



EMPLOYMENT TRIBUNALS

Claimant: Mr D Andersen

Respondent: Rheon Labs Limited

Heard at: London South Employment Tribunal (by CVP)
On: 30 September 2022

Before: Employment Judge Abbott (sitting alone)

Representation

Claimant: Tanya Jones, barrister, instructed by Tom Street & Co Solicitors Ltd

Respondent: Camille Ibbotson, barrister, instructed by Temple Bright LLP

RESERVED JUDGMENT

The claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The Claimant, Mr Doug Andersen (*Mr Andersen*), was employed by the Respondent, Rheon Labs Limited (*Rheon*), as a Development Engineer. His employment with Rheon began on 2 October 2017 (at a time when Rheon was named Dan Plant Engineering Ltd), and ended with his dismissal taking effect on 26 November 2021.
2. Mr Andersen brought a claim for unfair dismissal. Rheon denied Mr Andersen's claim.
3. The case came before me for Final Hearing on 30 September 2022. The hearing was held fully remote through the Cloud Video Platform. The one-day listing proved sufficient only to hear the evidence; the parties provided written closing submissions on 4 October 2022. I apologise for the delay in producing this reserved judgment, which results from workload pressures.

4. Rheon was represented by Camille Ibbotson, barrister, instructed by Temple Bright LLP. It called evidence from Mr Tim Brown (Rheon's Chief Operating Officer) and Ms Elizabeth Coles (Rheon's Culture and People Manager), both of whom provided witness statement and gave oral evidence.
5. Mr Andersen was represented by Tanya Jones, barrister, instructed by Tom Street & Co Solicitors Ltd. He provided a witness statement and gave oral evidence. He also relied upon written statements from two other individuals, Mr Ruben Doyle and Mr Guillermo Whitembury, who were offered for cross-examination but whose evidence was not challenged by Rheon.
6. I was also provided with a 271-page Hearing Bundle, an agreed chronology, cast list and list of issues, and permitted Rheon to rely upon an 8-page Supplemental Bundle of documents comprising documents identified shortly before the hearing.

Issues for determination

7. At the outset of the hearing, I confirmed with the parties the issues to be determined, being limited to issues of liability rather than quantum. Mr Andersen's only claim is for unfair dismissal. There was no dispute that Mr Andersen was a qualifying employee and brought his claim in time, and that there was a dismissal for the purposes of the Employment Rights Act 1996 (*ERA*). The issues to be determined, therefore, were:
 - 1) Was there a "potentially fair" reason for the Claimant's dismissal? The Respondent relies upon Section 98(2)(b) ERA 1996 - "conduct".
 - 2) Did the Respondent hold a genuine belief, on reasonable grounds, and following a reasonable investigation, that the Claimant was guilty of the alleged misconduct.
 - 3) Was the decision to dismiss the Claimant fair, that is, was it within the range of reasonable responses open to a reasonable employer? This issue may include considering whether the final written warning issued to the Claimant was issued in good faith and whether there were *prima facie* grounds for the Respondent to issue that disciplinary sanction.
 - 4) Did the Respondent adopt a fair procedure?

Findings of fact

6. The relevant facts are, I find, as follows. Where it has been necessary for me to resolve any conflict of evidence, I indicate how I have done so at the relevant point. References to "[xx]" are to page numbers in the Bundle of Documents. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. I have not referred to every document I have read and/or was taken to in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.
7. On 2 October 2017, Mr Andersen's formal employment with Rheon began.

It was subject to a written contract of employment, a copy of which was at [53-74]. The contract refers, e.g. in clause 14, to a Staff Handbook containing disciplinary and grievance procedures, but this was not published to employees of Rheon until April 2021.

8. In April-May 2020, Mr Andersen had a performance management review meeting with his then line manager, Mr Simon Huntsman. This was part of a standard appraisal / development process, not a disciplinary process. As part of that review [110-120], Mr Huntsman noted that there were “*some gaps in Doug’s soft skills that are holding him back in developing in the organisation*”. Nine areas of development were identified:

1. Need to motivate others around him more
2. Prioritise projects from a company perspective not just his own
3. Be more of a team player not a 'super-hero lone wolf'
4. Being more professional: more organised, prepared for meetings, timings etc....
5. Giving more praise to colleagues and saying 'thank you' more. Work also on empathy.
6. Having a consistent 'up-beat' demeanour in the office not big emotional swings.
7. Respecting all his colleagues, not just a few
8. Consistent quality across all projects. Judging the relative importance of each one
9. More collaborative thinking & working so less/ideally no 'battling' with colleagues.

9. There were follow-up emails between Mr Huntsman and Mr Andersen, in which Mr Andersen indicated his desire to understand how Rheon viewed his trajectory, but also recognised that training and mentoring in soft skills would be potentially of interest to him [121-123].

10. On 19 June 2020, Mr Tim Brown (Rheon’s Chief Operating Officer) became Mr Andersen’s line manager.

11. On 29 June 2020, Mr Brown met with Mr Andersen. A note of this meeting was at [126-128]. During the meeting, Mr Andersen indicated he felt he was stagnating and wanted progression. Mr Brown spoke to Mr Andersen regarding what Mr Brown considered to be weaknesses in Mr Andersen’s behaviour, noting in particular the “*universal negative feedback from [Senior Management Team] about [Mr Andersen’s] behaviour*”. Mr Brown indicated he was willing to support Mr Andersen if he was ready to change his behaviours, and asked Mr Andersen to take the rest of the day and the following day off to reflect.

12. Mr Brown followed up with an email on 3 July 2020 identifying certain areas to work on:

- Being more sophisticated when considering how to react to challenging situation, people and conversations. Minimising sulks or big mood swings.
- Enhance how to work with others in your project work and develop an “inclusive skill set” alongside your “lone-wolf skill set”
- Try to shift your project management focus to be 6 weeks ahead of current activities
- See negative feedback not as an attack on your capability but a data point that will help provide an opportunity to grow
- Using data to build persuasive cases and how the rigour associated with data capture, marshalling, analysis and presentation is critical.
- Recognising that scalability of the business and true performance in your role depends on your ability to manage interactions, behaviours and contribute to a good culture in the company. This means that behaviours are as, if not more, important than harder skills.
- Managing one’s image, profile and reputation within the organisation

13. On 8 January 2021 a meeting took place between Mr Andersen, Mr Brown and Ms Elizabeth Coles (Rheon's People & Culture Manager) to discuss Mr Andersen's ongoing behavioural weaknesses and poor attitude at work. During that meeting, Mr Andersen was offered the opportunity to work with a mentor, and (as he acknowledged in an email sent later that day [136]) was told he needed to work on emotion management, interpersonal communication and people management skills. Mr Andersen was also given a formal warning, as confirmed in writing by an email on 10 January 2021 [134]. The basis for this first written warning was a pattern of behaviour, being a continuation of the behaviours called out in the feedback in the course of 2020, including inappropriate tone in an email exchange with another senior member of the team, Ms Kravchenko (Head of Design) [131-133].
14. On 11 January 2021, Mr Andersen emailed Mr Brown asking for further details of the warning, including "*the instances this refers to outside of the direct conversations we've had in our 1-2-1 meetings*", details of the process and for how long the warning would last, why the warning had not been given earlier, and why Mr Brown had not raised issues sooner in 1-2-1 meetings [140-141]. Mr Andersen also sent a WhatsApp message to the founder of Rheon, Mr Dan Plant, asking him "*how close I am to getting fired and what has sparked this happening now?*". Having taken advice from Ms Coles [139], Mr Brown responded, largely avoiding answering Mr Andersen's questions (save to clarify, in high-level terms, the disciplinary process) and instead focusing on the future [144].
15. On 18 January 2021, Mr Andersen was introduced to Mr Paul Hodder, an external coach engaged by Rheon to work with him [149]. Mr Andersen and Mr Hodder had 3 coaching sessions, following which on 25 February 2021 Mr Andersen emailed Ms Coles and Mr Brown with some agreed objectives [162-163]. These objectives were incorporated by Ms Coles, with other comments and actions, into a Performance Improvement Plan issued to Mr Andersen on 12 March 2021 [175-176], though Mr Andersen never countersigned this Plan.
16. On the afternoon of Friday 5 March 2021 an incident took place on a company Zoom meeting. Mr Andersen was observed to be drinking beer on the call and was challenged by Mr Brown. There was competing evidence as to how Mr Andersen responded, but I find Mr Brown's evidence that Mr Andersen responded along the lines of "*deal with it*" to be a reliable account, consistent with his contemporaneous note at [168]. For the same reasons, I also accept Mr Brown's evidence that Mr Andersen demonstrated further inappropriate behaviour in the meeting, specifically not contributing on matters he would be expected to contribute on, being cynical with laughter and, ultimately, turning off his camera.
17. Mr Andersen was subsequently invited to a disciplinary meeting on 25 March 2021 and thereafter, on 30 March 2021, was issued with a final written warning [185]. A main purpose of the meeting was to address the incident of 5 March 2021, but Mr Andersen was also warned for "*using company assets (workshop) for personal use without permission*" and "*repeated poor housekeeping in the workshop resulting in complaints from*

peers". Mr Andersen was not told of a right to appeal, and did not raise concerns about the sanction with Mr Brown, Ms Coles or any other manager at Rheon.

18. Also on 30 March 2021, Mr Brown confirmed to Mr Andersen that he was to act as mentor/buddy to a University student on an industry placement, Mr Shafae Ali. Mr Andersen was provided with emails regarding the role [186-187], [192]. Mr Ali joined Rheon on 6 April 2021.
19. Around 7 September 2021, Mr Brown received feedback from two colleagues expressing concern voiced to them by Mr Ali about Mr Andersen's feedback to him about his internship performance. The reported nature of this feedback was at odds with the general view within Rheon that Mr Ali had made a success of his internship. Mr Brown raised these issues with Ms Coles [206].
20. On 9 September 2021, Ms Coles conducted a Zoom discussion with Mr Ali to investigate, the notes of which are at [207-208]. In short, Mr Ali noted some positive elements to his relationship with Mr Andersen but "*multiple occurrences throughout where it was quite disappointing and a lack of care on his behalf*", and provided specific examples. On the same day, Ms Coles also interviewed another Rheon colleague, Leah Pattison, who reported on Mr Andersen's behaviour as "*rude and negative*", and that she had been left on one occasion "*feeling unsupported*" [209].
21. On 16 September 2021, Ms Coles handed Mr Andersen a letter giving him notice of suspension and an invitation to a disciplinary hearing [211-214]. The letter detailed the allegations made against Mr Andersen and included copies of the notes of Ms Coles' discussions with Mr Ali and Ms Pattison. The letter also noted that Mr Andersen was the subject of a final written warning issued less than six months earlier, offered Mr Andersen the opportunity to be accompanied by a colleague or a trade union representative, and noted that a possible outcome of the process may be dismissal with notice. The letter also explained why Rheon had decided to suspend Mr Andersen pending the outcome of the disciplinary process. On the following day, in response to a query from Mr Andersen, Ms Coles provided him with a copy of the Staff Handbook, including the Disciplinary Policy that had been first provided to employees in April 2021.
22. The disciplinary hearing took place on 22 September 2021, chaired by Mr Brown. Mr Andersen was accompanied by a colleague. The notes of the meeting are at [223-232]. It is plain from the notes that Mr Andersen was given ample opportunity to put forward his version of events. In particular, regarding certain of the remarks reported by Mr Ali and Ms Pattison, Mr Andersen did not deny that they were made, but sought to explain them as mean as sarcasm / a joke. He also argued that he had not been sufficiently briefed on the role of a mentor.
23. Following the meeting, Mr Brown conducted further investigation to test an assertion made by Mr Andersen that he "*had sent emails saying Shafae had done good work*". Mr Brown identified only 3 emails that Mr Andersen had sent that included positive comments on Mr Ali's work over the six-month

internship [233].

24. By letter dated 1 October 2021 [236-240], Mr Brown provided Mr Andersen with the outcome of the disciplinary process. Mr Brown found that Mr Andersen's behaviour towards Mr Ali and Ms Pattison was inappropriate and fell well below the standards of conduct expected from him, especially in circumstances where Rheon had implemented various steps through mentoring and the Performance Improvement Plan to help Mr Andersen understand his behaviour and what is required of him. He expressly considered a sanction short of dismissal, but taking account of the history and the impact of the behaviour on the individuals concerned and on Rheon generally, decided that dismissal with notice was the appropriate sanction.
25. The dismissal letter offered Mr Andersen a right of appeal, but Mr Andersen decided not to take up that opportunity [241]. Accordingly, Mr Andersen's employment terminated on 26 November 2021.

Relevant law

Unfair dismissal

26. Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by their employer. It is not in dispute that Mr Andersen was a qualifying employee and was dismissed by Rheon.
27. Section 98 ERA deals with the fairness of dismissals. There are two stages within this section.
 - 27.1 First, the employer must show that it had a potentially fair reason for the dismissal, *i.e.* one of the reasons listed in section 98(2) or "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*" (section 98(1)(b)). Conduct is one of the potentially fair reasons, and is the reason relied upon by Rheon here.
 - 27.2 Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider whether the employer acted fairly or unfairly in dismissing for that reason. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case. The burden of proof at this stage is neutral.
28. It was common ground that, in cases relating to conduct (as this case is), the Tribunal should apply the test set out in *British Home Stores Ltd v Burchell* [1978] IRLR 379. In summary, the employer must demonstrate that:
 - 28.1 it genuinely believed that the employee was guilty of misconduct;

- 28.2 it had reasonable grounds for that belief; and
- 28.3 it had carried out an investigation into the matter that was reasonable in the circumstances of the case.
29. It is not for the Tribunal to substitute its own view of what it would have done in the position of the employer, but to determine whether what occurred fell within the range of reasonable responses of a reasonable employer, both in relation to the substantive decision and the procedure followed (*Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439; *J Sainsbury plc v Hitt* [2003] IRLR 23).
30. There is a dispute in this case over whether or not prior warnings given to Mr Andersen should have been relied upon by Rheon. The leading case on this issue is the decision of the Court of Appeal in *Davies v Sandwell Metropolitan Borough Council* [2013] IRLR 374, in which Mummery LJ held that it was legitimate for an employer to rely on a final warning, provided that it was issued in good faith, that there were at least *prima facie* grounds for imposing it and that it was not manifestly inappropriate to issue it. He further explained that, in answering the question of whether a dismissal was fair, it was not the function of the employment tribunal to reopen the final warning and rule on an issue raised by the claimant as to whether it was a legally valid warning or a nullity. The function of the tribunal was to apply the objective statutory test of reasonableness to determine whether the final warning was a circumstance which a reasonable employer could reasonably take into account in the decision to dismiss the claimant for subsequent misconduct.
31. Ms Ibbotson also directed me to the decision of the Employment Appeal Tribunal in *Wincanton Group plc v Stone* [2013] ICR D6 (which pre-dates the Court of Appeal decision in *Davies* but does refer to the EAT decision in that case which the Court of Appeal upheld), in which the then-President of the EAT, Langstaff J, summarised the general principles to be applied by the tribunal in respect of earlier warnings when determining the fairness of a dismissal:
- 31.1 The tribunal should take into account earlier warnings issued in good faith and with *prima facie* grounds for making it, but if the tribunal considers that a warning was issued in bad faith or without *prima facie* grounds, it will not be valid and cannot be relied upon by the employer;
- 31.2 The tribunal should take account of any proceedings, such as internal appeals, that may affect the validity of the warning, and give them such weight as it considers appropriate;
- 31.3 The tribunal may not go behind a valid warning to hold that it should not have been issued or that a lesser category of warning would have been appropriate;
- 31.4 The tribunal will not be going behind the warning where it takes into account the factual circumstances giving rise to it. There may be a considerable difference between the circumstances giving rise to the first warning and those considered later. Just as a degree of similarity

will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way;

31.5 The tribunal may also take account of the employer's treatment of similar matters relating to other employees, since this may show that an employer has subsequently been more or less lenient in similar circumstances; and

31.6 The tribunal must remember that a final written warning always implies, subject only to any contractual terms to the contrary, that any subsequent misconduct of whatever nature will usually be met with dismissal, and only exceptionally will dismissal not occur.

Conclusions

Unfair dismissal

Issue 1: Was there a "potentially fair" reason for the dismissal?

32. Rheon relied upon conduct as the potentially fair reason for the dismissal.
33. In the ET1, Mr Andersen argued that the dismissal "*was influenced by [Rheon's] desire to categorise [Mr Andersen] as a 'bad leaver' within the terms of the share option scheme, thereby removing his accumulated benefit under that scheme*". This was put to Mr Brown in cross-examination, and he categorically denied that this had any influence on the decision, which was the result of Mr Andersen's pattern of behaviour. I accept that evidence. I also note that no mention of this alleged influence is made in Ms Jones' closing submissions (the 'bad leaver' status being identified merely as a detrimental effect of the dismissal).
34. No other plausible reason for the dismissal, other than conduct, arises from the evidence. Accordingly, I find that there was a potentially fair reason for the dismissal: conduct.

Issue 2: Did the Respondent hold a genuine belief, on reasonable grounds, and following a reasonable investigation, that the Claimant was guilty of the alleged misconduct?

35. The conduct for which Mr Andersen was dismissed was inappropriate behaviour towards Mr Ali and Ms Pattison falling below the standards of conduct expected of him.
36. I find that Mr Brown had a genuine belief, on reasonable grounds, that Mr Andersen was guilty of the alleged misconduct, for the following reasons:
- 36.1 Mr Brown had, himself, received feedback from two colleagues expressing concern voiced to them by Mr Ali about Mr Andersen's feedback to him about his internship performance.
- 36.2 Mr Brown was provided with notes of discussions conducted by Ms Coles with Mr Ali and Ms Pattison, and there was no reason to disbelieve their accounts – indeed, Mr Andersen accepted (but sought to explain

away) much of the conduct they had complained of.

36.3 Mr Andersen was made aware of the expectations of him as a mentor/buddy to Mr Ali at the outset of the internship.

36.4 Whilst Ms Jones focused in her closing submissions on the concerns raised by Mr Ali regarding his Professional Development Review, and the involvement of Mr Brown in the preparation of that document, this was only part of the conduct complained of and does not detract from the other aspects of lack of support / misguided sarcasm.

37. I also find that this belief was held following a reasonable investigation:

37.1 Once concerns had been raised by others, Ms Coles interviewed Mr Ali to get his version of events.

37.2 Ms Coles also interviewed Ms Pattison regarding her complaints regarding Mr Andersen.

37.3 Mr Andersen was afforded the opportunity to put forward his version of events in the disciplinary hearing, having had sight of the notes of Ms Coles' discussions with Mr Ali and Ms Pattison.

37.4 Mr Brown extended the investigation, by checking Mr Andersen's emails, following the disciplinary hearing before making his decision.

Issue 3: Was the decision to dismiss within the range of reasonable responses open to the Respondent?

38. In considering this issue, I must consider whether or not it is appropriate to take into account the prior warnings on Mr Andersen's record. I am satisfied on the evidence that the warnings given in January and March 2021 were given in good faith and with *prima facie* grounds for them being given:

38.1 Mr Andersen's behavioural weaknesses had already been flagged as part of the normal appraisal process in mid-2020, but had not improved by January 2021 (as *prima facie* evidenced by the email exchange with Ms Kravchenko), leading to a first warning.

38.2 Rheon demonstrated good faith by engaging an external coach to work with Mr Andersen to seek to address his behavioural issues.

38.3 Mr Andersen's behaviour in the meeting of 5 March 2021 was *prima facie* inappropriate, and led to the second and final warning. Whilst Ms Jones directed criticism in her closing submissions at lack of clarity in the alcohol policy at Rheon, Mr Andersen's warning related also to his interactions in that meeting (the "just deal with it" comment to Mr Brown and his failure to contribute).

39. In those circumstances, the warnings were valid ones that I cannot go behind. Moreover, they are concerned with similar factual circumstances to the conduct relied upon for dismissal (relating to Mr Andersen's behaviour at work) and are therefore of clear relevance.

40. Accordingly, I find that Mr Brown was justified in taking account of the prior warnings (and the conduct that led to those warnings) in making his decision in the disciplinary process.
41. I note the point made in *Wincanton* that a final written warning always implies, subject only to any contractual terms to the contrary, that any subsequent misconduct of whatever nature will usually be met with dismissal, and only exceptionally will dismissal not occur. Mr Andersen was on a valid final written warning and, as I have found under issue 2, Mr Brown had a genuine belief on reasonable grounds following a reasonable investigation that he was guilty of further misconduct. In those circumstances, I consider that dismissal was plainly within the range of reasonable responses available to Rheon notwithstanding that (as Mr Brown and Ms Coles both accepted in evidence) the incidents with Mr Ali and Ms Pattison would not, in themselves, justify dismissal. As Mr Brown explained in oral evidence, he was not looking at an isolated incident but at a pattern of behaviour.

Issue 4: Did the Respondent adopt a fair procedure?

42. The criticisms of the procedure raised by Ms Jones in her closing arguments can be summarised as follows:
- 42.1 Failure to particularise the conduct leading to the first written warning;
- 42.2 Mr Brown's involvement as complainant and disciplining officer as regards the final written warning;
- 42.3 Failure to conduct investigation meetings with other participants in the 5 March 2021 meeting before issuing the final written warning;
- 42.4 Failing to inform Mr Andersen of his right of appeal against the written warnings;
- 42.5 No finalised disciplinary process in place at the time of dismissal;
- 42.6 Failing to inform Mr Andersen of the effects the warnings had on his employment.
43. The first three points relate to procedural issues that could arguably undermine the issuing of the earlier warnings. However, as I have concluded that those warnings were issued in good faith and there were *prima facie* grounds for making them, I cannot go behind those warnings and examine any potential procedural flaws in them being issued.
44. The fourth point could, in principle, be relevant to internal processes affecting the validity of the warnings. Mr Andersen should have been told of his right to appeal and these are therefore procedural flaws. However, their significance is lessened by the fact that, when Mr Andersen was dismissed and was afforded an opportunity to appeal, he decided not to take it. In addition, there is no evidence to indicate that Mr Andersen raised any issues internally (for example with Mr Plant, as he had done so following his first

warning) expressing concerns about his final written warning.

45. The fifth point is factually incorrect – the disciplinary process was in place at the time of Mr Andersen’s suspension and dismissal, and was sent to him before the disciplinary hearing [216].
46. I do not consider the sixth point to be well-founded. Mr Andersen had been informed of the four-step disciplinary process, so must have been aware that the next step after a second written warning was dismissal [144]. The second written warning was expressed to be a “*final written warning*” [185], so the consequences of further misconduct must have been evident. Even before that, after his first written warning, Mr Andersen had raised concerns about the potential for ultimate dismissal with Mr Plant [140].
47. Standing back and looking at the procedure as a whole, and taking account of the size and administrative resources of Rheon, I am satisfied it was overall a fair one. The trajectory was clear: Mr Andersen’s behaviour had been challenged by mid-2020 and, when it did not improve (despite the efforts of Rheon to assist Mr Andersen to develop his soft skills) it resulted in an escalation through the typical steps of a disciplinary process. The procedure was not perfect, but I am satisfied that the limited flaws I have identified did not render the process unfair on Mr Andersen.

Overall conclusion

48. In view of the above findings, I conclude that the claim for unfair dismissal is not well-founded and is dismissed.

Employment Judge Abbott

Date: 4 December 2022