# EMPLOYMENT TRIBUNALS

**Claimants:** Ms B Alexander (1) - 1402342/2021
Mr A Alexander (2) - 1402343/2021
Miss M Alexander (3) - 1402344/2021

**Respondents:** Ms S Alexander (1)
Mr P Johnson (2)
Both Trading As St Kitts Herbery (A Firm)

**Heard at:** Bristol (By VHS)

**On:** 21 and 22 March 2022 and in chambers on 23 March 2022

**Before:** Employment Judge Cuthbert

**Appearances:**

For the Claimants: Mr S Robillard - Solicitor
For Respondent (1): In Person
For Respondent (2): Mr G Probert - Counsel

# RESERVED JUDGMENT

1. The second respondent was and is properly a party to the proceedings.

2. The claimants' claims for redundancy payments, notice pay and holiday pay against the respondents fail and are dismissed.

3. The claimants' claims for unlawful deductions from wages are dismissed upon withdrawal.

# REASONS

## Introduction

1. The hearing was conducted with the parties attending by VHS. It was held in public. It was conducted in that manner without objection by the parties and because to do so met the overriding objective.

2. The claimants were represented by Mr Robillard, a solicitor; the first respondent appeared in person; and the second respondent was represented by Mr Probert of counsel. I explained the tribunal hearing process at various stages during the case to the first respondent, in view of her not being legally represented, and she had the same opportunity to question the other witnesses and to make closing submissions as the other parties.

3. The hearing was listed for three days, due to the rather unusual nature of the case, the issues raised within it and the number of witnesses (five), with the first and second respondents taking opposing positions on the claims brought, for reasons which are set out below, entailing three sets of representation.

4. I had heard all of the oral evidence and the parties' closing submissions by the end of the second day but I was uncertain as to whether I would be in a position to give oral judgment by the end of the third day, in view of the unusual nature of the issues arising, and so I explained to the parties at the end of the second day that I would reserve judgment in the circumstances and use the third day of the listing for deliberation. I also took the view that the parties would be likely to request written reasons for my eventual decision in any event, given the broader backdrop to the present proceedings.

## Claims and Issues

5. The background to the claims was a very unusual one. The claimants, Betty Alexander (C1), Albert Alexander (C2) and Minnie Alexander (C3) are siblings and their parents are their mother, Susan Alexander, the first respondent (R1), and Paul Johnson, the second respondent (R2).

6. R1 and R2 were the only two partners in a business trading by the name of St Kitts Herbery (SKH).

7. R1 and R2 were also married to each other but were separated and in the process of divorcing at the relevant time (and I understood that divorce process was still ongoing at the time of the full hearing in the present case). The claimants were the only employees of SKH at the relevant time.

8. The claimants, in their ET1, ticked the relevant boxes indicating claims for redundancy pay, notice pay, holiday pay and arrears of pay; the accompanying Particulars of Claim set out specific sums claimed by each claimant for redundancy pay, notice pay and holiday pay for each claimant but made no reference to any claim for unpaid wages being pursued or sums sought in respect of it.

9. The issues to be determined were identified and agreed with the parties and their representatives at a previous hearing on 1 October 2021 before EJ Self and there had been no applications to amend or revise those issues. I ran through the issues with the parties at the start of the hearing and they remained largely unchanged after some discussion. I set the issues out below, using the same numbering from the previous hearing, save for the unlawful deductions claim, which was withdrawn and so I mention it only briefly following the issues.

***Issues***

*Claims*

*1. The claimants claimed:*

*a. Redundancy payments*

*b. Notice pay*

*c. Holiday pay*

*d. ~~Unpaid wages~~ [see below]*

*"Preliminary issue"*

*2. It was admitted that R1 was a respondent to the claims and that the name of the firm was correct.*

*3. Was R2 a respondent included within the pleaded claims?*

*a. R2 asserted that he was not a member of the management committee of SKH at the material time of any termination of the claimants' employment; and*

*b. Due to not being named and/or served with the claim as an individual respondent by the claimants, including in a representative capacity, he should not be a respondent in this matter; and*

*c. R2 relied, in support of his position, on Nazir and another v Asim [2010] ICR 1225 and Affleck v Newcastle MIND [1999] ICR 852.*

*4. The claimants and R1 asserted that R2 maintained control over SKH.*

*5. In the event that R2 was not a proper respondent in this matter, should the tribunal permit him to participate in proceedings, and if so on what terms, on the basis that he had a legitimate interest in the matter – rule 35 ET Rules 2013?*

*Transfer of Undertaking*

*6. Was the employment of the claimants transferred from SKH to the company "Kitty's Herbery Limited"?*

*a. R2 asserted that the employment was transferred from SKH to this new limited company in or around 16 March 2021.*

*b. The claimants' and R1's position was that there was no transfer to the new limited company.*

*c. R1 further submitted that the claimants' employment transferred (or could have transferred) to a further new limited company, "St Kitts Limited", which was operated by R2.*

*7. Therefore, was there a termination of the Claimants' employment?*

*Dismissal*

*8. Were the claimants dismissed?*

*a. The claimants asserted that they were dismissed by the R1.*

*b. R1 admitted that she, in her capacity as employer, dismissed the claimants.*

*c. R2 disputed that there was a dismissal and asserted that, if there was a termination of employment, the claimants' contracts of employment with SKH were terminated by mutual consent between them and R1.*

*9. If there was a dismissal, when was it effective? The claimants asserted that they were dismissed without notice effective on 16 March 2021.*

*10. If there was a dismissal, what was the reason for dismissal?*

*a. The claimants asserted that the reason for dismissal was redundancy.*

*b. R1 admitted that reason.*

*c. R2 denied that redundancy was the reason for the dismissal and the reason (if there was a dismissal) was some other substantial reason (SOSR), namely the acrimonious breakdown in the relationship (both personal and commercial) between SKH's two partners, R1 and R2 and the establishing of a new limited company to carry on the business outside of the partnership.*

*Redundancy*

*11. (S.139 ERA 1996): Was the dismissal wholly or mainly attributable to:*

*a. The fact that the employer has ceased or intends to cease:*

*i. To carry on the business for the purposes of which the employee is employed, or*

*ii. To carry on that business in the place where the employee was employed? Or*

*b. The fact that the requirements of the business:*

*i. For employees to carry out work of a particular kind, or*

*ii. For employees to carry out work of a particular kind in the place where the employee was employed,*

*have ceased or diminished or are expected to cease or diminish?*

*Notice pay*

*12. If there was a termination by the employer, were the claimants paid for their period of notice?*

*Holiday pay*

*13. What was the claimants' holiday year?*

*14. What was the claimants' entitlement to holiday leave in the relevant holiday year?*

*15. What entitlement to holiday pay was outstanding on the termination of the claimants' employment for that holiday year?*

*16. Were the claimants' paid the correct outstanding amount upon termination of employment (if there was a termination of employment by the employer)?*

***The status of R2 in the proceedings***

10. R1 and R2 had been included as individual respondents at the previous hearing in October 2021 and this remained the position before me. In terms of the *"preliminary issue"* identified above, as to the position of R2 in respect of the claims and potential liability, I asked the parties whether they wished to deal with this separately at the outset of the hearing.

11. Mr Probert, on behalf of R2 who was the party raising the issue, indicated that it would not be practicable to sever that issue. Rather, he submitted, it would be sensible to hear all of the evidence, including on that issue, with R2 a party to the proceedings, but if I determined that he should not be a party, I could remove him as a respondent in my judgment. Mr Robillard was content to proceed on this basis, as was R1, as was I.

***The claimants' unlawful deduction of wages claim***

12. I asked Mr Robillard about the basis of the claim for unlawful deductions from wages, which was set out in the agreed list of issues but was unparticularised and appeared in fact not to have been pleaded in the original claim at all, save for ticking the *"arrears of pay"* box on the ET1. He said that he was unable to say what sums were claimed by, or were said to be due to, the claimants; rather, he explained, the issue was essentially that the claimants sought assurance that tax and national insurance contributions had been or would be properly paid on sums which the claimants had received from SKH over the period from December 2020 until March 2021.

13. It transpired that the claimants had received payments from R1, from a business bank account of SKH, over the period in issue, which were the same (or at least very substantially the same) as the net (furlough) pay which they would have expected to receive for the same period. Documents were produced by the claimants and R1 which sought to characterise these payments as a *"loan"* from R1 to the claimants rather than wages although there was no reference to such an arrangement in either the pleadings or in an emailed grievance by the claimants to R2 in March 2021 which referred to the sums they had received as being *"wages"* (page [102]); R1 also indicated that she was unlikely to require any repayment of the *"loan"* sums she had paid to the claimants.

14. In reality, the complaint here was not one for unpaid wages, but for proper tax and national insurance treatment to be applied by SKH to the sums which R1 had paid to the claimants. I explained to Mr Robillard at the outset of the hearing and again during the course of the claimants' evidence that this was not a remedy within the jurisdiction of an employment tribunal and that the claimants would need to be able to identify the sums claimed by way of unpaid wages if they sought a finding and remedy from me in respect of this part of the claim.

15. Mr Robillard took instructions and declined to withdraw this part of the claim, despite the apparent difficulties in identifying any wages said to have been unlawfully deducted and that the concerns about tax treatment fell outside the scope of the claim. He eventually did withdraw this claim during closing submissions, when invited by me to do so, after having not addressed this aspect of the claim within his closing submission on behalf of the claimants.

**Documents and Evidence**

16. I was provided with an agreed bundle of documents running to 261 pages, including the parties' witness statements. I read witness statements from, and heard oral evidence from, all of the claimants and both of the respondents.

17. Notwithstanding that the claimants and the second respondent were legally represented throughout proceedings and there had been clear case management orders made earlier in the proceedings:

    17.1 The bundle of documents was not ordered chronologically and instead consisted of multiple sections (A to G) each with its own subset of

documents, such that, at times when documents were sought during the course of oral evidence, they were difficult for witnesses (and representatives and the tribunal) to locate.

17.2 Many of the documents contained within the bundle were not referred to at all during the oral evidence, which lasted for just under two days.

17.3 Some documents which were referred to in witness evidence and/or during oral evidence, such as grievance emails, versions of contracts of employment and bank statements, were not contained within the bundle and as such were not before the tribunal.

17.4 None of the six witness statements (there were two from R1 and one from each of the other witnesses) were cross-referenced to any pages within the bundle despite a previous direction to this effect.

These matters were unhelpful during the hearing and when deliberating and I mentioned them during the hearing to the legal representatives.

18. I read some documents identified by Mr Probert at the start of the hearing as being key and I also read the documents to which I was taken during the course of oral evidence but I did not read other documents which were not mentioned or identified during the course of the hearing.

19. References to page numbers in square brackets in the course of these reasons [ ] are to those within the agreed bundle

## Findings of Fact

20. I have set out my findings below on the facts relevant to my decision on the issues above. I have not mentioned or made findings on matters which I did not consider to be relevant. It was very evident during the course of the hearing that these proceedings and the events in dispute were a part of a much broader picture and I sought to keep the focus of evidence on the issues which I needed to determine, as identified above.

### *Background*

21. SKH, the respondents' business, was a partnership which began in around 2001. It sold primarily herbal toiletries and luxury chocolate, online and from a shop premises, to individual customers and on a wholesale basis. There was also a coffee shop.

22. There was no partnership agreement between R1 and R1, who were married when the partnership was formed.

23. The business operated from the site of *"St Kitts Herbery"*; the claimants and the respondents lived together (until R2 left the home in November 2020) at *"The House"* which was part of the *"St Kitts Herbery"* site. There were other buildings on the site.

24. Although there had in the past been other employees of SKH, at the relevant times the employees were only the three claimants, the respondents' children. Copies of some contracts of employment were in the bundle and the key details for each employee (also taken from the Particulars of Claim) were as follows:

    24.1 Betty Alexander/C1 (page [62]) – commenced employment in July 2008, aged 16. She undertook many roles for SKH. In March 2021, her annual salary was £24,000 and she was employed for 35 hours a week.

    24.2 Albert Alexander/C2 (page [58]) – commenced employment in 2008, aged 13. His roles for SKH included IT Manager, Graphic Designer, Chocolatier and General Assistant. In March 2021, his annual salary was £21,000 and he was employed for 21 hours a week.

    24.3 Minnie Alexander/C3 (page [66]) – commenced employment in June 2012, aged 13. Her roles included serving in the coffee shop and assisting in making the business' products. She was training to become a nurse during the previous three years and so had been living away; she only worked for the business during time off from studying and holidays. She was (notionally it appears to some extent) employed for 18.3 hours per week on an annual salary of £8,250.

***Events during 2020***

25. Since April 2020, all of the claimants had been furloughed from their employment with SKH, due to the effects of the COVID pandemic, and remained furloughed until they ceased to be employed by SKH in March 2021.

26. It was not in dispute that, prior to November 2020, R1, Susan Alexander, was broadly concerned with the manufacturing side of SKH's business, and dealt mainly with staff issues and legal and compliance issues. R2, Paul Johnson, dealt with financial matters, including accounts, PAYE, cashflow, tax issues.

27. It was also clear that the relationship between R1 and R2 became very difficult over the course of time. In or around May 2020, divorce proceedings commenced. The claimants' relationship with R2 was also clearly very difficult by the time of the events in question. Until November 2020, R2 had continued to live at same address as the claimants and R2, The House, St Kitts Herbery.

28. In November 2020, R2 moved out of the family home. At some point, R1 had applied for a non-molestation order and an occupation order against R2, supported by the claimants, and this was resolved by way of R2 giving undertakings not to return to the property or to communicate directly with R1.

29. There were a number of disputes during this period in November 2020 into early 2021 between R1 and R2 relating to the SKH business; these included disputes about the use of and access to business banking accounts and other business accounts such as E-Bay and Amazon; blocking access and reinstating access and changing of access details; disputes about the SKH website and the like. I

did not find it necessary to make any specific findings on most of these matters and simply note that it was clear that running SKH as a business on an ongoing basis against this backdrop would clearly have been challenging for both R1 and/or R2.

30. It was also clear that over this period, communication between R1 and R2 about the running of SKH had understandably broken down entirely. I heard evidence that R1 and the claimants did not know where R2 was living after he moved out or have his contact details (save for his email address). R1 had set up a new business bank account for SKH in November 2020 into which income from the business was received and from which she made some payments on behalf of the business. The statement from that SKH bank account (page [119]) showed that, during December 2020, £26,607 was deposited (mostly via online payments made to the business by customers) and £9,830 was paid out by R1 on behalf of SKH.

31. I find as a fact that R2 as such had a negligible role in the running of SKH as a business between November 2020 and March 2021. There was no evidence, however, that the partnership between R1 and R2 ceased (or more specifically was dissolved or wound up).

32. During the subsequent period, there were essentially two main undisputed facts, as follows.

***(1) The establishment of Kitty's Herbery Limited – January 2021***

33. On 19 January 2021, the claimants incorporated a new private limited company, Kitty's Herbery Ltd (KHL), with the registration documents at pages [153] – [157]. It was apparent that the registered office was The House, St Kitty's Herbery; C1 and C2 were indicated as each being Managing Directors of KHL. C3 (who as noted earlier is completing her training to be a nurse) was a shareholder only.

34. KHL did not start trading at that time.

***(2) The ceasing of trade by SKH and the commencement of KHL trading – March 2021***

35. It was also not in dispute that on 15 March 2021, SKH ceased to trade and on the following day, KHL began to trade. This was documented as follows:

36. R1 sent an email to the customers of SKH on 16 March in the following terms (page [135]):

> *To our amazing customers,*
>
> *It is with a heavy heart that I have to announce that St Kitts Herbery has ceased to trade. It's been an incredible 19 years, and we've loved every second of working with you all, but personal circumstances have just made it impossible for us to continue. We wish you all the best with your future endeavours, and thank you wholeheartedly for your custom, support and*

*in many cases friendship over the years.*

*It's not all bad news though! Our amazing staff were in need of something to do, and didn't want to see any of you go without the luxury products you've come to love - so they've set up a business of their own. St Kitts, and myself, will not be involved in the new business at all, but I do know that you will still be able to find all of your favourite scents, a great wholesale range and a brand new attitude from their business.*

*If you'd like to find out more then feel free to get in touch with Betty or Albert at [email addresses for KHL] or have a look at their website [web address for KHL].*

*Thank you again, and a very fond goodbye.*

*Best wishes and cheers to new beginnings*
*Susan Alexander*

37. A message was posted at the same time on the SKH Facebook page as follows (page [160]):

> *It's a sad day here at St Kitts, as we announce that we will no longer be trading. It's been an incredible 19 years, and we've loved every second of working with you all, but personal circumstances have just made it too difficult to continue.*
>
> *It's not all bad news though! As one door closes, another opens and our loyal staff, in need of something to keep them busy, have set up their very own business! It's not St Kitts, and we won't be having anything to do with it, but I think they've done a great job - check it out!*

This post included a link to the KHL website and a photograph of some KHL-branded products.

38. It was put to the claimants and R1 by Mr Probert on behalf of R2 that the claimants had prepared or had input into this message but this was denied and R1 said that she prepared this of her own volition.

39. A prominent message was also posted on the SBH website homepage in the following terms:

> *TO OUR AMAZING CUSTOMERS.*
>
> *It is with a heavy heart that I have to announce that St Kitts Herbery has ceased to trade. It's been an incredible 19 years, and we've loved every second of working with you all, but personal circumstances have just made it impossible for us to continue. We wish you all the best with your future endeavours, and thank you wholeheartedly for your custom, support and in many cases friendship over the years.*

> *It's not all bad news though! Our amazing staff were in need of something to do, and didn't want to see any of you go without the luxury products you've come to love - so they've set up a business of their own. St Kitts, and myself, will not be involved in the new business at all, but I do know that you will still be able to find all of your favourite scents, a great wholesale range and a brand new attitude from their business.*
>
> *If you'd like to find out more then feel free to get in touch with Betty or Albert at [KHL email address] or have a look at their website [KHL website] (you can click this banner to be taken straight there).*
>
> *Thank you again, and a very fond goodbye. Best wishes and cheers to new beginnings*
>
> *Susan Alexander*

40. Again, the claimants and R1 denied that the claimants had any input into the creation of this message, including the *"banner"* link to the KHL website, and SA said that she had prepared this alone.

41. I was also taken during evidence to screenshots from the KHL website and from the SKH websites (pages [159], [164] – [167]), which showed very similar products on sale, for example:

    - Some *"amber musk"* products on sale on each website, branded accordingly, on sale at the same prices (bath tablets £11.95, hand cream £12.95, lotion £13.95)
    - Some *"bergamot"* products similarly on sale at the same prices (candle, perfume/eau de toilette)

42. Finally, I was shown in evidence two online reviews of KHL which appeared on their face to have been posted by former customers of SKH, including the comments *"Well done Kitty's for continuing the product line albeit under new management"* and *"A new venture but the same products".*

43. R2 became aware of the matters above when he was alerted to the Facebook posting. He did subsequently pursue an application for a freezing injunction under section 37 of the Matrimonial Causes Act 1973 concerning his interest in the SKH business. I was not taken to any documents to indicate precisely when this was done. The application was subsequently withdrawn, a decision which R2 said in evidence (which was not challenged) was a tactical one due to a low valuation ascribed to the SKH business.

***The dispute surrounding SKH/KHL – January to March 2021***

44. There was a substantial dispute surrounding the two undisputed matters above, particularly as to what did or did not transpire behind the scenes between the claimants and R1 in terms of SKH and KHL between January and March 2021. The claimants remained furloughed by SKH over this period.

45. R2's position in the present proceedings, in summary, was that the setting up of KHL by the claimants was an attempt, in collusion with R1, to circumvent the divorce settlement process and deprive R2 of his interest in the SKH business.

46. The position of the claimants and R1 was, in summary, that there was no collusion and that (1) the claimants had been unaware of any specific intent on the part of R1 to cease SKH's trading and likewise (2) R1 had been unaware that the claimants had set up KHL when she decided to cease trading.

47. R2's response to the claimants' claims in the present proceedings was pleaded expressly on the basis that the claims, based on the cessation of trade by SKH in March 2021, were a *"sham"* and amounted to a *"proxy war"* in the matrimonial proceedings between R1 and R2 (page [55]). Despite this express pleading, there was relatively little evidence-in-chief from claimants about those events, and the foundation of KHL.

48. R1 said as follows in her (first) witness statement of events during late 2020 and early 2021, at paragraphs 9 and 10:

> *9. When Paul took down the website I knew that this would be hugely damaging to the business and although I put a site back online and continued to trade. I did so in an attempt to continue to be able to pay staff and have access to an income. We lost a lot of sales through the removal of the website in November and although December's sales were reasonably brisk, we were heading for the leanest portion of the year (Jan-March) and it was obvious this would not sustain us without access to any of the income from earlier in the year, or the furlough payments.*
>
> *10. I believe our employees, our children, understood that this was an inevitable outcome and thus made their own plans, which I was not party to. In February, after accepting an offer for the house and business premises, I discussed with them the plans for ending the business that I was proposing to Paul, it was an informal discussion between parent and child rather than employer to employee. Paul's response to my suggested dates to cease trading was obstructive. He did however, indicate that he would be prepared to buy my share of the business and I asked him to make an offer. (The original intention was that he was to sell his share, either to Albert or a third party, something he made no attempt to do). He failed to make any offer to buy me out. Our correspondence via solicitors demonstrates that Paul was well aware that the business needed to cease to trade imminently and that the employees would be redundant as a result.*

49. As alluded to in above passage, during February 2021, after the formation of KHL, there was correspondence between R1's and R2's solicitors in the divorce proceedings (pages [186] – [190]). A letter on behalf of R1 referred to the potential winding up the partnership/business (i.e. SKH) and included reference to potential costs of making staff redundant. R1 proposed the purchase of the

SKH business domain and trade names for £1,000. This was rejected by R2's solicitors, who stated:

> *Winding up the partnership does not mean that the business itself is wound up. Indeed, we imagine that your client's proposal to purchase the business name and the domain names means that she will resurrect the business and continue as she is now. This of course strips the business of its cash, by virtue of paying their children, who are the employees, a redundancy payment, leaving our client with nothing after years of hard work, and your client with the business, who will undoubtedly reinstate the children into their current roles.*

50. The proposal of one or other partner buying out the other's share of the SKH business was raised and valuations were provisionally suggested on behalf of R2 but ultimately this did not happen.

51. Meanwhile, in terms of the formation of KHL on 19 January 2021, C1, Betty Alexander, was the only claimant to give evidence-in-chief on this issue, in one paragraph in her statement. She said that KHL was set up, following discussions between the claimants, as a *"contingency plan"* in the event that the uncertainty surrounding SKH made their continued employment by SKH unfeasible. The witness statements of C2 and C3 did not refer to the formation of KHL at all. R1 indicated in her witness statement that she was unaware of the formation of KHL until mid-March 2021.

52. Mr Probert, on behalf of R2, questioned the claimants and R1 at some length about the formation of KHL. He put it to them that R1 must have been aware of this decision by the claimants, her children, given that they lived together in the same house, and KHL was incorporated with a registered address there; that they must surely have discussed their plans with their mother (given what transpired in March 2021) and it was wholly implausible for them to suggest otherwise. Reference was made to paragraph 10 of R1's witness statement above and particularly the reference to R1 having said that discussed *"her plans for ending the business with Paul"* with the claimants.

53. C2, Albert Alexander, the first witness I heard from, repeatedly denied that there had been any discussions whatsoever with R1.

54. C1, Betty Alexnader, said that there were discussions between her and R1 as a parent but that she and her mother (i.e. R1) did not want to put each other in a position which could be *"compromising"*. She said that these discussions were about making plans for the future in *"general terms"* and that she, C1, was aware in general terms of difficulties for R1 with running the SKH business. C1 denied that she was aware that R1 intended to cease trading before 15 March 2021. She was somewhat equivocal about whether she had spoken to R1 about the possibility of the business ending, saying initially that this was not discussed and then subsequently that she and R1 tried not to discuss such matters.

55. C3, Minnie Alexander, said that the three siblings had discussed the position and agreed they would not tell their mother about the formation of KHL so as not to put her in a difficult position.

56. R1, Susan Alexander, denied that she was aware of the formation of KHL when this was put to her. She said she was *"concerned as a mum"* about her children's future employment if her business were to close and accepted that she might have touched on that issue with her children, but she had no in-depth conversations; she denied that she had talked specifically about closing the SKH business with the claimants, as she said that did not want them to worry and so she had put this conversation off. It was put to her that if her children set up a new business this may be a separate asset and so would fall outside of the divorce proceedings. She denied this.

57. I was taken to some correspondence between R1 and the claimants about the payments R1 had made to them in respect of wages (page [87] for example) in late 2020 and these referred to the future possibility of a formal *"transfer of employment"*. C1 indicated that this related to a possibility of C2 buying R2 out of his share of the SKH business, which C2 said had been raised as a possibility at one stage (as opposed to any other transfer).

58. So, in summary, the evidence of C1 and R1 broadly accepted there had been *some* discussions about the SKH business being in difficulties but said that there had been nothing very specific discussed and nothing whatsoever concerning KHL.

59. Turning the cessation of trade by SKH on 15 March 2021, there was relatively little evidence-in-chief from either the claimants or from R1 about the key events in this case, which occurred on 15 and 16 March 2021. It was only as follows:

    59.1 C1 (paragraphs 16 and 17 of her witness statement) said that on 15 March she was informed by R1 that R1 would be forced to make the claimants redundant due to the strains placed on SKH as a result of R2. C1 said that R1 informed her that pay in lieu of notice and redundancy pay was due, but that R1 did not have the funds in her account to pay them. C1 stated that, on being informed of their redundancy, the claimants made R1 aware of the set-up of KHL. C1 added:

    > *Although we were in no way prepared to begin trading with the end of our employment and lack of pay we had no choice but to begin trading on 16th March 2021. We offered to purchase the leftover fragrance oils, candles and packaging materials such as bottles from The Business. Ms Alexander sold us these items for a sum of £400, which [KHL] paid to [SKH]. No other products were purchased from [SKH] as they would not have been legally compliant for us to sell. On 16th March 2021, [KHL] began trading online, having set up our website in the space of 24 hours and with the intention of making stock to order.*

    59.2 C2 (paragraph 8 of his witness statement) simply said that R2 informed him *"of [his] redundancy on 15 March"* and made him aware that he was

owed redundancy pay, holiday pay and notice pay. He made no reference to the circumstances of KHL starting to trade.

59.3 C3 did not mention anything about events on 15 or 16 March 2021 in her witness statement. In oral evidence, she said that could not specifically recall the discussion about the end of her employment with SKH – she thought it might have been over the telephone with R1 but she could not remember. She was not involved in the trading of KHL but was aware that it had started trading on 16 March.

59.4 R1, in her first witness statement, said that she made the difficult decision to cease to trade and at that point the claimants let her know of *"their own decision to begin trading as a new business".* She said that she sold the claimants some left-over stock of candles, essential oils and other ingredients and some fragranced candles. She denied that she had transferred ownership of SKH and said that she had not transferred customer lists or assets.

60. The claimants and R1 also disclosed letters written from R1 to each of the claimants (pages [95] – [100]) dated 15 March 2021, which stated: *"As the business has ceased trading today you are also entitled to holiday pay, redundancy pay and pay in lieu of notice"* and went on to say that she did not have enough money to pay these sums.

61. C1, C2 and R1 were cross-examined at length about the above matters by Mr Probert and R2's case, in essence that the events on 15 and 16 March were an orchestrated transfer of the SKH business to KHL and not a genuine redundancy situation, was put to them. They stood by their position that the events were not orchestrated.

62. R1 said during cross examination that the decision to cease SKH's trading was an *"instant decision"* by her – she said that it was not planned and was taken by her on that day (15 March). She said that there had been a complete breakdown in communications with R2; R2 could at that time not contact her directly, only through solicitors or accountants. She referred to her mental state and could feel everything slipping away; she said that she watched her business go down the pan and her children in danger of having no jobs and being homeless/bankrupt.

63. C1's evidence in cross examination was that the name of KHL (Kitty's Herbery Limited) was chosen not because it closely resembled the name of SKH (St Kitt's Herbery), but rather because her personal email address (which appeared for example at page [103]) had closely resembled the name of KHL. C1 also suggested that the new business, KHL, used a different premises to SKH, namely the House rather than the Herbery building. She also said that the products were different but on being pressed that they were the same, she conceded that *"of course"* they were similar, as they were staying in the same industry. She said that C1 and C2 had gotten some things ready for the launch of KHL in 12 hours; some aspects had been looked into previously and so were *"ready to go"*. C1 denied that the claimants' *"purported dismissal"* (as it was put by Mr Probert) by R1 was not truly a dismissal but rather an agreed release from

employment by SKH to carry on the business under a similar name – she said that if this had that been proposed to her, she would not have agreed to it.

64. R1 and R2 both gave evidence that the process of obtaining the necessary legal/regulatory approval for the sale of new toiletry products took some time; R2 suggested this would be three to four months and his evidence was not challenged by the claimants. The implication here was that some forward planning would have been essential if setting up a business of this kind from scratch.

65. In the ET1 form, the claimants completed the *"new employment"* section as having commenced on 16 March 2021. C1 and C2 said that they were self-employed after they left SKH and were not employed by KHL.

66. R1 responded to cross examination about wording on the SKH social media, website etc, as set out above, to the effect that this was just *"marketing spiel"* and did not indicate any pre-planning or indicate the passing on of customers from SKH to KHL.

67. Ultimately, I preferred the position of R2 as to the factual circumstances leading to the cessation of SKH's trading and the, essentially immediate, commencement of KHL's trading on 16 March 2016, insofar as R2's case contended that there was some degree of co-ordination and ultimately an agreement between those involved.

68. I made no findings as to the motives or intentions of the claimants and R1 with regard to the concurrent divorce proceedings and/or R2's interest in the SKH business, as it is not necessary for me to do so. I simply found it was likely, on the balance of probabilities, that:

    68.1 there was some degree of co-ordination/discussion between R1 and the claimants, particularly with C1 and C2, about the cessation of trade by SKH and the launch of KHL; and

    68.2 the claimants in effect agreed with R1 that SKH would cease to trade and they would no longer be employed by SKH and that R1 would correspondingly assist the claimants with the concurrent launch of KHL.

69. I reached that conclusion for the following reasons:

    69.1 The contemporaneous emails and messages set out above, concerning the cessation of SKH and launching of KHL, in terms of trading, do strongly suggest some degree of co-ordination between R1 and the claimants beforehand.

    69.2 The claimants and R1 evidently remained very close throughout the events in early 2021 and remained so at the hearing before me. I found it unlikely on balance that matters of such importance to them would not have been discussed in some detail.

69.3 C1 and C2 shared a house with R1 at the relevant times.

69.4 The oral evidence as to what was and was not discussed in the lead up to events in March was somewhat inconsistent, varying between there having been no discussion (C2 and C3), to there having been some discussion but of a very unspecific nature (C1 and R1).

69.5 KHL was set up as a limited company in January 2021, with the registered address of the family home, which was on the same site as SKH, essentially the same address.

69.6 KHL's website was up and running on 16 March 2021 and selling KHL branded products, which appeared to be the same as, or remarkably similar to, products previously sold by SKH and at identical prices.

69.7 I found it unlikely on the balance of probabilities that it was purely coincidental, in circumstances where R1 and the claimant each respectively asserted essentially complete ignorance of the plans of the other party, that:

69.7.1 R1 had decided to cease trading relatively shortly after the claimants had set up KHL; and

69.7.2 KHL was immediately ready to start trading at precisely the same time that R1 ceased trading as SKH.

70. R2 some months later set up a separate limited company of his own, St Kitt's Limited.

***Presentation of the claims and responses – June to October 2021***

71. Following the events above, the claimants presented a single ET1 on 25 June 2021, naming the respondent as SKH, i.e. the partnership name. The claim was served by the tribunal on SKH at the St Kitts Herbery address and responded to by R1 by way of an ET3 submitted on 12 September 2021, admitting the claimants' claims.

72. At around the same time as the response was submitted by R1, R2 became aware of the existence of the claims, via R1's solicitors in the family court proceedings, who had mentioned the claim in correspondence with R2's solicitors. R2 contacted the tribunal shortly before the hearing on 1 October 2021 and at that hearing was joined to the proceedings, as a co-respondent with R1.

73. R2 submitted an ET3 and Grounds of Resistance, in accordance with orders made at the 1 October hearing, on 22 October 2021, firmly resisting the claims.

**The Law**

74. I set out as follows a summary of the relevant law arising in this case.

***Partnership law***

75. Section 1(1) of the Partnership Act 1890 (PA 1890) provides that:

> *Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.*

76. No written agreement, or partnership deed, is needed to create a partnership[1]. A partnership at will is form of partnership that arises where no fixed term has been agreed for the duration of the partnership or the partnership has been entered into for an undefined term. A partnership at will may be dissolved at any time by a partner serving notice on the other partner(s).

77. Section 5 of the PA 1890 sets out the power of am individual partner to bind the firm:

> ***5. Power of partner to bind the firm.***
>
> *Every partner is an agent of the firm and of the other partners in relation to the firm's business. Any act on his part in relation to the normal business of the firm binds him and his partners, unless the partner does not have actual authority to make the promise and the relevant third party receiving the promise either:*
> - *knows that he does not have authority; or*
> - *does not believe him to be a partner.*

78. Section 6 of the PA 1890 provides as follows in respect of partners being bound by acts done on behalf of intended to be done on behalf of the firm:

> *6.* ***Partners bound by acts on behalf of firm.***
>
> *An act or instrument relating to the business of the firm done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners.*
>
> *Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.*

79. Each partner in a partnership is liable jointly (but not severally) for all debts and obligations the firm incurs while he is a partner (section 9, PA 1890). Therefore, an individual partner is only liable for his share of contractual debts. By contrast, each partner is jointly and severally liable for wrongful acts or omissions (arising while he is a partner) of any partner acting in the ordinary course of the business or with the other partners' authority (section 10).

80. In the case of a partnership at will, notice of dissolution may be given by any partner at any time. The notice can be instantaneous, written or oral. A partnership may continue notwithstanding the fact that one partner might have

[1] Known for the purposes of the PA 1890 as *"a firm"* – section 4.

ceased to participate actively in the partnership business, either wilfully or due to circumstances beyond their control.

***Unincorporated associations***

81. Reference was made, on behalf of R2, to caselaw concerning employment tribunal claims brought against unincorporated associations.

82. A person employed by an unincorporated association is employed not by the entire membership of the association but by the executive committee and its members for the time being (*Affleck and ors v Newcastle Mind and ors*) [1999] ICR 852, EAT.

83. In *Nazir and anor v Asim* [2010] ICR 1225, the EAT held that, in accordance with the decision in *Affleck*, it was good practice for a claimant to name a representative respondent who was a member of the management committee of an unincorporated association at the relevant time and state that he or she is being sued on his or her own behalf and on behalf of all other members of the executive committee at the relevant time.

84. Neither the *Affleck* nor the *Nazir* decision directly concerned partnerships in the legal sense (such as existed in the present case before me) but rather unincorporated membership associations run in effect by management committees. Hughes LJ in *R v L* [2009] PTSR 119 was cited in *Nazir,* including the following passages from his judgment, concerning legal partnerships, in the context of a partnership being a type of unincorporated association:

> *14…many unincorporated associations have in reality a substantial existence which is treated by all who deal with them as distinct from the mere sum of those who are for the time being members. Those who have business dealings with an unincorporated partnership of accountants, with hundreds of partners worldwide, do not generally regard themselves as contracting with each partner personally; they look to the partnership as if it were an entity…*
>
> *15. As to the law, it no longer treats every unincorporated association as simply a collective expression for its members and has not done so for well over a hundred years. A great array of varying provisions has been made by statute to endow different unincorporated associations with many of the characteristics of legal personality. Examples selected at random include the following. The detailed special rules for partnerships contained in the Partnership Act 1890 scrupulously preserve the personal joint and several liability of the partners (see sections 5—12)…*

***TUPE – business transfers***

85. The principal provisions of the TUPE 2006 Regulations that are relevant to the issues in this case are as follows:

> *3. - A relevant transfer*

*(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.*

*(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.*

*(3) The conditions referred to in paragraph (1)(b) are that —*

*(a) immediately before the service provision change —*

*(i) there is an organised grouping of employees situated in Great Britain 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.*

*4. - Effect of relevant transfer on contracts of employment*

*(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) 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 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.*

86. Regulation 7(1), referred to in Regulation 4(3) above, provides as follows:

> *7.— Dismissal of employee because of relevant transfer*
>
> *(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of [ERA 1996] (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.*

87. There is a substantial amount of case law in relation to the TUPE regulations and the Acquired Rights Directive of the EU Council, No. 2001/23. In *Cheeseman v Brewer* [2001] IRLR 144, the EAT approved the approach set out in *Whitewater Leisure Management Limited* that it was *"quite plain that there are two questions to be asked and answered"* in determining whether there has been a business transfer, as follows:

> *whether or not there was an identifiable business entity constituting an undertaking within the meaning of the Regulations; and,*
>
> *secondly, assuming such could be determined, whether or not there was a relevant transfer.*

88. Addressing the first of those questions, economic entity is defined in regulation 3(2) as set out above. In that regard, having considered relevant decisions of both the UK courts and the ECJ, the EAT in *Cheeseman* set out the following principles with regard to whether an economic entity exists:

- *As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective"; (it being noted that the reference to "one specific works contract" is to be restricted to a contract for building works).*

- *In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible.*

- *In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower.*

- *An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity.*

- *An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.*

89. As for whether there has been a transfer, the EAT set out the following principles:

- *As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed.*

- *In a labour intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity.*

- *In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation.*

- *Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not*

*the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended.*

- *In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on.*

- *Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets.*

- *Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer.*

*…*

- *The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship.*

- *When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.*

- *The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub−contractor and the start by the successor.*

90. Also of relevance to the question of when an economic entity retains its identity is the guidance in the decision of the ECJ in *Spijkers v Gebrobroeders Benedik Abattoir C.V.* [1986] ECR 1119 in which (in what has been described as a *"multifactorial approach"*) it was said that *"it is necessary to take account of all the factual circumstances of the transaction in question"* including the following:

- the type of business or undertaking;
- the transfer or otherwise of tangible assets;
- the value of intangible assets at the date of transfer;
- whether the majority of the staff are taken over by the employer;
- the transfer or otherwise of customers;
- the degree of similarity of activities before and after the transfer; and
- the duration of any interruption in these activities.

91. The ECJ made clear that these are merely factors in an overall assessment and cannot be considered in isolation; thus suggesting that not all the factors need to be satisfied in order for regulation 3(1)(a) to apply.

92. Finally, and more generally, in *Cheeseman*, the EAT provided additional guidance including as follows:

> *The necessary factual appraisal is to be made by the National Court.*
>
> *The directive applies where, following the transfer, there is a change in the natural person responsible for the carrying on of the business who, by virtue of that fact, incurs the obligation of an employer vis−a−vis the employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred.*
>
> *The aim of the Directive is to ensure continuity of employment relationships within the economic entity irrespective of any change of ownership …. And our domestic law illustrates how readily the Courts will adopt a purposive construction to counter avoidance.*

93. I have set out 'the *Cheeseman* guidelines' above in relation to whether an economic entity exists and whether it retains its identity following a putative transfer. There are, however, two other questions arising from regulation 3(1)(a) of TUPE: namely, whether the entity is *"situated immediately before the transfer"* in the UK and whether there was a transfer *"to another person"*.

94. In many cases, the answer to the first question is self-evident and nothing more needs to be added. In answering the second question the courts have taken a purposive approach. It is established, for example, that TUPE can apply to the granting, terminating, surrendering or assigning of a lease of property where a business is intrinsically linked to such property and where as a result the business changes hands and continues to be run as essentially the same business. TUPE can also apply to the conferring of a franchise, licence or concession and where, for example, a licensee enters into a contractual arrangement to carry out a business activity, the fact that certain key tangible and intangible assets of the business continue to be owned by the person conferring the licence will not necessarily prevent the operation of the regulations.

95. In *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* [1988] IRLR 315, the ECJ restated its approach in *Landsorganisationen i Danmark v Ny Mølle Kro* [1989] ICR 330 that the Directive *"applies as soon as there is a change of the natural or legal person responsible for operating the undertaking who, consequently, enters into obligations as an employer towards the employees working in the undertaking, and it is of no importance to know whether the ownership of the undertaking has been transferred*". I also note from the first of these decisions that it is irrelevant that there is no contractual or other direct relationship between the transferor and the transferee so long as the undertaking in question retains its identity.

96. Where the TUPE Regulations apply to a business transfer, pursuant to Regulation 4, by operation of law, the employment of employees who are subject to it transfers to the transferee (subject to certain exemptions not relevant in these proceedings). Balcombe LJ, in *Secretary of State for Employment v Spence and ors* [1986] ICR 651, CA said as follows of Regulation 4: *'The paragraph has two effects: first, that a relevant transfer does not terminate a contract of employment; and the second effect, commencing with the word "but", is that there is a statutory novation of the contract.'*

***Redundancy and dismissal***

97. The definition of dismissal for the purposes of the statutory redundancy scheme is found in section 136(1) of the Employment Rights Act 1996 (ERA). This provision states that an employee will be treated as dismissed if:

- his or her contract of employment is terminated by the employer, either with or without notice — S.136(1)(a) ERA
- he or she is employed under a limited-term contract and the contract expires by virtue of the limiting event without being renewed under the same terms — S.136(1)(b) ERA, or
- he or she has been constructively dismissed — S.136(1)(c) ERA.

98. The employee must prove, on the balance of probabilities, that there has been a dismissal. The question of whether the employee was dismissed is a question of fact for the tribunal to decide — *Scott and ors v Coalite Fuels and Chemicals Ltd* [1988] ICR 355, EAT.

99. Although there is a statutory presumption that a dismissed employee claiming a redundancy payment has been dismissed by reason of redundancy, there is no presumption that an employee has been dismissed in the first place. Thus, if an employee fails to show that he or she has been dismissed, any claim for a redundancy payment will fail. In *Morris v London Iron and Steel Co Ltd* [1987] ICR 855, CA (an unfair dismissal case), M claimed that he had been unfairly dismissed, while the employer claimed that he had resigned. The tribunal was unable to decide whose evidence was more likely to be true and so it rejected M's claim. The Court of Appeal upheld the decision, saying that, in such exceptional circumstances, a tribunal would have to fall back on the onus of proof, which lay on the employee to prove that he had been dismissed. As the employee had failed to do so, the tribunal had been entitled to reject his claim.

100. Since a dismissal is the unilateral act of the employer, it follows that there is no dismissal where the employer and the employee **agree** to terminate the employment contract.

## Closing Submissions

101. I heard oral closing submissions from all three sides and I was also provided with a 15-page written skeleton argument from Mr Probert on behalf of R2. The submissions, in summary, and in the order heard, were as follows.

### *Submissions on behalf of R2*

102. In summary, Mr Probert contended as follows.

103. R2 had real concerns about the genuineness of the situation – the events giving rise to the claim were *"a proxy war"*. It was a very unusual case for one respondent in a business to admit it had dismissed the claimants for redundancy and the other respondent in the same business to say that it had not. R2, he submitted, was not part of the business at the relevant time.

104. The company, KHL, was a further complication and began trading the same day as the claimants claimed to have been dismissed, on 16 March. This fed into a situation which looked clear-cut but, Mr Probert submitted, something was *"not right and it stinks"*

105. Mr Probert further submitted that the decisions in *Affleck* and *Nasir* in effect meant that I needed to make a finding about whether or not R2 was on the *"management committee"* of SKH at the relevant times. *"Partnerships are unincorporated associations as a matter of law. A person employed by an unincorporated association is considered to be employed by its managing committee and its members"* he submitted in his written closing. He also cited the decision of *Chandra v Mayor; Mayor v Mahendru and others* [2017] 1 WLR 729 as an example of the crystalising of claims (wrongful dismissal) against a management committee, in a case which involved an unincorporated membership association and charity and in which Dr Mayor was sued in a representative capacity on behalf of the members of the relevant executive committee.

106. I raised with Mr Probert as to whether he suggested that his interpretation of the caselaw concerning unincorporated associations applied notwithstanding the express statutory provisions of the PA 1890, which addressed the liability of partners in a case where there was no specific partnership agreement. He said that, whilst R2 was a partner in the present case, he was not controlling the business of SKH at the relevant times; it was a question of fact for me as to whether or not R2 had a sufficient degree of control to be on the management committee of SKH at the relevant times. Mr Probert accepted that there was no specific authority as to what degree of control (or the lack of) was required here and submitted that it was a fact-sensitive question. He identified a number of key factors (para 9 of his skeleton argument) which he said indicated that R2 had no or no real management control of the business – it was impossible for R1 and R2 to work together. The degree of control which R1 had was demonstrated by her unilateral decision that SKH would cease trading.

107. I was invited to determine that R2 should not remain a respondent in the claim.

108. Mr Probert then addressed the issue of TUPE and cited the relevant caselaw in some detail in his skeleton argument. He submitted that even though there was an attempt by R1 to terminate the employment of the claimants, the relevant provisions of TUPE would not allow that to happen.

109. He explained that R2's primary position was that a TUPE transfer happened on 16 March and so although R2 intended to terminate the contracts of the claimants, what happened in law was that the new company (KHL) subsumed the contracts; R2 contended that the proceedings before the tribunal were therefore an abuse of process and a sham. There was not a true dismissal – merely an agreement the new company would take forwards the business. There was no termination and the claimants' employment simply continued under new company.

110. The question of whether there was a business transfer was a question of fact. The staff, the means and the know-how were the same as were the products, despite various witnesses' attempts to suggest a different guise – the three documents which R1 wrote at pages [135], [160] and [194] were key. They were telling SKH customers to buy the same products from KHL. There was an economic entity which retained its semblance and carried out the same business – the family firm continued. C1 and C2 continued to do all they had ever known – they had set up KHL to step into the shoes of SKH.

111. He submitted that the evidence of the claimants and R1 that the first each had known of the other's plans was on 15 March and the following day KHL was trading was "*fanciful and ridiculous"*. It was incomprehensible that in a further 12-hour period there was an actively trading website and email addresses – there was a plan and they had talked about it – they were a family and lived together.

112. Mr Probert submitted that there was no redundancy in statute; what transpired was *"a sham to get a windfall"* rubber stamped by R1 until the case reached the hearing on 1 October. By then, R2 had the opportunity to sniff it out and, Mr Probert submitted, *"it stinks".*

113. Mr Probert concluded with brief submissions on the claims for notice pay, holiday pay and the wages claim, but given my findings on the issue of TUPE and termination below, I have not set out any detail of those submissions within these reasons.

***The submissions on behalf of the claimants***

114. Mr Robillard made oral closing submissions on behalf of the claimants.

115. He agreed with the repeated characterisation of the circumstances of the claim as unusual – he had not dealt before with anything quite like this where the claimants were the children of the respondents. It was an *"awful situation all around"* he said.

116. He took issue with any suggestion that R2 was not properly served with the claim. He made some references to the CPR and pointed out that the claim was commenced against the SKH partnership name and that R1 and R2 were mentioned by name as partners in the Particulars. I pointed out that the preliminary issue here was not about service of the claim on R2, but about whether he should properly be and remain a respondent.

117. Mr Robillard submitted that EJ Self, at the hearing on 1 October 2021, gave R2 the opportunity to file a response and he did do so, which suggested he was happy to be before the tribunal and happy to be a respondent. He submitted that the PA 1890 was relevant.

118. He took issue with Mr Probert's reliance upon *Affleck* and *Nasir.* Both concerned unincorporated membership associations which operated for non-commercial purposes. The present case involved a partnership which had operated for 19 years or more and both respondents had input into the running of the firm. SKH was and had remained a partnership.

119. On the question of whether there was a redundancy situation, R1 had said that she had wanted to keep SKH running; there was an acrimonious separation but it was unfortunate that those stuck in the middle were the claimants; they should not be treated any differently to how other employees would have been treated because they were the children of the respondents.

120. R1 had explained that the business had been failing and could not continue; on 15 March 2021 she had to make the claimants redundant. Her partner, R2, had every opportunity to keep the business afloat for the sake of the employees.

121. Mr Robillard submitted that, had the claimants not been siblings, they would not be in the position they were before me; SKH would have ceased to trade, they would have been dismissal and section 139 ERA *"would have kicked in"*.

122. In terms of TUPE, Mr Robillard submitted that SKH had *"ceased to operate"* and, he argued, how could there be a TUPE transfer if the business had ceased to operate? The claimants' contracts of employment had ceased and there was no transfer of their employment to KHL. He submitted that (as had been mentioned during the evidence of R2) R2 was paying his costs of the present proceedings from SKH funds and, as such, how could there have been a transfer if all of the liabilities of SKH had not transferred to KHL. He submitted that C1 and C2 were *"carrying on doing the same job"* but that was all that they had ever done; *"they knew nothing else"*; why was it so unusual that they should have a contingency plan in place, he posed.

123. He also made oral submissions on the notice pay and holiday pay claims which, as with Mr Probert's submissions on these issues, I do not set out in these reasons given the findings I made.

***Closing submission by R1***

124. Finally, I heard from R1. She submitted that much of what had been advanced on behalf of R2 had been based on speculation. She continued to have a relationship with the respondents' children and it was very unfair for their claims to have no legitimacy because of that.

125. She said that there was no meeting beforehand; there were comments in passing and a brief conversation but there was *"no big plan"* or bid to get R2 out. The claimants were victims of, and buffeted by, events. She and they had been doing their best and she did not see that the employees of SKH should be entitled to any less than any other employee who would have worked for the business.

**Conclusions**

126. My conclusions on the key issues are as follows.

*Preliminary issue – status of R2*

127. There was no dispute that SKH operated as a partnership at will, with the two partners in the firm being R1 and R2.

128. I carefully considered the submissions of Mr Probert and the case law concerning unincorporated membership associations to which he referred.

129. I did not consider that the caselaw cited gave rise to any lawful or legitimate basis upon which a partner, subject to the provisions of the PA 1890, could or should be able potentially elude the express provisions of that act concerning their liability, by contending that they were not sufficiently involved in the running of the firm at the relevant times.

130. I set out the relevant provisions of the PA 1890 above and I was not provided with any authority or submission which persuaded me that they should not apply here.

131. Accordingly, notwithstanding that he was not materially involved in the running of SKH at the relevant time and took no part in the decision to cease trading and purportedly make the claimants redundant, but given the opposing stances taken by each partner in the firm on the key issues in these proceedings, I have found that **R2 was and is an appropriate respondent to the claims, alongside his fellow-partner at will in the firm, R1.**

132. Given my conclusions below on the remaining issues, my conclusion on this preliminary issue was in effect academic.

*Was there a TUPE transfer and did the claimants' employment transfer to KHL?*

133. On this point, I preferred the case of R2 to the case of the claimants and R1.

134. I have found, having had regard to the extensive caselaw summarised above concerning the various factors which may be present to indicate a relevant transfer, that there **was** a transfer of the business of SKH to KHL on 15 March 2021 on the basis that, on the evidence which was before me:

    134.1 SKH was a stable economic entity having existed and traded since around 2001, primarily selling luxury fragrances and other products.
    134.2 It was clear that the business of SKH ceased on that date. KHL commenced trading the following day.
    134.3 KHL was operated by the two key employees of SKH, C1 and C2. The fact that those employees decided to work for KHL on a self-employed basis (as Managing Directors), as I was told was the case, rather than as employees of KHL, does not preclude there having been a transfer of the business. The key staff and know-how transferred to the new business.
    134.4 The only contemporaneous documents about the cessation of trading by SKH and the commencement of trading by KHL on 15 and 16 March 2021 which were before me, at pages [135], [160] and [194], set out above, were strongly indicative of the same underlying business continuing, merely under a different name and run by the former employees.
    134.5 I was shown online products of SKH and KHL which on their face appeared to be the same products and were sold at identical prices.
    134.6 The nature of the trade was the same, primarily via online sales from a website.
    134.7 Some of SKH's products were sold directly to KHL to sell.
    134.8 The customer base was the same and customers of SKH were directed to, and evidently did, shop for the same products at KHL. There was a transfer of goodwill.
    134.9 The names of the two businesses were very similar.
    134.10 The businesses traded from the same family property.
    134.11 There was minimal interruption in trade, less than one day
    134.12 The fact that there was no formal contract or transfer as between SKH and KHL is not determinative and the existence of such a document would have been surprising in the circumstances.

135. I considered what the position would have been of a notional employee of SKH as at 16 March 2021, unencumbered by the complex family dynamics in play between the parties before me, had SKH ceased to trade and KHL immediately commenced trading on the same day. Such an individual would, other things being equal, almost invariably have contended that TUPE would have applied so as to have automatically, by operation of law, transferred their employment to the new business, KLH, being run by C1 and C2 from essentially the same location, selling the same products to many of the same customers, which would in turn preserve their continuity of employment and associated employment rights.

136. Given that I have found that there was a business transfer within Regulation 3 of TUPE, in turn I have found the contracts of employment of the employees within the undertaking, namely the claimants, transferred automatically by

operation of law from the firm operated by the respondents, SKH, to the limited company owned by the claimants and operated by C1 and C2, pursuant to Regulation 4 of TUPE.

137. I did not accept that there was an effective dismissal of the claimants by R1 on behalf of SKH prior to the business transfer; even if there had been such a dismissal, it would have been by reason of the transfer and as such any related liabilities would have transferred to KHL in any event, pursuant to Regulations 4(3) and 7(1) TUPE, set out above.

138. There was no evidence to support any subsequent transfer of business from SKH to R2's company, St Kitts Limited, for the purposes of TUPE. In particular, that other company did not come into formation until several months after SKH ceased to trade and transferred its business to KHL.

139. As I have found that the claimants' employment and any related rights and liabilities transferred from SKH to KHL, accordingly **the claimants' claims against the respondents, which were contingent upon a prior effective dismissal by SKH, namely claims for redundancy payments, notice payments and payment in lieu of untaken holiday on termination, must therefore fail and are dismissed.**

*Was there a dismissal (in the event that there was not a TUPE transfer)?*

140. Had I not found that the employment of the claimants transferred to KHL by operation of law, pursuant to TUPE and that accordingly there was no termination of their employment by SKH, I would have found instead that the claimants' employment was terminated by mutual agreement with R1 and that there was no dismissal.

141. The burden of proof rested upon the claimants to establish that they were dismissed, namely their employment was terminated by virtue of a unilateral decision by R1, on behalf of SKH. I would have found that they did **not** establish that state of affairs and that their employment by SKH was not ended by a unilateral act by R1. Rather I would have found, considering all of the circumstances, that it ended by mutual agreement with R1, as part of the commencement of trading by KHL, an agreement which included the steps taken by R1 to direct customers of SKH to KHL, intended to facilitate the continuation of the family business by the claimants, with minimal disruption to trade (not requiring any notice by either side).

Employment Judge Cuthbert
Date: **18 April 2022**

Judgment & reasons sent to parties: 29 April 2022

FOR THE TRIBUNAL OFFICE