



# EMPLOYMENT TRIBUNALS

**Claimants:** Mr Richard Clegg  
Mrs Suzanne Clegg

**Respondent:** Secretary of State for Business, Energy and Industrial Strategy

**Heard at:** Norwich Employment Tribunal

**On:** 6 September 2022

**Before:** Employment Judge Hutchings (sitting alone)

## Representation

Mr Clegg: in person

Mrs Clegg: did not attend

Respondent: did not attend

# RESERVED JUDGMENT

1. The Secretary of State for Business, Energy and Industrial Strategy shall pay the sum of **£6,604.30 to Mr Richard Clegg** from the NIF calculated as:
  - a. 8 weeks' pay, (capped at £489): £3,912 gross.
  - b. Holiday pay of £2,692.30 gross: 14 days at an annual salary of £50,000.
  - c. These awards are made gross; Mr Clegg is liable to account to HMRC for any tax due on these awards.
  
2. The Secretary of State for Business, Energy and Industrial Strategy shall pay the sum of **£1,420 to Mrs Suzanne Clegg** from the NIF calculated as:
  - a. 5 weeks' pay, (capped at £384) less £500 paid: £1,420 gross.
  - b. This award is made gross; Mrs Clegg is liable to account to HMRC for any tax due on these awards.

# REASONS

## Introduction

1. The claimants, Mr Richard Clegg and Mrs Suzanne Clegg, were employed by GMS Law Ltd (the 'Company'). Mr Clegg was employed as a personal injury solicitor from August 2003 until June 2018; he was appointed as a director of

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the Company on 20 June 2012 and remained a director until the company ceased to exist in November 2020. Mrs Clerk was employed as a paralegal from September 2013 to 28 February 2018.

2. By a claim forms dated 29 October 2020 Mr and Mrs Clegg submitted individual claims seeking to recover redundancy pay, arrears of pay, holiday pay accrued and compensation for loss of notice pay pursuant to sections 166 and 182 of the Employment Rights Act 1996 (the 'Act'). The claims assert that, as possession had been taken by / on behalf of a debenture holder of a debenture secured by a floating charge over the Company's assets, Mr and Mrs Clegg are entitled to recover the monies under the government's Redundancy Payments Service ("RPS") which operates a scheme whereby the National Insurance Fund ("NIF") will make certain payments to ex-employees of an insolvent employer where statutory conditions are satisfied. The claims were submitted against GMS Law Ltd and the Secretary of State for Business, Energy and Industrial Strategy ('SOS'), who is responsible for making payments from the NIF. The claimants submit the Company is not able to pay the monies they allege they are owed, and therefore payments should be made by the SOS from the NIF as the debenture satisfies the statutory conditions. Mr and Mrs Clegg started ACAS consultation on 21 October 2020; a certificate was issued by ACAS on 27 October 2020.
3. By Order dated 16 September 2021 the Tribunal directed that Mr and Mrs Clegg's claims would be heard together. On 20 September 2021 Judge Lewis struck out the claims against the GMS Law Limited as the Company ceased to exist. The claim continued against the SOS.
4. By a response form dated 21 April 2021 the SOS contests the claim. The SOS does not admit that GMS Law Limited is insolvent within the meaning of sections 166 and 183 of the Act (the statutory definitions of insolvency). Therefore, the SOS contends that he is not able to act as guarantor to the monies the claimants allege they are owed.

**Procedure, documents, and evidence**

5. Mr Clegg represented himself and submitted a signed witness statement dated 25 April 2022. Mrs Clegg did not attend; she submitted evidence in a witness statement dated 25 April 2022. Mr and Mrs Clegg called sworn evidence from Mr Gordon Dean, a solicitor dated 5 April 2022. Mr Dean did not attend the hearing.
6. I noted, and referred Mr Clegg to, the concern expressed by Judge Hoyle at the hearing on 4 May 2022, noted in the Adjournment Notice dated 26 May 2022, that neither Mrs Clegg nor Mr Dean had attended that hearing: the notice records Mr Clegg's explanation:

*'his wife did not want to travel to Watford and she felt he could make representations on her behalf; and Mr Clegg said he thought that because Mr Dean was a practising solicitor his evidence would be accepted as evidence with no requirement for him to give oral evidence.'*

7. Judge Hoyle warned Mr Clegg that the inconvenience of attending the hearing centre is not an excuse for another party's or the witness's non-attendance.

8. Mr Clegg explained Mrs Clegg did not attend today's hearing as she was at work, but that the basis of her claim paralleled his claim, was based on the same facts and evidence and, consequentially, the Tribunal had ordered that the cases could be heard together. Mr Clegg told me he would be able to answer any questions about Mrs Clegg's claim. He suggested the evidence of Mr Dean should be accepted as Mr Clegg is a solicitor. Mr Clegg's explanation for Mrs Clegg's absence is not an excuse for non-attendance of a hearing for a claim she has submitted to the Tribunal. A claimant is required to answer the Tribunal's questions themselves, not through a third party, even one involved in a joined case. Similarly, the Tribunal cannot accept a witness' evidence simply because that witness is a solicitor. If a party submits a witness statement, and that witness is not at the hearing to answer questions from the Tribunal, then that evidence is given less weight by the Tribunal. Mr Clegg confirmed that he understood and accepted the reasons for this.
9. The Respondent was not represented at the hearing. In the SOS response dated 21 April 2021 he informed the Tribunal that he does not propose to be represented at any future hearing and invited the Tribunal, pursuant to Rule 42 of the Employment Tribunals Rules of Procedure 2013, to take account of the respondent's submissions in the ET3 and the SOS's written representation dated 21 April 2021. The Tribunal accepts this request, noting that the written presentations satisfy Rule 42 in that they were delivered to the Tribunal and both claimants at least 7 days before the hearing.
10. I considered the documents from a 67-page bundles of documents which Mr Clegg introduced in evidence; the order of Judge Hoyle sets out the documents he expected the claimants to provide as a minimum.

### **Redundancy Payments Scheme - Issues for the Tribunal to decide**

11. Mr Clegg confirmed that the monetary claims were based on sections 166 and section 182 of the Act and the definition of insolvent on which the claimants relied was that possession has been taken by a debenture holder whose debenture was secured by a floating charge of Company property. The SOS asserts that GMS Law Limited was not in a formal state of insolvency under section 166 or section 182 of the Act. Therefore, I must determine:
  - 11.1. Whether, in 2018, the Company met the statutory definition of 'insolvent' under sections 166 and 183 of the Act, in particular whether possession was taken by or on behalf of a debenture holder of a debenture secured by a floating charge; and
  - 11.2. If I find that the company did meet the statutory definition of insolvency, the amounts payable to Mr and Mrs Clegg.

### **Findings of fact**

12. The relevant facts are as follows. First, the Tribunal makes a general finding on evidence accessed. Several documents listed by Judge Hoyle were not in the bundle. Mr Clegg told me this was because he no longer had them, explaining Mrs Clegg having thrown out payslips and records. Of Mrs Clegg's absence, Mr Clegg asked *'what questions could the Tribunal possibly ask her'*; here is an example. I was unable to ask about missing evidence or confirm reasons for some of the comments in her witness statement, such as why she had not taken

any holiday. By virtue of her non-attendance Mrs Clegg's claim is compromised, and the evidence submitted given less weight.

13. Mr Clegg was employed by GMS Law Limited (the 'Company') as a personal injury solicitor from 1 August 2003 until 31 May 2018. On 20 June 2012 he was appointed a director of the company, and company secretary. Mr Clegg makes this claim in his capacity as an employee of the Company. Mr Clegg did not disclose a signed contract of employment to the Tribunal, explaining that he started work in 2003 and did not have a copy of his original contract; he disclosed a proforma contract for the company. In 2014 he was paid £45,000, rising to £50,000 by 2018. While Mr Clegg did not produce payslips for 2018, telling me that his wife had thrown these away, his P45 notes total pay for 2 months in the 2018 tax year as £8333.34, which equates to an annual salary of £50,000.
14. Mrs Clegg was employed by the Company from September 2013 to 28 February 2018 when she was made redundant; payslips evidence a monthly salary of £1,666.67, which equate to an annual salary of £20,000 in 2018. In evidence there are 2 payslips for February 2018, one showing £1666.67 and the other £500. This is odd. Mr Clegg told me she was only paid £500 that month as the Company could not afford to pay anymore. This does not explain why there are 2 payslips for the same month; given Mrs Clegg's non-attendance I was unable to clarify this discrepancy. Based on the documentary evidence before me I find that Mrs Clegg received both payments in February 2018.
15. Given their length of service, based on the proforma contract, Mr and Mrs Clegg were both entitled to '*an annual entitlement of 20 days plus statutory holidays*' (8 bank holidays), a total annual allowance of 28 days. The Company's holiday year was 1 January to 31 December. Under the proforma contract an employee with 2 to 12 years' service is entitled to one week's notice for each year of service and employees with over 12 years' service has '*not less than twelve weeks' notice*'. In 2018 Mrs Clegg had been employed 5 years and was entitled to 5 weeks' notice. Mr Clegg was entitled to 12 weeks' notice.
16. On 19 April 2012 the Company issued a debenture to Mr Godfrey Morgan (the 'Debenture'), the terms of which are recorded in a resolution of the same date as: '*the sum of £2,000,000 be borrowed from Godfrey Morgan*' secured by a '*first floating charge of the Company both present and future and the value of its Work in Progress*'. A copy of this resolution is filed at Companies House. The Company's 2017 accounts (dated 28 February 2017) show Company's largest asset as Work in Progress ('WIP'); Mr Clegg told me that for personal injury work the firm operated on the basis of Conditional Fee Agreements ('CFA'), under which '*cases are paid at the end, if the case is successful*'.
17. Mr Clegg told me that as a director of the Company he can confirm that the floating debenture holder (Mr Godfrey) took control of the assets (WIP, computer system and office furniture) of the Company because the Company's profitability was impacted by government reforms which meant that success fees in personal injury cases could no longer be received from defendants. I find that Mr Godfrey enforced his Debenture floating charge by instructing Mr Clegg to recover the WIP by selling client files through a specialist company, Recovery First, which transferred files to alternative solicitors. When fees were paid on the successful completion of a file the payment was made to Mr

Godfrey as the Debenture holder, and not to the Company, under the terms of an assignment deed dated 14 September 2018 (the 'Assignment'), a copy of which I have seen.

18. The majority of the files were transferred via Recovery First, with Mr Clegg mopping up remaining cases by transferring them to local and national firms. Mr Clegg approached Mr Dean's firm. In written evidence Mr Dean confirmed that some of these files were transferred to Mr Dean's practice with WIP. When transferred WIP costs were payable by the clients on these files Mr Dean was sent a copy of the Debenture and the Assignment, as evidence that the fees for WIP incurred by GMS Law Limited should be paid to Mr Godfrey, and not the Company; Mr Godfrey enforced his floating charge in this way. Mr Dean asked the Solicitors Regulation Authority ('SRA') to confirm payments to Mr Godfrey under the Debenture and not the Company. On the approval of the SRA Mr Dean paid the fees to Mr Godfrey, thereby honouring the Debenture. Accordingly, I find that Mr Godfrey as holder of the Debenture enforced the floating charge over the Company's assets.
19. On 11 May 2018 the SRA confirmed closure of GMS Law Limited for financial reasons. Other than Mr Clegg and the office manager (who continued to work until 31 May 2018 to close down the office) the Company made all employees redundant in February 2018; this information was provided to the RPS on the stencil. The company terminated Mr Clegg's employment on 31 May 2018; his P45 notes his leaving date as 30 June 2018. Mr Clegg did not receive written notice: his employment came to an end '*when all the files had gone*'.
20. The claimants made applications to the PRS. On 13 July 2020 Mr Clegg was notified that he was not entitled to redundancy pay as the service believed that the Company '*is not insolvent as described in sections 166 and/or 183 of the ...Act*'. Mr Clegg challenged this on the basis that the test under section 166(5)(b) and 183 was satisfied by Mr Godfrey enforcing his Debenture through this Assignment.
21. By email dated 18 August 2020 Mr Clegg wrote to the RPS to confirm that Mr Morgan as the debenture holder took possession of the assets (subject to the floating charge) of the Company. He identified the assets as all WIP, office and computer equipment. Mr Clegg made this confirmation in his capacity of director of the company.
22. On 24 August 2018 Mr Clegg wrote to the Company claiming £13,692:
  - 22.1. £6,846 (14 weeks' notice pay capped at £489 per week); and
  - 22.2. £6,846 (14 further' notice pay capped at £489 per week).
23. On 24 August 2018 Mr Clegg wrote to the Company claiming £3,872:
  - 23.1. £800 underpayment in February 2018;
  - 23.2. £1,536 4 weeks' notice pay at £384 per week; and
  - 23.3. £1,536 4 weeks' notice pay at £384 per week.
24. Records held at Companies House show that the company was dissolved by compulsory strike off on 17 November 2020.

**Law – Redundancy Payments Scheme**

25. I have set out in detail below the statutory provisions relevant to a payment by the SOS from the NIF and the definition of insolvency on which the claimants rely.

26. Section 166 sets out the statutory test which employees must satisfy to apply to the SOS to recover certain payments from the NIF (subject to sections 167 and 168 of the Act). I set out below the sections of section 166 on which the claimants rely:

*(1) Where an employee claims that his employer is liable to pay to him an employer's payment and either—*

*(a) that the employee has taken all reasonable steps, other than legal proceedings, to recover the payment from the employer and the employer has refused or failed to pay it, or has paid part of it and has refused or failed to pay the balance, or*

*(b) that the employer is insolvent and the whole or part of the payment remains unpaid,*

*the employee may apply to the Secretary of State for a payment under this section.*

27. Section 166(2) defines an “employer's payment”, in relation to an employee:

*(a) a redundancy payment which his employer is liable to pay to him under this Part....*

28. Section 166(5)(b) defines the meaning of insolvent for the purposes of subsection (1)(b) where the employer is a company [as in these claims], if (but only if) subsections (7) [the basis on which the claims are made], (8ZA) or (8A) [not quoted as not claimed] is satisfied. The claimants rely on the definition in section 166(7) which defines a company as insolvent if:

*.....(b) if a receiver or (in England and Wales only) a manager of the company's undertaking has been duly appointed, or (in England and Wales only) possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge*

29. If the claimants satisfy the test in section 166, Section 167 requires the SOS to pay to the employee out of the NIF a sum calculated in accordance with section 168 but reduced by so much (if any) of the employer's payment as has already been paid, provided the employee is entitled to the employer's payment, and that one of the conditions specified in sections 166(1)(a) or (b) is fulfilled. Section 168 addresses the amount of any payment; in the case of a redundancy payment, this is the amount of a redundancy payment.

30. Subject to the statutory limits in section 186, section 182 of the Act provides

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that, on a written application by an employee, the SOS shall pay that employee out of the NFI the amount to which, in the opinion of the Secretary of State, the employee is entitled, provided the SOS is satisfied that:

- (a) the employee's employer has become insolvent,*
- (b) the employee's employment has been terminated, and*
- (c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies*

31. Section 183(b) defines insolvent. where the employer is a company, by reference to subsections (3). Section 3(b) is the basis on which Mr and Mrs Clegg assert GMS Law Limited was insolvent:

*.....(b) if a receiver or (in England and Wales only) a manager of the company's undertaking has been duly appointed, or (in England and Wales only) possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge*

32. Section 184 define the debts an applicant to the RPS can seek to recover:

- (a) any arrears of pay in respect of one or more (but not more than eight) weeks,*
- (b) any amount which the employer is liable to pay the employee for the period of notice required by section 86(1) or (2) or for any failure of the employer to give the period of notice required by section 86(1),*
- (c) any holiday pay—*
  - (i) in respect of a period or periods of holiday not exceeding six weeks in all, and*
  - (ii) to which the employee became entitled during the twelve months ending with the appropriate date,*

33. In the case of Secretary of State for Trade and Industry v Walden & Anor [1999] UKEAT 905 the EAT addresses claims for payment from the NIF. The EAT emphasised that the relevant statutory provisions set out an exhaustive list of events amounting to insolvency. The onus is on the claimant to adduce evidence that one of those events had occurred; absence of proof that one of the events has occurred is fatal to the claim. In Walden the claimant failed to produce documentary evidence

## **Conclusions**

34. The RPS operates a scheme whereby the SOS will make certain payments from the NIF to ex-employees of an insolvent employer when statutory conditions are satisfied.

35. First, I address the claims under section 166. Mr and Mrs Clegg assert their

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employer, GMS Law Limited is *'insolvent'* (section 166(1)(b), relying on the definition in section 166(7) which defines a company as insolvent if *'possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge'*. Based on my finding that Mr Godfrey enforced his Debenture over the floating assets of the Company, recovered fees from WIP and the office and computer furniture, I conclude that the Company satisfies this statutory definition of insolvent.

36. Second, I address the claims under section 182(1)(a) of the Act on the basis that the Company was insolvent. The statutory definition of insolvent includes. *'possession has been taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge'* (section 183(b)). This is the same definition for section 166. According, for the same reasons I conclude the definition is satisfied: that Mr Godfrey enforced his Debenture over the floating assets of the Company, recovered fees from WIP and the office and computer furniture.

37. As the definition has been satisfied, I address the second issue of the amounts the SOS must pay. Section 167 requires the SOS to pay to the employee out of the NIF a redundancy payment reduced by so much (if any) of the employer's payment as has already been paid. Section 184 define the debts an applicant may recover. I address the awards for each of the claimants below:

37.1. Mr Clegg:

37.1.1. Arrears of pay in respect of one or more weeks, capped at 8 weeks; in his letter to the Company dated 24 August 2018 Mr Clegg claims *'notice pay and further pay'*. If an award is made for notice pay such that the contractual period of notice is paid in lieu, an additional award for redundancy pay cannot be made as this would result in double compensation. I make awards for notice pay on the basis Mr Clegg states his employment was terminated on 31 May 2018. His P45 notes end of employment as 30 June 2018. Therefore, he received 4 weeks' notice pay. He was entitled to 12 weeks' pay as he had been employed more than 12 years. Mr Clegg is entitled to 8 weeks' pay (capped at £489): £3,912 gross.

37.1.2. Based on the proforma contract, I have found that Mr Clegg's annual holiday allowance in 2018 was 28 days. In evidence he says he did not take holiday after 1 January 2018 as he was busy shutting down the business and transferring files. He does not address 2017, part of which falls within 12 months before the 'appropriate date'. His employment ended on 30 June 2018 so he was entitled to 14 days holiday. I conclude Mr Clegg is entitled to holiday pay of £2,692.30 gross: 14 days at an annual salary of £50,000.

37.2. Mrs Clegg: I have found that Mrs Clegg's employment ended on 28 February 2018. She was entitled to 5 weeks' notice. I have found that the payslips evidence that Mrs Clegg was paid her full salary in February 2018 plus an additional payment of £500. As she did not attend, I conclude this was a payment in lieu of notice as I was not able to ask questions of her explanation as to why there were 2 payslips for February 2018. I note she did not attend the first hearing listed either; in her absence on 2 occasions, I cannot accept Mr Clegg's answers to questions which should rightly be directed to her. Therefore, she is entitled to:



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- 37.2.1. Notice pay: 5 weeks' notice at £384 per week (£1920) less £500 paid: £1,420
- 37.2.2. Up to 6 weeks holiday pay accruing over the 12 months before 'the appropriate date'. In her witness statement Mrs Clegg says she did not take holiday after 1 January 2018. She does not address 2017, part of which falls within 12 months before the 'appropriate date'. As she was not present to be questioned about her evidence on holidays and the reasons why she did not take any, I make no award for holiday pay.

Employment Judge **Hutchings**

6 September 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES  
ON 23 September 2022

FOR EMPLOYMENT TRIBUNALS