EMPLOYMENT TRIBUNALS

Claimant: **Ms Yuliia Khimicheva**

Respondent: **Key Promotions (UK) Ltd**

Heard at: **Ashford (remote hearing by CVP)**

On: **21 and 22 January 2020 and 27 January in chambers**

Before: **Employment Judge Street**
Ms A Williams
Mr J Matharu

Representation
Claimant: in person
Respondent: Mr Stuart Sells, Company Director

RESERVED JUDGMENT

In the judgment of the Tribunal, the claimant, Ms Khimicheva, was unfairly dismissed and subject to discrimination contrary to the Equality Act 2010 by the respondent, Key Promotions (UK) Ltd because of her pregnancy.

REASONS

1. **Evidence**

1.1. The Tribunal heard from the claimant Ms Khimicheva and from Mrs Edwards, Personnel Manager.

1.2. The Tribunal read the documents provided.

2. Issues

2.1. The claimant claims automatically unfair dismissal and discrimination because of pregnancy.
2.2. The issues before the Tribunal to decide were identified in the Order of 27 April 2020 as follows:

> (1). Does the claimant prove that the reason or principal reason for her dismissal on 26 July 2019 with effect from the 2 August 2019 related to her pregnancy, notified to the respondent on 16 July 2019?
> (2). Alternatively, does the claimant prove facts from which the tribunal could reasonably conclude that the claimant's dismissal was materially influenced by her pregnancy or the illness suffered by her because of it?
> (3).If yes, does the respondent prove that the reason for her dismissal had nothing to do with her pregnancy, but because she had failed her probationary period following poor performance unrelated to her pregnancy?

2.3. It was recorded in that telephone hearing on 27 April 2020 that the claimant agreed that she told the respondent of her pregnancy on 16 July, but in her evidence her case was that she first told the respondent of her pregnancy on around 9 July. That is not agreed.
2.4. The respondent's case is that the reason for her dismissal was because she failed her probationary period, in particular after its extension on the 23 of May 2019 and after warnings about her performance. The dismissal was for reasons preceding and unconnected with her pregnancy.

3. Findings of Fact

3.1. The claimant was employed by the respondent from 13 March 2019 as a magazine finisher.
3.2. The respondent is a company that packs books and magazines.
3.3. Mrs Edwards is responsible for recruitment, induction, training, attendance and management of all staff.
3.4. All new staff are subject to a probationary period of 12 weeks.
3.5. This is what the Employee Handbook says about that.

> "An initial informal review will take place after 6 weeks with your line manager, with a formal review after 12 weeks. Your appointment will be confirmed on satisfactory completion of the 12 week period. During this probationary period, you will be given appropriate support and development opportunity to help you reach the required standards.

> Extension of the probationary period may be granted to enable the required standards to be achieved but failure to do so could result in termination of your employment." (Employee Handbook, page 6).

3.6. The records produced are the annotations on the Training Performance Review Sheets and a Communications Record. There is no separate record of any review of the probationary period and the records seen do not show a review after 6 or 12 weeks. There is no record of any decision to extend the probationary period or of it being notified in writing to Ms Khimicheva.

3.7. Ms Khimicheva's probationary period, if not extended, ran from 13 March 2019 to 5 June 2019. (Ms Khimicheva's understanding was that it ran to 12 June 2019).

3.8. The contract sets out the following in relation to the termination of employment.

> "After successful complete of your probationary period, the prior written notice required for you or the company to terminate your employment shall be in the notice set out below:
>
> | Length of Service | Notice Period |
> |---|---|
> | Under 12 weeks of service | Nil |
> | 12 weeks of service but less than 2 years | 1 week…." |

The Training Performance Review Sheets

3.9. Ms Khimicheva had weekly reviews of her performance carried out by Mrs Edwards.

3.10. In week ending 10 May 2019, the Training Performance Review Sheet is annotated,

> "Julie tries hard to achieve. Attendance very good"

3.11. The comments on the Training Performance Review Sheet include that her figures were below standard in week ending 24 May 2019

3.12. On the Communications Record for Ms Khimicheva, Mrs Edwards noted, on 23 May 2019, (scan 4252)

> "Performance does need to improve…….Still within probationary period"

3.13. The only later note on the Communications Record is dated 26 July 2019.

3.14. In week ending 31 May 2019, the comment on the Training Performance Review Sheet is,

> ""Have explained to Julie her figures are too low and we need to see some improvement.

Documented on Communications sheet" (scan 4256)

3.15. There is no new entry on the Communications Record but against the reference to that Record on the Training Performance Review Sheet, the date 23//05 is added, cross referencing to the note referred to of 23 May.

3.16. In week ending 21/06/19, the comment on the Training Performance Review Sheet is,

> "Julie's figures have dropped compared to figures in 12 week period". (scan 4259)

3.17. Ms Khimicheva was absent from work through sickness for the first time on 25 June 2019, save for leaving work partway through the working day on 1 May 2019.

3.18. In week ending 28 June 2019, Ms Khimicheva had two days off sick.

3.19. In week ending 5 July 2019, the comment is "need to see improvements".

3.20. In week ending 12 July 2019, the comment is "still unacceptable." Lower on the same Training Performance Review Sheet a couple of lines below Ms Edward's signature is one word with a large asterisk - ,

> "finish"

3.21. Mrs Edwards says that that is when she made the decision to terminate employment. It is in that week that Ms Khimicheva says she told Mrs Edwards of her pregnancy.

3.22. In week ending 19 July 2019, the note on the Training Performance Review Sheet is

> "16th Julie has said she is pregnant. Risk assessment done. Copy to her file. Went home 16th worked two hours."

3.23. In that week, Ms Khimicheva was off work through sickness on 15 July and for the balance of the week after going home during the working day on 16 July 2019.

3.24. The risk assessment of 16 July 2019 carried out by Mrs Edwards acknowledges the pregnancy and dealt with safety, lifting and the provision of a chair if needed. It is said to be a short version and that there was a fuller version prepared the same day. It says,

> "I have explained that it is also as much her responsibility to make sure her working area is kept clear for her…..
> I have said to ask for help when needed, she has a chair which is available on request. I have informed all supervisors and strappers that she may need help and to offer this when asked. Lifting of Boxes etc"

3.25. Mrs Edwards says that having decided to dismiss Ms Khimicheva, she spoke to Mr Sells on 18 July 2019 and asked his view "given that we had now received notification of pregnancy". She reports that he told her that,

> "If I had made the decision to terminate before this then there is no reason to change that decision and it should stand."

3.26. In week ending 26/07/19, Ms Khimicheva had two days off sick, 24 to 25 July.

3.27. On 26 July, Mrs Edwards spoke to Ms Khimicheva and told her she was being dismissed. She says she first told her on 22 July.

3.28. The comment on the Training Performance Review Sheet is,

> "Julie's attendance over recent weeks a concern.
> Need to monitor. Have spoken to her and said the reasons why this extension is not working issued letter" (scan 4264)

3.29. On 26 July 2019, Mrs Edwards recorded on the Communications Record the following,

> "Spoke to Julie regarding her Performance and production and have looked at this and feel the job is not suitable for her or suitable for the company. Have give her one week notice of which she wants to work so will finish 2 August."

3.30. By a letter dated 26 July 2019, Mrs Edwards wrote to Ms Khimicheva as follows,

> "Dear Y Khimicheva Payroll Number 2575
>
> Following our discussion regarding your Production and Attendance of late. Before you reached your 12 week Probationary Period I spoke to you on 23rd May -19 As your production was lower than it should be after such time your attendance started to fall behind as a result being very busy with work and your continued absence I have decided this job is not Working for you or for the Company so as of today 26th July – 19 I will give you one Weeks notice to work of which Friday 2nd August will be your last working day any money owed to you along with any holiday pay if owed will be paid to you on the next pay period 23rd August 019 your P45 will be posted to you to the address we have on file. Please do not hesitate to speak to me if you have any questions."

Absences

3.31. The following are the self-certified absences, also recorded on the Training Performance Review Sheets:

- 25 June 2019
- 28 June 2019
- 15 July 2019
- 16 July (part) to 19 July 2019 inclusive
- 24 and 25 July 2019

3.32. That is in addition to the day when Ms Khimicheva went home sick for part of the day, 1 May 2019, the only earlier sickness absence.

4. **Law**

4.1. The Claimant claims automatically unfair dismissal and pregnancy discrimination.
4.2. Section 86 of the Employment Rights Act 1996 ("the ERA 1996") sets out minimum periods of notice. After employment for one month or more, the minimum period is at least one week.
4.3. ACAS publishes both a Code and Guidance on handling disciplinary matters in the workplace. They include guidance handling performance issues and absences fairly.

Unfair dismissal

4.4. By Section 99(1) of the Employment Rights Act 1996 ("the ERA 1996"),

> "An employee who is dismissed shall be regarded …. as unfairly dismissed if –
>
> (a) the reason or principal reason for the dismissal is of a prescribed kind, or
> (b) the dismissal takes place in prescribed circumstances.

4.5. Such a dismissal is regarded as automatically unfair.
4.6. By section 99(3)(a), for the purposes of section 99, a prescribed reason or set of circumstances includes those related to pregnancy.
4.7. By regulation 20 of the Maternity and Parental Leave etc Regulations 1999, ("the MPL Regulations)", where the reason or principal for dismissal is one connected with the pregnancy of the employee, an employee will be regarded as unfairly dismissed under section 99 (reg 20(1) and (3)(a)).
4.8. "Connected with her pregnancy" in reg 20(3) is wide and covers pregnancy-related illness.

4.9. For a claim of automatically unfair dismissal for a reason connected with pregnancy under Regulation 20(3)(a) to succeed, the employer must know or believe that the woman is pregnant.

4.10. Once it is found that the reason for dismissal is an inadmissible reason, there is no room for the employer to argue that the dismissal was nonetheless reasonable in all the circumstances and therefore fair.

4.11. Ordinarily a claim for unfair dismissal can only be brought after at least two years continuous service. That does not apply for automatically unfair dismissal because of or related to pregnancy. In such cases, there is no minimum service requirement. The Tribunal has jurisdiction to consider unfair dismissal without any requirement that the employment had lasted at least two years.

4.12. Where the claimant does not have two years' continuous service, the burden of proof is on her to show that the claim falls within the Tribunal's jurisdiction – that is, that the usual rule in respect of two years' service does not apply. So it is for the claimant to prove that the reason or principal reason was the pregnancy or related to the pregnancy (Smith v Hayle Town Council 1978 ICR 996 CA).

4.13. In relation to unsatisfactory performance, the ACAS Code requires a written warning with details of the poor performance and of the change required, including the timescale for it. There should be a warning of the consequences of failing to improve, with usually a final written warning before dismissal. An employee should be given the right to have someone with them at any disciplinary meeting, and to have advance warning of the problem. The employee should be informed of their right of appeal.

4.14. Appendix 4 of the ACAS Guide contains guidance on handling absences. Unexpected absences should be investigated promptly, and the employee asked to explain them. In all cases, the employee should be told what improvement in attendance is expected and warned of the likely consequences if that does not happen.

Pregnancy discrimination

4.15. By section 18(2) of the Equality Act 2010 ("the EA 2010"),

> "A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably –
>
> (a) because of the pregnancy, or
> (b) because of illness suffered by her as a result of it."

4.16. The protected period begins when the pregnancy begins and continues until after the end of the pregnancy (s18(6)).

4.17. No comparator is needed. The test is whether the treatment was unfavourable rather than less favourable.

Burden of proof

4.18. By section 136(2) and (3) of the EA 2010, the test in respect of the burden of proof is set out, including how the burden of proof may pass from the claimant to the respondent:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.'

4.19. That applies to any proceedings relating to a contravention of the EA 2010. It applies in respect of any breach, so the caselaw may refer to different kinds of discrimination and still afford guidance in general on the approach to the burden of proof.

4.20. The provision in relation to the shifting of the burden of proof is explained in the Code of Practice on Employment (2011) ("the Code") prepared by the Equality and Human Rights Commission. That is a statutory Code to which Tribunals must have regard.

4.21. The operation of the change in the burden of proof is set out in the Code at para 15.34:

> "If a claimant has proved facts from which a tribunal ***could conclude*** that there has been an unlawful act, then the burden of proof shifts to the respondent. To successfully defend a claim, the respondent will have to prove, on balance of probability, that they did not act unlawfully. If the respondent's explanation is inadequate or unsatisfactory, the tribunal ***must*** find that the act was unlawful." (emphasis added)

4.22. For the burden of proof to shift, the claimant must show facts sufficient to enable the tribunal to find discrimination –that is, without the explanation referred to. Then it is for the respondent to prove that there was no discrimination.

4.23. Guidelines on the application of the shifting burden of proof were given by the Court of Appeal in the case of Barton v Investec Henderson Crosthwaite Securities Ltd [2003} and those guidelines, as amended in the Igen case (Igen v Wong, 2005 IRLR 258, CA, ("Igen")), remain the basis for applying the law notwithstanding the re-enactment of discrimination legislation in the 2010 Act. It is those guidelines that establish the two-stage test,

> "The first stage requires the complainant to prove facts from which the Employment Tribunal could, apart from the section, conclude in the

> absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld (Peter Gibson LJ, para 17, Igen)

4.24. In the case of Hewage v Grampian Health Board [2012] UKSC 37, the UK Supreme Court approved the application of the Barton/Igen guidelines to cases under the Equality Act 2010. At paragraph 33, Lord Hope, on the burden of proof provisions, says,

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence…"

4.25. That means that the cases decided on this before the EA 2010 apply to the interpretation of section 136.

4.26. In Laing and Manchester City Council and others [2006] IRLR 748, the correct approach in relation to the two stage test is discussed,

> "No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case…. (para 73)
> The focus of the tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race (*or other)* discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a tribunal to say, in effect, 'There is a nice question as to whether the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race'.

4.27. The nub of the question remains why the claimant was treated as he or she was:

> "The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination." (Madarassy v Nomura International plc) 2007 IRLR 246).

4.28. The presence of discrimination is almost always a matter of inference rather than direct proof – even after the change in the burden of proof that is now in section 136, it is still for a claimant to establish matters from which the presence of discrimination could be inferred, before any burden passes to his or her employer.

4.29. In drawing inferences, an uncritical belief in credibility is insufficient' as Sedley LJ pointed out in Anya v University of Oxford 2001 IRLR 377 CA (paragraph 25). It may be very difficult to say whether a witness is telling the truth or not. Where there is a conflict of evidence, reference to the objective facts and documents, to the likely motives of a witness and the overall probabilities can give a court very great assistance in ascertaining the truth.

5. **Reasons**

5.1. The hearing was a remote hearing, conducted by Cloud Video Platform. That was because it was not likely that an in-person hearing could take place within a reasonable period. The parties agreed to a remote hearing and wished to see further delay at this stage avoided, there having been previous postponements.

5.2. The hearing was translated very ably, the interpreter translating into and from Russian for the benefit of the claimant.

5.3. The bundle and witness statements were originally required for an in-person hearing over two days, starting on 20 October 2020. Mr Sells had sent the bundle to the Tribunal Service in June, in accordance with the order that required delivery "no later than" the first day of the hearing. He had complied with the order. His assumption had been that the documents would be kept, and he had not been told otherwise. There was however no trace of the copies of the bundle for the Tribunal with the file or in the storage room for part-heard cases. The usual practice, as reflected in the Order, is for documents to be provided at the start of the hearing, but Mr Sells had not known that.

5.4. There had been no direction for the bundle to be provided electronically when the hearing was converted to a remote hearing by video.

5.5. The claimant had emailed the documents she relied on, the day before the hearing. Mr Sells was invited to email the evidence he relied on during the morning of the first day and he did so. Those were individual scanned pages. Because of a change-over between clerks, some had to be emailed twice. The interpreter was supplied with copies of some documents. Both parties had hard copies.

5.6. On starting the oral evidence in the afternoon, the claimant had difficulty with her internet, to the point that her evidence could not be taken.

5.7. The hearing had been deferred three times, with Orders from three different Judges. The next available hearing date was in July. Both parties expressed a clear preference to proceed with the hearing if fair and practicable.

5.8. No evidence was heard on the first day, but the panel had the opportunity to index and read the documents provided by each party. Oral evidence from both parties was heard on the second day and the judgment reserved.

Claims and Issues

5.9. The claims as noted on the Order of 27 April 2020 are

(1). Automatically unfair dismissal for a reason related to pregnancy, contrary to section 99 of the Employment Rights Act 1996;

(2). Unfavourable treatment in relation to her dismissal because of her pregnancy, or because of the illness suffered by her because of it, contrary to sections 18 and 39 (2) (c) of the Equality Act 2010

5.10. The issues arising from those claims, the points for the Tribunal to decide are these, again as set out in the Order of 27 April 2020:

(1). Does the claimant prove that the reason or principal reason for her dismissal on 26 July 2019 with effect from the 2 August 2019 related to her pregnancy, notified to the respondent on 16 July 2019?
(2). Alternatively, does the claimant prove facts from which the tribunal could reasonably conclude that the claimant's dismissal was materially influenced by her pregnancy or the illness suffered by her because of it?
(3).If yes, does the respondent prove that the reason for her dismissal had nothing to do with her pregnancy, but because she had failed her probationary period following poor performance unrelated to her pregnancy?

5.11. It was recorded in that telephone hearing on 27 April 2020 that the claimant agreed that she told the respondent of her pregnancy on 16 July, but in her evidence her case was that she first told the respondent of her pregnancy on around 9 July. That is not agreed.

5.12. The respondent's case is that the reason for her dismissal was because she failed her probationary period, in particular after its extension on the 23 of May 2019 and after warnings about her performance. The dismissal was for reasons preceding and unconnected with her pregnancy.

Discussion

5.13. There are a number of key points of difference between the claimant's account and that of the respondent's witness, Mrs Edwards:

- Was the probationary period extended?

- When did Ms Khimicheva first notify her pregnancy, on 9 July 2019 or 16 July 2019?
- When was Ms Khimicheva dismissed – was that on 22 July 2019 or 26 July 2019?

5.14. Throughout the respondent's records are inadequate. They do not support the account Mrs Edwards gave.

5.15. The claimant's evidence has not been wholly reliable. She was not, for example, forced to work weekends as she set out in her claim form – that didn't happen, although she explained that she was threatened with weekend working as a way to make up her poor performance. Her claim form sets out that unmet performance targets were raised with her only after she disclosed her pregnancy, but she herself signed the note on 23 May 2019 in the Communications Record setting out that her performance needed to improve.

The probationary period

5.16. The respondent produces two records, the Communication Record and the Training Performance Review Sheet. That sheet is not shared with the employee. It is an internal document. Only the Communication Record is shared with the employee.

5.17. The contract says that the probationary period will be subject to first an informal review after 6 weeks and then a formal review after 12 weeks.

5.18. A review requires discussion with the employee. There was no such discussion on those dates. There is no record of such a discussion and Mrs Edwards does not say that reviews took place in accordance with the policy. She relies on the weekly training performance reviews.

5.19. Mrs Edwards may have reviewed the probationary period in her own mind but nothing shows a review being conducted with Ms Khimicheva.

5.20. A probationary period comes to an end at the end of the period. It does not continue automatically until review. If there is no review, and the employment continues, the employee has ceased to be on probation. That is the normal and natural basis on which probationary periods are applied.

5.21. Mrs Edwards regarded the probationary period as continuing unless brought to an end. Mrs Edwards believed that the probationary period for Ms Khimicheva never came to an end.

> "When did the probationary period end?"
> "It didn't"
> "When would it have ended, given her start date?"
> "It would have depended on her performance – ideally 12 weeks" (oral evidence).

5.22. She described her normal practice,

"We would look at the 12 week period and then if a person is not quite performing with their achievements we would extend beyond if they are showing improvements."

"I would speak to people over a period of weeks to see how they are developing. If improving. I don't necessarily tell them I am extending, but we just follow on hopefully that they will be able to meet the targets."

"There would be no time factor as to how long the probationary period would be extended because we would look at it on a day-to-day basis" (oral evidence).

5.23. That does not reflect the terms and conditions. The end of a probationary period has significance for the employee, in terms of their status, in terms of the support they are given and can expect and, according to this contract, in terms of the notice they are entitled to.

5.24. This contract indicates that the employee is not entitled to notice during her probationary period. By statute, employees are always entitled to at least one week's notice after the first month; but in any event, Ms Khimicheva was entitled and needed to know when she had completed her probationary period.

5.25. It is unreasonable to purport to extend the probationary period without discussion with or notice to the employee. There has to be a formal review and the employee has to be told whether they have passed the probationary period or whether it has been extended – or whether they are at risk of dismissal.

5.26. If performance is so bad that dismissal is likely, then it is fair and reasonable to give written warning of that in express terms, so, for example, explaining and recording that there is a risk of dismissal if improvement is not made within a clear time-frame, perhaps a couple of weeks or as appropriate to the role. That is what the ACAS Guidance requires.

5.27. Even if this employer did not see the need for the employee to know, it is an essential that when any such decision is made, it is properly documented.

5.28. If there was a decision here to extend the probationary period, there is no record of it. The Training Performance Review Sheet only shows that as at 23 May 2019, Ms Khimicheva was still on her probationary period. It was due to end on 5 June 2019. The Communications Record does not show a decision to extend the probationary period. It only shows concern about performance.

5.29. There was no letter to Ms Khimicheva notifying her of the extension of the probationary period, as would be expected. There was no letter warning of failures of performance.

5.30. Ms Khimicheva says she was unaware of the probationary period being extended. That is consistent with the silence in the records. It is also consistent with Mrs Edwards account of her own practice, not considering notice to the employee to be necessary.

5.31. We accept that Ms Khimicheva had verbal warnings that her performance needed to improve but she was not told that the probationary period was being extended.
5.32. She was not warned that failure to improve might lead to dismissal.

Notification of pregnancy

5.33. Ms Khimicheva is clear that she told Mrs Edwards of her pregnancy around 9 July 2019 and gives a detailed account of that discussion, that she went through the line manager and as to Mrs Edwards' reaction, reported as, "I'm too busy for this".
5.34. Mrs Edwards denies that there was any discussion of pregnancy until 16 June 2019.
5.35. It is Mrs Edwards' case that she decided to dismiss Ms Khimicheva on 12 July 2019 on performance grounds, unaware of the pregnancy.
5.36. We have to weigh Ms Khimicheva's detailed account of an earlier discussion against Mrs Edwards' denial,

> "No. I had no line manager come to me to ask for a meeting for any staff member on that day."

5.37. The summary risk assessment we have seen reports that Mrs Edwards has already told the line manager and other staff of the pregnancy. That might suggest that she had had time to do so before the preparation of the risk assessment with the employee. We have however not seen either her notes, made at that meeting, or what is described as a fuller risk assessment.
5.38. We find on balance Ms Khimicheva's account more credible, given that it is consistently given, with supportive detail.
5.39. If Ms Khimicheva's account is right, Mrs Edwards knew of the pregnancy before the date that she says she decided to dismiss. That would point to the pregnancy being a factor in her thinking.
5.40. We do not however rely simply on that earlier discussion, while accepting that it probably took place. That is because Ms Khimicheva was not dismissed on 12 July 2019 but on 26 July 2019, by which time there is no doubt that Mrs Edwards knew of the pregnancy.

The Risk Assessment

5.41. We have not seen the full risk assessment we are told exists and was in the original bundle. We are concerned about the content of the summary one we have seen. The only positive step taken is to provide a chair and to allow Ms Khimicheva to use it. Any other support Ms Khimicheva is told to ask for. That is seriously inadequate.
5.42. With a pregnant employee, we would expect discussion of the need for breaks including additional toilet breaks. The employee may well feel sick and

need guidance on what to do if that happens. Support should be provided rather than left to the individual to request.

5.43. Ms Khimicheva gives an account of asking for help the following week from a strapper, who told her he had not been told of her pregnancy. It is hard for someone to ask for help when that means interrupting someone else's workflow. Options need to be explored. For example, an express arrangement to pair a pregnant worker with someone who has a responsibility to help and who will not be penalised for loss of production would be reasonable.

When was notice of dismissal first given?

5.44. Ms Khimicheva tells us she was told that she was being dismissed on 26 July for the first time and received the letter of dismissal only in the course of the following week.

5.45. Mrs Edwards tells us that she consulted Mr Sells about the proposed dismissal on 18 July 2019. That is consistent with a decision to dismiss taken on 12 July 2019. She says this in her witness statement,

> "On Thursday 18th July 2019 I spoke to Stuart Sells (Director) and asked his view based upon the fact that we had now received notification of pregnancy. He said that if I had made the decision to terminate before this then there is no reason to change that decision and it should stand."

5.46. Mrs Edwards tells us that she told Ms Khimicheva that she was being dismissed on 22 July 2019 and that there was a further discussion on 26 July 2019 when she wrote the letter of dismissal.

5.47. It is hard to see why if Mrs Edwards dismissed Ms Khimicheva verbally on 22 July 2019, there is no record of it, and the notice period ran from 26 July 2019.

5.48. In her oral evidence, Mrs Edwards gave the date as 26 July 2019 more than once,

> "So when did you tell her you were going to dismiss her?"
>
> "On 26 July".

5.49. That is the date that she documented in the Communications Record and she told us she took into account absences up to the 26 July 2019.

5.50. We find that Ms Khimicheva was dismissed on 26 July 2019.

The dismissal letter

5.51. The dismissal letter is inadequate. It is discourteous to dismiss someone with whom you have had recent and quite personal conversations addressing them as "Dear Y Khimicheva". As a pregnant woman under dismissal, Ms

Khimicheva is entitled to a statement of reasons for dismissal and the reasons are mentioned only briefly and in the most general terms.

5.52. The letter gives performances and absences as the reasons for dismissal, absences being referred to as “continued”.

Does the claimant prove that the reason or principal reason for her dismissal on 26th July 2019 with effect from the 2nd August 2019 related to her pregnancy, notified to the respondent on 16th July 2019?

5.53. Coming to the issues before the Tribunal, it is common ground that the claimant notified the pregnancy on 16 July 2019, whether for the first time or not – we find it was probably the second notification.

5.54. It is common ground that Mrs Edwards dismissed her on 26 July 2019, whether that was the first dismissal or not – we have found that it was.

5.55. The dismissal letter relies on performance and absences as the reason for her dismissal.

5.56. It is common ground that the only absences other than holiday arose from 25 June 2019, during the period of the disclosed pregnancy, save for the earlier part day on 1 May 2019.

5.57. On the face of it, Ms Khimicheva was dismissed at least in part because of the absences caused by the pregnancy related illness.

5.58. What then was the principal reason for the dismissal her performance or absences?

5.59. Mrs Edwards tells us that the principal reason for dismissal was Ms Khimicheva’s performance.

5.60. We accept that Ms Khimicheva’s performance was poor.

5.61. The last note to that effect is 12 July 2019. On that date, Mrs Edwards wrote “*finish” on the Training Performance Review Sheet.

5.62. She tells us that was when she decided on dismissal. It was another 10 to 14 days before she communicated that to Ms Khimicheva

5.63. Asked why she did not dismiss earlier, in that case, Mrs Edwards said

> “We would continue to extend someone’s probationary period if we saw improvements and I did see improvements from Julie”

5.64. The Training Performance Review Sheets do not document any improvement. That reply does not seem to reflect the facts of the case.

5.65. If performance is relied on, we would expect to see clear warning and a meeting in which the employee is told that her performance is so poor that dismissal is now likely.

5.66. Mrs Edwards did not discuss performance with Ms Khimicheva after 23 May 2019 – as shown on the Communications Record.

5.67. The records kept do not show that she was warned that continued poor performance was likely to lead to dismissal.

5.68. It may be that Mrs Edwards decided to dismiss on 12 July 2019, albeit that the only record of that is the word “finish”. It may be that at that point, her

concern was the performance, not the absences. There had been only two recent absences. Or it may be that the dismissal reflected concern about continued poor performance coupled with the pregnancy.

5.69. What changed between 12 July 2019 and the dismissal on 26 July 2019 were the increased days of absence, all but two hours in the week beginning 15 July 2019 and two days out of four in the following week.

5.70. Mrs Edwards was asked about the absences referred to in the dismissal letter,

> "Which absences are you relying on?"
> "It would have been the week leading up to 26 July."

5.71. The prompt for the dismissal on 26 July was those more recent absences.

5.72. That is supported by reading the dismissal letter itself. Performance is referred to on the basis that Ms Khimicheva had failed to achieve the expected level of productivity by 23 May 2019. It was when her attendance fell behind that Mrs Edwards dismissed her.

5.73. We accept that performance played a part in the dismissal. We do not accept that performance was the principal reason. The principal reason was Ms Khimicheva's absences.

5.74. That is consistent with the record kept and the answers given.

Did the absences relate to the pregnancy?

5.75. When Ms Khimicheva reported her pregnancy, she said she was about three weeks pregnant. The relevant absences started on 25 June. These are recent absences and an early stage pregnancy.

5.76. Mrs Edwards denied that she made any connection between the absences and the pregnancy.

5.77. We do not accept that. The connection is obvious. This is far from the first pregnancy the respondent has dealt with, on their own evidence. The dates alone make the connection. If Ms Khimicheva herself did not make the connection expressly, the right and obvious course would have been for Mrs Edwards to ask.

5.78. We cannot accept Mrs Edwards' assertion that she did not relate the pregnancies and the absences. That simply makes no sense in the circumstances.

5.79. The absences were the principal reason for the dismissal and they were related to the pregnancy.

5.80. The dismissal was automatically unfair.

5.81. Had we been considering the dismissal on the basis of the usual unfair dismissal provisions, we would also have looked at the fairness of the

5.82. procedure here. This was not a fair procedure. It falls far short of the guidance in the ACAS Code and Guidance.

(2). Alternatively, does the claimant prove facts from which the tribunal could reasonably conclude that the claimant's dismissal was materially influenced by her pregnancy or the illness suffered by her because of it?

5.83. We do conclude that the claimant's dismissal was materially influenced by the illness suffered by the claimant because of her pregnancy.

5.84. In her witness statement, Ms Khimicheva said this,

> "26th of July I returned to work and was immediately called to the manager - Caroline Edwards, she said me about a decision to dismiss me because of my absence. When I said that they cannot count days of absence because of sickness related to pregnancy with other absence days and it cannot be a reason for dismissal the main reason of dismissal became poor performance at last days…..
> When I tried to explain that my condition affect my performance all that I have heard as an answer - We are not a charity organisation to pay for not enough work. Mrs Edwards also claimed that I have been working for five months only and this is too short period of time for becoming pregnant and apply for the Maternity Leave and Statutory Maternity Pay."

5.85. Mrs Edwards did not dissent from that account. It is an account that supports the view that pregnancy was very much in her mind when dismissing Ms Khimicheva.

(3).If yes, does the respondent prove that the reason for her dismissal had nothing to do with her pregnancy, but because she had failed her probationary period following poor performance unrelated to her pregnancy?

5.86. The respondent has not satisfied us that the reason for the dismissal was nothing to do with the pregnancy. Even her performance, as Ms Khimicheva explains, was impacted by her pregnancy, but the principal reason for the dismissal on 26 July was the pregnancy-related absence.

Judgment

5.87. The tribunal finds automatic unfair dismissal and discrimination because of pregnancy. The Tribunal is satisfied that the principal reason for the dismissal was related to and connected with her pregnancy because it related

5.88. to her pregnancy-related illness.

5.89. The dismissal amounted to unfavourable treatment because of illness suffered by her because of her pregnancy and is pregnancy discrimination.

Employment Judge Street
Date 27 January 2021