EMPLOYMENT TRIBUNALS

Claimants: (1) Mr Richard Clegg
(2) Mrs Suzanne Clegg

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

Heard at: Norwich Employment Tribunal

On: 31 March 2023

Before: Employment Judge Hutchings (sitting alone)

Representation
Mr Clegg: in person
Mrs Clegg: in person
Respondent: did not attend

UPON APPLICATION made by letter dated 3 October 2022 to reconsider the judgment dated 6 September 2022 under rule 71 of the Employment Tribunals Rules of Procedure 2013.

JUDGMENT

The claimant's application for reconsideration of the judgment sent to the parties on the 23 September 2022 is granted and the judgment dated 6 September 2022 is revoked and the following awards are made in place of that Judgment:

1. The Secretary of State for Business, Energy and Industrial Strategy shall pay the sum of **£15,691.08**:**to Richard Clegg** from the NIF calculated as:

    a. 12 weeks' Notice Pay (capped at £489): £5,868 gross;
    b. Holiday Pay of £2,243.58 gross; and
    c. Redundancy Pay of £7,579.50.

2. The Secretary of State for Business, Energy and Industrial Strategy shall pay the sum of £**£4,901.87 to Suzanne Clegg** from the NIF calculated as:

    a. Arrears of Pay for February 2018: £894.90 net;
    b. 4 weeks' Notice Pay (at £384): £1,536 gross;
    c. Holiday Pay of £358.97 gross; and
    d. Redundancy Pay of £2,112.

3. Mr and Mrs Clegg are liable to account (separately) to HMRC for any tax due on the awards of notice pay and holiday pay. The awards for arrears of pay are made net of tax. The awards of redundancy pay are also net of tax.

REASONS

Background

1. The procedure upon a reconsideration application is for the Employment Judge that heard the case or gave the judgment in question to consider the application and determine if there are reasonable prospects of the original decision or judgment being varied or revoked. Essentially, this is a reviewing function in which the Employment Judge must consider whether there is a reasonable prospect of reconsideration in the interest of justice. There must be some basis for reconsideration. It is insufficient for an applicant to apply simply because he or she disagrees with the decision.

2. If the Employment Judge considers that there is no such reasonable prospect, then the application shall be refused. Otherwise, the original decision shall be reconsidered at a subsequent reconsideration hearing. The Employment Judge's role therefore upon considering such an application is to act as a filter to determine whether there is a reasonable prospect of the Judgment being varied or revoked were the matter to be considered at a reconsideration hearing. It is my decision, for the reasons stated below, that the Judgment dated 6 September 2022 is revoked and replaced by this Judgment.

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

4. 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.

5. 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.

6. 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.

7. In this case, I issued a judgment on 6 September 2022 ('the Judgment') sent to the

parties on 23 September 2022. In a letter dated 6 October 2022, the claimants applied for reconsideration of the judgment raising points on the calculation of holiday pay and offsetting of notice pay and redundancy pay. My provisional view was that the application to reconsider the judgment should be granted due to my misunderstanding the pay slip evidence presented at the hearing on 6 September 2022 and misapplication of the provisions of section 167 of the Employment Rights Act 1996. The respondent was asked to *write to the Tribunal, giving reasons, by* 5 November 2022 if it thought that the judgment should not be reconsidered; it did not do so.

8. Given the issues raised by the claimants with the calculation of holiday pay and interpretation of the pay slips, and the fact that the second claimant was unable to attend the hearing on 6 September 2022 due to work and childcare commitments, I considered it just and fair to reconsider the Judgment by video hearing to afford the second claimant to attend and give evidence in relation to her holiday pay, a point raised in reconsideration on the basis the Tribunal had misunderstood the evidence the second claimant had given in her witness statement.

The law: rules on reconsideration

9. Any application for the reconsideration of a judgment must be determined in accordance rules 70 to 74 of the Employment Tribunal Rules of Procedure 2013. Rules 6. The relevant employment tribunal rules for this application read as follows:

RECONSIDERATION OF JUDGMENTS

Principles

70.A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied, or revoked. If it is revoked it may be taken again.

Application

71.Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.

Process

72.— (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused, and the Tribunal shall inform the parties of the refusal. Otherwise, the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application. (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations. (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or the full tribunal which

made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.

10. In accordance with rule 70, a tribunal may reconsider any judgment "where it is necessary in the interests of justice to do so". On reconsideration, the decision may be confirmed, varied, or revoked. If it is revoked it may be taken again.

11. In determining the question of a reconsideration, the Tribunal must have regard to the overriding objective, to deal with cases fairly and justly. This obligation is set out in Rule 2 of the 2013 Regulations and includes: (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.

12. The Employment Appeal Tribunal has given guidance as to the nature of a request for reconsideration: (a) Reconsideration is not an opportunity for a party to seek to re-litigate matters that have already been litigated, or to re-argue matters in a different way or adopting points previously omitted. (b) There is an underlying public policy principle in all judicial proceedings that there should be finality in litigation, and reconsideration applications are a limited exception to that rule. (c) It is not a means by which to have a second bite at the cherry, or is it intended to provide parties with the opportunity of a rehearing at which the same evidence and the same arguments can be rehearsed but with different emphasis or additional evidence that was previously available being tendered. (d) Tribunals have a wide discretion whether or not to order reconsideration. Where a matter has been fully ventilated and properly argued, and in the absence of any identifiable administrative error or event occurring after the hearing that requires a reconsideration in the interests of justice, any asserted error of law is to be corrected on appeal and not through the back door by way of a reconsideration application.

Redundancy Payments Scheme - Issues for the Tribunal to decide

13. The application of 3 October 2022 seeks:

    13.1. Reconsideration of the awards made by the Tribunal and details, with calculations, the basis on which the claimants submit the awards should be revised as follows to include reconsideration of the date of the termination of Mr Clegg's employment from 30 June 2018 to 31 May 2018, and a consequential recalculation of the awards for notice pay and holiday pay; and

    13.2. Redundancy; the claimants request that I reconsider my conclusion that where notice pay is paid (or in this case awarded) then a redundancy award cannot be made as this would result in double compensation on the basis that *"Notice Pay and Redundancy Pay are conceptually and time-wise different things, Notice is something that an Employee is entitled to before they are dismissed, Redundancy Pay is an entitlement because they are being dismissed. In a redundancy situation, no employer can ultimately pay less than an employee is entitled to just by dismissing an employee without notice and in breach of contract"* [claimants' written reconsideration submission].

14. The Tribunal proceeded on the basis that, in light of an explanation of the evidence the claimants provided to me at the reconsideration hearing and the submission made about the payment of redundancy pay and notice pay, the Tribunal revoked the Judgment dated 6 September 2022 and issued this Judgment in its place.

15. 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:

    15.1. 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
    15.2. If I find that the company did meet the statutory definition of insolvency, the amounts payable to Mr and Mrs Clegg.

Evidence for the reconsideration hearing

16. In advance of the reconsideration hearing the Tribunal claimants received and considered the following documents from the claimants:

    16.1. A 67-page hearing bundle which Mr Clegg introduced in evidence for the hearing on 6 September 2022;
    16.2. Written reconsideration request dated 3 October 2022, attaching bank statements;
    16.3. Witness statement of Richard Clegg dated 16 March 2023; and
    16.4. Witness statement of Suzanne Clegg dated 23 March 2023. At the reconsideration hearing I had the benefit of asking Mrs Clegg questions seeking to clarify the statement she had made in her witness statement about holiday pay

17. During the hearing Mr Clegg referenced letters dated 27 October and 14 March 2023 from The Insolvency Service, which he forwarded to the Tribunal, and I received on 12 April 2023.

18. The Respondent was not represented at the hearing on 6 September 2022 nor at the reconsideration hearing on 31 March 2023. 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 accepted 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 that hearing. The respondent did not provide any documentation for consideration at the reconsideration hearing.

Findings of fact

19. 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.

20. 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. In the Judgment dated

6 September 2022 I found that Mrs Clegg received both payments as February 2018 salary. This was an error of fact. At the reconsideration hearing Mr Clegg told me that he was responsible for payroll at the Company and explained that the payslips are alternative not cumulative as they have the same starting year to date salary figures and so cannot have been cumulative. Mr Clegg explained to me that he had created a "dummy" payslip for each employee who was paid £500 in February 2018 to illustrate the amount of salary they should have received for their records and to assist in making any claim to the RPS, telling me that he appreciated he was underpaying all staff and, as a result, all staff would have had a claim against the Company so he gave employees the second payslip as a record of what they should have received in February 2018, but this amount was not paid by the company or received by employees. Mr Clegg explained how he had produced the payslips: he printed the payslips showing the full salary payment before the payslip was submitted for payment, resulting in a payslip copy recording the salary that should be received. Mr Clegg confirmed that he did this for all staff and that the payslips was never submitted in the system; instead he printed them for staff and submitted a payslip in the sum of £500, the amount paid to ensure all staff received the £500 and had the printed payslip to help employees dismissed immediately, so they could see the amount they should have received and would be able to make a claim. I find that all employees that were made redundant in February 2018 were paid £500: each was given 2 payslips; one to show the £500 paid; and a second to show the normal salary they were due in February 2018.

21. To confirm this as the correct interpretation of the payslips, at the reconsideration hearing Mrs Clegg submitted her bank statement covering the salary payment for February 2018. I have considered this statement; it evidence that the only payment made by the Company as February 2018 salary was £500, paid on 3 March 2018. I confirm from this statement that the £1,394.90 was not paid. Having considered the payslips I note that they are the same date, same tax month (month 11, February). T he payslip recording a salary of £500 for February 2018 is the amount paid to Mrs Clegg. This is reflected in the payslip recording a payment of £500; the year to date total includes the £500 payment.

22. Therefore, I find that the £1,394.90 was not paid (this being the amount she would have been paid in February 2018 had the Company not been insolvent). I am satisfied that Mr Clegg's explanation as to why there are two payslips for Mrs Clegg in February 2018 is accurate.

23. 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 4 years and was entitled to 4 weeks' notice. Mr Clegg was entitled to 12 weeks' notice.

24. 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'.*

25. 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.

26. 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.

27. 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 dated 30 June 2018 notes that he was paid up until 31 May 2018 as his leaving date. Mr Clegg did not receive written notice: his employment came to an end *'when all the files had* gone', nor did he receive pay in June or any notice pay. Mr Clegg's P45 evidence that he received salary payment in April and May 2018 only. I find that his employment ended on 31 May 2018 and that he was paid up to this date. He did not take any holiday in this time.

28. At the reconsideration hearing, in oral evidence Mrs Clegg clarified her statement on holiday in 2018. I find that she did not take any holiday for the period 1 January 2018 until her employment was terminated at the end of February 2018; indeed, she was saving her holiday to take at Easter when her children were off school.

29. 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.

30. 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.

31. On 24 August 2018 Mr Clegg wrote to the Company claiming £13,692:

    31.1. £6,846 (14 weeks' notice pay capped at £489 per week); and
    31.2. £6,846 (14 further' notice pay capped at £489 per week).

32. On 24 August 2018 Mrs Clegg wrote to the Company claiming £3,872:

    32.1. £800 underpayment in February 2018;

32.2. £1,536 4 weeks' notice pay at £384 per week; and
32.3. £1,536 4 weeks' notice pay at £384 per week.

33. Records held at Companies House show that the company was dissolved by compulsory strike off on 17 November 2020.

Law – Redundancy Payments Scheme

34. 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. Section 166 of the Employment Rigths Act 1996 (the "Act") 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.

35. 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,

(b)a payment which his employer is, under an agreement in respect of which an order is in force under section 157, liable to make to him on the termination of his contract of employment.

36. 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

37. 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.

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

39. 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

40. 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,

41. 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 to support the basis on which he argued his employer was insolvent.

Conclusions

42. 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.

43. In my Judgment I concluded that 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. At the reconsideration hearing Mr Clegg informed me that, following additional correspondence with the claimants, the respondent had accepted this conclusion and that it was liable for payments. As this decision revokes the Judgment I set out my conclusions on insolvency below.

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

45. 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.

46. As the definition has been satisfied, I address the second issue of the amounts the SOS must pay. I have reconsidered the provisions of section 166 of the Act alongside the government's advice for employees when an employer is insolvent [https://www.gov.uk/your-rights-if-your-employer-is-insolvent]. In my Judgment dated 6 September I misinterpreted section 166 by reference to section 167. 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."* I interpreted this to mean that if an employee had received one amount from the NIF (in lieu of notice), the amount of the redundancy payment received from the NIF would be reduced by the same amount.

47. Upon reconsideration, I conclude that an employee who can prove that their employer is insolvent is entitled to a redundancy payment in addition to notice pay paid by the NIF. The two payments are not offset if both are paid from the NIF. Section 167 addresses the situation where an employee has received a payment from its employer. The relevant part of section 167(2) provides that the requirements referred to in subsection (1) are: (a) That the employee is entitled to the employer's payment, and (b) That one of the conditions specified in paragraphs (a) and (b) of subsection (1) of section 166 is satisfied. Therefore, I conclude that once the Secretary of State receives an application under section 166 for the payment of a redundancy payment, he must pay it if he is satisfied that the employee is entitled to the redundancy payment and 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 that the employer is insolvent and the whole or part of the payment remains unpaid. If satisfied of those matters, section 168 then governs the amount payable by the Secretary of State under section 167. In the case of a redundancy payment, it is the sum equal to the amount of the redundancy payment. To qualify for a redundancy payment the claimants must have been continuously employed by the Company for two or more years (both claimants have) and have made a written application to your employer or applied to the Tribunal for an award, within six months of your job ending (I have seen evidence that both have).

48. Having reconsidered the relevant statutory framework and the factual background as set out above, I have no hesitation in concluding that the claimants are entitled to notice pay and redundancy pay from the NIF. I address the awards for each of the claimants below:

Mr Clegg

48.1. *Notice pay:* In his letter to the Company dated 24 August 2018 Mr Clegg

claims *'notice pay and further pay'*. Statutory notice pay is awarded as 1 week's notice for every year of employment, up to a maximum of twelve weeks. I have found that Mr Clegg was employed by GMS Law Limited as from 1 August 2003 and paid up until 31 May 2018. Therefore, I conclude he satisfies the criteria for the maximum notice pay of 12 weeks. In 2018/2019 the weekly amount for notice pay was capped at £489. I conclude that 12 weeks at £489 weekly results in an award for notice pay of **£5,868 gross.**

48.2. *Holiday pay:* 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 31 May 2018, so he was entitled to 5/12 of 28 days based on his annual salary of £50,000. I conclude that the award for holiday pay is **£2,243.58 gross.**

48.3. *Redundancy pay:* Mr Clegg has 14 years' length service, 3 of which are an enhanced award of 1.5 per year, based on his age and date of birth (April 1974). The redundancy payment is exempt from tax. The redundancy calculation is: 15.5 multiplied by £489 (14 years' service, with 3 years at the enhanced rate of 1.5 per year of service due to age, resulting in a redundancy award of **£7,579.50.**

Mrs Clegg

48.4. *Arrears of pay:* taking account of the payment made of £500 in February 2018 and the figure in the second (generated) payslip, and offsetting the amounts I conclude Mrs Clegg is entitled to arrears pay of **£894.90 net;**

48.5. *Notice pay:* I have found that Mrs Clegg's employment ended on 28 February 2018. She was entitled to 4 weeks' notice on the basis that she had 4 years complete service. Therefore, I award Mrs Clegg 4 weeks' pay at £384 per week resulting in an award for notice pay of **£1,536 gross.**

48.6. *Holiday pay:* Mrs Clegg did not take any holiday in the relevant period. Therefore, I conclude she is entitled to holiday Pay of **£358.97 gross** (2/12 of 28 days at an annual salary of £20,000);

48.7. *Redundancy pay:* 5.5 weeks at a weekly pay of £384, based on 4 years' length of service, 3 years of which at an enhanced award of 1.5 per year, based on her age and date of birth (November 1973), resulting in a redundancy payment of **£2,112.** The redundancy payment is exempt from tax.

Employment Judge Hutchings

Date: 17 April 2023

JUDGMENT SENT TO THE PARTIES ON

2 May 2023

FOR THE TRIBUNAL OFFICE