ms Cunningham, Ms Metcalfe and Ms McCracken made it clear that they did not wish to ask for a joinder of JHFP, as an additional respondent to these proceedings.
8. Subsequently, Ms Clarke wrote to state that she wished to apply for the joinder of JHFP. That has since been done.
9. All of the claimants made it clear that they had no objection to Census being allowed to put in a late response, in any of these cases. Accordingly, Census has been given permission to put in a late response in all of the relevant cases in which the response was submitted late.
10. All of the claimants were content that these cases should be heard together.
11. All of the cases were listed for a hearing on 3 October 2013.
12. Because of Ms Clarke's joinder of JHFP, her case will no longer be heard alongside the other cases, but will instead be heard at a later date (as soon as practicable) after JHFP has been given the requisite time to present a response.
13. Ms Metcalfe provided me with a copy of a letter dated 10 September 2013, which was apparently sent by Census to a Mr Jenkinson. A copy of that letter will be provided to Census.

Chairman:



Date: 25 September 2013