EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr H Tavakoli	AND	Rayner Interocular Lenses Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (By VHS) ON 13 to 16 September 2021

EMPLOYMENT JUDGE J Bax
MEMBERS Mr J Evans
Mr P Monaghan

Representation

For the Claimant: Mr H Tavakoli (in person assisted by Mr Deal, Counsel, as McKenzie Friend)
For the Respondent: Mr M Curtis (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that the claims of automatic unfair dismissal and detriment for making protected disclosures are dismissed.

REASONS

1. In this case the Claimant, Mr Tavakoli, claimed that he had been automatically unfairly dismissed and subjected to detriments for making protected disclosures. The Respondent contended that the reason for the dismissal was that the Claimant had a lack of technical capability and there was not a real prospect of improvement.

Background

2. The Claimant notified ACAS of the dispute on 9 April 2020 and the certificate was issued on 28 April 2020. The claim was presented on 22 May 2020.

3. The Claimant had previously been represented by Mr T Deal of counsel. Mr Deal was in attendance at the hearing but in the capacity as McKenzie friend and was not representing the Claimant as such.

The issues and preliminary matters

4. At a Telephone Case Management Hearing on 27 January 2021, Employment Judge Roper discussed the issues with the parties. The issues were agreed, subject to the Claimant providing some further information. The parties provided revised lists of issues but were unable to agree what they were.

5. In relation to the alleged disclosure regarding EML lenses, the Claimant had added an additional four disclosures which the Respondent objected to on the basis that the disclosure had been limited to a single date at the case management hearing before Employment Judge Roper. The Claimant had also referred to a disclosure in relation to financial matters which followed his last alleged detriment and dismissal. The Claimant consulted with Mr Deal and confirmed that the only disclosure relied upon in relation to EML was on 2 January 2020 and that he did not require the financial disclosure on 28 February 2020 to be determined because it could not have been the cause of any detriment or dismissal.

6. Approximately two thirds of the way through the cross-examination of the Claimant, after a break, the Claimant sought permission to add additional matters to his witness statement by effectively annexing his further particulars of claim, which were included in the bundle. The Claimant had not referred to a number of allegations in the list of issues within in his witness statement. Counsel for the Respondent, from the outset, said that he would only cross-examine on matters contained in the witness statement. The Claimant had referred to some matters in the further information within his witness statement, but had chosen not to do so in relation to all of them. The bundle for the final hearing was much larger than ordered. The Respondent had applied for and been granted an extension to the word limits for its witness statements. The Claimant did not make any such application, prior to the start of the hearing, in relation to his own statement. The Claimant was represented by Counsel at the telephone preliminary hearing, had been helped with preparation for the hearing and was assisted by the same barrister, as a McKenzie friend, at the final hearing. The Claimant was ordered by Employment Judge Roper to provide specific further information so that the Respondent knew what was being alleged and the case it had to meet. The witness statement was a separate document. The parties were ordered to provide witness statements. The order was clear and stated, “A witness statement is a document containing everything relevant the witness can tell the tribunal. Witnesses will not be

allowed to add to their statements unless the Tribunal agrees." The Claimant had been cross-examined on the basis of that statement. It was not for the Respondent to predict what the evidence would be from documents in the bundle. The witness statement was to be taken as the evidence in chief. We accepted the Respondent's estimate that it would take 2 to 3 hours to prepare additional cross-examination and a further 2 to 3 hours to cross examine the Claimant on those points. The Claimant sought to rely on rule 41. He also submitted that he had tried to keep to the word limit, however he did not seek an extension. The parties were aware that the timetable for the case was tight, and it had been indicated at the start of the hearing that, if relevant, remedy could be heard separately. We took into account there needed to be fairness to the parties and that the case needed to be heard in a timely manner. That included hearing the evidence, deliberations and judgment. The Respondent was prejudiced by not preparing for such cross-examination. The Claimant was prejudiced by not having set out all facts in his statement. This was not a case where the Claimant was a pure litigant in person, he had been represented and advised by counsel, including at the final hearing. The hearing timetable was an important factor. There was prejudice to both parties. Balancing all factors, the order of Employment Judge Roper was clear, the Claimant had legal advice and chose what to put in his witness statement despite that clear order. In the circumstances, applying the overriding objective, the application was refused.

The evidence

7. We heard from the Claimant and Dr Lopez on his behalf. Mr Purchase, head of optics, Mr Brown Global Marketing Manager Surgical, and Mr Davies, Director of Research and Development, gave evidence for the Respondent

8. We were provided with a bundle of 381 pages. Any reference in square brackets, in these reasons, is a reference to a page in the bundle.

9. There was a degree of conflict on the evidence.

10. We were not satisfied that the Claimant was a reliable witness. On a number of occasions in cross-examination he made assertions of fact, only to be further questioned and then to accept that what he had asserted was incorrect. On one occasion, he accepted that what he had originally said was misleading. The Claimant's evidence was often confused, and he was not clear in his answers. Some examples of this are set out in our reasons.

The facts

11. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after

listening to the factual and legal submissions made by and on behalf of the respective parties.

12. The Respondent is a medical device designer and manufacturer. It is the main operating subsidiary in the Rayner Group of companies. It manufactures intraocular lenses, which are medical implants replacing the natural lens in the eye, following surgery for conditions such as cataract.

13. The Claimant was interviewed by Dr Purchase, Head of Optics and Mr Davies, Head of the Research and Development Team. The Claimant's recent work history had been more focussed on sales and marketing, but he had some historic experience in research and development ("R&D"). Dr Purchase and Mr Davies were concerned about the Claimant's level of experience, but it was hoped that he would be able to fulfil the requirements of the role with training. The vacancy for the position had been open for a long time. The Claimant was asked what he was currently earning and what it would take for him to move. As a result, the Claimant was offered a position at the top of the salary band. The Claimant relied on an e-mail from Ms Calvert (HR) to the recruitment agency, saying that Dr Purchase and Mr Davies had been impressed, however we accepted that they still held the concerns about his experience.

14. The Claimant commenced his employment with the Respondent on 4 March 2019 as an Optical Design Engineer in the Research and Development Team. The Claimant's role meant that he was to be involved in all stages of product design and also working on and improving and maintaining processes and introducing new systems. He was also expected to ensure that all processes were fully validated to a level consistent with the needs of regulatory bodies. It was a fundamental part of his role to propose process and product improvements and to flag potential technical issues with lenses under development so that they could be improved, confirmed safe and met regulatory obligations before being submitted for regulatory approval. The Claimant's role was to assist with moving products from the development stage to production. He accepted, in evidence, that products in the development stage would not necessarily be compliant with regulatory standard until the end of the development stage and that the phase was there to solve problems. Under the terms of his job description, he was required to work with production to solve manufacturing issues and this was a key part of his role.

15. The Claimant was aware that the Respondent had a whistleblowing policy and where he could find it, although he did not refer to it.

16. The Claimant's line manager was Dr purchase, Head of Optics. Dr Purchase reported to Mr Davies, Director of R&D.

17. The Claimant was working on the 613Z lens, a toric lens which can correct astigmatism. The project involved adding toric optics to a trifocal lens. A trifocal lens is a lens which has more than one point of focus and can focus on near, medium and far objects. The Claimant's role was to help transfer the project from R&D to operations. We accepted that there are always issues and problems discovered during development phases and that they need to be solved as part of a companywide project team. This was something which the Respondent expected to happen in such projects. The lens was still in the development phase and was not being marketed.

18. In May 2019 the Claimant was working on the 613Z lens and in particular in relation to toric axis marks, which are used by a surgeon to implant a lens in a patient's eye.

19. On 31 May 2019, the Claimant and a colleague, Dr Lopez, discovered that the device used to check the lenses, Nimo, did not allow them to verify a small angle between the toric marks and toric axis. The machine was not designed for the lens without additional software. They tried to visualise the mark, but the measurements were not accurate. Under BS EN ISO standard 11979-02 (2014) the tolerance for angle of difference between toric axis and the toric marks on the lens was 5°, any variation greater than 5° was outside of the tolerance.

20. On 30 and 31 May 2019, e-mails circulated in the team following a suggestion by Dr Lopez. Mr Davies asked Dr Lopez to consider a method of quantifying the amount of realignment and that the NIMO test should be a rough test at that stage. It was agreed between Dr Purchase and Mr Davies that testing should be carried out.

21. On 31 May 2019 Dr Lopez, e-mailed Mr Davies, Mr Clayton, Mr Convery and copied in the Claimant and Dr Purchase, he said, "Hamid and I have done some test on Nimo to check the angle between the toric marks and the toric axis of some 613Z lenses." The results showed Nimo was good to assess visually large misalignment, but was not consistent when trying to verify a small angle. An example was provided, and it was said that based on ISO 11979.2 (4.2.2) the lens failed. He and the Claimant did not think that Nimo was a reliable tool for the test [p124-127]. The e-mail was signed only by Dr Lopez, and it did not say that it was written on behalf of the Claimant.

22. Mr Davies responded by saying, "In the absence of a viable alternative, if you have shown that NIMO measures at around 0-10 deg accuracy, then lets class that as a pass for the purpose of this rough test – you will at least identify how many of the PQ lenses are significantly out of alignment." We accepted that the lenses were produced on validated lathes. To avoid the machinery losing position there was a re-start/re-reference prior to cutting

the toric surfaces. The process was validated and the Nimo check was considered as an extra rough test. Dr Purchase gave evidence, which we accepted, that the NIMO system gives an image of the lens and axis from which the angle can be deduced by a manual protractor and trigonometry. This check in combination with what else was done in the facility, in relation to the validated lathes, meant Dr Purchase believed that there was sufficient accuracy for clinical and standards purposes. At this stage the aim was to confirm that the toric marks were approximately in the correct location on products manufactured under test conditions.

23. Later that day the Claimant e-mailed Dr Lopez some technical information, copying in Dr purchase. Mr Davies asked the Claimant for a technical assessment/evaluation of the results and later for some further clarification. The information originally provided by the Claimant lacked detail about the batch tested, why images were overlaid and whether he was saying that a physical mark was missing. This meant that the original information was ambiguous and confusing. We accepted that this was typical of communications sent by the Claimant throughout his employment.

24. Following the e-mail Dr Purchase asked the Claimant to become signed off on the SOPs for the 613Z lens before carrying on testing. Dr Purchase's evidence was that this was because before the implementation of a planned deviation to an SOP could be started, it was the Respondent's quality management policy for employees to be signed off on the original SOP to show that it was fully understood before any changes were made. The Claimant had read some of the SOPs but had not been signed off. The Claimant's initial evidence was that he was instructed by Dr Purchase to study all Quality Management System files and that he could not carry out any further tests until he had done so. He later agreed that the instruction was to make sure he had been signed off on the 613Z Standard Operating Procedures before doing further testing, which he said he had done in his induction. He also accepted it would have been a relevant instruction. This was an example of a change in the Claimant's oral evidence. We preferred the evidence of Dr Purchase and accepted his version of events and that the reason he gave was the reason in his mind at the time of the conversation. We did not accept that Dr Purchase described the investigation as useless or that Dr Purchase was hostile in the meeting.

25. The Claimant and Dr Lopez recommended an additional step in the process, which the Respondent put in place on 31 May 2019. [p127]

26. On 11 June 2019, the Claimant wrote an "Axis Test Protocol" and started to test all of the 613Z lenses made by him. He then wrote a report.

27. On 24 June 2019, the Claimant attended a planned deviation meeting with Mr Wells (Head of Quality), Mr Clayton (project manager), Mr Davies and

Dr Purchase. The purpose of such meetings was to allow the Respondent to introduce changes to the production process in a controlled manner. The Claimant been asked to give a presentation on toric axis mark measurement so that action could be taken to improve production. The Claimant discussed his findings from his earlier tests and noted in his PowerPoint presentation that that there was not a specific verification test or tool to measure or estimate the angle difference between the physical axis indicator and the meridian with the lowest dioptric power in the toric lenses. They could not see the lens haptic, nor the physical axis indicator. Technicians could see the lens haptic with Nimo, but often could not see the axis indicator. In the presentation he had referred to the ISO standard. He also identified challenges for manufacture. In the presentation the Claimant also included information in relation to burned surfaces.

28. The Claimant's evidence was that he was raising that the test was missing, and more equipment was needed. He accepted that at the time the product was not going to market and that there was not a breach of obligation at that stage. He suggested that the lenses already made were to be used for a clinical trial, we rejected that suggestion and accepted the Respondent's evidence that no such lenses were used. We accepted that the Claimant believed that implants to an eye was high risk surgery and that if a replacement lens needed to be later removed that was surgery with a higher risk. We accepted that if the lens was re-replaced during the original surgery that there was not any significant increased risk to the patient.

29. The Claimant also raised that toric lenses already in production would have had the same problems, however he did not test any such lenses. The slides in the presentation did not make specific reference to toric lenses already on the market. The Claimant did not cross-examine Dr Purchase nor Mr Davies on this basis, and they did not refer to it in their witness statements and it was not referred to in the amended grounds of resistance. In the closing submissions the Respondent did not deny that it had been raised. We concluded that the Claimant probably mentioned that the issue could apply to older toric lenses. The Claimant had not tested any of the older lenses and we were not satisfied that he had looked at the older SOPs in relation to them. We accepted Dr Purchase's evidence that there was a visual check on screen for each lens, but that a protractor was not used.

30. At the meeting, it was resolved that they would continue to test all of 613Z lenses based on the Claimant's plan.

31. Following on from this, on 27 June 2019, a new R&D protocol was introduced requiring that if the angle was larger than 5° the lens failed, and it should be removed from the batch. The same day the Claimant provided test results showing that all lenses had passed. [p164] In October 2019, a further test protocol was implemented for design verification showing that

the measured angle difference between the axis marks and toric axis was below 5°. These were later incorporated by the Claimant into a new Standard Operating Procedure ("SOP") SOP3303-W10 to ensure in compliance with the ISO standard. It was notable that the Claimant signed the report dated 24 October 2019, that he had reviewed and approved the test results and all procedures for manufactured 613Z lenses, and that the documentation complied with applicable SOPS and standards [p241]. He initially suggested that he had not signed this was the case, but subsequently accepted that was what he had signed. This was an example of the Claimant's inconsistency.

32. During a clinical trial on 8 August 2019 a 613z lens was removed from the patient's eye and a replacement lens was used. This was because the surgeon had difficulty seeing the toric marks. The surgeon did not have any problems with the replacement lens from the same batch. The removed lens was discarded and could not be tested. The Respondent tested all other lenses in the batch and found all toric marks were present. It was assumed that the surgeon was unfamiliar with the lens and was being very careful. We accepted Dr Purchase's evidence that all lenses went through the validation exercise and that none used in the clinical trial were manufactured before the new processes were adopted.

33. The Claimant suggested that there was hostility at a subsequent 1:1 meeting on 24 June 2019 and that Dr Purchase was upset with the presentation he had given. On 25 September 2019 the Claimant e-mailed Dr Purchase and said he was told that he had not liked the presentation and asked for what mistakes he made. Dr Purchase responded by saying that he had not said he did not like the presentation, but he had said that the Claimant should not have confused the meeting by including speculation about burned surfaces. The meeting had been to discuss the planned deviation and the unrelated topic ran the risk of the meeting going off track. We accepted Dr Purchase's version of events and that he had communicated this at a 1:1 meeting after the presentation. Dr Purchase did not tell the Claimant that he did not like the presentation. Dr Purchase was not hostile in the meeting and was trying to assist the Claimant.

34. The Claimant also suggested that at the meeting he was asked to repeat tasks and perform tests for which Dr Purchase had no theoretical explanation. No examples were given in his witness statement nor in his oral evidence. Such matters were not put to Dr Purchase. We did not accept that the Claimant was asked to repeat tasks or perform tasks with no theoretical explanation.

35. We were referred to e-mails between the Claimant and Dr Purchase on 20 September 2019 [p214-210]. The Claimant accepted that Dr Purchase was asking whether he needed help and he suggested a fix. He also made

suggestions of how to best make use of time. The Claimant accepted that these e-mails were supportive, but said that Dr Purchase had not been generally supportive and had not replied to 50 e-mails. We were not referred to any e-mails suggesting a non-supportive approach. We accepted that the e-mails [p214-210] were indicative of the interactions between Dr Purchase and the Claimant, and that Dr Purchase was supportive.

36. On 12 July 2019, Dr Lopez left the Respondent's employment. We accepted his evidence that in January 2018 staff left and some new investors joined the company and from that time the workload increased. From mid-2018 the Respondent had deadlines to meet and had fewer staff to do it. The workload was increasing because of impending deadlines. Dr Lopez considered that Dr Purchase was stressed because he had the deadlines to meet and as a result he was nervous and did not realise about the way he was speaking to others. Dr Lopez did not suggest any link between his e-mail dated 31 May 2019 and his relationship with Dr Purchase.

37. On 6 September 2019, the Claimant attended a probationary review meeting, at which Dr Purchase said he had concerns and that they had known from the outset that the Claimant needed time with Zemax. The Claimant was told that with his previous knowledge he should be thinking about new products with all relevant production and regulatory requirements in mind. Discussion took place as to what the EMV tool was for. It was suggested that Dr Purchase could be more prescriptive with what was required. Dr Purchase wanted to extend the probation by a couple of months to see if they could get things better aligned. Although the probation period was extended, the meeting was supportive.

38. On 9 September 2020, the Claimant was sent a letter confirming that his probationary period was extended by 2 months. The reasons given were: (1) concern over work discussed versus work delivered, (2) it was possible that communication was the cause, and a different approach would be tried with a more detailed work requirement. It was stated that the measures were agreed.

39. In evidence the Claimant initially disputed that discussion had taken place about work discussed versus work delivered and suggested it only related to Zemax. However, after being referred back to the meeting notes he accepted that other concerns were also raised; this was a significant inconsistency. The Claimant did not accept that the conclusions were fair. We accepted Dr Purchase's evidence that the Claimant often provided incorrect data and recommendations and that at the time the Claimant was not reaching the required standard and that he held the concerns. We accepted Dr Purchase's evidence that he had doubts as to whether the Claimant would be able to improve but decided to try and help him, rather then saying the Claimant had not passed the probationary period.

40. On 13 September 2019 the Claimant attended a grievance meeting with Ms Burgess (HR) and Ms Michalas (HR Administrator). The Claimant gave a PowerPoint presentation. He complained about issues with 1:1 meetings, being left with many SOPs and unanswered e-mails from the start of his probation period. The Claimant also referred to the e-mail sent on 31 May 2020 and mentioned the ISO standard and the equipment as of that time. He also referred to there being a standard deviation to the SOP being implemented. There was no reference to the standard deviation being in breach of any standard. The Claimant accepted in cross-examination that many of the complaints pre-dated any disclosure about the 613Z lens. In oral evidence the Claimant suggested that the treatment got worse after 31 May 2019, however this was not apparent from the slides and Dr Lopez gave evidence that there was always a high workload, and we rejected the Claimant's evidence on this point. The Claimant did not give evidence as to how this was information tended to show a breach of a legal obligation or affecting the health and safety of an individual.

41. On 18 September the Claimant had a meeting with Dr Purchase. At the meeting, concerns were raised about the Claimant not providing details about things discussed and providing different things to what had been discussed. There were problems with data supplied by the Claimant and help was offered. There appeared to be a problem with the Claimant not asking for help. There was concern with data provided and that it was meaning Dr Purchase was having to re-check the validity data, thereby increasing his own workload. It was suggested by Dr Purchase that the Claimant should start with the most basic optics to see if the results were correct, and he offered to help. The next day the Claimant sent a new data set, which was still incorrect; this made Dr Purchase further doubt the Claimant's technical capabilities.

42. On 20 September 2019, the Claimant attended a second meeting with HR, at which Dr Purchase attended. The Claimant gave inconsistent evidence, in that he first asserted Dr Purchase agreed that the concerns raised on 6 September 2019 were incorrect. He then conceded that this was not said directly and then accepted it was misleading to say that Dr Purchase had accepted that things said in the probation meeting were wrong. At the meeting the Claimant did not accept Dr Purchase's conclusions on his abilities. In order to try and improve the situation, although Dr Purchase maintained the criticism was justified, he agreed to withdraw the letter of 9 September 2019. The Claimant agreed to have more 1:1 sessions so that Dr Purchase was able to say whether the Claimant had passed or failed his probationary period, with a final review to take place on 4 November 2019.

43. On 8 November 2019, the Claimant attended a probationary review meeting with Dr Purchase and was informed that he had satisfactorily completed his

extended probation period. The review form [p245-246] recorded that the Claimant's enthusiasm and commitment to the role were excellent, and there had been positive feedback from operations that he was always willing to assist production. It was agreed there were additional training needs in relation to Zemax. A deeper understanding of optical systems (PMTF and NIMO) was needed and would be gained via close work with Dr Purchase and RDTR report writing. There was a need for improvement in relation to technical detail and technical report writing. In the review, the Claimant gave thanks for friendly and professional training, support and help. Dr Purchase commented that the Claimant had worked hard and performed well in his work with production support. Some technical areas required improvement, and this was explained to the Claimant. Due to the need for further improvement, Dr Purchase continued to have concerns about the Claimant's technical knowledge and ability.

44. On 15 November 2019 at a 1:1 meeting Dr Purchase told the Claimant that he was working too quickly and needed more attention to detail.

45. On 12 December 2019, the Claimant was advised by Dr Purchase that his training course on Zemax, due to take place on 3 to 7 February 2020, would have to be moved to later in the year due to project commitments. The Claimant's evidence was that there was only one course a year. Dr Purchase gave evidence that that type of course was run multiple times a year and based this on his previous experience. We accepted that Dr Purchase believed that the course was run multiple times a year and that due to the workload in the department at the beginning of 2020 he had asked the Claimant to postpone the course. The course was not needed for the work that the Claimant was to be required to do at the beginning of the year, as the basic Zemax course he had undertaken earlier was sufficient. We did not accept that there was only one course a year. The Claimant did not raise a complaint with the Respondent about this.

46. The Respondent had purchased a patent on an Enhanced Monovision Lens ("EML"). The patent was registered in 2011. As part of the patent there were a number of variations to the design. The Claimant was involved in modelling, simulation and lab testing of prototypes. The Claimant and his colleagues had found that the original patent lens ("HOYA") gave good vision in daylight outdoors, but that there was a drop in vision in lower light conditions. There was a project kick off meeting planned.

47. On 2 January 2020 at a project pre-kick off meeting the Claimant, Mr Brown (Marketing Manager Surgical), Mr Convery (R&D), Dr Melk (R&D) and Mr Barszcz met to practice presentations for the kick-off meeting on 6 January 2020. The Claimant had produced a presentation. The Claimant identified the problem with the HOYA lens at the meeting and said that he was

working on improving it. The Claimant accepted that project had not reached the development stage and was not on the market.

48. The Claimant's evidence was that the original HOYA lens could destroy the vision of the patient and that they needed to test the quality of the lens by checking the pupil size of the patient. It was put to the Claimant that the lens was not something that was being sent to development or production and therefore there could not be a breach of a legal obligation. The Claimant responded by saying that the lens was not on the market but there was an order after 2 January to continue making it, we rejected that evidence. We accepted Mr Davies' evidence that the ultimate lens was developed from the patent and the original lens was only being used for comparison purposes. We were not satisfied that as of 2 January 2020, the Claimant believed that the original HOYA lens was going to be marketed nor that there was any breach of legal obligation or risk to health and safety in relation to the EML lens that was being explored. The lens was in a pre-development stage, work was continuing on it, and it was not being marketed.

49. At some point after the meeting Mr Davies was informed that the Claimant had said, at another meeting with the marketing team, that the lens was outdated technology and would fail ISO standards. We accepted Mr Davies evidence that it was not outdated technology and that the type of lens did not yet have any ISO standards attached to it. Mr Davies then had to spend time reassuring the marketing team. Following this, Mr Davies asked that the Claimant did not attend project meetings without a more senior member of the R& D Team present.

50. On 6 January 2020, the Claimant was asked by Dr Purchase, to develop physical prototypes to test and not to solely use the Zemax programme for simulations. The Claimant originally said in evidence that he was asked to make physical prototypes of variations to lenses rather than using Zemax, because Dr Purchase did not trust Zemax. In cross-examination it was put to him that Dr Purchase had said not to use Zemax alone but also to use physical prototypes. The Claimant denied this, but said if it was said he had not heard it. We rejected the Claimant's evidence. We accepted Dr Purchase's evidence that Zemax was never used on its own and that physical prototypes are made so that the simulated lens could be tested, and it discovered whether it can be manufactured.

51. Dr Purchase also told the Claimant, that by saying in multi-team meetings that the technology was outdated it was destabilising the EML project meetings. He also said that when the project was just starting and someone from the optical team was saying it would not work, it was bad for morale, and it was important for the optical team to maintain a single voice.

52. The Claimant was undertaking studies into the Nimo and PMTF systems and thought that he had discovered that the calibration of the machines was incorrectly set so that the quality of the MTF (power of the lens) was reading as 10% higher. The Claimant spoke to the inventor of the system who was surprised by the finding.

53. The Claimant said in evidence that it was the Respondent's responsibility to calibrate Nimo and that Lambda-X only carried out maintenance. Dr Purchase gave evidence that it was not possible for Rayner to calibrate the MTF for Nimo and that they simply checked it and that the calibration was carried out by Lambda-X. We preferred the evidence of Dr Purchase. We also accepted Dr Purchase's evidence that the Lambda-X manual said that non-standard cuvettes (lens holders) were acceptable to be used.

54. The Claimant cross-examined Dr Purchase about the positioning of the lens in relation to the cross-hairs on the system. We accepted Dr Purchase's evidence that he had spoken to Lambda-X who had confirmed that measurements could be taken slightly off centre and that it was fairer to align the centre of lens to the centre of the system, rather than the centre of the cross hair. We did not accept that this was subsequently referred to by the Claimant on 14 January 2020.

55. The Claimant accepted that the Respondent set higher limits than required by ISO standards, in relation to some parameters, and this included the calibration of the MTF. Therefore, the Respondents required a higher degree of accuracy than the standards required.

56. On 14 January 2020, the Claimant mentioned to Dr Purchase that there were possible manipulations of the system and that a non-standard lens holder was being used. We did not accept that there was any mention of the Respondent manipulating the system to obtain fake yields. In his closing submissions the Claimant said that there was a breach of an obligation in relation to the standards for MTF, however he did not give any evidence that he referred to this at the time.

57. On 16 January 2020 Dr Purchase asked the Claimant to triple check a file was correct and whether it could be sent to Lambda-X. On 16 January 2020, the Claimant sent an e-mail [p270-272] to Dr Purchase and Dr Melk with results he had taken from measuring the levels of MTF with NIMO, PTMF and Trioptic with the same graphs as attached to Dr Purchase's e-mail. The e-mail did not mention any breach of standards, but suggested that different systems provided different results. We accepted Dr Purchase's evidence that they did not have to compare multiple systems for ISO standards, but that they had to compare against traceable reference systems, which is what the Respondent did. Further we accepted that the Claimant had not

run his tests at the correct measure and had done so at 59 lines per millimetre, rather than 100.

58. On 21 January 2020, the Claimant applied for an internal job vacancy as an International Product Specialist. The Claimant subsequently attended an interview with Mr Dawes (VP International). He was later told he was overqualified for the role.

59. On 22 January 2020, the Claimant sent copies of the slides he had prepared for 2 January 2020 to Tim Brown. Mr Brown could not access them. The Claimant resent them on 21 February, but Mr Brown did not have time to look at them before the Claimant's dismissal.

60. On 7 February 2020, the Claimant gave a presentation comparing monovision and multifocal lenses. He did not give any analysis or opinion as to which was better.

61. On 10 February 2020, the Claimant's team were sent appraisal forms and were required to complete them before their appraisal meetings [p 273-274].

62. On 18 February 2020, the Claimant attended an annual appraisal meeting with Dr Purchase. He had not prepared the appraisal form in advance of the meeting. The Claimant's evidence was that he had been too busy to prepare the form and that it had been agreed they would have a meeting the following day to discuss it, we rejected that evidence. Dr Purchase's evidence, which we accepted, was that he tried to muddle his way though the appraisal as best as he could and told the Claimant that he needed to complete his part immediately afterwards. There was a scheduled 1:1 session the following day and Dr Purchase asked the Claimant whether there was anything that he would particularly want to raise and if not whether the meeting could be cancelled. The Claimant agreed to cancel the meeting.

63. On 19 February 2020, Dr Purchase completed his part of the appraisal form and sent it to Mr Davies for some advice. Dr Purchase observed that in relation to technical attention to detail and total product thinking that input was excellent when the task was clearly defined, but that the level of definition required was too great for a position of optical design engineer. Tyring to improve those skills was challenging and that it was evident that the claimant had not listened and offered answers before the question was fully developed and that had been previously raised at his probation meeting.

64. On about 20 February 2020 the Claimant said that he made disclosures about financial irregularities to unnamed colleagues. He did not provide any

details in relation to this. The Claimant said in his closing submissions that he did not think they were in the public interest.

65. At about this time, the decision was taken to dismiss the Claimant. Dr Purchase considered that the Claimant continued to provide inaccurate data, which was taking up his time. Further the Claimant was not showing any signs of technical improvement and that the situation was getting worse. The Claimant referred to his presentation on EML which he had uploaded to his personal folder. Dr Purchase had not looked at this when making his decision. We accepted Dr Purchase's evidence that he had raised data and Zemax issues with the Claimant on numerous occasions. The Claimant had been good at PTMF work, but that was work at a technician level. The Claimant also suggested that he had written 5 RDTR reports which had been signed off and demonstrated his technical level, however we accepted that 4 of them were written by Dr Purchase and that he had great assistance with the other. We also accepted Dr Purchase's evidence that the Claimant would identify problems but not offer potential solutions and if suggestions were provided they were generic and non-specific. We accepted that Dr Purchase genuinely believed that the Claimant's technical capability was lacking for an optical design engineer and that given the attempts to help the Claimant improve, further improvement was unlikely. It was also likely that the failure of the Claimant to complete the employee assessment for the appraisal was considered to be disappointing and had an effect in the decision making process.

66. The Claimant's 1:1 meeting on 26 February 2020 was cancelled because Dr Purchase did not know what to do and was seeking advice about the Claimant's continuing employment.

67. On 28 February 2020, Dr Purchase called the Claimant into a meeting with Mr Davies. The Claimant was told that it was his last day of work for the Respondent. He was told that the reason was his technical abilities and that he had not been operating at the required level for the role. It was also discussed that because the Claimant had been looking for other roles that it could be recognition that he did not fit in his present role. He was told his contact would be terminated with immediate effect and he would be paid in lieu of notice. The dismissal letter said that the reason was that the Claimant was not "not operating at the required technical level required for this role." [p369]

The law

68. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the

reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

69. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

70. Under Section 47B a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. This provision does not apply to employees where the alleged detriment amounts to dismissal.

71. Section 48(1) and (1A) of the Act state that an employee may present a claim that he has been subjected to detriment contrary to s. 44 and 47B of the Act. Under section 48(2) of the Act, on a complaint to an employment tribunal, it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

72. s. 48(3) provides: An employment tribunal shall not consider a complaint under this section unless it is presented—
(*a*) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
(*b*) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
(4) For the purposes of subsection (3)—
(*a*) where an act extends over a period, the 'date of the act' means the last day of that period, and
(*b*) a deliberate failure to act shall be treated as done when it was decided on;
and, in the absence of evidence establishing the contrary, an employer[,a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has

done no such inconsistent act, when the period expires within which he might reasonable have been expected to do the failed act if it was to be done.

73. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Protected disclosures

74. The tests were recently stated by the Court of Appeal in Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73.

75. First, we had to determine whether there had been disclosures of '*information*' or facts, which was not necessarily the same thing as a simple or bare allegation (see the cases of Geduld-v-Cavendish-Munro [2010] ICR 325 in light of the caution urged by the Court of Appeal in Kilraine-v-Wandsworth BC [2018] EWCA Civ 1346). An allegation could contain '*information*'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to '*information*' under the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. For example, the words "*you have failed to comply with health and safety requirements*" might ordinarily fall short on their own, but may constitute information if accompanied by a gesture of pointing at a specific hazard. The issue was a matter for objective analysis, subject to an evaluative judgment by the tribunal in light of all the circumstances. A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

76. Next, we had to consider whether the disclosure indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue (Western Union-v-Anastasiou UKEAT/0135/13/LA).

77. We also had to consider whether the Claimant had a reasonable belief that the information that she had disclosed had tended to show that the matters within s. 43B (1)(b) or (d) had been or were likely to have been covered at

the time that any disclosure was made. To that extent, we had to assess the objective reasonableness of the Claimant's belief at the time that she held it (Babula-v-Waltham Forest College [2007] IRLR 3412 and Korashi-v-Abertawe University Local Health Board [2012] IRLR 4). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. The test was not met simply because a risk *could* have materialised (as in Kraus-v-Penna [2004] IRLR 260 EAT). Further, the belief in that context had to have been a *belief* about the information, not a doubt or an uncertainty. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in *Chesterton Global Ltd v Nurmohamed* [2017] EWCA Civ 979; [2017] IRLR 837, para.8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

78. 'Breach of a legal obligation' under s. 43B (1)(b) was a broad category and has been held to include tortious and/or statutory duties such as defamation (Ibrahim-v-HCA UKEAT/0105/18).

79. Next, we had to consider whether the disclosures had been '*in the public interest.*' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, we had to consider the objective reasonableness of the Claimant's belief at the time that he possessed it (see Babula and Korashi above). That test required us to consider her personal circumstances and ask ourselves the question; was it reasonable for her to have believed that the disclosures were made in the public interest when they were made.

80. The '*public interest*' was not defined as a concept within the Act, but the case of *Chesterton-v-Nurmohamed* [2017] IRLR 837 was of assistance. The Court of Appeal determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure. As to the need to tie the concept to the reasonable belief of the worker;

> "*The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief*

that the disclosure is made in the public interest" (per Supperstone J in the EAT, paragraph 28).

81. The Court of Appeal [2017] IRLR 837 dismissed the appeal. At paragraph 31 Underhill LJ said that he did not think "there is much value in adding a general gloss to the phrase 'in the public interest. … The relevant context here is the legislative history explained at paragraphs 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interests of the worker making the disclosure and those that serve a wider interest."

82. Further at paragraph 36 to 37
"36. …The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

37. Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character [5]), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at paragraph 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

83. The factors referred to are:

(a) the numbers in the group whose interests the disclosure served – see above;
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, 'the larger or more prominent the wrongdoer (in terms

of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest' – though he goes on to say that this should not be taken too far.

84. Finally, we did not have to determine whether the disclosures had been made to the right class of recipient since the Respondent accepted that if they had been made, they were made to the Claimant's 'employer' within the meaning of section 43C (1)(a).

Detriment (s. 47B)

85. The next question to determine was whether or not the Claimant suffered detriment as a result of the disclosure. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 of the decision in Harrow London Borough Council-v-Knight [2002] UKEAT 80/0790/01).

86. Section 48 (2) was also relevant, in that, "*On such a complaint it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*"

87. A detriment is something that is to the Claimant's disadvantage. In Ministry of Defence v Jeremiah [1980] ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, in which Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"

88. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective. (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

89. The test in s. 47B is whether the act was done "*on the ground that*" the disclosure had been made. In other words, that the disclosure had been the

cause or influence of the treatment complained of (see paragraphs 15 and 16 in Harrow London Borough Council-v-Knight [2002] UKEAT 80/0790/01). It will be infringed if the protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the whistle blower (NHS Manchester-v-Fecitt [2012] IRLR 64 and International Petroleum Ltd v Osipov UKEAT 0229/16).

90. The test was not one amenable to the application of the approach in *Wong-v-Igen Ltd*, according to the Court of Appeal in NHS Manchester-v-Fecitt [2012] IRLR 64). It was important to remember, however, if there was a failure on the part of the Respondent to show the ground on which the act was done, the Claimant did not automatically win. The failure then created an inference that the act occurred on the prohibited ground (International Petroleum Ltd v Osipov EAT 0058/17).

91. As observed in (Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73)

" *30. As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Kahn [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:*

> *"Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

31. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused

the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B."

Dismissal (s. 103A)

92. We considered the test in Kuzel-v-Roche [2008] IRLR 530;
    (a) whether the Claimant and had showed that there was a real issue as to whether the reason put forward by the Respondent was not the true reason for dismissal;
    (b) if so, had the employer showed its reason for dismissal;
    (c) if not, it is open to the tribunal to find that the reason was as asserted by the employee, but that reason does not have to be accepted. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not one advanced by either side.

93. However, since the Claimant lacked the requisite service to bring an ordinary unfair dismissal claim, the burden was on him to prove the reason for her dismissal under s.103A on the balance of probabilities; it is a greater burden than the requirements to merely prove a prima facie case if he had a two-year service under Kuzel-v-Roche [2008] IRLR 530; Ross-v-Eddie Stobart [2013] UKEAT/0068/13/RN.

Conclusions

Did the Claimant make protected disclosures?

On 31 May 2019 that the compliance of the 613Z lens with BS EN ISO Standard 11979-02 (2014) paragraph 4.2.2 had not been tested and that the Respondent did not have professional/precise tools for this test.

94. The Claimant was not the person who sent the e-mail, and the e-mail did not say that it was written by the Claimant and Dr Lopez. In his closing submissions the Claimant said that he did not consider that there was a public interest at this time, but it was from 24 June 2019. Accordingly, the Claimant did not provide information that tended to show a breach of a legal obligation or that that there was a danger to a person's health or safety, and he did not believe that there was a public interest. Accordingly, this was not a protected disclosure.

On 24 June 2019 at a planned deviation meeting that compliance of the 613Z Lens with BS EN ISO Standard 11979-02 (2014) paragraph 4.2.2 had not been tested. In particular that the Respondent did not measure the angle difference between the physical axis indicator and the meridian with the lowest dioptic power of the

other sold toric lenses for 10 to 15 years.

95. The Claimant raised in the meeting that there was not a specific verification test or tool to test the angle between the toric mark and the toric axis on the 613Z lens. During the presentation he made reference to the ISO standard. He also mentioned that toric lenses already in production could have the same problems. This was a disclosure of information

96. The 613Z lens was in a developmental phase and was not being marketed. At that time the lens was not subject to ISO standards, and it was not being implanted in the eyes of patients. There was no evidence that the lens was going to go to market in its current form. The Claimant was part of the technical team and would have known that the lens had not been fully developed and that the purpose of the meeting was to discuss a deviation from the standard operating procedure. We did not accept that the Claimant believed that the information tended to show that there was a breach of ISO standard or a danger to health and safety health and safety of an individual. Even if the Claimant did hold such belief, such a belief was unreasonable.

97. The 613Z lens was not being marketed and the lenses at that stage would not be implanted. Accordingly, the Claimant did not have a reasonable belief that there would be any effect on patients and consequently that it was in the public interest.

98. In relation to the older lenses the Claimant thought that a similar issue might have occurred with the verification of the angle. He had not tested any of the older lenses and he had not checked the SOPs in relation to them. The Claimant was a technically skilled employee and was aware that there were SOPs and processes for the manufacture of the lenses. Without checking the lenses nor considering the SOPs in relation to their production the Claimant would not have been able to assess whether they complied with the ISO standards and if not whether there was a health and safety risk. There was a visual check for all manufactured lenses and the lathes were calibrated. Taking into account the Claimant's technical knowledge and that he had not considered the SOPs or carried out any tests, the Claimant at most had a doubt or thought that there was a possibility that there might be a breach of the ISO standard or a risk to health and safety. This was based on a thought and not any research or checking into the products. The Claimant did not believe that the information tended to show that a breach of a legal obligation was likely or that it was likely that an individual's health and safety was endangered. Taking into account the Claimant's technical knowledge and the lack of investigation, the Claimant did not have a reasonable belief that the information tended to show that there was a danger to health and safety or a breach of legal obligation.

99. This therefore was not a protected disclosure.

On 13 September 2019, in a grievance meeting, that he had suffered detriments at work including extension of his probationary period because of the disclosures on 31 May 2019 and 24 June 2019

100. At the meeting the Claimant referred to the e-mail sent on 31 May 2019. The slides referred the ISO standard and that the equipment was not suitable for the 613Z lens as of 31 May 2019. The slides referred to the issue causing a high rejection rate. He also referred to there being a standard deviation to the SOP being implemented. There was no reference to the standard deviation being in breach of any ISO standard. We were not satisfied that the Claimant disclosed information which tended to show that there was or had been a breach of a legal obligation or that the health and safety of an individual was endangered.

101. This was not a protected disclosure.

On 2 January 2020 during the first EML project meeting that there were serious flaws in the proposed optical design of the purchased patent for the lens

102. The Claimant told the meeting that the original HOYA patent lens for the EML project had problems with vision in lower light conditions and that he was working on improving it. This was a disclosure of information.

103. The project had not reached the development stage and was not being marketed, of which the Claimant was aware. As such ISO standards did not apply to it. The Claimant accepted that it had not reached the development stage. Due to the stage the project had reached the lens would not have been implanted in anyone's eye. The Claimant's technical knowledge meant that he knew it was still in the pre-development stage. We did not accept that the Claimant had a belief that the original lens was going to be marketed or that that the information tended to show that there was any breach of a legal obligation or risk to health and safety. Even if the Claimant had such a belief it would have been unreasonable given his technical knowledge and that it was still at a pre-development stage. In the circumstances the Claimant was aware that the original patent lens would not be made available to patients, and he did not have a reasonable belief that it was in the public interest.

104. This was not a protected disclosure.

On 14 January 2020 and in the weeks after, the Claimant verbally disclosed to Dr Purchase and Dr Melk that in relation to Lambda-X that the Respondent's optical

metrology systems are manipulated to get a fake yield result

105. On 14 January 2020, the Claimant mentioned to Dr Purchase that there were possible manipulations on the lambda-x equipment and that a non-standard lens holder was being used. The Claimant did not suggest that it was being manipulated to get fake results or that there was any breach of an ISO standard. There was no suggestion in what the Claimant said that tended to suggest that there was a breach of legal obligation or that the health and safety of an individual was being put at risk. Accordingly, there was not a disclosure of information.

106. In any event the Claimant accepted that the Respondent set higher standards than required by the ISO standard. Further given the Claimant's technical knowledge he would have been aware that machines are measured against traceable reference systems and not other machines. The Claimant incorrectly asserted that the Respondent calibrated the equipment, when it was Lambda-X which did it, of which he should have been aware. Further that the manual said that non-standard cuvettes could be used. The Claimant did not suggest in his evidence what legal obligation had been breached. We were not satisfied that the Claimant had in mind any particular legal obligation or that he believed that there had been such a breach. In any event, taking into account the Claimant's knowledge any such belief would not have been reasonable.

107. This was not a protected disclosure.

On 16 January 2020, by e-mail to Dr Purchase and Dr Melk provided investigation results and comparison graphs showing the miscalibration of NIMO devised to obtain a higher MTF rate compared to reference tools. NIMO was reporting 10% higher than the actual quality of the lens.

108. On 16 January 2020, the Claimant provided an e-mail providing some compared results. There was no explanation in the e-mail or attachment as to what the information tended to show, other than there was a difference between the systems. There was no mention of ISO standards or health and safety. We did not accept that the Claimant had provided information that tended to show that there had been a breach of a legal obligation or that there was a risk to health and safety.

109. Further on the basis of the previous reasoning above, we did not accept that the Claimant would have had a reasonable belief that there had been breach of a legal obligation or that the health and safety of an individual had been endangered.

110. This was not a protected disclosure

On 20 February 2020 the Claimant disclosed verbally and in writing to unnamed

colleagues various alleged financial irregularities

111. There was no evidence as to what the Claimant disclosed to his unnamed colleagues, and he said in his closing submissions that it was not in the public interest. Accordingly, this could not be a protected disclosure.

Detriment and dismissal

112. Although we found that there were not any protected disclosures we addressed the detriment and dismissal issues for completeness.

Was the Claimant subjected to a detriment by the Respondent on the ground that he made a protected disclosure by:

On 31 May 2019 by instructing the Claimant to study all of the recorded QMS (Quality Management System) files, over hundreds of pages, on the system and by not authorising him to implement any test till he finishes them all. While the Claimant was allowed to test lenses before the disclosure. Until Mr. Davies directly ordered the Claimant to follow the matter and report back to him on the process. And by undermining, underestimating and humiliating him verbally and the later optical team meetings;

113. The Respondent was considering a planned deviation to the SOP for the 613Z lens. It was a requirement of its Quality Management Policy that before an employee could start a planned deviation they had to be signed off on the relevant SOPs. This would have been applied to all employees and as such was not something that put the Claimant to a disadvantage and a reasonable employee could not have considered it to be a detriment. In any event Mr Purchase asked the Claimant to do this because it was company policy, and the e-mail of 31 May 2019 had no influence on the instruction.

114. We did not accept that Mr Purchase described the investigation carried out by the Claimant as useless or that the meeting was hostile. The Claimant failed to prove that there had been any detrimental treatment.

On 24 June 2019, following the Claimant's presentation, by asking the Claimant to repeat tasks and perform tests that even Dr Purchase had no theoretical explanation for; and, On 24 June 2019 by undermining, underestimating and humiliating him verbally after the meeting;

115. At the 1:1 meeting following the presentation on 24 June 2019, the Claimant was not asked to repeat tasks or perform tests for which there was not a theoretical explanation. Dr Purchase said that the reference to burned surfaces should not have been referred to because it caused confusion and it ran the risk of the meeting going off track. We did not accept that the

meeting was hostile, but that Dr Purchase referred to the burned surfaces in order to assist the Claimant. This was carried out in a 1:1 setting, and we did not accept that a reasonable worker would have considered such feedback as a detriment. In any event the motivation behind what Dr Purchase said was to assist the Claimant and to help him focus on the matters to be discussed and avoid confusion in meetings. We would not have accepted that any of the alleged protected disclosure had any influence on what Dr Purchase said and concluded that he was acting in a supportive manner.

In July and August 2019 part of the Claimant's induction course was cancelled during the clinical trial of 613Z. This training was supposed to be completed during the Claimant's probationary period; and on 15 September 2019 a booked internal training course was cancelled because the Claimant's probationary period had been extended;

116. The Claimant did not refer to these matters in his witness statement and did not adduce any evidence in relation to them. As such we were not satisfied that the Claimant proved that such events occurred.

On 6 September 2019 by undermining, underestimating and humiliating him during and after the meeting with the decision to extend the Claimant's probationary period; and On 9 September 2019 by sending the Claimant a letter which undermined, underestimated and humiliated him; and On 20 September 2019 by undermining, underestimating and humiliating him during and after the grievance meeting with HR; and Between 20 September and 4 October 2019 by holding the Claimant in an uncertain, stressful situation and didn't give him the withdrawal letter;

117. We accepted that to extend a probationary period would be considered by an employee to be to their disadvantage, in that there would be a delay to the confirmation of their employment, and this would be a detriment. The Claimant often provided incorrect data and recommendations to Dr Purchase. On 6 September 2019 there was a discussion as to where the Claimant was not meeting the expected standard and Dr Purchase suggested that if he was more prescriptive that it could help. The Claimant did not have Zemax experience and there were errors associated with using that system. We accepted that Dr Purchase considered that this was the case. It was notable that after the e-mail dated 31 May 2019 and the presentation on 24 June 2019, that the Respondent had taken on board what had been said about the 613Z lens and put in place Standard Deviations to the SOPs, this tended to suggest that there was not any hostility towards the Claimant. If there had been a protected disclosure we would have been satisfied that the reason for the extension of the probation period was solely because the Claimant was not meeting

the required standards and that the alleged protected disclosures had no influence in that decision or the timing of the confirmation that the letter of 9 September 2019 was withdrawn.

On 22 November 2019, following the HR letter dated 15 November 2019, by asking the Claimant to implement annual calibration of all PMTF systems in 9 working days between 22 November and 4 December 2019 meanwhile the Claimant had to complete works on the 613Z project and the EML project too;

118. The Claimant did not provide any evidence in relation to this allegation and did not cross-examine Dr Purchase in relation to it. We were not satisfied that it occurred.

On 12 December 2019, the Claimant was asked to cancel the booked unique Zemax training course in 2020.While it was referred as one of the three essential weak points of the Claimant in his probation review by the Respondent. This course had already been confirmed by the Respondent on the HR calendar as "training off-days" and its Purchase requisition # PR000142831 was registered on accounting system. Dr Purchase asked to cancel it and postpone this essential training course to unspecified date;

119. The Claimant was asked to postpone his training to later in the year due to project commitments. We accepted that a reasonable employee could consider that such a request was to their detriment, as such a course would assist them with their role. Dr Purchase believed that more than one course ran each year, and we were not satisfied that there was only one course per year. The course was not needed for the work that the Claimant was being required to do at the beginning of 2020 and at that time the departmental workload was high, and he was needed to be working in the department. We accepted Dr Purchase's evidence in that respect. If there had been a protected disclosure we would have been satisfied that the Claimant was asked to postpone the course due to the departmental workload and that any disclosure had no influence in the decision.

A few days after the 2 January 2020 by undermining, underestimating and humiliating him and warning to the Claimant and Dr Melk about the disclosures at the EML kick-off meeting and stating that "there is only one voice and that is mine"; and on 6 January 2020 by asking the Claimant to design and make several EML prototype lenses that not only were not expected to help in resolving the issues but also, there was no theoretical reason to do so. The Claimant tried to answer the questions by modelling the ordered prototypes in Zemax software but Dr Purchase unreasonably repeated "I don't trust Zemax. You have to make and test them all by yourself and report result of the tests to me" creating many hours of unnecessary work;

120. We did not accept that the Claimant was asked to make physical prototypes of lenses rather than using Zemax. The Claimant was asked to make prototypes and not solely use Zemax simulations. Prototypes were made to test the simulated lens and to test whether it could be manufactured. We accepted that this would have been a reasonable request and that no reasonable employee would have considered it to be a detriment.

121. Dr Purchase told the Claimant that saying in multi-team meetings that the EML technology was outdated was destabilising the project and affecting morale and it was important for the team to maintain a single voice. This did not appear to relate to the protected disclosures relied upon by the Claimant, as no such words were used on 2 January 2020. We therefore would not have been satisfied that a protected disclosure would have had any influence on what was said.

On 16 January 2020, 20 February 2020 and 27 February 2020 by asking the Claimant to repeat works for which there was already known results. The Claimant had already presented the found facts in his PowerPoint files under title of "Monovision-V-Multifocal" and "Rayner's EMV+A Lens-V-Dr Barrett's EMV HOYA Lens" in optical team and 1-to-1 meetings to Dr Purchase.

122. The Claimant did not adduce any evidence in his witness statement or the bundle that tended to suggest that he was asked to repeat work. We were not satisfied that such events occurred and accordingly there was no detriment.

Excluding the Claimant from several 1-2-1 meetings after 31 May 2019 including the meetings on 19 February 2020 and 26 February 2020;

123. On 18 February 2020, the Claimant agreed to cancel the meeting on 19 February 2020, because they had already had a long discussion that day and there was nothing further he wished to add. A reasonable employee would not have considered this to their disadvantage, and it was not a detriment.

124. A reasonable employee could have considered the cancellation of the meeting on 26 February 2020 to be to their disadvantage and it was a detriment. Dr Purchase had considered that the Claimant was not meeting the technical requirements of the role and that there was no real prospect of the Claimant improving. He was seeking advice as to how to deal with the situation and did not want to have the meeting because he did not know what to do. We accepted that the concerns about the Claimant's technical abilities were genuinely held. It was notable that the Respondent had made changes to its procedures in relation to the 613Z lens and that they were looking to send readings from the NIMO system to Lambda-X. This strongly

suggested that any disclosure made by the Claimant formed no part of Dr Purchase's decision. If there had been a protected disclosure we would have been satisfied that any such disclosure played no part in the decision and that it was solely due to Dr Purchase not being sure what to do, given that he thought the Claimant should be dismissed.

By undermining the value of the work and pretending that they were not worth a feedback. Dr Purchase never replied technically / as a line manager / head of optic to the disclosed issues; By underestimating the Claimant's knowledge and experience after the disclosures and provided scientific proofs and presentations; and by humiliating the Claimant in asking him to repeat manual works after making the disclosures and providing scientific proofs and presentations.

125. The Claimant provided little, if any, evidence about such allegations other than those detailed above. We were not satisfied that Dr Purchase acted in such a manner towards the Claimant, and we accepted that he was a supportive manger and offered help to the Claimant and made suggestions of fixes to problems. We were not satisfied that the Claimant proved any such allegations occurred and there was no detriment.

Excluding the Claimant from EML project meetings after the made disclosures; and Excluding the Claimant from the meeting/s with the patent owner, Dr Graham Barret, and removing his name from list of invited professionals after the made disclosures regarding the obtained patent for EML lens.

126. The Claimant adduced no evidence in his witness statement or the bundle in relation to these allegations. The Claimant was asked not to attend meetings without someone more senior from the team being present, however that was not the same as exclusion. We were not satisfied that the Claimant was excluded from any meeting or that he had proved the alleged detriments had occurred.

127. Accordingly, if there had been a protected disclosure we would not have found that the Claimant was subjected to any detriment because of it.

Dismissal

<u>What was the principal reason for the Claimant's dismissal?</u>

128. The burden of proof was on the Claimant to show that the reason for his dismissal was because he made a protected disclosure. We accepted the evidence of Dr Purchase that he considered that the Claimant's technical capability was not sufficient for the role of optical engineer. There had been concerns about the Claimant's experience from the outset. At the

probation review the Claimant was reminded of the areas of concern and rather than dismissing him the probationary period was extended. This was a supportive measure by Dr Purchase. The problems with the Claimant providing inaccurate data and recommendations continued, notwithstanding highly prescriptive requests from Dr Purchase. The failure of the Claimant to complete his part of the annual appraisal was significant and was something that tended to show that the Claimant was not complying with what he was asked to do. The Claimant suggested that he was dismissed because he had applied for another job, which was a reason other than because of a protected disclosure. He also said he was dismissed because he had sent Mr Brown his slides from 2 January 2020 and that this was the reason. There was no evidence that Mr Purchase was aware of the slides at the time he made his decision. The Claimant submitted that the failure to consider his work in February 2020 was sufficient to show that the reason was for something other than his technical capability, however we accepted the Respondent's evidence that the problems were ongoing and were getting worse. We were not satisfied on the balance of probabilities that the reason for the Claimant's dismissal was because he made a protected disclosure. We were satisfied that the principal reason for his dismissal was due to a lack of technical capability and that there was not any real prospect of improvement.

129. Accordingly, the Claimant was not dismissed for making a protected disclosure.

Conclusion

130. Accordingly, the claims of automatically unfair dismissal, detriment were dismissed.

Employment Judge J Bax
Dated: 1 October 2021

Reasons sent to parties: 12 October 2021

FOR THE TRIBUNAL OFFICE