EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss E Geldard	**v**	Tactical Shooting Sports Club CIC Ltd

Heard at: Reading **On:** 14 January 2019

Before: Employment Judge Chudleigh (sitting alone)

Appearances
For the Claimant: Mr P Geldard (father)
For the Respondent: Mr N Shah (Solicitor)

JUDGMENT

The Claimant was automatically unfairly dismissed by the Respondent within the meaning of section 100(1)(c) of the Employment Rights Act 1996 (ERA).

REASONS

Issues

1. In a complaint presented on 28 February 2018, the Claimant complained of automatic unfair dismissal from her job as an administration assistant with the Respondent.

2. At the outset of the hearing, the issues were agreed with the parties to be as follows:

   (1) Was the Claimant an employee at a place where there was no safety representative or safety committee?

   (2) Alternatively, if there was such a representative or safety committee, whether or not it was reasonably practicable for the Claimant to raise her concerns about health and safety by those means.

   (3) If so, did the Claimant bring to the Respondent's attention by reasonable means, circumstances connected with her work which

she reasonably believed were harmful or potentially harmful to health or safety?

(4) Was the reason or principal reason for the Claimant's dismissal the fact that the Claimant brought such matters to the Respondent's attention?

(5) Alternatively, whether in circumstances of danger which the Claimant reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert, she refused to return to her place of work or any dangerous part of her place of work. If so, whether the reason or principal reason for the Claimant's dismissal was that the refused to return to her place of work or any dangerous part of her place of work.

Evidence

3. The Claimant gave evidence at the hearing. On behalf of the Respondent, I heard from Ms Stephanie Chapman, Office Manager and the person who made the decision to dismiss the Claimant, and from Mr James Holt, Regional Manager and the person who presided over the Claimant's unsuccessful appeal.

Findings of fact

4. I made the following findings of material fact.

5. The Claimant was employed by the Respondent as an administration assistant with effect from 14 August 2017 until her dismissal on 23 November 2017. The advertisement that she responded to made clear that there was an outdoor element to the role and that a driving licence was required. The job description provided for a variety of activities including audits of venues as required. There was no indication at the outset of the Claimant's employment that long distance travel within the UK was an essential ingredient of the job and that the post holder would be required to travel long distances frequently.

6. The Claimant was 19 years old when she started the job. It was her first proper job after leaving school.

7. The Claimant was good at her job and the Respondent had no concerns whatsoever about her abilities.

8. The Claimant's employment was subject to a 12 week probationary period which officially was to end on 6 November 2017. As the Respondent was pleased with the way in which she was working and because the Claimant received praise from colleagues and more senior employees within the company, she did not consider that her job was under threat.

9. There was a notice in the kitchen at the Respondent's Guildford premises that named a safety representative. However, the notice was not brought to the Claimant's attention and she did not know that there was a health and safety representative at her work place to whom she could complain about safety matters. The staff handbook did not make mention of either and required safety matters to be raised with the line manager.

10. There were some minutes produced at the hearing which indicated that there had been a health and safety committee meeting at Stoke Football Stadium on 30 October 2017. Accordingly, it appeared clear that the Respondent did have a health and safety committee. Its main focus was however, the safety of customers at venues, not the safety of employees in the workplace. The Claimants did not know that the Respondent had a safety committee or that she could make complaints to it about safety.

11. There were a couple of occasions when the Claimant was late for work but she more than made up any lost time at the end of the day and indeed she regularly stayed up to 45 minutes late dealing with work issues.

12. There was one occasion when the Claimant had an informal chat with Stephanie Chapman, her line manager, about her timekeeping but the timekeeping issue was not of any particular concern to the Respondent because the Claimant more than put the hours in and because she was a good employee.

13. Following the Claimant's appeal against her dismissal (see below), she was sent three documents entitled "Statement of informal discussion" which purported to record concerns about the Claimant's timekeeping on six separate occasions. I was not satisfied that the documents were genuine and found that they were manufactured after the Claimant's dismissal in order to support the Respondent's decision to dismiss.

14. The Respondent is an organisation that undertakes paintballing activities at various venues across the UK and indeed, in Sweden. There are approximately 34 such venues. 17 in what is regarded as the "South", and 17 in what is regarded as the "North", although those include a venue in Stockholm, a venue in Newcastle and two in Scotland which were too far from Guildford to be visited for the proposes of audits. This left 13 venues in the "North" which potentially might have to be visited by an administration assistance based in Guildford.

15. One of the tasks that the Claimant was required to undertake was that of a secret customer whereby she would visit a venue and engage in the paintballing activities. The first such occasion when the Claimant did this was 9 September 2017 in Birmingham. She was asked to make notes. The Claimant went beyond that and spent three hours that evening writing a report on each aspect of the centre she had encountered. The Respondent liked the report and found it useful.

16. On 21 October 2017, i.e. some six weeks later, the Claimant was required to undertake a similar visit to the Respondent's Reading centre and produce a report.

17. The Claimant had a 15-year old car and was a relatively new driver. After being required on 2 November 2017 to drive into Central London to make some deliveries, she became concerned about the amount of mileage she was being required to do.

18. On 6 November 2017, the Claimant was asked by Ms Chapman to make plans to travel to the Northern centres to produce reports. It was proposed that she travel to Cardiff and to Bristol over the weekend of 11 and 12 November 2017 to undertake site visits and produce reports. It was indicated to the Claimant that she would be required to go to sites further afield in the foreseeable future, including potentially to Newcastle which was a 340 mile drive followed by a 180 mile drive to the Liverpool venue in the same weekend. When making these trips, the Claimant would be put up by the Respondent in hotel accommodation on Saturday night but not on the Sunday when she would have to drive home.

19. The Claimant had a series of WhatsApp communications with Ms Chapman, On 7 November 2017 at 14:58, she said: *"I'm more than happy to work the weekends, but I'm afraid long drives and weekends on my own is not really an option"*. She also referred to having had a chat with her partner, Chris, and a few others to see if they could accompany her on these journeys. The Claimant's partner, Chris, was in the hospitality business and a casual employee of the Respondent. The suggestion from the Respondent was that he could accompany her on the visits and would receive a free ticket for the paintballing. This was not going to be viable for the Claimant's partner on a full time basis because of his other job in hospitality.

20. On 9 November 2017, the Claimant was concerned about the proposed trip to Cardiff and Bristol the following weekend. She had a series of WhatsApp communications with Ms Chapman about this including at 19:12 the following: *"I'm really sorry, but the miles for the Northern centres are just too much in a 15 year old car, especially when I am not covered for anything but commuting to work and social. I completely understand the need for the reports, and I can do them, but not to every single weekend. I'll be physically and emotionally exhausted from the driving"*. The Respondent's Cardiff and Bristol centres were regarded as "Northern" centres.

21. Ms Chapman proposed that the Claimant could do a Northern weekend one weekend and then a Southern weekend the following weekend and suggested that that was a fair compromise. The Claimant indicated that she could not travel over the forthcoming weekend because of her car. She said: *"I really don't feel comfortable travelling huge distances right now"* and *"I don't feel comfortable – By I don't feel comfortable, I mean safe"*. She said that she was not insured and if she broke down she would

have no way of getting home. The Claimant also said: *"I'm really sorry, and I don't want to let anybody down in any way, but I didn't realise I'd be expected to travel hundreds of miles uninsured, in my old rust bucket when I offered to do some reports"*.

22. On 9 November, the Ms Chapman cancelled the Claimant's hotel in Cardiff for the forthcoming weekend. She did so when she was on a plane and about to take off on a flight to the Maldives for a company reward holiday.

23. On 13 November 2017, Ms Chapman messaged the Claimant to ask her if she was going to North Bristol and Cardiff that week. The Claimant said: *"I can indeed visit Bristol this week"* but asked questions about whether it was imperative and pointed out that she had had communications via Facebook with employees there so it may be that she would not be particularly secret. This issue was not resolved and the Claimant did not make the trip.

24. On 18 November 2017, Ms Chapman sent the Claimant a message from the Maldives asking: *"How's the West Country?"*. The Claimant responded: *"Raining and suddenly incredibly cold. -1 at night, so tell everyone coming back to wrap up warm"*. Ms Chapman had been taking about Bristol and Cardiff but the Claimant misunderstood her; she thought she was talking about the UK generally.

25. Ms Chapman went from the Maldives to South Africa on 20 November 2017. She then discovered that the Claimant had not been to Bristol and Cardiff the weekend before. She raised this with the Claimant and the Claimant referred to an email that she had sent on 15 November. In that email, the Claimant said:

    "The amount of travel I am now expected to do is causing me quite a lot of concern. I am relatively young to be doing that amount of mileage on a weekly basis (especially by myself). Not only this, but my car is also far too old to withstand that amount of use. On top of this, my insurance does not cover me for that amount of business travel, and I suspect if something were to go wrong, the company I am insured with may find a way to wriggle out of paying out on any claim. I appreciate that I am paid mileage to cover petrol costs and maintenance, but if the worst were to happen, this wouldn't cover recovery, especially if I were to become stranded somewhere as far away as Liverpool, Manchester or Newcastle. My car was originally purchased with the intention of doing no more than 50 miles a day to commute to work, and these other requests are not really considered a normal commute. I have also put off starting the weekly centre reports schedule as it may be argued that if I can do the first weekend trip away, there is no reason I can't do the others. I am of course eager to please, but I don't want to give the impression that I am capable of doing something that I am in fact not"

26. She indicated in her email that she felt that she was being asked to run before she could walk and that she would like to sit down and review the situation and make the job slightly more within her current skillset.

27. Ms Chapman saw the Claimant's email of 15 November on 20 November 2017. She discussed it with a director, Jack Johnson, on 22 November 2017. She decided on that day to dismiss the Claimant and prepared some notes to assist her with a telephone conversation she planned to have with the Claimant. Those notes said: *"Explain the admin role evolved and the business needs will travel anywhere and be flexible which taking into account she doesn't feel comfortable doing"*. Also *"On top of this, we have also had several discussions about her timekeeping and she is frequently late"*.

28. On 23 November 2017, Ms Chapman messaged the Claimant on Skype asking her if she was free for a chat. She did not give her any warning that the meeting was to be a formal meeting or concern her probation or the ending of her employment. During that meeting, Ms Chapman told the Claimant that she would not be continuing with her employment as the job role had evolved and that she was no longer suited to the position. During the conversation, she asked Ms Chapman if there was anything she could do to ensure her continued employment and she was told that there was not.

29. Ms Chapman produced a note of that meeting which was given to the Claimant in a letter of 11 January 2018. My finding was that the note Ms Chapman produced was not a true reflection of the meeting. In the note, it says that during the conversation Ms Chapman told the Claimant that she could invite a partner or a friend to accompany her on the trips and that the Claimant said that it was unlikely she would be able to find someone to do this with her. I find as a fact that that exchange did not take place and that Ms Chapman manufactured it after the event in order to support the Respondent's case. In the note, there is also reference to the Claimant's timekeeping. I found as a fact that there was no conversation about the timekeeping and indeed, that the timekeeping was absolutely nothing whatsoever to do with the reason for the Claimant's dismissal. There had been one or two occasions when the Claimant had been late, but she was a good employee and her timekeeping was not a concern, particularly as she more than made up any time.

30. The Claimant was sent a dismissal letter dated 28 November 2017 in which Ms Chapman stated: *"I gave careful consideration to your responses in the meeting but reached the conclusion that you were no longer suitable for the role"*. This was a misrepresentation as in fact Ms Chapman had decided to dismiss before the telephone conversation on 23 November.

31. The Claimant appealed to Mr Holt. Her appeal was unsuccessful.

32. In evidence, Ms Chapman said that regular visits to centres across the UK had been a part of the administration assistant role even before the

Claimant began and that Northern visits were required to be made every other weekend. She also explained that there were only 14 venues within the UK which were regarded as "Northern" and which could be reached without an excessive amount of travel. Venues in Scotland, for example were too far to expect an administration assistant to visit over a weekend. Further, usually 2 venues would be visited in any given weekend like Bristol and Cardiff or Newcastle and Liverpool.

33. I believed that Ms Chapman exaggerating the amount of Northern trips that were required of the administration assistant. There were only 14 such venues and often 2 could be visited in one trip. Furthermore, because the trips involved an element of surprise, the employee in question was required to pose as a customer. It was obvious that an employee could not be required to attend at the same venue particularly frequently as she could be recognised. I therefore rejected Ms Chapman's evidence regarding the frequency with which these trips were to be undertaken. If two centres were visited on every trip, all venues could be seen over 7 weekends. There are 52 weekends in a year which would mean that Ms Chapman was suggesting that each northern venue would be the subject of a secret visit and audit about 3 times a year. `I did not accept that is how the Respondent had operated in the past, or how it really wanted secret visits and audits to be done in the future.

The law

34. S.100(1) ERA provides:

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

……..

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger

persisted) refused to return to his place of work or any dangerous part of his place of work……

35. An employee is to be regarded as having been automatically unfairly dismissed under s. 100 ERA if the reason or principal reason for dismissal was one of the health and safety grounds listed in S.100(1).

36. Where an employee does not have enough qualifying service to bring an ordinary unfair dismissal claim as in this case, the burden of proof is on the employee to show an automatically unfair reason for dismissal for which no qualifying service is required: *Smith v Hayle Town Council [1978] ICR 996, CA.*

37. In *Balfour Kilpatrick Ltd v Acheson [2003] IRLR 683, EAT*, three requirements were identified that need to be satisfied for a claim under S.100(1)(c) to be made out: it was not reasonably practicable for the employee to raise the health and safety matters through the safety representative or safety committee; the employee must have brought to the employer's attention by reasonable means the circumstances that he or she reasonably believes are harmful or potentially harmful to health or safety; and the reason, or principal reason, for the dismissal must have been the fact that the employee was exercising her rights.

Submissions

38. The Respondent's case was that there was a health and safety representative and a safety committee that the Claimant was aware of and who she could have made complaints to. It was also argued that the Claimant did not raise any valid health and safety concerns and that she was dismissed because she refused to travel to perform audits at various centres and because of her timekeeping.

39. On behalf of the Claimant, it was argued that it was not practicable for her to make complaints to a health and safety rep or a safety committee because she did not know of their existence, save that she made a complaint to Ms Chapman who was on the health and safety committee.

Conclusions

40. First I considered the question as to whether there was a safety representative or a safety committee at the Claimant's place of work and if so, whether it was reasonably practicable for the claimant to raise her concerns by those means.

41. The Respondent's case has that there was a notice in the kitchen that named the safety representative. I accepted that this was the case, however, the notice was not brought to the Claimant's attention and she

did not know that there was a health and safety representative at her work place to whom she could complain.

42. There were some minutes produced at the hearing which indicated that there had been a health and safety committee meeting at Stoke Football Stadium on 30 October 2017. Accordingly, it appeared clear that the Respondent did have a health and safety committee. Its main focus was however, the safety of customers at venues, not the safety of employees in the workplace.

43. The Claimant however did not know that the Respondent had a health and safety committee. She had arranged the travel and hotel accommodation for some of the attendees at that particular meeting, and had assisted with producing some quarterly statistics on accidents at venues, but she did not know that it was a health and safety committee meeting.

44. Accordingly, although I accept that there was a health and safety committee and that there was a health and safety representative, I found as a fact that the Claimant did not know about the existence of either.

45. Furthermore, the staff handbook which the Claimant had been provided with at the outset of her employment made no mention whatsoever of a health and safety committee or a health and safety representative. Indeed, in the health and safety section of the handbook, it provided that: *"All employees shall inform your line manager of any hazard or danger that may be a risk to the health and safety of themselves or others"*. Accordingly, the Claimant was following that instruction in the handbook in raising concerns about her safety when travelling with her line manager, Ms Chapman. In addition, the company handbook provided that *"A failure to abide by the company's health and safety policy and procedures may result in disciplinary action being taken against you"*.

46. In the circumstances, my finding was that it was not reasonably practicable for the Claimant to raise her safety concerns about travel to venues with a health and safety representative or a safety committee.

47. Next I considered whether the Claimant brought to the Respondent's attention by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

48. The Claimant did raise concerns about her health and safety with her line manager (which was what she was required to do by the terms of the handbook). She started to do so on 7 November 2017 when she raised issues about long drives. She was more explicit on 9 November 2017 when she said in terms that she did not feel safe undertaking the distances that the travel in question required and indicated that driving made her physically and emotionally exhausted.

49. Moreover, the Claimant raised health and safety concerns in her email of 15 November 2017 when she referred to the amount of travel she was expected to do. She said explicitly that this was causing a lot of concern and that she was too young to be doing that amount of mileage on a weekly basis, particularly in an old car. My finding was that the Claimant was raising health and safety concerns in this email.

50. The communications, particularly when taken together, indicate that the Claimant was raising health and safety concerns within the meaning of section 100(1)(c) of the ERA.

51. I considered that the means used to communicate those concerns were reasonable – WhatsApp was a method of communication habitually used between the Claimant and Ms Chapman and email is obviously an acceptable method of communication between employer and employee.

52. Furthermore, the circumstances were such that the Claimant reasonably believed that the travel she was being required to do was harmful or potentially harmful to health or safety. She was being required to travel long distances in her own car which was old. Moreover, she was only 19 years old and an inexperienced driver. Further, she was to drive home on Sunday nights rather than stay in a hotel after a long day of paintballing, potentially at two venues that were geographically separate.

53. The key question was as to whether the reason or principal reason for the dismissal was that the Claimant brought to the Respondent's attention by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety.

54. The Claimant was dismissed, that was agreed. She was a good employee and there was no criticism of her work so performance in the job was not the reason for the dismissal. There had been some minor concerns about timekeeping, but the Claimant had always more than made up the time and the Claimant's timekeeping was, in my view, no part of the reason for dismissal.

55. During the hearing, Ms Chapman raised the fact that the Claimant had not attended at Cardiff and Bristol over the weekend when she was in the Maldives. She sought to infer that this was misconduct, and that this was part of the reason for the dismissal. However, there was no mention of this issue in her witness statement or in the dismissal letter. My view was that this was a matter which was not a reason for dismissal. Had it been so, then the Respondent would have been explicit about it and it would have been expressly addressed as a misconduct issue.

56. The only other reason for dismissal was the Claimant's purported refusal to undertake travel.

57. My finding was that Ms Chapman exaggerated the amount of travel that the post holder had been expected to undertake in the past and which the post holder would be required to undertake in the future.

58. The Respondent only had 14 "Northern" venues which on Ms Chapman's case, were to be audited by secret visits from Guildford. In my view, Ms Chapman was not telling the truth when she said that the post holder was required to visit one of these venues every other weekend. Often two venues were visited in any given weekend. Further, the visits necessarily required the administration assistant not to be recognised, which meant that it would be unwise for the visits to take place frequently.

59. My scepticism about Mr Chapman's evidence on this point was borne out by the chronology of visits to venues made by the Claimant during her employment. There were visits to Birmingham, Reading and South Stockholm and a visit proposed to Bristol and Cardiff on 11 & 12 November. Not all of these were to "Northern" venues. At best there were two visits or proposed visits to Northern venues during the whole of the Claimant's employment (more than 3 months).

60. Moreover, the Claimant did not "refuse" to travel which is the word that Ms Chapman used in paragraph 19 of her witness statement. Nor was she "unwilling" to travel which is the word used by Ms Chapman in her note of the meeting of 23 November 2017. The Claimant simply raised concerns about the safety aspect of the travel and the fact that the proposed travel was not what she had expected when she took the job. She wanted to sit down and discuss expectations and reach an agreement as to precisely what was required of her (see the email of 15 November 2017). The was no attempt by the Respondent to spell out exactly what long distance travel was required and reach an agreement about what was expected of the Claimant. Instead, the Respondent moved straight to dismissal.

61. In the circumstances, I was not satisfied with Ms Chapman's explanation for the Claimant's dismissal. The reason for dismissal was not performance, timekeeping or misconduct. The requirement for travel to Northern venues was probably more like once every 4 – 6 weeks and the Claimant had not point blank refused to do this.

62. I considered that the only potential reason for dismissal was the fact that the Claimant had raised concerns about her health and safety. In the circumstances, having carefully considered the evidence, I concluded that the principal reason for dismissal was that the Claimant brought to the Respondent's attention her health and safety concerns. The burden of proof was on the Claimant and I was satisfied that she discharged the burden. The principal reason for the dismissal had to be the raising of safety concerns. There was no other possible reason and I was satisfied on the balance of probabilities that the raising of these concerns was the principal reason for dismissal. I had regard when reaching this decision,

the fact that Ms Chapman had manufactured evidence regarding timekeeping and written an untrue account of the dismissal meeting.

63. In the circumstances, my view was that the Claimant was automatically unfairly dismissed within the meaning of s. 100(1)(c) of the ERA.

64. It was unnecessary for me to make finding on 100(1)(d) but in any event, I did not find that there was serious and imminent danger so the sub-section was not applicable.

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Employment Judge Chudleigh

Date: 6 February 2019

Judgment and Reasons

Sent to the parties on: 11 February 2019

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For the Tribunal Office