EMPLOYMENT TRIBUNALS

Claimant: Halina Dorola Krupa

Respondents: 1. B & M Retail Limited
2. Andy Brown
3. David Garrett
4. David Lambert
5. Krisztina Safarne
6. Alex Wragg

HELD AT: Liverpool **ON:** 23, 24, 25 and 26 January 2017

BEFORE: Employment Judge Robinson
Dr L Roberts
Mr J Murdie

REPRESENTATION:

Claimant: In person with Mr K Szwarc, Interpreter
Respondents: Mr I Steel, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claims of the claimant of race discrimination succeed in relation to victimisation and harassment by B & M Retail Limited, victimisation personally by Mr Garrett and with regard to direct discrimination and harassment personally by Mr David Lambert but fail against all other respondents. The claims against those respondents are dismissed. The claims against Alex Wragg were dismissed during the course of the proceedings as the claimant withdrew those claims.

2. The claimant also succeeds against B & M Retail Limited in relation to the detriment of loosing her job which is connected to her qualifying protected disclosures.

3. There will be a remedy hearing and that will take place at **Liverpool Employment Tribunal, 3rd Floor, Civil & Family Court Centre, 35 Vernon Street, Liverpool, L2 2BX** at **10.00am** on **5 June 2017**.

REASONS

1. The issues that have to be dealt with by this Tribunal relate to claims of detriment with regard to qualifying protected disclosures contrary to Section 47B of

the Employment Rights Act 1996 and Direct Discrimination, Harassment and Victimisation relating to the protected characteristic of race (the claimant is Polish) contrary to sections 13, 26 and 27 of the Equality Act 2010.

2. The allegations were whittled down at the hearing in September 2016 over which Employment Judge Robinson presided. They are listed below together with the outcome:

2.1 Allegation 1 related to B & M Retail and Andrew Brown with regard to whether the claimant should be allowed to use a hand cart to move rubbish. Failed.

2.2 Allegation 5 against B & M Retail Limited and David Lambert with regard to the allegation that he urinated on the floor of the toilet after the claimant had cleaned it. Succeeded with regard to direct discrimination and harassment.

2.3 Allegation 6 against B & M Retail Limited and David Lambert and also other managers, in particular Krisztina Safarne relating to the way in which various members of staff who were British workers were allowed more breaks than the Polish workers. Failed.

2.4 Allegation 8, in that Krisztina Safarne gave the claimant a test which required her to clean the whole of the warehouse when she was under pressure to do so. Failed.

2.5 Allegation 9 against B & M Retail Limited, that the claimant was allocated an unreasonable workload compared to her comparator, Graham Miller. Failed.

2.6 Allegation 12 against both David Garrett and Alex Wragg (although the claimant confirmed that Alex Wragg did nothing wrong), in relation to the way they treated the claimant in a meeting on 30 November 2015 in that, in particular, they shouted at the claimant, said she had mental problems, forced to sign the minutes and if she did not sign the minutes she would be fired. Failed.

2.7 Allegation 13 which overlaps with allegation 8, that the claimant was asked to do more work than British workers, and that the claimant was followed around when she was carrying out that work. Failed.

2.8 Allegations 14 and 15. These were claims of victimisation contrary to section 27(2)(c) of the Equality Act 2010 together with the claimant's claims that she made protected disclosures and she suffered a detriment in that she was dismissed because of three emails sent to Simon Arora, the CEO of the respondent company, B & M Retail Limited, on 19 September, 18 October and 25 November 2015. Succeeded with regard to Victimisation and Public Interest Disclosure.

3. The detriments that the claimant said she suffered was more work after 25 November 2015 and termination of her contract. She alleged that she suffered harassment at the hands of Mr Lambert.

4. Those are the claims which the claimant proceeded with, and we heard evidence over four days in relation to all those issues. We heard from all the individual respondents except Alex Wragg.

5. However, the claimant when giving her evidence withdrew the allegations against Alex Wragg and said to us that it was David Garrett who was responsible for the allegations she makes in relation to inappropriate behaviour towards her at the meeting on 30 November 2015.

Findings of Fact

6. The findings of fact in relation to each of the allegations are set out below.

7. Before setting those out in detail, however, much of the evidence we heard from all the witnesses was self serving. It was difficult to establish what exactly had happened during the incidents complained of because of the confusing way in which the evidence was given to us. Different incidents were mixed up with others by some witnesses or witnesses could not remember some of the incidents. We also were of the view that Mr Bzymek's statement was based mainly on what his partner, the claimant, had told him. Ms Franczyk's statement similarly based on much of what the claimant had told her. They were not witnesses to the actual incidents to which they refer in their evidence in chief.

8. For each and every relevant discrimination allegation we applied the principles in section 136 Equality Act 2010 relating to the burden of proof and the principles set out in the well known case of **Igen v Wong. If there were facts from which the Tribunal could decide, in the absence of an explanation, that any of the respondents contravened the provision the Tribunal must hold that the contravention occurred, unless the respondents show they did not so contravene.** Dealing with each allegation we came to the following conclusions.

Allegation 1

9. Mr Graham Miller and the claimant had different jobs.

10. The evidence was confusing but on balance we concluded the claimant's job was to clean the whole of the warehouse and that Ms Franczyk dealt with the cleaning of the office, canteen and toilets.

11. Mr Miller used an electric cart to pick up foils on the warehouse floor.

12. The claimant had to pull rubbish bags across the floor and was not allowed by Mr Brown (the shift manager) to use either an electric cart or the electric powered pallet truck. There was some confusion as to what piece of equipment the claimant was actually telling us she could not use but we came to the conclusion, having heard Mr Brown's evidence, that she was referring to an electric powered pallet truck operated by a push button on the handle.

13. It was part of the respondent's policy that use of such equipment would only be allowed if the employee or worker had passed the necessary test and the claimant had not. She had not been offered the test but the claimant's actual

allegation was not so much whether she could use the hand cart but the way in which Mr Brown addressed her when asking her not to use it. Unfortunately, due to miscommunication (and miscommunication is a feature of this case) the claimant had previously been allowed to use the electric truck by Radek Prodek who worked for Protemps (the agency employing the claimant at the warehouse) and who was the go between between the agency workers and the management of B & M Retail Limited. He had no authority to allow the claimant to do that. The only reason the claimant was not allowed to use the hand cart was because she had not passed a test, not that she was being deprived of the use of it because she was Polish.

14. Mr Brown did not engage in unwanted conduct because the claimant was Polish. He addressed her in the appropriate manner when stopping her from using the machinery. Although the claimant on the face of it has proved facts upon which we may have decided that the claimant had been discriminated against, the explanation from the respondents that she had to pass a test first was satisfactory and this claim is dismissed.

15. The treatment of the claimant was not on the grounds of whistle-blowing by the claimant because it occurred before the claimant's first email to Simon Arora dated 19 September 2015 which is accepted as the first possible protected disclosure.

Allegation 5

16. This allegation relates to David Lambert who was a pick manager at the warehouse and one of the claimant's line managers.

17. Mr Lambert went into the toilet after the claimant had cleaned it and urinated over the floor. This was an act of direct discrimination and harassment of the claimant in that he treated her less favourably than he would have treated other employees who were not Polish and it was unwanted conduct. He did this because of the claimant's protected characteristic and it was related to the claimant's race.

18. The reasons we so concluded are as follows. We drew inferences for the following reasons. The evidence of Mr Lambert was not convincing, whereas the evidence of the claimant in relation to this issue and also from Ms Franczyk was persuasive. The chronology of the incident was important. The request by Mr Lambert for the claimant to clean the toilets was unusual. She did not like cleaning the toilets because of the smell of urine in the male toilets and it was not her job to do so. When she had nearly finished cleaning the toilets she was asked by Mr Lambert to remove herself while he used the facilities and when she went back to the toilets there was urine all round the toilet again. Ms Franczyk confirmed the claimant's timings and that it was her who cleaned the toilet, that she had done that about an hour before and that the claimant did not usually clean the toilets because the claimant role was to clean the warehouse generally. She described the claimant's upset at what had happened. Mr Lambert simply suggested that he did not do what the claimant accused him of doing. He gave no reason as to why he asked the claimant to leave the toilet when she had not finished cleaning them.

19. Applying the burden of proof provisions we find the claimant has proved facts upon which we could decide she had suffered direct discrimination, so we wanted an explanation from Mr Lambert and none was forthcoming, or at the very least an inadequate explanation was given to us. Although not necessary when dealing with

harassment claims, we found the burden of proof provisions helpful when deciding that there had been harassment of the claimant. Mr Lambert said he did not realise the claimant was Polish but only Eastern European. However, we do believe that he treated the claimant in the way that he did over the toilet because she was Polish and not British. If the claimant had been British we found he would not have done what he did.

20. We find B & M Retail Limited liable for the acts of Mr Lambert as his employer. They did not take all reasonable steps to prevent the employee from carrying out the acts that he did. Indeed we received no evidence that they had from the respondent.

21. The claims of direct discrimination and harassment succeed against Mr Lambert and B & M Retail Limited. We did not find however that the actions of Mr Lambert had anything to do with the claimant's whistle blowing. The claimant herself made no such allegation.

Allegation 6

22. With regard to allegation 6, we do not find that the claimant was given fewer breaks than the British workers.

23. The agency workers Adam Cliff, Nick Wilcox, Alex Hill, Mike Young, Ben Hammond, Liam Smith, Patrick Carmen-Lee and Anthony Stephenson, with whom the claimant compared herself, took breaks more than other workers of all nationalities, including cigarette breaks, but they were dismissed from the employment of the respondent because they were not of the quality of other workers and taking longer breaks was part of that assessment by the managers. It had nothing to do with race.

24. There was a general allegation that Polish staff received fewer breaks than British staff. That allegation was not proved by the claimant. There was no evidence that that was the case.

25. The warehouse was run badly in the first few months of 2015 when it opened. It was only when Mr Garrett took over the warehouse that it became better run. Prior to that there was no clocking on and clocking off for employees generally (not just British workers but all workers). All employees were taking advantage of the laxity by going for unscheduled breaks.

26. However all workers, of whatever nationality, received the appropriate Working Time Regulations breaks. We did not accept the claimant's evidence that she and other Polish workers had fewer scheduled breaks than other workers because we had no statistics put before us. Mr Garrett eventually tightened things up for all workers who then worked under the same break regime.

27. With regard to the specific allegation about the claimant coughing and having to go outside to get some fresh air, we did not conclude that bringing her back into the warehouse to work had anything to do with her protected characteristic or her status as a whistle blower. The claimant's evidence was confusing on this issue. Any worker, whether Polish, British or of any other nationality, would have been dealt with in the same way as Ms Krupa in those circumstances. Consequently this claim is dismissed.

Allegation 8

28. Krisztina Safarne issued the claimant with a job description.

29. The claimant suggests that this list of work was given to her out of spite and that a test was set up to see if she could carry out the work within a given period of time. There was miscommunication between the claimant, Krisztina Safarne and Dominika Odolczyk (the translator). All the claimant was being asked to do was what was contained in the job description.

30. Ms Safarne was a credible witness. She explained there was a lot of mess in the warehouse at first. In order to improve standards of cleaning she decided that, as there were no defined duties for cleaners, she would produce a list of duties. She emailed that list to other managers for approval. The list was adopted by other managers.

31. A rota for cleaning the warehouse generally was then given to all cleaners.

32. The claimant did not complain at the time when Ms Safarne gave her the list. The claimant does not get over the first hurdle in relation to the burden of proof. We required no explanation from the respondents although they did give us an explanation which simply was that this was a list of duties which was needed so that the warehouse could be cleaned properly.

33. We have seen the list of duties. The claimant would not have been expected to clean a 350,000sq feet warehouse in one shift. Nor would anybody else. Her claims of discrimination and whistle blowing are not made out. The cleaning of the warehouse had been previously chaotic. Ms Safarne, under the stewardship of Mr Garrett, was getting to grips with the needs of the business in that respect.

34. These claims are therefore dismissed.

Allegation 9

35. We are not sure what the claimant is saying in relation to this allegation and against whom it is made. We think the claimant was suggesting that she and other Polish workers had a higher volume of work allocated to them than other workers in particular Mr Graham Miller. She complained in her final email before she was dismissed on 25 November 2015 to Simon Arora, the Chief Executive Officer of the respondent.

36. At this stage the claimant's son had been dismissed for an unconnected issue and the claimant was upset about this. That may have been the reason for her perception that she was being singled out. This claim is connected to Allegation 1. We heard no evidence that stood up to scrutiny to suggest that the claimant in particular, and Polish workers generally, were allocated an unreasonable workload.

37. There was no evidence from the claimant that proved her claim. Quite the opposite. Graham Miller, her direct comparator, did a different job to the claimant because he had passed the test as set out in the paragraph above relating to Allegation 1. The claimant does not connect this to her whistle blowing claim. She does not get over the first stage of the burden of proof provisions with regard to her race claims.

Allegation 12

38 Turning to the meeting on 30 November 2015 with David Garrett, who was the Distribution Centre Manager, and Alex Wragg, a university placement student who had come into minute the meeting, we concluded as follows.

39 This meeting with the claimant has to be viewed in context. The claimant had, within a few days of being employed by the respondents, put in a complaint to Simon Arora in September 2015, then a longer complaint sent by her on 18 October 2015. The claimant saw herself as the spokesperson for many Poles working in the warehouse. Unfortunately she got no reply to the September email from either Simon Arora, his personal assistant or Human Resources. Once she sent a second one to Mr Arora a meeting was arranged for her to speak with Mr Garrett on 21 October 2015 in the presence of an interpreter from Protemps agency. The note taker for the company at that point was Kate Albertina.

40 Mr Garrett was conciliatory at that meeting. He accepted that some of the general complaints made by the claimant were valid, that the warehouse had not been run properly, that he had only just started in September himself and that he was in the process of putting the warehouse into some sort of shape.

41 He agreed with the claimant that she should not go to Mr Arora again and that if she had any other issues she must immediately tell Mr Garrett. If she did not get satisfaction from her line managers or supervisors on the shop floor then Mr Garrett was willing to hear her complaints.

42 However, in breach of that agreement, on 25 November 2015 the claimant wrote to Mr Arora without going back to Mr Garrett.

43 When Mr Garrett met with Ms Krupa on 30 November in the presence of Mr Wragg there is no doubt that feelings were running high. We find that the claimant was not calm and she was upset. By this time her son had been dismissed, she still felt there were injustices with regard to the treatment of Poles in the warehouse, and the meeting was heated.

44 Mr Garrett was not best pleased that the claimant had once more circumvented his authority and gone to the Chief Executive without allowing Mr Garrett to sort out the problems.

45 Mr Garrett did not suggest that the claimant had mental problems, forced her to sign the minutes and threaten to sack her if she did not sign the minutes. The claimant had with her a Polish national, Radek Prodek, to translate. Therefore there should not have been any difficulty in communication. It was the claimant who acted badly at that meeting. She made sweeping allegations that everybody in the warehouse who was not Polish was racist, she was still intensely annoyed her son had been sacked and she suggested before us, with no evidence to support the contention, that the notes of the meeting were forged.

46 There were handwritten notes which were signed by the claimant which have been destroyed but the typed up notes of Mr Wragg show that despite Mr Garrett's frustration that the claimant had bypassed him he was willing to deal with those complaints. We accepted those notes as authentic.

47 Mr Garrett looked into the situation with regard to the claimant's son at the claimant's request. Mr Garrett felt that her son had been properly dismissed once he had done that research. What he then asked was whether the claimant would follow procedure in the future and report to him not Mr Arora. Her answer did not fill him with confidence. The claimant ends that meeting by saying:

> "I understand and just want to get on with my job without any problems".

48 Mr Garrett was entitled to accept, at that point, that the issues between the claimant and B & M Retail Limited were dealt with.

49 During the course of the meeting Mr Garrett made it plain to the claimant that all cleaners got a list of duties, not just her, and it would be normal for the parties to sign any minutes. Even if the claimant was threatened by Mr Garrett for not signing the minutes, he would have dealt with any worker of whatever nationality who was frustrating him in the way that the claimant was frustrating him in exactly the same way, and would insist that the minutes were signed.

50 The claimant has not satisfied us with regard to the first part of the test in **Igen v Wong**, but the respondent witness has given us an explanation as to what happened at that meeting in any event. Mr Garrett would have treated any worker in the same circumstances in exactly the same way as he treated the claimant on that day. He dealt with the claimant appropriately despite his frustration with her and none of his actions were connected to the whistle blowing or her race. The claimant suffered no detriment at that point in any event.

Allegation 13

51 This allegation returns to the issue of Krisztina Safarne and the claimant's suggestion she was overworked and harassed by Ms Safarne.

52 Ms Safarne did on occasions follow the claimant round the warehouse to watch her work, but we accepted Ms Safarne's evidence that she did that with every worker. She was convincing when she gave evidence. It was her job to check on what each of the workers were doing in the warehouse, whether they were picking, emptying containers or cleaning. Her evidence smacked of the truth and therefore the claimant has not satisfied us in relation to the first part of the test in **Igen v Wong**. She would have treated any worker in exactly the same way in any event. There is no connection to the whistle blowing and the claimant does not suggest that. The claimant has suffered no detriment.

Allegations 14 and 15

53 These allegations relate to victimisation of the claimant and the fact that she was dismissed and given more work from 25 November 2015 because of the protected disclosures.

54 Our finding of fact is that the claimant was given no more work than anybody else and therefore we dismissed that part of the claim. We accept that the claimant's emails to Mr Arora (all three of them) were qualifying protected disclosures. We were therefore interested in why Mr Garrett dismissed the claimant on 14 December 2015.

55 His reasons were these:-

55.1 That she had a very limited skill set.

55.2 The cost of agency workers.

55.3 He wished to reduce cleaning staff because he wanted all his workers in the warehouse to pick, empty containers and clean and that he was in the process of bringing a stricter regime into the warehouse to get it running smoothly.

55.4 The claimant annoyed him for being an obstructive employee and he had made an exception for her by allowing her to come straight to him with regard to any complaints. Despite that agreement she had bypassed him.

56 The claimant by sending emails to Mr Arora was “doing any other thing for the purpose of or in connection with this act”, as per section 27(2)(c) of the Equality Act 2010. In short she was complaining about the treatment of Poles.

57 We accepted each of the emails to Mr Arora on 19 September 2015, 18 October 2015 and 25 November 2015 were qualifying public interest disclosures on the basis that they showed a breach of legal obligation and potentially that the health and safety of the workers was endangered. They were made to the appropriate person, namely the claimant's employer. They also amounted to protected acts as set out in Section 27(1)(a) of the Equality Act 2010.

58 We also accepted that the claimant reasonably believed that what she was saying was substantially true and none of the allegations were made for personal gain.

59 The claimant suffered a detriment in that she was dismissed. She wanted to keep her job. It was important to her and losing it was a blow to her.

60 What was the causal connection between the emails and the claimant’s dismissal? There was a connection. Mr Garrett admitted that the claimant was and had become a nuisance. Although Mr Garrett felt that he had an agreement with her to initially come to him with her complaints, the fact is that the respondent did not have a whistle-blowing policy (or at least one to which we were referred) and the claimant genuinely felt there were real issues with regard to the treatment of the Polish nationals.

61 We accept that the respondents were reducing the number of agency workers at the end of 2015 and that Mr Garrett needed to reduce costs. That point was not challenged by the claimant.

62 Mr Garrett was clear when he said “she annoyed me because she was a very obstructive employee”. That view of his coloured the way he dealt with the claimant

and was the connection between the claimant's protected disclosure, the protected acts and the loss of her job.

63 The claimant's claims under section 27 of the Equality Act 2010 relating to victimisation succeed as does the claim for detriment for making a protected disclosure.

64 In order to conclude as we have, we applied the following principles as well as those already set out above. In relation to the public interest disclosure issue, we accepted that these were detriment claims under section 47B of the Employment Rights Act 1996. We find that the claimant is a worker and that she brought the claim in time. Her disclosure did disclose information and her disclosure was in the public interest because it related to possible discrimination in the workplace at the respondent's warehouse. The disclosures qualified as protected disclosures under section 43B in that the disclosure tended to show a breach of legal obligation. It was made to her employer and therefore was protected. We accepted that the claimant reasonably believed that what she was saying was substantially true and was not for personal gain. The incident with Mr Lambert was the incident which brought the claimant to that conclusion. That was unfortunate because we believe that was an isolated incident. The issue that troubled us consequently was the question of causation.

65 With regard to that, we concluded there was a protected disclosure and the respondent had subjected the claimant to that detriment. We then looked to the respondent to prove that the worker was not subjected to that detriment on the ground he or she had made the protected disclosure, and we found that the respondent failed.

66 A detriment is defined as putting the claimant under a disadvantage and that section 47B provides protection from any detriment. We found that the claimant was ultimately treated differently from other workers because she had made a protected disclosure and she lost her job at the warehouse because of that.

67 We accepted that there potentially were additional reasons for the claimant losing her job, for example the fact that she had broken an agreement between herself and Mr Garrett about not going to Mr Arora with complaints. However, we were not impressed by Mr Garrett's explanation that he had looked at the headcount in relation to cleaners. If he had to reduce the number of cleaners for business reasons because he had decided he only needed 187 cleaning hours per week as opposed to 450 hours a week, the question was why did he choose the claimant to go? His suggestion that the claimant had a limited skill set was not based on any empirical evidence that was put before us. In the end we were satisfied that the disclosures made by the claimant had a material influence on Mr Garrett getting rid of the claimant and he did not prove to us that the detriment suffered was not done on the grounds that she made a disclosure.

68 With regard to the harassment we found that Mr Lambert had engaged in unwanted conduct relating to the relevant protected characteristic and that the conduct did have the effect of violating the claimant's dignity. It was the claimant's perception that we took into account. We found that it was reasonable for the conduct of Mr Lambert to have that effect on the claimant.

69 Finally with regard to victimisation, we concluded that the three emails were protected acts within the meaning of section 27(2)(b) of the Equality Act 2010. We concluded that the detriment was the loss of her job, and that was something which the claimant might reasonably have considered changed her position for the worse and put her at a disadvantage. We noted that to succeed in a claim of victimisation the claimant must show that she was subject to the detriment because she did a protected act. We found there was a causal link between the protected act and the victimisation of the claimant with the loss of her job. We do not find with regard to allegations 14 and 15 that the respondent company or Mr Garrett has directly discriminated against the claimant. Mr Garrett would have treated a complaining British worker in the same way. Equally there was no evidence Mr Garrett harassed the claimant.

70 For all the above reasons we found that the claimant succeeds in her claim in part.

71 Consequently this matter will now move to the remedy hearing.

28-03-17
Employment Judge Robinson

JUDGMENT AND REASONS SENT TO THE PARTIES ON

31 March 2017

FOR THE TRIBUNAL OFFICE