Case Numbers: 2202801/2020, 2202802/2020, 2203334/2020 and 2203335/2020

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr N Mendy		(1) Motorola Solutions UK Limited (2) Motorola Solutions Inc (3) Ronan Despres (4) Fergus Mayne (5) Carole Lawrence (6) Uwe Niske

JUDGMENT ON CLAIMANT'S APPLICATION FOR RECONSIDERATION

The judgment of the Tribunal is that the Claimant's application for reconsideration of the judgment on the Claimant's interim relief application sent to the parties on 25 June 2020 is dismissed.

REASONS

The Claimant's application

1. By email of 9 July 2020 the Claimant has applied for reconsideration of my judgment in relation to his application for interim relief under s 128 of the Employment Rights Act 1996 (ERA 1996) sent to the parties on 25 June 2020 following a hearing on 24 June 2020.

2. I have decided that the Claimant's application stands no reasonable prospect of success for the reasons set out below.

Preliminary issue

3. The Claimant has suggested that this application should be considered by a different judge because he says the Tribunal: (i) was 'unduly concerned' about the fact that he had made secret recordings of various conversations and meetings with the Respondent; (ii) wrongly refused to listen to those recordings; and (iii) 'only had reference to R's submissions'.

4. The Claimant's concerns in these respects are misplaced. I was not 'unduly concerned' about the fact that he had made secret recordings. I included reference to the secret recordings at appropriate points in my judgment as being agreed facts. I set out in paragraphs 10-11 of my judgment why it was not appropriate for me to listen to those recordings in the context of a summary consideration of an interim relief application. I did not only have reference to the Respondent's submissions. I carefully considered all the Claimant's oral and written submissions and summarised them at paragraph 76.

5. In any event, even if the Claimant's concerns were not misplaced, the Tribunal's Rules require an application for reconsideration to be considered by the Judge who made the original decision unless it is not practicable (Rule 72(3)). Here, it is practicable, and I have therefore considered the Claimant's application myself.

The law

6. Rules 70-73 of the Tribunal Rules provides as follows:-

> **70. Principles**
> A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.
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> **71. Application**
> Except where it is made in the course of a hearing, an application for reconsideration shall be presented in writing (and copied to all the other parties) within 14 days of the date on which the written record, or other written communication, of the original decision was sent to the parties or within 14 days of the date that the written reasons were sent (if later) and shall set out why reconsideration of the original decision is necessary.
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> **72. Process**
> (1) An Employment Judge shall consider any application made under rule 71. If the Judge considers that there is no reasonable prospect of the original decision being varied or revoked (including, unless there are special reasons, where substantially the same application has already been made and refused), the application shall be refused and the Tribunal shall inform the parties of the refusal. Otherwise the Tribunal shall send a notice to the parties setting a time limit for any response to the application by the other parties and seeking the views of the parties on whether the application can be determined without a hearing. The notice may set out the Judge's provisional views on the application.
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> (2) If the application has not been refused under paragraph (1), the original decision shall be reconsidered at a hearing unless the Employment Judge considers, having regard to any response to the notice provided under paragraph (1), that a hearing is not necessary in the interests of justice. If the reconsideration proceeds without a hearing the parties shall be given a reasonable opportunity to make further written representations.

> (3) Where practicable, the consideration under paragraph (1) shall be by the Employment Judge who made the original decision or, as the case may be, chaired the full tribunal which made it; and any reconsideration under paragraph (2) shall be made by the Judge or, as the case may be, the full tribunal which made the original decision. Where that is not practicable, the President, Vice President or a Regional Employment Judge shall appoint another Employment Judge to deal with the application or, in the case of a decision of a full tribunal, shall either direct that the reconsideration be by such members of the original Tribunal as remain available or reconstitute the Tribunal in whole or in part.
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> **73. Reconsideration by the Tribunal on its own initiative**
> Where the Tribunal proposes to reconsider a decision on its own initiative, it shall inform the parties of the reasons why the decision is being reconsidered and the decision shall be reconsidered in accordance with rule 72(2) (as if an application had been made and not refused).

7. The Tribunal thus has discretion to reconsider a judgment if it considers it in the interests of justice to do so. Under Rule 72(1), I must dismiss the application if I consider that there is no reasonable prospect of the original decision being varied or revoked. Otherwise, I must (under Rule 72(2)) consider whether a hearing is necessary in the interests of justice to enable the application to be determined. A hearing would, unless not practicable, be a hearing of the full tribunal that made the original decision (Rule 72(3)). If, however, I decide that it is in the interests of justice to determine the application without a hearing under Rule 72(2), then I must give the parties a reasonable opportunity to make further written representations.

8. In deciding whether or not to reconsider the judgment, the authorities indicate that I have a broad discretion, which *"must be exercised judicially … having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible be finality of litigation"* (*Outasight v Brown* [2015] ICR D11). The Court of Appeal in *Ministry of Justice v Burton* [2016] ICR 1128 also emphasised the importance of the finality of litigation (ibid, para 20).

9. That said, if an obvious error has been made which may lead to a judgment or part of it being corrected on appeal, it will generally be appropriate for it to be dealt with by way of reconsideration: *Williams v Ferrosan Ltd* [2004] IRLR 607 at para 17 *per* Hooper J (an approach approved by Underhill J, as he then was, in *Newcastle upon Tyne City Council v Marsden* [2010] ICR 743 at para 16).

10. It may also be appropriate for a judgment to be reconsidered if a party for some reason has not had a fair opportunity to address the Tribunal on a particular point (*Trimble v Supertravel Ltd*, *Newcastle-upon-Tyne City Council v Marsden* ibid).

11. However, a mere failure by a party (in particular a represented party) or the Tribunal to raise a particular point is not normally grounds for reconsideration (*Ministry of Justice v Burton* (ibid) at para 24) – an application for reconsideration is not an opportunity to re-argue the merits.

Conclusions

12. I have considered the Claimant's application carefully, but I do not consider that there is a reasonable prospect of my judgment being varied or revoked in the light of his submissions and I have not therefore invited the Respondent to comment on his application.

13. In my judgment the Claimant has misunderstood three fundamental points about the nature of the judgment I have given and is merely seeking to re-argue the merits of his application. The four fundamental points the Claimant has misunderstood are as follows:-

    a. First, the key question on an application for interim relief is an assessment of likelihood. As set out in paragraph 56 of my judgment, the Claimant has to show that his case has *"a pretty good chance"* of success. The Claimant does not in his application for reconsideration acknowledge this high hurdle.

    b. Secondly, an application for interim relief is a summary assessment. Even at a full hearing the Tribunal is not bound to deal in its judgment with every point of evidence or argument made. This is all the more true on an interim relief application.

    c. Thirdly, the Claimant appears to be under the misapprehension that I have purported to find 'facts' about his case that will be binding on the Tribunal at full hearing. That is not so, as is stated expressly at paragraph 15 of my judgment.

    d. Fourthly, the Claimant has devoted much of his application to addressing the merits of his alleged protected disclosures, but nothing that he says there could make any difference to my judgment, not only because I considered his arguments and rejected them in relation to most of his protected disclosures for the reasons set out at paragraph 79 of my judgment, but because I actually accepted that he was likely to succeed in showing that he had made at least one protected disclosure as set out in paragraph 80 of my judgment, and that protected disclosure was the principal one relied on by the Claimant and repeated on most occasions to the Respondent as set out in my recital of the facts in my judgment.

14. As to the Claimant's submissions in relation to my conclusions on the likelihood of it being established at trial that his protected disclosures were the sole or principal reason for his dismissal, he appears here simply to disagree with my conclusion at paragraphs 83-86 of my judgment that the misconduct identified by the Respondent in the dismissal letter is likely to be found at trial to be genuinely the principal reason for dismissal.

15. None of those incidents of misconduct were 'bogus' because they were all things that the Claimant had written in emails.

16. Having set that out at paragraph 83, I then went on at paragraphs 84-85 to consider whether, nonetheless, the Claimant was likely to succeed in showing that it was his protected disclosures rather than the misconduct which had ultimately been the principal reason for the Respondent's decision to dismiss. I concluded not for the reasons there set out.

17. I add that the Claimant questions whether, in addition to considering *Jhuti* principles (which I did as set out in the judgment at paragraphs 85-86), I also considered Mr Mayne's own state of mind. I did: Mr Mayne's evidence on that is at paragraph 53, the direction I gave to myself about this is at paragraph 82 and my conclusions are at paragraph 83.

18. As to the Claimant's suggestion at paragraph 39ff that I failed to consider all relevant materials, I do not see that there is any special relevance to the Claimant having followed the Respondent's whistleblowing policy. As he says, there was no dispute about this and it does not appear to me to assist one way or another in relation to establishing the legal issues. I have dealt with the issue of his protected disclosures, and my approach to the secret recordings, above.

Overall conclusion

19. For all these reasons I find that there is no reasonable prospect of the judgment being varied or revoked on an application for reconsideration and the Claimant's application is therefore dismissed.

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Employment Judge Stout

10 July 2020

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Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/07/2020

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FOR THE TRIBUNAL OFFICE