



EMPLOYMENT TRIBUNALS

Claimant

Mr R Pandey

v

Respondents

(1) Rolta UK Limited
(2) Rolta International Inc.

Heard at: Bury St Edmunds

On: 14 & 15 December 2020

Before: Employment Judge KJ Palmer

Appearances

For the Claimant: Mr G Mahmood (Counsel).

For the Respondents: Mr G Self (Counsel).

JUDGMENT having been sent to the parties on 7 January 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This claim came before me having been postponed on two previous occasions. Both the claimant and the first and second respondents are represented by counsel. For the claimant I had Mr Mahmood in front of me and for both respondents Mr Self.
2. In essence the issues before me in this case are relatively narrow, the claimant was employed between 28 September 2011 and 2 January 2019 as Managing Director and President of Big Data and Digital Solutions International. The identity of the employer is in dispute. He was summarily dismissed without notice and without any formal disciplinary process being followed on 2 January 2019.

3. The issues before me are first, a jurisdictional one, "Who employed the claimant?". He says it was the first respondent Rolta UK Limited. He says he was the Managing Director of that company. Essentially that role continued throughout his employment. The respondents argue that it was in fact the second respondent, Rolta International Inc, an American company who employ or employed the claimant. Irrespective of that jurisdictional point the claimant claims unfair dismissal against his employer. The respondents argue that the dismissal was fair and they say it was fair by reason of capability.
4. The claimant also pursues claims for unlawful deduction of wages under s.13 of the Employment Rights Act 1996 and a failure to pay monies in lieu of accrued untaken holiday under the Working Time Regulations 1998, more specifically regulation 14 payment in lieu of accrued but untaken holiday at termination. The respondents argue that they were entitled to withhold those payments by virtue of a contract deductions clause in respect of the value of items they say were not returned by the claimant after the termination of his employment.
5. I had before me an extensive bundle marked C1 and an additional document was handed up during the course of the first day of this hearing marked C2. I heard evidence from the claimant and for the respondents from Mr Rajneesh Roy HR Manager of the first respondent. I was due to hear evidence by CVP from a Mr P Garg and from a Ms Preetha Pulusani who is the individual who actually dismissed the claimant. However, neither produced a witness statement worthy of the name, they being simply one line statements specifying that they endorsed the evidence in Mr Roy's statement. In any event the respondents chose not to call either of those witnesses to give evidence.

Findings of Fact

6. The claimant started his employment with his employer on 28 September 2011.
7. The respondents are part of a large group of companies whose principal company and parent company is in India, in Mumbai and that is called Rolta India. There are some 17 companies in the group around the world at one time employing many thousands of employees but today employing less but still in the region of a thousand. The company provides platform solutions to major companies in the oil and gas sector, and the utilities sector. It also enters into contracts with the military under significant tenders.
8. When he started employment, Mr Pandey signed a contract which was before me in the bundle. That contract specifies the claimant's employer as being Rolta International Inc the US company in the Rolta Group. It includes a jurisdictional clause which specifies that all legal disputes will be the subject of the jurisdiction of Indian Law. The contract is not detailed but includes a brief deductions clause.

9. However, evidence before me during the course of this hearing makes it abundantly clear that the claimant's employment was something very different from that set out in the contract. It is common ground between the parties openly admitted by Mr Roy of the respondents in cross examination that the reality of the agreement between the parties was that the claimant was actually employed as Managing Director of Rolta UK Limited. Mr Mahmood in his submissions sets out a lengthy list supporting this fact at paragraph 7 of his submissions. I do not propose to repeat that list here save to say that I accept it and I make findings of fact in that respect.
10. As a matter of fact, I find that the claimant was employed by the first respondent. I am entitled to look behind the written agreement to find the true arrangement between the parties pursuant to a recent line of authorities and I am entitled to do this where there is conflict between these two things, I do that.
11. I found the evidence of the claimant to be honestly given and I found that even under cross examination he was steadfast and entirely credible. Where there is conflict in the evidence before me I prefer the evidence of the claimant.
12. I am bound to say however that the respondents have adduced so little probative evidence before this Tribunal as to render this case highly unusual. Mr Roy who was the respondents' only witness admitted that he could give no evidence as to the claimant's dismissal as he had not been involved. The respondents chose not to adduce evidence from two crucial witnesses who might have supported their case, Ms Preetha Pulusani and Mr K K Singh. Mr Singh is the Chairman and overall boss of the Rolta Group. Instead poor Mr Roy was sent to give largely hearsay evidence of events he knew little or nothing about. I find that approach highly reprehensible on the part of the respondents.
13. The respondents defence to the unfair dismissal claim was largely based on Mr Self's attempts to shake the claimant in cross examination by taking the claimant to documents in the bundle and arguing that those documents showed that the claimant had failed to generate sales in Rolta UK Limited and that this therefore somehow justified his summary dismissal without process. In fact, on closer examination those documents support the fact that the claimant had actually done a superb job in the face of many obstacles to keep the UK company cash rich. The claimant was not employed as a salesman as the respondents have sought to suggest during the course of this hearing. He was employed as a Managing Director to run and manage the UK business. This he did with considerable skill and success. Sales targets which may or may not have been fair or achievable were only one aspect of his role in running that UK company.

14. The evidence of his success was entirely plain on the very documents referred to, in an attempt to illustrate the opposite. Despite the company not at any point between 2011 and 2016 meeting sales targets Mr Pandey had turned around a parlous cash position in the business and the claimant was as a result handsomely rewarded with appraisal ratings of 'outstanding' together with salary increases and bonus payments. Hardly the actions of an employer dealing with an incompetent employee as the respondents seek to suggest.
15. Much is made of the claimant's considerable salary of £250,000 plus bonuses. This only serves to emphasise his success and the fact that he was managing the whole business and was not Head of Sales as has been suggested. Any failure to make sales targets cannot be laid at his door on the evidence before me.
16. Appraisals stopped in March 2016 after the claimant was given yet another outstanding performance rating and a further pay rise and a significant bonus of £100,000. The reason was that the company, that is the parent company had fallen into financial difficulties and had defaulted on its credit bond which in turn caused considerable difficulties for the group. The company was preparing for a sale and the claimant was delegated by Mr Singh to be at the forefront of that process. It appears that Mr Singh conducts a very top down management style bordering on the dictatorial.
17. Throughout the period to the end of 2018 the claimant who had managed and maintained a stable business in the UK was required to fund the failing group businesses by pumping cash into them, this the UK company managed to do only because it was run extremely well by the claimant. However, this meant that the company in the UK was essentially bled of \$4,000,000 of cash over that period of time.
18. Mr Singh was desperate for the sale to come to fruition and even offered the claimant a £1,000,000 bonus if he could facilitate the sale. The uncertainty and disruption of both the impending sale and the credit failures in the group made even the best run part of it, that is the UK arm, difficult to manage. Sales leaders left and this meant that sales targets were not met even if those targets had been realistic in respect of which I have no evidence whatsoever before me. Mr Singh became increasingly desperate which culminated in an extraordinary meeting in Mumbai on 18 September 2018. Here although a possible sale of the company was still in the offing the claimant was essentially told he was being dismissed out of hand by Mr Singh. The claimant not unsurprisingly pleaded for his job and this resulted in him being bullied into agreeing wholly unrealistic sales targets for the near future for the UK company. Clearly he felt he had no choice.

19. It was clear from the documentary evidence before me and the Claimant's evidence that Mr Singh and his President of International Operations, Preetha Pulusani felt that they could simply treat the claimant as they wished as his employment was governed by Indian Law and they should pay no cognisance to UK Statutory Law.
20. There were some further exchanges of emails until without warning the claimant was dismissed by a perfunctory email from Ms Pulusani on 2 January 2019. This dismissal was summary. It is important to make clear that there was not even the vaguest attempt to follow even the most basic process or procedure prior to this dismissal occurring. The respondents clearly thought they could get away with engaging no investigation or procedure to attempt to justify the dismissal. They did nothing. The respondents had not even begun to attempt to justify the claimant's dismissal in this case. Frankly they barely tried. I had no evidence from Ms Pulusani or Mr Singh, only poor Mr Roy was sent in as a sacrificial lamb to the slaughter.

The claimant's claims

21. The claimant pursues a claim for unfair dismissal. The respondents argue that the dismissal was fair by reason of capability. They say the claimant was incompetent and this justified his summary dismissal.
22. The claimant also pursues a claim for unlawful deduction of wages and a failure to pay holiday pay in lieu of untaken holiday at the termination of his employment under the Working Time Regulations 1998, Regulation 14(3). In respect of the claims for unlawful deduction and holiday pay, the respondents ventured no defence in their ET3 yet seemed to have by default ventured one by getting the claimant to agree a list of issues which was then subsequently incorporated into a case management summary by this Tribunal.
23. However, it is pretty much clear where that attempt at a defence lies, in that they admit the unlawful deduction and the failure to pay holiday pay as claimed yet argue a right of set off in respect of the unlawful deduction claims made under s.13 of the Employment Rights Act 1996 in respect of a deductions clause in the contract. Their defence on the holiday pay claim is wholly unformed, albeit they mention a right of set off. The fact is that there is no cogent evidence which has been produced in this Tribunal that supports any suggestion that the respondents were owed any sums by the claimant. In fact the only evidence that has been produced suggests the contrary. Evidence that the claimant put forward was that he is in possession of some goods which belong to the respondents but he has attempted to have those collected and his attempts at contacting the respondents to have those goods collected have been ignored. Apparently he is still happy to return those goods and I suggest that perhaps after this Tribunal the respondents make arrangements for their collection.

Jurisdiction

24. I have made a finding of fact that the claimant was actually employed by Rolta UK Limited, despite that the respondents still argue that this Tribunal has no jurisdiction to hear these claims as a result of the jurisdiction clause I have referred to previously.
25. I have written and oral submissions from both counsel in front of me and in particular on the law in this area and the governing law is not really in dispute between the two parties. The leading case is the well-known case in the House of Lords of **Lawson v Serco Limited [2006]**. This set out certain principles in such a case as this. The guiding principal is whether the claimant was ordinarily working in Great Britain at the time of his dismissal. Even in cases where someone was required to travel frequently abroad in the course of his work the common sense approach is always taken.
26. “Where was the employee based?” is the essential question. Even on the respondents’ own evidence in this case the claimant was clearly based in the United Kingdom. He worked here, he was based in Reading, he lived in Reading, he was employed by a United Kingdom company which paid him. He ran that United Kingdom company. His day to day activities were in the United Kingdom at the United Kingdom office. The contract cannot displace this. I have already said that the contract was not reflective of the real true position between the parties as I am entitled to do so and on any analysis it is very plain that this Tribunal has jurisdiction to hear the claimant’s claims.

The Unfair Dismissal claim

27. Such a claim is governed by s.98 of the Employment Rights Act 1996. Under s.98(1) the employer must show a potentially fair reason for the dismissal. Open to the employer are reasons such as capability, conduct, redundancy or some other substantial reason. It can be a combination of one or more of those reasons. Here the respondents argue that the reason was capability. This is unusual as it is more often associated with ill-health dismissals but sometimes one sees capability run as a reason for dismissal in circumstances of incompetency and that is the essential argument put forward by the respondents here.
28. If they are able to show that that was the reason and it is a potentially fair reason under s.98(2) then the Tribunal must assess the evidence before it and apply s.98(4) and ask itself, whether in all the circumstances taking into account the size of the undertaking whether that reason was a sufficient reason for the dismissal. In making an assessment under s.98(4) the Tribunal must look at all the circumstances of the case, including whether a fair procedure was followed. The Tribunals are guided by various cases in this respect, the leading case being **Iceland Frozen Foods v Jones [1983] ICR 17** which says that a Tribunal must assess whether the decision to dismiss fell within a band of reasonable responses to the circumstances that particular employer was faced with. It is important to note the Tribunal cannot substitute its own view as to what it would have done but rather

assess whether the respondent's decision fell within that band of reasonable responses.

Polkey

29. We heard much mention of **Polkey** in submissions. The case of **AE Dayton Services Ltd v Polkey [1988] ICR 142** House of Lords sets out a principal which is still good law today. That principal is that if a Tribunal finds that a dismissal was unfair largely due to failure to follow a proper procedure but that on the evidence before it, it can conclude that had a fair procedure been followed a fair dismissal would have occurred then it may make a reduction in the amount of the compensatory award subsequently awarded.
30. What Tribunals do here is they assess the facts and often where they feel that **Polkey** is engaged, they will apply a percentage reduction based on the likelihood of that outcome. Occasionally, they might limit the period of loss to be included in any compensatory award where they feel that **Polkey** is likely to be engaged. There is guidance on the principle in a number of authorities, one of which I have been referred to, **King v Eaton Limited [1998] IRLR 686**. This **Polkey** assessment usually involves an element of crystal ball gazing.

Conclusions

31. The claimant was dismissed without even the most rudimentary or perfunctory investigation. In evidence the respondents have put forward scant evidence of the real reason. They have adduced no evidence from the two people involved in the decision-making process. We have no evidence of meetings of a disciplinary nature and no evidence of a decision made pursuant to a proper process such as the ACAS Code of Practice.
32. The respondents have not even remotely come close to showing that the real reason for the dismissal was capability. The documentary evidence relied upon tends to show the opposite. No other evidence was adduced. The evidence suggests a sham as alluded to by the claimant in his evidence. The respondents have come nowhere near showing that the reason for the dismissal was potentially fair under s.98(2). I therefore do not even need to consider s.98(4). However I am bound to say that the respondents would have failed spectacularly under s.98(4) if they had crossed the first hurdle under s.98(2). No investigation and no procedure was followed. A half baked explanation for dismissal based on targets not proven to be fair or realistic or achievable, or even the responsibility of the claimant was all that was ventured.
33. As for **Polkey**, I cannot imagine a case less likely to engage a **Polkey** finding that had a fair procedure taken place, a fair dismissal might have occurred, **Polkey** cannot on any analysis be engaged in this case. The unfair dismissal claim succeeds with no **Polkey** reduction.

- 34. The unlawful deduction of wages claim succeeds and I make a finding and declaration in that respect.
- 35. The claim under the Working Time Regulations also succeeds and the claimant is awarded pay in lieu of accrued untaken holiday.
- 36. A Remedy Hearing will be listed before me on **29 March 2021** at this Tribunal.

Employment Judge KJ Palmer

Date: 12 January 2021

Sent to the parties on:

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For the Tribunal Office