EMPLOYMENT TRIBUNALS

Claimant: **Mr M Clifford**

Respondents: **1. Millicom Services UK LTD ("R1")**
2. Martin Frechette ("R2)
3. Cara Viglucci ("R3")
4. Hl Rogers ("R4")

RECORD OF A PRELIMINARY HEARING

Heard at: London Central (in private; in person and by video)

On: 14, 15 and 16 February 2024

Before: Employment Judge **P Klimov**

Appearances:

For the claimant: **Mr G Callus,** of counsel and **Mr B Hamer**, of counsel.

For the respondent: **Ms C Callaghan KC,** of counsel

RESERVED DECISION

The Respondents' application, pursuant to Rule 50(1) of the Employment Tribunals Rules of Procedure 2013 ("**the ET Rules**"), for an anonymity order and restricted reporting order prohibiting the disclosure to the public, or the publication or broadcasting by any means, of:

(1) The name and identity of Tundu Lissu;

(2) Any reference to the shooting and/or attempted assassination of Tundu Lissu in Tanzania on 7 September 2017;

(3) Any reference to the alleged connection between MIC Tanzania or any of its employees and that event;

or any information likely to lead to identification of those matters, primarily by use of a code to refer to relevant persons, events and dates (together "**the Information**"),

is refused.

REASONS

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Procedural background

1. This hearing was a preliminary hearing (in private) to determine the Respondents' privacy and restriction on disclosure application, made pursuant to Rule 50(1) of the ET Rules on 2 September 2020, as subsequently amended on 22 October 2020, [**p.188-190**] ("**the Application**").

2. The Application was refused by Employment Judge Henderson on 27 October 2020 ("**the ET Refusal**").

3. The Respondents appealed the ET Refusal to the Employment Appeal Tribunal ("**the EAT**"). By a judgment dated 11 May 2022 ("**the EAT Judgment**"), Mrs Justice Eady, President, partially allowed the appeal and remitted the Application to a differently constituted Employment Tribunal for redetermination in accordance with the principles laid down in the EAT Judgment.

4. The Claimant appealed the EAT Judgment to the Court of Appeal ("**the CoA**") and the Respondents cross-appealed. The CoA dismissed the Claimant's appeal and allowed the Respondents' cross-appeal. The CoA issued a judgment ("**the CoA Judgment**") and an order directing that the Application be remitted for redetermination by a differently constituted Employment Tribunal in accordance with the EAT Judgment, amending the order of Eady, P to remove the words in brackets.

5. The result of that is that in determining the Application, I shall consider *as at the date of its determination*:

    a. Whether the derogations sought from the principle of open justice are necessary (i) in the interests of justice or (ii) to protect the Article 8 ECHR rights of the Second Appellant [R2] ~~(including whether those rights are engaged)~~. In addressing those issues, the Employment Tribunal shall carry out a fact-specific balancing exercise which takes into account, among other things, the Article 6 ECHR rights of all parties to the litigation, the Second Appellant's subjective concerns as to the potential risk and evidence as to his intended course of action if the application was refused; and/or

    b. Whether the derogations sought from the principle of open justice are necessary in the circumstances identified in section 10A of the Employment Tribunals Act 1996, taking into account, among other things, the finding that the Claimant owed the Respondents a contractual duty of confidence and addressing whether it was in the public interest for the duty of confidence to be breached, taking into account the ECHR rights of others.

    4. The primary findings of fact made by the original Employment Tribunal continue to stand but, in considering the remitted application, the Employment Tribunal will need to consider any material change in circumstances. As for the evidence to be adduced at the remitted hearing in this regard, and other matters of case management, this shall be for the Employment Tribunal to determine.

6. On 11 August 2022, HHJ Auerbach made an interim restrictive reporting order to prevent disclosure to the public of the information covered by the Application ("**the RRO1**"). The RRO1 was made until:

> *a. permission to appeal is refused, in which case this Order is discharged; or*
> *b. if permission to appeal is granted, the determination of the Appeal; or*
> *c. further order.*

7. On 26 July 2023, LJ Simler (as she then was) granted an interim restrictive reporting order essentially on the same terms as the RRO1, until the determination of the Appeal ("**the RRO2**").

8. I note that it appears that both the RRO1 and the RRO2 have lapsed upon the determination of the Appeal. However, by the Order of EJ Singh sent to the parties on 27 November 2023, the RRO2 remains in place "*until after the determination of the Respondents' Rule 50 application remitted to the Employment Tribunal or further order.*"

9. At a case management preliminary hearing on 10 November 2023, EJ Singh ordered this preliminary hearing to re-determine the Application and listed the claim for a final hearing over 11 days in September 2024. A further case management preliminary hearing was fixed for 29 February 2024.

10. As I warned the parties at the end of the hearing, due to my work and other commitments, I was unable to produce this decision in time for the 29 February 2024 preliminary hearing. I also apologise for the slight delay in promulgating my decision following the hearing and hope this did not affect the parties' preparation for the final hearing in September.

The hearing

11. This preliminary hearing was listed for two days (in person). However, it quickly transpired that given the volume of evidence and witness testimony that needed to be considered at the hearing two days would not be sufficient. Fortunately, it was possible to add a further half a day to the hearing. All witnesses were heard and cross-examined in person on 14 and 15 February. The parties presented their final submissions on 16 February (by video). I reserved my decision.

12. Mr Callus and Mr Hamer appeared for the Claimant and Ms Callaghan KC for the Respondents. I am grateful to them all for their cogent and helpful submissions and other assistance to the Tribunal.

13. Both sides submitted helpful opening Skeleton Arguments. Closing submissions were made orally.

The evidence

14. There were four witnesses: the Claimant, and for the Respondents:

(i) Mr Martin Frechette (the second respondent and the former Vice President & General Counsel Europe - Africa of the Millicom group),
(ii) Mr Anton Mifsud-Bonnici (an Environmental, Social and Governance risk business consultant), and
(iii) Mr Adrian Stones (a Director of Stoneswift Limited, which provides risk, security and intelligence-related consultancy services).

15. The Respondents' witnesses are the same individuals who gave evidence at the first ET hearing of the Application in October 2020, as did the Claimant. However, unlike at this hearing, at the first ET hearing all witness evidence were considered "on paper" and none of the witnesses had been cross-examined.

16. The parties introduced in evidence the witness statements they had prepared for this hearing, as well as their previous witness statements, used at the first ET hearing, and prepared for the EAT hearing. There were two witness statements (with exhibits) made by the Claimant, three (with exhibits) made by Mr Mifsud-Bonnici and by Mr Stones, each, and five (with exhibits) made by Mr Frechette. All witnesses gave their evidence under oath and were cross-examined.

17. I shall observe that the evidence given by the witnesses contained a great deal of expression of opinion, assessments, value judgments and predictions. Additionally, a substantial part of the witness statements contained witnesses' interpretations of various events in Tanzania reported in the local and international press, and citations from other publications about politics, economy, and social life in Tanzania.

18. This is not meant as a criticism of the witnesses. I understand and accept that given the nature of the matter before me, the witnesses had to give their views about the possibility of various uncertain future events, and to do that based on how they see and interpret political, social, and economic landscape in Tanzania and changes in circumstances since the ET Refusal, in most of which they have not been directly involved. I say that simply to explain that while in finding the relevant facts I pay full regard to the witnesses' opinions, value judgments, assessments, and predictions, as well as to their interpretations of the press reporting of the relevant past events, I do not take those opinions, assessments, value judgments, predictions and interpretations, as unequivocally establishing the relevant underlying facts. It is important to note, the task before me is to carry out "*a fact-specific balancing exercise*".

19. Furthermore, while I accept Mr Mifsud-Bonnici and Mr Stones have considerable expertise and knowledge in their respective fields, the Respondents called them as witnesses of fact and not as expert witnesses. Therefore, their evidence must be treated as such, and various epithets they use in their witness statements (such as "*a game changer*", "*bombshell*", "*incendiary*", "*superficial*", "*cosmetic*", etc.) when opining on various matters

are not to be taken as establishing the underlying facts, or as qualifying those facts in that way.

20. Finally, the latest round of the Respondents' witness statements (Mr Frechette's fifth witness statement, and the third witness statements of Mr Mifsud-Bonnici and Mr Stones) is more akin to them challenging various statements in the Claimant's second witness statement and arguing the Respondents' case, rather than giving any further evidence of fact. However, there was no objection by the Claimant to have these statements admitted in evidence. I have carefully considered all witness statements presented by the parties.

21. The references in this decision in the format **[WS[letter][number] p[number]** is to paragraphs in the witness's relevant witness statement. For example, [**WSF4 p10**] – indicates a reference to paragraph 10 in the Mr Frechette's fourth witness statement. The codes for the Claimant's, Mr Mifsud-Bonnici's, and Mr Stones' witness statements are "**C**", "**MB**" and "**S**", respectively.

22. I was referred to various documents in the 1452-page bundle of documents the parties introduced in evidence. The bundle included the witness statements, and the relevant orders and judgments in this case. In the course of the hearing, three further documents were submitted in evidence: (i) an email of 4 June 2020 from the Claimant to Mr T Twitchett of Morgan Lewis with attached list of the Claimant's disclosure documents of 29 pages (**"Additional Doc1"**); (ii) a print-out of a news article, dated 13 September 2017 from Kahawa Tungu website entitled "*RC Paul Makonda Personally Supervised the Attempted Assassination of MP Tundu Lissu*" (**"Additional Doc2"**); and (iii) a print-out of a news article from Al Jazeera website dated 27 January 2024 entitled "*Packed Tanzania protests offer hope but reforms remain a distant dream*" (**"Additional Doc3"**). I admitted these documents as evidence.

23. Various quotations in my findings of fact are taken from the press articles and other publications introduced by the parties as part of the evidence bundle. Reference in this decision in the format [**p.xxxx**] are to the corresponding page(s) in the bundle.

Legal authorities

24. The parties submitted a joint bundle of authorities containing the following statute and judgments.

1 Contempt of Court Act 1981, sections 2, 11, 19
2 *Scott v Scott* [1913] AC 417
3 *Niemitz v Germany* (1993) 16 EHRR 97
4 *R (Lord Saville of Newdigate), ex parte A* [2000] 1 WLR 1855
5 *In re Officer L* [2007] UKHL 36; [2007] 1 WLR 2135
6 *HRH The Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 (CA)
7 *Re Nelson Inquiry* [2009] NICA 6
8 *In re Guardian News & Media* [2010] 2 AC 697
9 *Libyan Investment Authority v Societé Generale (No.1)* [2015] EWHC 550 (QB)

10 *Libyan Investment Authority v Societé Generale (No.2)* [2016] EWHC 375 (Comm)
11 *ABC v Telegraph Media Group Ltd* [2019] EMLR 5
12 *RXG v Ministry of Justice* [2020] QB 703
13 *Abbasi v Newcastle upon Tyne NHS Foundation Trust* [2021] EWHC 1699 (Fam); [2022] 2 WLR 465
14 *TYU v ILA Spa Ltd* [2022] ICR 287 (EAT)
15 *Abbasi v Newcastle upon Tyne NHS Foundation Trust* [2023] 3 WLR 575
16 *Clifford v Millicom Services UK Ltd* [2023] EWCA Civ 50; [2023] ICR 663 (CA)

25. The ET Refusal, the EAT Judgment, the CoA Judgment, the RRO1 and the RRO2 were included in the evidence bundle.

26. For the closing submissions Ms Callaghan submitted an additional authority *AB v. BBC* [2015] A.C. 588.

27. I have carefully considered all the authorities, including those referred by the parties in their opening skeletons.

28. After the hearing, on 23 February 2024, Mr Hamer, sent a copy of the judgment of Nicklin J in *Farley & Ors v. Paymaster (1836) Limited* [2024] EWHC 383 (KB), which was handed down on that day. He drew my attention to paragraphs [118] to [122] of that judgment, where Nicklin J sets out the relevant legal principles on the question of derogation from open justice. I have read the judgment in full. While the said paragraphs contain a helpful summary of the case law on derogation from the open justice principle, I do not consider the judgment breaks any new ground on this issue, or casts different light on the authorities relied upon by the parties at the hearing.

The facts

29. The underlying factual background of this dispute is well-known to the parties and recorded in some detail in the ET Refusal, the EAT Judgment and the CoA Judgment. There is no need for me to repeat it here.

30. The EAT decided (as confirmed by the CoA) that "*[t]he primary findings of fact made by the original Employment Tribunal continue to stand but, in considering the remitted application, the Employment Tribunal will need to consider any material change in circumstances*".

31. Accordingly, I limit my factual findings to material changes in circumstances since the date of the ET Refusal. All my findings of fact are on the balance of probabilities (unless stated otherwise) and are based on the totality of evidence presented to me. While I have duly considered all oral and documentary evidence presented by the parties, I record my factual findings on the matters I consider to be of most importance for the understanding of the basis upon which the determination of the Application is made.

Changes in circumstances

New President and key political developments

32. Following the attempted assassination of Mr Lissu on 7 September 2017, and his subsequent medical treatment in Kenia (where he was visited in the hospital by the then Vice President Hassan), in January 2018 Mr Lissu moved to Belgium and lived there in exile.

33. In July 2020, Mr Lissu returned to Tanzania to take part in the Presidential election as a candidate for the main opposition party ("**CHADEMA"**).

34. On 30 October 2020, the Tanzanian Presidential election was won by the then-sitting President, President Magufuli, of the ruling party - Chama Cha Mapinduzi ("**CCM**"), with a declared share of 84% of the vote. Mr Lissu was declared to have received just 13%. The election was not considered free and fair by international election observers.

35. Following the election, on 2 November 2020, Mr Lissu was arrested by the police. He was released a few hours later. He sought refuge in the German ambassador's residence. On 10 November 2020, he returned to Belgium.

36. On 17 March 2021, President Magufuli has died.

37. On 19 March 2021, the then-Vice President, Samia Hassan, formally ascended to the Presidency (pursuant to the Tanzanian Constitution, without an election) to serve out the remainder of the President Magufuli's five-year term. President Hassan is entitled, under the Tanzanian Constitution, to seek a second and final term in the office. The next Presidential elections is due in December 2025.

38. Since ascending to the Presidency, President Hassan has made positive changes aimed at liberalisation of the political life in Tanzania and creating a better business environment for foreign investments. She reversed some of the Magufuli-era policies that were used to target foreign investors, Tanzanian businesspeople, human rights activists, and opposition politicians. This included revoking the ban on four opposition newspapers, lifting a six-year ban on opposition political rallies, and announcing a national reconciliation drive with the opposition to address past injustices.

39. Early on during her current presidency, in June 2021, CHADEMA, organised a forum demanding a new constitution. It was reported that dozens of activists attending the forum had been arrested and detained for hours before being released.

40. On 21 June 2021, CHADEMA national chairperson, Freeman Mbowe, who was the guest of honour at the forum, was arrested and charged with money-laundering and conspiring to commit terrorist activities against the government. After spending almost eight months in prison, on 4 March 2022, he was released with all charges against him dropped by the public

prosecutor. Immediately after leaving the prison, he met with President Hassan.

41. Meanwhile, on 16 February 2022, President Hassan met Mr Lissu in Belgium. According to the government's press release "*the two discussed various issues of interests to the welfare of the United Republic of Tanzania*" [**p.0948**].

42. On 20 May 2022, President Hassam held a first meeting between leaders of CCM, CHADEMA and the government as part of her initiative to seek reconciliation with all key political actors in Tanzania.

43. In July 2022, to mark 30 years of multipartyism in Tanzania, President Hassan wrote a "letter to Tanzanians". In the letter under the title "*I am determined to bring about political, economic change*", the President noted that the work of fighting for democracy was not yet complete. She explained that Tanzania was currently facing the same difficulties that existed when the multiparty system was re-introduced. She said: "*This is why in my leadership I believe in the so-called 4Rs - Reconciliation, Resiliency, Reforms and Rebuilding*" [**p.1169**].

44. In September 2022, a leading civil society organisation, Twaweza, launched a new report in August drawing on data from their Sauti za Wananchi (Voices of the People) series of nationally-representative public opinion surveys. This was a significant step both for Twaweza and for Tanzania more generally, as such data had become highly politicised under President Magufuli, and Twaweza - while continuing to collect some data throughout, had not publicly released any new public opinion data in Tanzania since mid-2018. At that time, the data had revealed a sharp decline in public approval of the then President's performance. The government then responded by challenging the organisation's right to collect and publish such data. Twaweza's executive director, Aidan Eyakuze - a Tanzanian citizen - had his nationality questioned publicly and his passport confiscated. Since President Hassan took office, the government has taken a more open attitude to freedom of expression, including the right of organisations like Twaweza to collect and publish public opinion data. Aidan Eyakuze has had his passport returned to him, and this first release of data for four years is seen by some commentators as a test case for political and civil society freedoms [**p.1173**].

45. This liberalisation process also reinvigorated the opposition demands for a constitutional and electoral reform, which had initially started some 30 years ago, when Tanzania had moved from one-party rule to a multiparty system. However, despite the initial moves in that direction, President Hassan declared that the reform would be considered only after the next Presidential election in late 2025 [**p.0967**]. This appears to remain the main "bone of contention" between the government and the opposition [**p.0831-0835**].

46. On 3 January 2023, President Hassan lifted a ban on opposition political rallies, promising reform to electoral laws and constitution-making.

47. On 25 January 2023, Mr Lissu, who remains a leader of CHADEMA, returned from exile in Belgium to active participation in politics in Tanzania [**p.0836-0837**].

48. On 8 March 2023, President Hassan celebrated International Women's Day as guest of honour of CHADEMA at an event in Kilimanjaro, the stronghold of CHADEMA chairman, Freeman Mbowe. In his interview to Daily Maverick in March 2023, referring to this event, Mr Lissu is reported to have said: "*I am almost pinching myself. I believe that we are going to pave the way forward for a new Tanzania*" [**p.0972**]. Mr Lissu also commented on the lifted ban on opposition political rallies: "*All those years when we held political rallies, even during the good old days of Benjamin Mkapa and Jakaya Kikwete, the police would come to our meetings armed to the teeth. Now not only do police arrive without visible weapons, but they are there to give us protection*" [**p.0973**].

49. However, the ruling party, CCM, remains in power, and some of the hardline figures in that party, who supported the regime of the late President Magufuli, continue to occupy important positions in the government apparatus. Notably, in October 2013, President Hassan appointed Paul Makonda as the new CCM ideology and publicity secretary. Mr Makonda was a former Regional Commissioner for Dar Es Salaam (the capital city), who was a close confidant of President Magufuli [**p.0988**]. He was accused in the press of being behind the assassination attempt on Mr Lissu [**Additional Doc2**]. In January 2020, he was designated by the U.S. Department of State as ineligible for entry into the United States "*due to his involvement in gross violations of human rights, which include the flagrant denial of the right to life, liberty, or the security of persons*" [**p.1437**].

50. On the other hand, the Magufuli-era Police Chief, Simon Sirro, and the Head of Intelligence, Diwani Athuman, were removed from their posts. Both were regarded as "enforcers-in-chief" of the Magufuli regime [**p.0973**]. However, their successors were reportedly also involved in the persecution of opposition leaders and activists [**p.0975**].

51. In April 2023, President Hassan inaugurated a commission to review the public bodies responsible for dispensing criminal justice in Tanzania, with the goal of improving the justice system. The President urged the commission to pay particular attention to the Police Force, saying that it tops other institutions in terms of complaints from the public. She said: "*If you ask 100 people what they consider to be the most problematic institutions in terms of access to justice, 70 of them will point at the Police Force*" [**p.1162**].

52. In the aforementioned interview to Daily Maverick in March 2023, Mr Lissu reportedly has said that the CCM's new central committee was "*almost unrecognisable*" from that which served under Magafuli, adding: "*Many of the CCM power brokers are gone. That's incredible*" [**p.0973**]. However, referring to the current police chief and his deputy, who allegedly were involved in the Magufuli-era repressions, Mr Lissu is reported to have said:

"*That they've been promoted rather than sacked is a chilling reminder that we're not out of the woods yet*" [**p.0975**].

53. In September 2023, Mr Lissu was arrested by the police in Arusha, northern Tanzania, for allegedly holding an illegal assembly. He was released a few hours later [**p.0980**].

54. In January 2024, the opposition held a protest march in the capital. The march passed peacefully. It was reported in the press that Mr Lissu had made the following statement: "*We have been asking for these constitutional reforms for 30 years, now we'll demand them on the roads. If it's not possible to get a new constitution over dialogue, it will be obtained in the streets*". [**Additional Doc3**]

55. In contrast with President Magufuli's isolationism policies, President Hassan seeks to promote Tanzania abroad and attract foreign investments. In April 2022 she met the US Vice-President Harris in Washington DC. In March 2023 Vice President Harris was hosted by President Hassan in Dar es Salam, Tanzania. In February 2024, President Hassan travelled to Rome and met Pope Francis. She also met with other important figures in the international politics and economy, including hosting visits by the former British prime minister Tony Blair, World Bank managing director Mari Pangestu and African Development Bank president Akinwumi Adesina. She made official visits to Uganda, Kenya, Rwanda, Burundi, France, Belgium, the UK and the USA. [**p.1176**]

56. The US government's report "U.S. Relations with Tanzania" dated 10 August 2023 states: "*Tanzania's governance and democracy, business climate, and relations with the United States have significantly improved in the two years since President Sarnia took power.*" [**p.1013**]

57. Amnesty International's report "*Human Rights in Tanzania 2022*" confirms the positive changes made by President Hassan. The report notes that she has made "*at least 21 regional and other international trips to improve international relations and to mobilize funds for development. This was in stark contrast to her predecessor, President Magufuli*" [**p.1139**]. However, the report is critical with respect to the authorities' continued restrictions and violation of the right to freedom of political rallies, targeting online media outlets, excessive use of force by security forces, and some other aspects of political and social life.

58. In sum, in my judgment, since the ET Refusal there have been significant positive changes in the political and social life in Tanzania aimed at strengthening democracy, civil freedoms and the rule of law, and moving away from the past authoritarian practices and excesses of the Magufuli-era. However, there remain serious challenges ahead. As Mr Lissu is reported to have said in his interview to Daily Maverick in March 2023: "*We have not even begun. What remains is massive… absolutely massive*" [**p.0974**].

General level of risk to foreign businesses

59. EJ Henderson in the ET Refusal accepted the Respondents' evidence on the issue of risk to foreign businesses, which can be summarised as follows. At the date of the ET Refusal there was a significant general level of risk for foreign businesses and their employees operating in Tanzania, which included arbitrary arrest and prosecution, indefinite detention and extortion, because of the political volatility, level of corruption in the public sector (including the police, prosecutors and judiciary) and the government's lack of respect for the rule of law and fundamental human rights. These are the primary findings of fact, which continue to stand as far as they relate to the period at the time of the ET Refusal.

60. However, based on the new evidence before me I find that the level of the identified risks for foreign businesses and their employees operating in Tanzania has significantly reduced since the ET Refusal. I say that for the following reasons.

61. The political and social developments since President Hassan taking office show (see paragraphs 38-57 above) that, unlike her predecessor, President Hassan seeks to establish a more safe, stable, predictable, and investment-friendly political and social environment in her country.

62. In February 2023, President Hassan addressed Judges and other delegates at the Law Day celebration. In her address she said: "*Timely dispensation of justice through arbitration rather than the long court procedures will create confidence among the citizens and investors. Justice denied is justice delayed and thus we should focus on arbitration*". She pointed to the fact that the government had opened up the country for investment and trade in the region and beyond, and thus investors needed to be assured of protection of their investments, saying: "*Long procedures in solving disputes are not healthy for the country and they scare away investors*" [**p.0977 - 0979**].

63. I also note that the US government's report "*U.S. Relations with Tanzania*" dated 10 August 2023 states:

> "*Tanzania has a diverse, relatively stable economy with many opportunities for investment. In recent years, the Government of Tanzania's (GoT) approach to economic policy and the business community has improved long-term prospects for investment and economic growth.* ***Policies and practices during the Magufuli administration created a deteriorating environment for business and investment, which deterred foreign investors and harmed all companies operating in Tanzania. However, President Sarnia has made improving Tanzania's economic environment one of her top priorities and has publicly highlighted restoring domestic and international confidence in Tanzania's business climate.*** *Agricultural commodities, minerals, and textiles dominate Tanzania's exports to the United States while imports from the United States include aircraft, machinery, cereals, plastics, and milling products. Tanzania receives preferential trade benefits under the African Growth and Opportunity Act. The United States is committed to Tanzania's long-term development as a stable, reliable, and democratic partner that is committed to growing its economy through private sector led growth to support the health, education and human rights of its people, as well as promoting peace and security domestically and regionally*" [**p.1014**]. (***my emphasis***)

64. During her visit to Tanzania, the US Vice-President Harris announced $560 million in U.S. assistance aimed at expanding the countries' trade relationship and encouraging democratic governance. [**p.1018**]

65. Mr Mifsud-Bonnici, in his second witness statement, states that since President Hassan acceded to office no foreign investors or expatriates working in Tanzania have been targeted or prosecuted. Mr Mifsud-Bonnici, however, says that the risks remain because there has been no "overhaul" of Tanzania's law enforcement and security apparatus, which remain unaccountable to the Tanzanian Parliament for their actions, the anti-business Magufuli-era laws remain on the statute books, and past charges of economic crimes have not been dropped and victims have not been compensated [**WSMB2 p.30**]. His general conclusion is that "*whilst the abuse has stopped, the risk is now better concealed. The environment is more pleasant, but it is not safe. …. Any change on the geopolitical landscape could again unleash the use of the suspended powers*" [**WSMB2 p.31**].

66. In cross-examination, Mr Mifsud-Bonnici accepted that in the 14-item list of examples of foreign and Tanzanian workers charged with economic crimes without access to bail, he had produced with his first witness statement [**p.0918-0919**], personally he was involved only in one such cases. With respect to the other 13 cases, he was unable to give evidence whether the charges against those people were indeed arbitrary. I accept that the legislative regime, which allows the police to charge a person with an economic crime and then detain him/her without the possibility of the detainee seeking a bail, could be prone to abuse, and could be used by the authorities as a means of extortion. This, however, does not necessarily follow that the underlying charge is arbitrary or groundless, or that the charged persons are "victims", and the charges against them must be dropped and they must be compensated. In any event, as Mr Mifsud-Bonnici accepts, since Ms Hassan becoming the President there have been no new arrests targeting foreign investors or expatriate executives working in Tanzania [**WSMB2 p.30**].

67. Mr Mifsud-Bonnici evidence [**WSMB2p.17 (b)**] that the release of Mr Mbowe from prison in March 2022 (see paragraph 40 above) "*became the basis for a political reconciliation process, but President Hassan has publicly maintained that her government, and that of her predecessor, are united and that she is determined to maintain Magafuli's legacy*" is misleading.

68. In support of this statement, he refers to an article dated March 2021 (a year before Mr Mbowe's release and indeed even before his arrest in June 2021) about President Hassan inspecting the Tanzania Peoples' Defence Forces guard of honour shortly after being sworn in as President [**p.0954**]. Furthermore, I do not accept that on a fair reading of that article the President has actually said what Mr Mifsud-Bonnici ascribes to her. On the contrary, she is quoted in the article as saying: "*This is a time to bury our differences and unite as one. This is not the time to look into the future with doubts, but with hope and confidence*. … *I appeal to you dear Tanzanians to*

remain calm and united during this difficult time. I can assure you that we are strong as a nation and we, your leaders, have an elaborate plan to continue from where our colleague stopped."

69. Additionally, Mr Mifsud-Bonnici evidence **[WSMB2p.17 (b)]** that "*President Hassan has publicly maintained that her government, and that of her predecessor, are united and that she is determined to maintain Magafuli's legacy*" ignores all the steps she has taken since ascending to Presidency to suspend or reverse her predecessors' policies, the operation of which was giving rise to a significant general level of risk for foreign businesses and their employees operating in Tanzania.

70. Therefore, at its highest, Mr Mifsud-Bonnici evidence shows that the risk of unjust persecution of businesspeople cannot be fully ruled out, because what he considers as oppressive laws (unbailable offences) remain on the statute books and the security apparatus of the Magufuli-era has not been completely "*overhauled*". Therefore, if the power reverts to the Magufuli-era hardliners, they will have both the means and the legal basis to "*unleash*" persecutions of foreign investors, foreign businesses and their employees operating in Tanzania.

71. Mr Mifsud-Bonnici, however, does not say that the risk of President Hassan losing power to Magufuli- era hardliners is real and present. His evidence is that "*… Any change on the geopolitical landscape could again unleash the use of the suspended powers*" **[WSMB2 p.31]**. He, however, does not say that such changes to "*the geopolitical landscape*" are imminent or the risk of them happening is real and present.

72. I accept that anything could happen in the geopolitical landscape of any country, especially one with a relatively short history of a multiparty system. However, I am wholly unpersuaded that the Respondents' evidence, taken as a whole, demonstrate that the risk of hardlines taking the power back and "*unleashing*" persecution of foreign businesses and their employees now or by the time the claim comes to be heard in September 2024 is probable.

73. In sum, I find that since the ET Refusal there have been significant positive changes aimed at creating a more safe, stable, predictable, and investment-friendly political and business environment for foreign businesses in Tanzania, and a significant general level of risk to foreign businesses and their employees operating in Tanzania (with all its constituent elements as described in paragraph 59 above), as it existed at the time of the ET Refusal is no longer present. I also find that this risk level position is more likely than not to remain substantially the same by the time this claim comes to trial in September 2024.

Sale of Millicom, Mr Frechette, and "Tigo" Employees

74. On 19 April 2021, Millicom formally announced that it had agreed to sell its operations in Tanzania to a consortium led by Axian, a pan-African group.

75. In December 2021, Millicom reached an agreement with the Tanzanian government regarding allegations of non-compliance with local laws by Millicom's Tanzanian operation, which allegations Millicom considered unsubstantiated and used by government's officials to extort a substantial financial payment, including by arresting in February 2021 six senior executives from Millicom and two local banks, over allegations of illegally pledging telecom licences.

76. The agreement allowed Millicom to complete the sale on 5 April 2022. The purchaser retained the business brand "Tigo", under which Millicom had been offering its telecommunications and mobile money services to customers in Tanzania. The business continues to operate under this brand. The business employs about 360 employees in Tanzania. I shall refer to them and to former Millicom employees as "**Tigo employees**".

77. Mr Frechette was directly involved in the settlement discussions with the government and in negotiating the sale of the business. Between April 2021 and March 2023, he travelled to Tanzania 13 times for that purpose.

78. Mr Frechette employment with Millicom ended on 31 March 2023 by reason of redundancy. He continued to provide services to Millicom as a consultant until June 2023.

79. In June 2023, Mr Frechette joined Airtel Africa Plc, a multinational company headquartered in Dubai, United Arab Emirates ("**Airtel**"), as the Chief Legal Officer. He relocated to Dubai, where he now lives.

80. Airtel provides telecommunications and mobile money services in Africa.

81. In his role as the Chief Legal Officer for Airtel, Mr Frechette is responsible for all legal affairs of Airtel relating to its telecom operations and mobile money services in various African countries, including Tanzania. This includes advising on policy, driving and shaping legal strategy, leading transactions and litigation and mitigating risk for Airtel's operations. He is supported by and manages a legal team of approximately 50 employees who support Airtel's activities across fourteen African markets. As part of his role, he is required to travel to each of Airtel's African markets, including Tanzania. Mr Frechette travelled to Tanzania in connection with his new role with Airtel on 28 November 2023.

82. Mr Fechette continues to believe that there is a serious risk to his safety and security if the Information enters into the public domain. He did not disclose his security concerns to his current employer, because he believes he cannot do that for reasons of confidentiality.

83. Mr Frechette's concerns are based on his past personal experience dealing with government officials in Tanzania and his assessment that the political developments since the death of President Magufuli have not materially changed the situation from a governance and security perspective.

84. Mr Frechette also believes that "*any employee who works for 'Tigo' in Tanzania, whether or not they were previously employed by Millicom's subsidiary, will be associated with the Tigo brand and with the actions of Millicom's subsidiary*". That is because he thinks that "*[t]hey will be exposed to the same risks as people who were MIC Tanzania employees at the time of the Tundu Lissu attack because ordinary Tanzanians will not distinguish between them.*" [**WSF4 p.37**]

85. He considers that three former Millicom executives: Jérôme Albou (a senior manager of Tigo), Sylvia Balwire (Director of Regulatory matters), and Tumaini Shija (Legal Director of the Tanzanian operation) are particularly vulnerable to the same risks to personal safety and security as Mr Frechette perceives exist for him. That is because these three individuals are specifically named by the Claimant in his pleadings "*as Millicom executives allegedly linked to the sharing of telephonic data with the Tanzanian authorities that might have been a factor in the later attack on Tundu Lissu*". [**WSF4 p.38**]

86. Mr Frechette's evidence, which I accept, is that none of these three individuals are willing to provide a statement in connection with these proceedings. However, I am not persuaded that the reason for that is that they have significant and genuine fears about potential consequences to their personal safety and security.

87. Their reluctance to get involved in these proceedings might be born out of general unwillingness to get involved in a foreign court case, which does not directly concern them, or feeling apprehensive about having to give potentially self-incriminating evidence, or for many other reasons unconnected to fears for personal safety and security.

88. Although Mr Frechette says in his fourth and fifth witness statement [**WSF4 p.39**] and [**WSF5 p.19**] that <u>he believes</u> these individuals have significant and genuine fears for their safety, Mr Frechette does not give any evidence about what exactly they told him for him to form that belief. His evidence on this issue is not even hearsay evidence of the reason these individuals say they have for not wanting to be witnesses in these proceedings, but the evidence of Mr Frechette's belief of what that reason might be.

89. In cross-examination Mr Frechette said that they all had declined to be involved because they "*do not want anything to do with this*". He said that he had asked them to make an affidavit for this closed preliminary hearing (presumably to explain why they do not want to be involved), but they had refused. Mr Frechette also said that they were concerned about the outcome of this hearing. He, however, gave no evidence that they had told him that the reason for their refusal to be witnesses or otherwise involved in this case was their fear for personal safety and security.

90. As such, I find Mr Frechette's evidence insufficient for me to make a positive finding that the true reason for these three individuals refusing to give

evidence is that they have significant and genuine fears about potential consequences to their personal safety and security.

91. Mr Frechette's fears for personal safety and the safety of other Tigo employees are based on his assessment that if the Information enters into the public domain, there will be a real risk of reprisal and physical violence from three sources:

    (i) the assailants themselves, who remain unidentified and at large, or people connected with them. This is because if the assailants consider there is a possibility of Millicom's investigations (i.e. a public inquiry or a police investigation, which Mr Frechette believes, with the Information coming into the public domain, the government will be forced to institute) leading to their identification, they might act to stop that happening by killing or maiming people connected with Millicom;

    (ii) the Tanzanian authorities, which might arrest and detain Tigo employees in Tanzania, to try to distance themselves from the attack, or to be seen as taking actions to punish employees of a Western telecommunications company, which will be seen as being connected to the assassination attempt, and

    (iii) Mr Lissu's supporters or agents, who may cause physical harm to persons associated with Millicom, in the event the Claimant's allegations about the Millicom's potential involvement in the attempt on Mr Lissu's life become public.

92. Mr Frechette maintains his position that if the Application was not granted, he would not be willing to give evidence as a witness in these proceedings. It is accepted by the Respondents that it is no longer within Mr Frechette's powers to stop Millicom from defending the proceedings. The Respondents did not present any fresh evidence that whoever now has the relevant authority to allow or not to allow the proceedings to be defended by Millicom, would, as Mr Frechette, too not allow the proceedings to be defended if the Application was not granted. Mr Frechette's evidence is that he does not know how the current executives will act. He thinks they "*will decide whether to proceed once the remitted Rule 50 hearing is complete and all facts are known*". [**WSF4 p.48**]

93. I also observe that although Mr Frechette's evidence is that he would not be willing to give evidence as a witness in these proceedings if the Application was refused, he does not say that he would not defend the claim as an individual respondent.

The Law

94. With exception to the issue of whether Mr Frechette continues to enjoy the European Convention on Human Rights (thereinafter "**ECHR**" or "**the Convention**") rights, despite now living in Dubai, UAE (a non-Convention state), there is no dispute between the parties with respect to the applicable legal principles.

95. These are fully set out in the EAT Judgment (at [33] – [79] and the CoA Judgment (at [22] – [76]). There is no need for me to re-state them here in full. Instead, I shall proceed to analyse the issues by reference to the specific directions given by the CoA and the EAT, explaining why applying the relevant legal principles to the facts, as I found them, I come to these conclusions.

96. I also note that the CoA identified five specific flaws in the approach adopted by EJ Henderson in her ET Refusal. In my analysis I shall strive to avoid falling into these errors.

Analysis and Conclusions

97. The Application is advanced by the Respondents on three separate grounds/limbs under Rule 50(1) of the ET Rules: (i) the interests of justice; (ii) protection of Mr Frechette's Convention rights; (iii) section 10A of the Employment Tribunals Act 1996/confidentiality. I shall deal with them in turn.

Common law interests of justice

98. At paragraph 32 the CoA said that the starting point is for me to ask myself "*whether the derogations sought were justified by the common law exception to open justice*". In answering that question, I must keep at the forefront of my analysis the fundamental importance of open justice, however recognising that it is not absolute, and derogations are permitted.

99. Specifically, the CoA said (at [32]): "*Usually, the court's concern will be with the requirements of the due administration of justice in the proceedings before it. That is the focus of attention in the present case"*. However, the qualification is wider and "*permits derogations that are required for the protection of the administration of justice in other legal proceedings or even to secure the general effectiveness of law enforcement authorities*"[1] and this qualification "*may go further*" (at [33]).

[1] It was not argued by the Respondents that the sought derogations were required for the protection of the administration of justice in any other legal proceedings (except this Tribunal claim), or to secure the general effectiveness of law enforcement authorities.

100. The CoA said that it was not setting any specific "*boundaries of the common law exception to open justice*" (at [33]). However, the CoA specifically approved the position that where the application of the open justice principle creates a real risk to life and limb of a person this would be a proper ground to derogate from it. Such risk must not be ignored, regardless of whether that person enjoys the protection of the ECHR. In other words, if I am satisfied that not granting the Application will create a real risk to life, limb or security of a person (wherever they might happen to be), the principle of open justice must give way.

101. The CoA explained (at [35]) that there are two reasons for that:

> *"[…] The first is that fairness to parties and witnesses may require the court to take account of risks to related persons, such as those with whom they live or work, wherever those persons may be, and whatever their status under the Convention. The second is that the issue is not just one of fairness to parties and witnesses. The aim is to protect and further the interests of justice more generally. […]."*

102. The CoA directed that when it is argued (as it was in the present case) that a derogation from open justice is required to protect the right to life and security of a person, the court must look for "*evidence of a real and immediate risk of harm*" (at [36]), but bearing in mind that "*derogations from open justice may be granted under common law principles in circumstances where the evidence does not meet the high threshold for interference on the grounds that there would be a risk to life, limb or security*" (at [37]).

103. In that context the CoA referred to the House of Lords judgment in *In Re Officer L* [2007] UKHL 36, [2007] 1 WLR 2135, explaining that "*For this purpose, a "real risk" is one that is "objectively verified". The subjective concerns of the applicants are not enough; fears of harm are only relevant if they are "objectively well-founded*". However, even if such fears of risk to life and limb are not "*objectively verified*", but purely "*subjective*", it does not mean that they should be ignored in the overall assessment whether it is in the interests of justice to derogate from the principle of open justice (at [39]).

104. In ***Re Officer L***, dealing with the question of what constitutes "*real and immediate*" risk, Lord Carswell said (at [20]):

> *"Two matters have become clear in the subsequent development of the case law.* ***First, this positive obligation arises only when the risk is real and immediate****. The wording of this test has been the subject of some critical discussion, but its meaning has been aptly summarised in Northern Ireland by Weatherup J in In re W s Application [2004] NIQB 67, at [17], where he said that* ***a real risk is one that is objectively verified*** *and* ***an immediate risk is one that is present and continuing****.* ***It is in my opinion clear that the criterion is and should be one that is not readily satisfied: in other words, the threshold is high.*** *There was a suggestion in para 28 of the judgment of the court in R (A) v Lord Saville of Newdigate [2002] 1 WLR 1249, 1261 (also known as the Widgery Soldiers case, to distinguish it from the earlier case with a very similar title) that a lower degree would engage article 2 when the risk is attendant upon some action that an authority is contemplating putting into effect itself. I shall return to this case later, but I do not think that this suggestion is well-founded.* ***In my opinion the standard is constant and not variable with the type of act in contemplation, and is not easily reached. Moreover, the requirement that the fear has to be real means that it must be objectively well-founded. In this respect the approach adopted by Morgan J was capable of causing confusion when he held that the tribunal should have commenced by assessing the subjective nature of the fears entertained by the applicants for anonymity before going on to assess the extent to which those fears were objectively justified. That is a valid approach when considering***

> ***the common law test, but in assessing the existence of a real and immediate risk for the purposes of article 2 the issue does not depend on the subjective concerns of the applicant, but on the reality of the existence of the risk. As the Court of Appeal indicated in para 33 of its judgment, the existence of subjective fears is not a prerequisite to the finding that there is a risk which satisfies the test of article 2, and, conversely, if a risk to life exists, article 2 will be engaged even if the person affected robustly disclaims having any subjective fears. That is not to say that the existence of a subjective fear is evidentially irrelevant, for it may be a pointer towards the existence of a real and immediate risk, but in the context of article 2 it is no more than evidence****." (my emphasis)***

105. I pause here to observe that before the Application was originally heard in October 2020 the Respondents had abandoned the reliance on Article 2 (*Right to life*). They maintained reliance on Article 3 (*Freedom from torture and inhuman or degrading treatment*) and Article 5 (*Right to liberty and security*). The Respondents' case under Article 3 and 5 had been rejected by the Employment Tribunal, the EAT upheld that decision and there was no appeal on this issue to the CoA. Therefore, for the purposes of the redetermination of the Application, in so far as the Convention rights are concerns, the Respondents rely only on Mr Frechette's rights under Article 8 (*Respect of private and family life*).

106. However, when considering the matter under the common law interests of justice limb of Rule 50(1), I must still analyse whether there is a real and immediate risk to life and limb of a person, regardless of the applicability of the corresponding Convention rights.

Is there a real and immediate risk of harm (objectively verified)?

107. I, therefore, start my analysis by first considering whether the Respondents' evidence objectively show that there is a "*real and immediate*" risk of harm to Mr Frechette or any other Tigo employees, if the Information becomes public. In doing so, I bear in mind that in establishing the case that such real and immediate risk does, (or, with the release of the Information into the public domain, - will) exist, the evidential threshold for the Respondents is to show "*a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm*" (the EAT Judgment at [90] referring to *Venebles v NGN* [2001] Fam 430 at [87]-89]), and not higher.

Risk outside Tanzania[2]

108. EJ Henderson's finding, which has not been disturbed on appeal, is that Mr Frechette's evidence that there is a risk of reprisals carried out in the UK and Europe, given the number of Tanzanian-born people living in the UK and the presence of a Tanzanian High Commission in London, is not

[2] I deal with this matter for the sake of completeness and because the Respondents' position on this issue is somewhat ambiguous. On the one hand, in their Replacement Skeleton Argument to the CoA dated 16 November 2022, the Respondents stated **[p 0308 – footnote]**: "*The Respondents accepted, before the ET and the EAT, in light of Mr Stones' evidence, that there is no objective evidence of risk of physical harm outside the country in question*." On the other hand, at this hearing, the Respondents still led evidence of Mr Frechette that the risk still exists, albeit to a lesser extent.

plausible. Mr Frechette's evidence on this point was directly contradicted by Mr Stones' evidence that there was no such risk present.

109. In his fourth witness statement, Mr Frechette said that due to the closure of Millicom's London office and the fact that he no longer works in London, "*the risk of reprisal being carried out against [him] outside Tanzania has now lessened"* [**WSF4 p.36**]. He does not, however, advance any positive evidential case that there is still a real and present (albeit lessened) risk of reprisal against him being carried out in Dubai, or in some other country (excluding Tanzania) he might have to visit on business.

110. Furthermore, in giving his evidence to this Tribunal, while maintaining his position that the risk was still real and present, Mr Frechette was unable to articulate on what basis he says that. The only example he gave was of an ex-employee from Millicom's subsidiary in Chad, who had been dismissed, turning up at the Millicom London office to protest his dismissal. Mr Frechette did not say that there was any violence involved or anyone's life or limb was put at risk. In any event, I do not see how that example could sensibly be said to be showing that, if the Information enters into the public domain, there will be a real, present and continuing risk of life and limb outside of Tanzania from the sources of that risk identified by Mr Frechette (see paragraph 91 above).

111. Mr Stones evidence to this Tribunal was that no such real risk was ever present, and that if Mr Frechette believed in its existence, it was "*a stretch*".

112. Mr Frechette now lives in Dubai, UAE, R3 in Miami, USA, and R4 in South Korea. The Respondents presented no cogent evidence that there would be any risk to their life and limb in those countries if the Information became public. The changes in circumstances, as recorded in my findings of fact, show that even if any such risk was ever present (and the EJ Henderson's finding is that it was not), it certainly does not exist now, at any rate, not such to attain the high bar of real, present and continuing.

Risk in Tanzania

113. The next question I must answer is whether such risk exists in Tanzania. I must analyse this question not on the basis as things stand today, but on the assumption of the Information entering the public domain.

114. The Respondents say that if the Application is not granted, the following events will unfold.

(i) The Information will enter into the public domain;
(ii) Considering the way the Claimant has pleaded his case, and the content of his written witness evidence, containing the statements that Millicom was involved in an act of political assassination and terrorism and colluded with the Tanzanian government in carrying it out, the Information will be "*incendiary*", it will be widely reported in the press;

(iii) The limited political reforms by President Hassan exacerbate the situation, because with the lifting of the bans on the right of assembly and on the opposition press, the story is likely to stay on the front pages longer, the opposition is likely to be bolder in their demands for a public inquiry into the assassination attempt and in its other actions, the press will "*whip the opposition into a frenzy*" (from Ms Callaghan's closing submissions);

(iv) If the opposition sees the government prevaricating and not bringing the culprits to justice, they will take justice in their own hands;

(v) Furthermore, the Information is likely to be used by the opposition for their political ends in the forthcoming local (September 2024) and Presidential (December 2025) elections;

(vi) As a result of the above, government would not be able to suppress the news and would have to give in to the pressure and call a public inquiry into the shooting;

(vii) This in turn will make the assailants fear that the inquiry will expose them. To prevent that happening they might kill or maim Tigo employees, who might be potential witnesses to the inquiry;

(viii) Furthermore, the assailants might act rationally by targeting Tigo employees, who have information that might expose the assailants, or irrationally, by simply lashing out at any Tigo employee, because of the fear of being identified. It was also suggested by Mr Stones that the assailants might target Tigo employees, who might be witnesses to the inquiry, but who do not have information that might lead to the identification of the assailants, as a warning shot to other non-Tigo witnesses, who have incriminating information about the assailants;

(ix) At the same time, the government would be put under pressure to be seen to be responding to the public outcry and will respond by arbitrary detaining and charging current and former Tigo employees, which could include Mr Frechette, given his high public profile in Tanzania and his past dealings with the government, including negotiating the sale of Millicom's operations in Tanzania.

115. In my judgment, while all that might have the right to exist as "a theory" it falls far short of establishing an "*objectively verified*" risk to life and limb to a person, by applying the evidential standard of "*a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm.*" I say that for the following reasons.

116. Firstly, there was a disagreement between the Respondents' witnesses on the likelihood of a public inquiry being called in consequence of the Information entering the public domain. Mr Frechette and Mr Stones think that it is likely, where Mr Mifsud-Bonnici evidence is that there is very little, if any, chance of that happening. It appears to me that Mr Mifsud-Bonnici is in

a far better position to make this assessment. It falls within his area of expertise. He has considerable historic and present knowledge of political affairs in that country. Although he has not been to Tanzania since 2019, he maintains a network of local stakeholders, with whom he communicates on a regular basis. Mr Lissu is one of his correspondents.

117. On the other hand, although Mr Frechette too has good knowledge of Tanzania through his work as a legal counsel covering the region, his area of expertise is not environment, social and political governance. Additionally, as one of the Respondents in these proceedings, and a potential witness, who says that he would not testify unless the Application was granted, his evidence on this question would be less objective and independent as those of Mr Mifsud-Bonnici.

118. Mr Stones area of expertise is security and intelligence-related consultancy. He is not a political analyst. Until recently, when he, on the Respondents' request, travelled to Tanzania and met with a diplomat, a local lawyer and a political activist, he had no direct involvement in Tanzanian political, business or social life. He had not been to that country before his trip in March 2023. His direct knowledge of the country, including its political, business and social life, is quite limited. Unlike Mr Mifsud-Bonnici, Mr Stones does not maintain a circle of local correspondents/stakeholders with whom he communicates on a regular basis. His prediction on how the Tanzanian government will react is based on much more modest country specific knowledge-base than that of Mr Mifsud-Bonnici.

119. I, therefore, prefer Mr Mifsud-Bonnici evidence on this issue, and, on the balance of probabilities, find that the release of the Information into the public domain will not lead to the government instituting a public inquiry into the assassination attempt on Mr Lissu.

120. Furthermore, considering the following factors:

a. the fact of the assassination attempt is well known to the Tanzanian public;
b. there had been prior calls from the local opposition and the international community (see, for example, **[p.1153]**) for the shooting to be properly investigated, all of which went unheeded;
c. there was a number of press articles, suggesting that the government and police officials were behind the attempt on Mr Lissu's life (see, for example, **Additional Doc2**);
d. both Mr Mifsud-Bonnici and Mr Stones conceded in cross-examination that the revelation that Millicom tracked Mr Lissu's mobile phones and supplied Mr Lissu's mobile telephone call data and live tracking data ("**mobile phone/location data"**) to the government without following a proper legal process would not come as a shock[3]. Mr Stones himself gave evidence that he had watched

[3] I would also observe that the revelation of the Tanzanian government spying on opposition leaders using electronic/mobile data will hardly be the only example of a state (including states generally considered as

BBC's *HardTalk* programme with Mr Lissu, where Mr Lissu said that he believed he was being under electronic surveillance;

e. Mr Stones' evidence (also accepted by Mr Frechette) is that it is very unlikely that the mobile phone/location data shared by Millicom was used by the assailants to track down Mr Lissu, because Mr Lissu's place of residence was not a secret, and he was attacked when he travelled home from a session in Parliament;
f. The evidence that Millicom shared customer data with the regulator ("**TCRA**") and the police on other occasions, including of the opposition leader, Mr Mbowe, which revelation, although generated some negative tweets for Millicom, but no violence or physical reprisals against Tigo employees [**p.1289 – 1323**]. I do accept that the circumstances of that case were quite different from the sharing of Mr Lissu's mobile phone/location data, however, it still shows that the public would be aware that Millicom (and possibly other telecommunication and money-services providers in Tanzania) share customers' data, when requested to do so by TCRA or other government agencies (in Mr Mbowe's case it was the Commissioner of Scientific Investigations); and
g. By the time this claim comes to be heard in September 2024, seven years will have passed since the assassination attempt.

I am totally unpersuaded that the Respondents' evidence establish, even on the "*a possibility that cannot sensibly be ignored*" standard, that the Information entering the public domain will have the incendiary effect they seek portray.

121. It is also notable that while Mr Stones and Mr Frechette give such predictions, Mr Mifsud-Bonnici, who arguably is the best placed to "war-game" this scenario, while remaining very critical of the political landscape in Tanzania, does not venture to suggest that the Information entering the public domain will lead to any violence either from the government side or the opposition, or result in retribution actions against Mr Frechette or Tigo employees.

122. Furthermore, at the hearing I asked Mr Stones why the fact that Millicom had shared Mr Lissu's mobile phone/location data with TCRA and the proximity of that data sharing with the assassination attempt, would have such an explosive effect, when the assassination attempt on a prominent opposition leader, which is an outrage in and of itself, so far had not provoked any violence or reprisals despite calls for investigation and press reporting suggesting the government's involvement. Mr Stones' response was that it all would depend on what happens at the public inquiry, the possibility of which happening Mr Mifsud-Bonnici assesses as zero. Mr Stones' also conceded in cross-examination that absent things being "whipped up" in the press, the Information becoming public would not have the incendiary effect.

libertarian, respecting human rights and the rule of law) engaging in unlawful surreptitious electronic surveillance of their citizens.

123. All three of the Respondents' witnesses accepted that they are not aware of any violent reprisals or other forms of demonstration of violence by opposition supporters. Mr Frechette's evidence was that the fact that the opposition had not done that in the past did not mean they would not resort to violence in the future. However, such "never say never"- type of evidence is wholly insufficient to show a real, present and continuing risk to life and limb.

124. The Respondents' witnesses appear to accept that Millicom employees (including those who shared Mr Lissu's mobile phone/location data with the authorities) would not have information to identify the assailants. They passed the Mr Lissu's mobile phone/location data to the TCRA. What happened with the data after that is a matter of speculations. It was suggested that the data might have been then passed onto the Tanzanian security services, who then might have used it to track down Mr Lissu, although both Mr Stones and Mr Frechette accept that Mr Lissu's whereabouts would be known to the authorities without having to track him down via his mobile phone.

125. Therefore, Tigo employees would not be able to identify the assailants, and as such cannot pose a direct threat to the assailants, even if the government institutes a public inquiry or orders a police investigation. Mr Frechette said that the assailants would not know what Millicom employees know or do not know. This, however, takes the matter into the arena of pure hypotheticals and speculations, a long way away from "objectively verified" facts.

126. Equally, Mr Stones' and Mr Frechette's theories of "irrational assailants" and the assailants going after Tigo employees as "a warning shot" to other potential witnesses, are too pure speculations. Neither of them was able to provide any concrete examples from their extensive experience of anything similar occurring elsewhere, let alone such things happening in Tanzania. In any event, both of these, in my view, highly speculative scenarios, even on the Respondents' case are predicated on the public inquiry being instituted by the government, which, as I found, on the balance of probabilities, will not happen.

127. Finally, with respect to the risk of the authorities going after Tigo employees to be seen as doing something in response. Firstly, as accepted by the Respondents, if Mr Lissu's mobile phone/location data had been unlawfully shared with the authorities, as alleged by the Claimant, Millicom would have committed a serious breach of the local law. In that respect, if the Information entering the public domain will cause the police to open an investigation into this matter, this by itself cannot be said to be a valid reason to keep the Information confidential.

128. I am not persuaded by the Respondents' evidence that if the authorities decides to act, they will resort to arbitrary arrests, torture or other unlawful practices, thus creating a real risk to life and limb to Tigo employees.

129. As explained above (see paragraph 66) Mr Mifsud-Bonnici's examples of prior detention of businesspeople in Tanzania do not support the conclusion that all those arrests and charges were arbitrary. Mr Mifsud-Bonnici gives evidence that persecutions of businesspeople have stopped under President Hassan.

130. Secondly, the Respondents' theory fails to take into account the undoubtedly positive changes in the political and social environment under President Hassan (see my findings of fact above). As I have noted above, even taking into account Mr Mifsud-Bonnici's scepticism about the irreversibility of these changes, the undeniable fact remains that the political and security landscape in Tanzania has changed significantly and for the better. The Respondents' evidence, in my view, fall far short of showing that the Information entering the public domain will have the effect of reversing these changes and the authorities reviving the Magufuli-era persecutions of businesspeople and employees of foreign companies.

131. Thirdly, it is not clear to me why the Respondents suggest that in this scenario the police would arrest Tigo employees at random, when the Information will identify Tigo employees who were responsible for the alleged illegal sharing of Mr Lissu's mobile phone/location data.

132. Finally, it was Mr Stones' evidence [**WSS1 p.23b**] that if Tigo employees were arrested by the police, their conditions in detention "*are unlikely to be pleasant*", because Tanzanian prisons are likely to be "*over-crowded, hot and unhygienic*". He also gives evidence that the authorities are unlikely to give Tigo employees access to telephones or lawyers. In cross-examination, Mr Stones admitted that during his recent and the only trip to Tanzania he did not visit a local prison, and therefore was unable to verify his assumptions about the conditions in detention. Accordingly, to the extent this evidence is relied upon by the Respondents as showing that the possibility of Tigo employees being arrested by itself creates a real risk to life and limb, I reject it as not being supported by any credible factual evidence. Mr Stones' evidence of Tigo employees not being allowed a telephone call or granted access to a lawyer is, again, no more than a speculative suggestion. In any event, even if that were true, I cannot see how that could be said as creating a risk to life and limb.

133. For all these reasons, I find that the Respondents have failed to establish that there will be a "*real and immediate*" risk to life and limb if the Information is made public.

Interests of justice balancing exercise

134. The next question I must address is whether, despite the Respondents failing to meet the high threshold for interference with the open justice principle on the ground of a *real and immediate* risk to life and limb, the sought derogations must nevertheless be granted as being in the interests of justice.

135. The CoA explained (at [41], [42]) that this requires undertaking a balancing exercise, weighing the following factors: "*(a) the extent to which the derogation sought would interfere with the principle of open justice; (b) the importance to the case of the information which the applicant seeks to protect; and (c) the role or status within the litigation of the person whose rights or interests are under consideration"*.

136. In addition, I should bear in mind "*the harm disclosure would cause and, conversely, the extent to which the order sought would compromise "the purpose of the open justice principle [and] the potential value of the information in . . . advancing that purpose*"*: A v British Broadcasting Corpn [2015] AC 588, para 41 (Lord Reed JSC)*" (the CoA Judgment at [43]).

137. At [44] the CoA directed:

> *"As a general proposition, it may be said that the more remote an item of information is from the issues requiring resolution in the case the less likely it is that a restriction on its disclosure will offend the open justice principle or compromise its purposes. In this case, the ET will need to consider the Millicom parties' contentions that the derogations they seek are "minor" and peripheral, relate to people who are not parties or witnesses, and concern information which has "no relevance" to the issues in dispute in the ET proceedings"*.

138. The CoA agreed (at [45]) with the EAT's conclusion that the factors for the balancing exercise should "*include Mr Frechette's evidence that, because of his apprehensions about the risks of violence, he would not give evidence or allow Millicom to defend the proceedings if derogations were refused*". The EAT Judgment further explains (at [102])

> "*in considering whether it ought to make an order under rule 50 of the Employment Tribunals Rules in the interests of justice, the question for the employment tribunal was whether the second respondent's [Mr Frechette's] subjective concerns - even if not well founded (see In re Officer L [2007] 1 WLR 2135) - were such as would prejudice the administration of justice if the order sought was not made*."

139. Finally, the CoA (at [49] - [51]) directed that there should a further step of checking the conclusions against the relevant human rights and Convention rights, that is because:

> "*Rule 50 is delegated legislation which must be construed and given effect compatibly with Convention rights: sections 2, 3 and 6 of the HRA all apply. And for good measure rule 50(2) expressly requires the tribunal to give effect to the Convention right to freedom of expression*".

140. In starting my analysis, I remind myself that open justice is a fundamental principle. Any derogation from it is allowed when it is strictly necessary in the interests of justice. The question, therefore, is not whether justice could still be done if the Application was granted, but whether the granting of the Application is necessary in the interests of justice. Additionally, the outcome of the balancing exercise is not a matter for my discretion. In other words, there is only one right answer, and I must get it right.

141. The burden of showing that the derogation is necessary is on the person seeking it - the Respondents in the present case.

142. With all that in mind, I turn to the Respondents' submissions on why they say the sought derogations are necessary in the interests of justice.

143. Ms Callaghan submits that Mr Frechette's fears of reprisal are genuine (as was found by EJ Henderson[4]) and it is hardly surprising, given his substantial experience of doing business in Tanzania and his prior encounters with the Tanzanian's authorities. The genuinesness and sound basis for his fears are also supported by the Claimant's own experience of being arbitrary accused of wrongdoings by a Tigo employee with connections in the government and the Claimant's evident fears of potential severe consequences for his safety and security (Doris accusations, the episode with Mr Barns in a hotel lobby, the Claimant's refusal to come to Tanzania to give his evidence to a court in a labour law dispute involving Doris).

144. Ms Callaghan submits that looking at those examples against the up-to-date evidence given by Mr Frechette, Mr Mifsud-Bonnici and Mr Stones shows that Tanzania remains a dangerous place where "*bad things could happen to good people*."

145. The second important matter why the balancing exercise should give the result sought by the Respondents, Ms Callaghan says, is the fact that without the Application being granted the Respondents would be severely prejudiced in their ability to defend the claim. That is because Mr Frechette's stated intention not to give evidence for fear of reprisal, without whose evidence, Ms Callaghan says, it will be much harder, if not impossible, for the Respondents to defend the claim.

146. Ms Callaghan emphasises that the sought derogations are minimal. They do not affect the Claimant's ability to prosecute his "ordinary" unfair dismissal and disability discrimination complaints, and only relevant to one out of five alleged protected disclosures. In any event, Ms Callaghan argues, the Information has limited or no relevance to the Claimant's claim, that is because on his own case his first protected disclosure was about Millicom unlawfully sharing Ms Lissu's mobile phone/location data, not about the data being used in the assassination attempt, which the Claimant accepts he has no knowledge to say one way or the other. Therefore, Ms Callaghan submits, the Information is not relevant to his claim.

147. Furthermore, the Tribunal hearing the claim would have the Information available to it. In other words, the Tribunal bundles and witness statements will not be redacted. Therefore, the Tribunal will have a full and clear picture

[4] To be precise, EJ Henderson found that Mr Frechette's intention "*that if the rule 50 order is not made he will not allow the respondents to proceed in defending the claim*" "*may well be a genuine one*" (at [96] of the ET Refusal). I do not read her decision as containing a factual finding that Mr Frechette's fears of reprisal are genuine. At [109] EJ Henderson says: "*Further, I do not accept that the subjective fears raised by Mr Frechette are sufficient to engage Article 8 and therefore, I do not need to go on to consider the balancing test of proportionality under Article 8 (2)".* She goes no further. The CoA (at [40]) says it was the third flaw and the Judge should have considered Mr Frechette's fears in the balancing exercise. I shall do so.

of everything and would be able to assess the parties' evidence knowing all the necessary underlying details.

148. Ms Callaghan reminds me that the test whether it is the interests of justice to have the Information publicly disclosed in these proceedings is not the same as whether, in disclosing the Information to his employer, the Claimant reasonably believed the disclosure was in the public interests, as was explained by the CoA (at [74(2)]).

149. With reference to the third factor - *the role or status within the litigation of the person whose rights or interests are under consideration* – Ms Callaghan submits that the rights and interests under consideration are of Mr Frechette (who is a named respondent and a witness) and current and former employees of Millicom in Tanzania, and they have the strongest claim to have their rights and interests protected.

150. Finally, with respect to the Claimant's Article 6 and Article 10 Convention rights, and the press Article 10 right, Ms Callaghan emphasises the minimal nature of the sought derogations, contrasting that with the adverse impact on the Respondents' Article 6 right to a fair trial, if the derogations are refused (see paragraph 145 above).

151. I find the Respondents arguments unpersuasive for the following reasons[5].

152. Firstly, having found that the Respondents have failed (and by some considerable margin) to make good their evidential case that the release of the Information into the public domain will result in a "*real and immediate*" risk to life and limb to Mr Frechette or other Tigo employees, I also find that Mr Frechette's ongoing "*subjective fears*" for his safety, in light of the substantial changes in the circumstances (see my findings of fact above), are exaggerated.

153. The examples Ms Callaghan gives in support of these fears being grounded on the reality of the situation (including of the Claimant's personal negative experience in Tanzania) are all from the pre-President Hassan era. For the reasons explained above (see in particular paragraphs 58 and 60-73) I find that the risk of arbitrary reprisals has significantly reduced since the ET Refusal.

154. Secondly, there are also several logical inconsistencies in Mr Frechette's evidence, which, in my view, make his evidence on the extent of his subjective fears far less persuasive.

155. First, in his first witness statement Mr Frechette gave evidence [**WSF1 p.34**] that:

[5] To avoid unnecessarily elongating this already lengthy decision, I will not set out the Claimant's counsel opposing arguments. It is not a sign of disrespect or disregard of them. I have duly considered all Mr Callus' and Mr Hamer's written and oral submissions.

> "*[e]ven though I have limited knowledge of the Tundu Lissu matter, I still fear that I will be at risk of physical violence or arbitrary detention by the Tanzanian authorities if this matter is disclosed to the public.* ***The mere fact that I am a respondent in a lawsuit which discloses these matters makes me a target for the authorities, the assassins, the supporters of Mr Lissu and all other stakeholders****. I may never be able to return to Tanzania if these matters are disclosed, which will prevent me doing my job properly*". (***my emphasis***)

156. In his fourth witness statement Mr Frechette writes [**WSF4 p.44**]:

> "*As to the risks to which I believe I am personally exposed (see paragraph 34 of my First Witness Statement (pg 11 to 12)),* ***I do not believe these have diminished and they remain a source of real fear and concern*** *(particularly when I travel to Tanzania, as I will continue to do in my new role for Airtel). I am also concerned that* ***they may have increased*** *due to my significant involvement in the negotiation of the Sale and the fact that, as a result, I now have a higher profile in Tanzania and am better known to the Tanzanian government (pgs 239 to 240). As someone who regularly visits Tanzania and is now well known to various members of the Tanzanian government, I would be an obvious candidate* ***in the event of malign actors seeking to target Millicom or its personnel****.* ***I do not think the end of my employment with Millicom diminishes these risks*** *– this is a nuance which is unlikely to feature heavily* ***in the calculations of any malign actors in Tanzania who intend to harm Millicom, my former colleagues, or myself***". (***my emphasis***)

157. It appears, therefore, that Mr Frechette's view is that the *mere fact* of him being named as a respondent in these proceedings is enough for him to become a target of "malign actors" ("*the authorities, the assassins, the supporters of Mr Lissu and all other stakeholders*"). Yet, at no point during these proceedings did Mr Frechette seek an anonymity order with respect to himself. Even at this late stage, his position is that if the Application was refused, he would not be prepared to give evidence as a witness, however, he does not say that he would not be prepared to defend the complaints brought against him personally.

158. Second, Mr Frechette did not give any cogent evidence to explain how him not giving evidence at the trial, would prevent or mitigate the risk to his personal or other Tigo employees' safety and security, he says he is concerned about, if the Application was refused. Mr Frechette's name and those other employees' names feature in the pleadings and most likely be mentioned several times in witness statements. Therefore, it appears to me that unless the Application is granted, his name and names of other Tigo employees, for whose safety and security Mr Frechette says he has concerns, will enter the public domain, meaning that the same risks will arise, whether or not Mr Frechette gives witness evidence at the trial.

159. Furthermore, Mr Frechette's evidence to this Tribunal was that he was not personally involved in the alleged passing of Mr Lissu's mobile phone/location data by Millicom to the authorities and only learned about that matter some months later. Therefore, if Mr Frechette's fears of reprisal are based on him being somehow associated with the passing of the data to the authorities, it is not clear to me how him not giving evidence to the Tribunal, essentially distancing himself from that event, could mitigate the risks he says he is concerned about.

160. Finally, Mr Frechette's apparent view is that the risk arises from his past association with Millicom and his high profile in Tanzania (including extra

visibility in government's circles due to his work on the sale of Millicom). His evidence is that the end of his employment with Millicom does not diminish this risk, that is because this "*nuance ... is unlikely to feature heavily in the calculations of any malign actors in Tanzania who intend to harm Millicom, my former colleagues, or myself*". If that is correct, and Mr Frechette's past association with Millicom and his high profile in Tanzania is what creates the risk, then it must follow that whether or not Mr Frechette gives evidence (or indeed remains a respondent in these proceedings) makes no difference to the level of risk if the Information gets into the open. On his case, the malign actors will be lashing out at him or his former colleagues regardless of their association with this case or their involvement in the release of Mr Lissu's mobile phone/location data to the authorities in August 2017.

161. Whether Mr Frechette gives evidence or not is, of course, a matter for him. I am not seeking to persuade him one way or the other. I am just pointing out the logical flaws in his position, which, in my view, casts a shadow of doubt as to the true level of fears he has for his personal safety and for other Tigo employees.

162. Furthermore, for the reasons explained above (see paragraphs 115-132 above) I find that the risk of "malign actors" targeting Tigo employees (including Mr Frechette and his former colleagues) is not real and immediate and at most can be described as hypothetical.

163. Moreover, Mr Frechette maintaining the position as a witness that the risk to his safety and security outside Tanzania still exists, despite this position being abandoned by the Respondents (including Mr Frechette himself as a respondent) as far back as 16 November 2022, if not earlier, (see footnote 2 above), and despite him not being able to provide any rational basis for that position, further supports my view that Mr Frechette overplays the real extent of his fears and concerns.

164. This does not mean that I find that Mr Frechette's concerns are not genuine. However, I do find that the release of the Information in the public domain will not cause the level of Mr Frechette's concerns and fears to attain the level of "*causing [him] to live in fear of a physical or verbal attack*[6] *on [him] or [his] colleagues*", as described by Ms Callaghan in her opening skeleton (at [65]).

165. Next, while I accept that Mr Frechette might have useful evidence to give to the Tribunal, in particular with respect to the Claimant's dismissal and the procedure adopted by R1 in dismissing the Claimant for the stated reason of redundancy, I do not accept Ms Callaghan's submission that without Mr Frechette's evidence "*the defence of the claim against him and the other respondents will be much harder, if not impossible*".

[6] There was no specific evidence led by the Respondents witness about the possibility of "verbal attack", separate from physical violence. I, however, accept that physical violence might well be accompanied by abuse or other forms of verbal aggression.

166. To put simply, the Claimant's primary case is that Mr Frechette was made to dismiss the Claimant for a made-up reason of redundancy. The decision to dismiss the Claimant was made elsewhere and Mr Frechette was simply executing it.

167. In the Grounds of Resistance (at [100 (b)] the Respondents seem to confirm that the decision to dismiss was not made by Mr Frechette (or at any rate, not by him alone): "*The decision to place the Claimant at risk of redundancy, and ultimately, to dismiss him on grounds of redundancy,* ***was taken at a Group level****, and was carried out by the Second Respondent alone*" [**p.0120**]. (***my emphasis***)

168. Furthermore, the Respondents' pleaded case (at [78] of the Grounds of Resistance) is that the redundancy was due to the downsizing of Millicom's African operations and the closure of the London's office [**p.0112**], and it was known to the Claimant since September 2018 (at [81] – [**p.0113**]). Therefore, it appears to be that even if Mr Frechette refuses to be a witness for the Respondents, considering the size of R1 there ought to be other executives and HR managers, who would be able to give relevant evidence about these matters.

169. Mr Frechette was not a person to whom the alleged protected disclosures had been made. It is not alleged that he was responsible for or otherwise involved in any of the pre-redundancy detriments. Therefore, it does not appear to me that without him the Respondents would not be able to defend a large part of the Claimant's "whistleblowing" detriments complaint.

170. I am equally unpersuaded that without Mr Frechette's evidence it would be impossible for the Respondents to defend the Claimant's disability discrimination complaints, considering how the complaints are put and how the Respondents' defence is pleaded (see paragraphs of the Grounds of Resistance [128] - [131] [**p.0127 – 0128**]).

171. In sum, although I do not discount Mr Frechette's refusal to give evidence (whatever the logic of that he might have) as a relevant factor, I do not ascribe to it the weight of making the defence of the claim "*much harder, if not impossible*".

172. Moving to the next factor, I do not accept Ms Callaghan's submission that the Information is of no or limited relevance to the Claimant's case, or that it concerns only the first of the six pleaded protected disclosures. On the contrary, I find it is central to the Claimant's entire claim.

173. The Claimant's case, in a nutshell, is that him uncovering the facts described in the Information and informing R3 and R4 about those, was the start of a chain of events entailing increasingly negative consequences for the Claimant and ultimately resulting in his dismissal. Put it simply, the Claimant's revelations made R3 and R4 and some well-connected local employees of Millicom in Tanzania very unhappy, and in consequence he

was threatened with repercussions, marginalised, subjected to other detriments, and finally dismissed[7].

174. His case is that everything that happened after his first protected disclosure, both in terms of other disclosures and detriments, are part and parcel of one story. Therefore, in my view, the Information is of considerable importance for him to be able to tell his story to the Tribunal. Accordingly, the derogations sought of preventing the Information being aired in open court are far from being "minor" or "peripheral". In my view, they are likely to have the effect of taking the sting out of the Claimant's case.

175. It is also incorrect to say, as Ms Callaghan submits, that the Information concerns only the first of the six alleged protected disclosure. The Claimant's replies to the Respondents' request for further information [**p.0027-0049**] clearly show that the Information in one way or another formed part of his subsequent disclosures, including his disclosure to Sidley Austin law firm, which, on the Claimant's case, led to further retaliations by the Respondents.

176. Next, I find that restricting the Claimant in telling his story to the Tribunal by having to adopt various codes and naming conventions will be prejudicial to him and most likely negatively affect eloquence of his evidence to the Tribunal, thus interfering with his Article 6 rights. The Claimant said in his evidence that he would be confused having to look at redacted papers, consequently he would be making mistakes when giving his evidence at the trial. He said it that would be "a complete nightmare" for him. I can see why, given that the Information lies at the foundation of his entire case, and he would have to find a way of conveying the seriousness of what happened using 17 different naming codes.

177. The fact that the Tribunal hearing the claim will have unredacted versions of the bundle and witness statements is not going to help the Claimant. Equally, the Tribunal being able to correct the Claimant if he unintentionally slips the Information when giving his evidence and warn the press and public that the disclosed Information is subject to the RRO and must not be published (the mitigation suggested by Ms Callaghan) is likely to make things more difficult for the Claimant. Being interrupted and reminded to use the codes when he needs to concentrate on answering difficult questions put to him in cross-examination by a leading counsel is unlikely to help with giving full and considered answers.

178. Furthermore, the Information will be equally important in considering what consciously or unconsciously operated on the minds of people who are alleged to have subjected the Claimant to various detriments. It is not unreasonable to suggest (as was submitted by Mr Callus at the hearing) that the seriousness of the facts discovered by the Claimant, the gravity of the potentially associated consequence of the Millicom's action, and the severity of potential repercussions on the Respondents if the Claimant's disclosure

[7] I, of course, make no findings whether these allegations are true or not. That will be for the Tribunal hearing the claim on its merits to determine.

became public (including jeopardising the planned sale of the business in Tanzania) could have made people to react in a more drastic way than how they would have reacted if the Claimant blew the whistle about a less serious matter. In my view, not being able to use the Information in putting this case to the Respondents' witnesses at the trial will create an unfair disadvantage for the Claimant.

179. Ms Callaghan's submission that the Information is of no relevance because the Tribunal will not be making any findings who the assailants were and whether they used the Millicom supplier data is not to the point. The issue is not whether the Millicom supplied data was used by the assailants but whether the Claimant disclosing the Information that it might have been so used was "the ground" on which he was subjected to the alleged detriments and/or "the reason" for his dismissal.

180. Finally, the oft-quoted dictum by Lord Hewart, the then Lord Chief Justice of England, in the case of *Rex v. Sussex Justices*, [1924] 1 KB 256 that: "*Justice must not only be done, but must also be seen to be done*" is relevant too.

181. In *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38, [2020] AC 629 Baroness Hale of Richmond PSC said "*although said in the context of an appearance of bias, but the principle is of broader application. With only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done*.", and went on to explain (at [42], [43]):

> *"42 The principal purposes of the open justice principle are two-fold and there may well be others.* ***The first is to enable public scrutiny of the way in which courts decide cases to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly.*** *In A v British Broadcasting Corpn [2015] AC 588, Lord Reed JSC reminded us of the comment of Lord Shaw of Dunfermline, in Scott v Scott [1913] AC 417, 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard "with open doors", "bore testimony to a determination to secure civil liberties against the judges as well as against the Crown" (para 24).*
>
> *43* ***But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases.*** *In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place.* ***Often, documents are not read out. It is difficult, if not impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material."*** *(****my emphasis****)*

182. Considering the importance of the Information to the entire Claimant's case, in my judgment, "*justice will not be seen to be done*", if the press and members of the public would have to follow the trial with important elements of the story being hidden under various codes and naming conventions. There will be a real risk that the ultimate decision taken on the merits of the Claimant's claim, which too would have to be carefully crafted not to reveal the Information, would lack clarity and details for the public to properly understand why the Tribunal decided the case in a way it did.

183. For the same reasons, it is also my view that the sought derogations will seriously interfere not only with the open justice principle, but also with Article 10 rights of the Claimant, the press and public.

184. Finally, I do not accept Ms Callaghan submission that on the correct reading of Lord Wolf's dictum in *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966 at [8]-[9], Mr Frechette and current and former Millicom employees "*have the strongest claim to be protected by the court*."

185. The relevant passage in full reads as follows:

> *"8.* ***A distinction can also be made depending on whether what is being sought is anonymity for a plaintiff, a defendant or a third party****. It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public.* ***A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation****.* ***In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule.***
>
> *9. There can however be situations where a party or witness can reasonably require protection. In prosecutions for rape and blackmail, it is well established that the victim can be entitled to protection.* ***Outside the well established cases where anonymity is provided, the reasonableness of the claim for protection is important. Although the foundation of the exceptions is the need to avoid frustrating the ability of the courts to do justice, a party cannot be allowed to achieve anonymity by insisting upon it as a condition for being involved in the proceedings irrespective of whether the demand is reasonable. There must be some objective foundation for the claim which is being made.****" (****my emphasis****)*

186. In the present case, no anonymity is sought in relation to Mr Frechette (as a party or as a witness). Mr Frechette says he is not prepared to give evidence if the Application is not granted. As I found, there is no "*real and immediate*" risk to life and limb to Mr Frechette or other Tigo employees, and therefore no "objective foundation" for Mr Frechette's insistence on the Information being withheld from the public.

187. With respect to other Tigo employees (Simon Karikari, Jerome Albou, Sylvia Balwire and Tumaini Shija), the Respondents are not seeking to anonymised their names in these proceedings as such, but only refer to them as Person A – D (respectively) when they are referred to in connection with the shooting of Mr Lissu. And that is to avoid Person X (Mr Lissu), Event Y (the shooting) and Claim YY (Mr Lissu's subsequent claims that he had been followed and placed under surveillance by the Tanzanian Government) being "decoded" by the press and public. The Respondents do not say any of these individuals will be witnesses in the proceedings. In fact, Mr Frechette's evidence is that they all have refused to get involved. My finding is that there is no objective "real and immediate" risk to life and limb to them. Therefore, even if they had a claim for protection (which they don't make) it would still lack an "objective foundation".

188. Stepping back and looking at the entre picture, I have little difficulty in finding that the balancing exercise unequivocally gives the outcome that it is not necessary in the interests of justice to grant the Application. The factors advanced by the Respondents in support of the Application, when closely examined, do not outweigh the fundamental principle of open justice. In fact, for the reasons explained above (see paragraphs 172-182) I find that granting the Application will be positively contrary to the interests of justice in this case.

Mr Frechette's Article 8 rights

189. I now move to deal with the second ground, namely interference with Mr Frechette's Article 8 rights.

190. The CoA explained (at [54]) that:

> " *…. Consideration of article 8 in this case requires a two-stage process. The first question is whether the conduct under consideration (public disclosure of information by the state in legal proceedings) would involve an "interference" with a person's article 8 rights. If so, the second question arises: would that interference be justified as necessary in pursuit of one of the legitimate aims identified in article 8(2)?*"

191. I also note that in remitting the case to the employment tribunal, the CoA said (at [78]) that the words in brackets in the EAT Order ["(ii) to protect the Article 8 ECHR rights of the Second Appellant [R2] (including whether those rights are engaged)"] must be removed.

192. I do not, however, read this direction as a judicial decision binding on me to the effect that as at the date of this hearing Mr Frechette has Article 8 rights. It is not in dispute that he had Article 8 rights at the time of the ET Refusal. However, the EAT Order (approved by the CoA) says that I must consider "*any material change in circumstances*". Mr Frechette moving from London, UK (a Convention state) to Dubai, UAE (not a Convention state) is one of such material changes in circumstances.

193. Ms Callaghan submits that despite Mr Frechette now living in Dubai, he still has Convention rights by reason of being a party to these proceedings. In support of this contention, she relies on the Supreme Court decision in *AB v. BBC* [2015] A.C. 588. I find that submission is misconceived.

194. In the ***AB v BBC*** the issue before the Supreme Court was not whether AB retained his Convention rights despite being deported from the UK to a non-Convention state. The Supreme Court was concerned with the question whether the interference with BBC's Article 10 rights was justified in the circumstances when anonymisation of AB's name was a key consideration in the immigration tribunal's decision to authorise his deportation to his home country, on the basis that the anonymity would be a significant protection of AB's Article 3 rights. However, his Article 3 rights were relied upon before the deportation, when AB was still in the UK and resisting the deportation, relying, *inter alia*, on his Article 3 rights.

195. I do not read the passage at [76] of that judgment that "*The interference with the BBC's article 10 rights was also necessary for the protection of the rights of others, namely the right of A not to be subjected to violent attack*", or at [79] that "*… it is appropriate both in the interests of justice, and in order to protect A's safety, that his identity should continue to be withheld in connection with these proceedings, and that the order should therefore remain in place*", as the Supreme Court saying that AB retained his Convention rights despite no longer being present in the UK and living in a non-Convention state.

196. The EAT Judgment (see [45], [46], [81] – [84]) summarises the correct legal position, namely that those located outside Convention states do not have Convention rights (save in exceptional circumstances of the extraterritorial application of the ECHR, which are not present in this case), and therefore the Tribunal's powers under Rule 50 to make an order to derogate from open justice on that ground does not extend to those located outside the territorial reach of the ECHR. To put it differently, if such individuals do not have Convention rights, they have nothing to rely upon when seeking derogation on this ground - "*in order to protect the Convention rights of any person*".

197. Accordingly, my primary finding is that at the date of the re-determination Mr Frechette does not have Convention rights, because he lives in a non-Convention state and thus outside the territorial scope of the ECHR. The Respondents seek the derogations from open justice because they say the disclosure of the Information to the public will "*interfere* ***with Mr Frechette's*** *Article 8 rights*" (***my emphasis***), as opposed any other person's Convention rights within the territorial reach of the ECHR. Therefore, on this basis alone, the Application under this limb must fail.

198. If, however, I am wrong on this, and Mr Frechette still enjoys Article 8 rights (either because Ms Callaghan is correct that ***AB v BBC*** establishes that a party to English court proceedings enjoys Convention rights irrespective of their domicile, or because Mr Frechette had the Convention rights when the proceedings had started and retained them despite moving outside the territorial reach of the ECHR, or under some other theory), I find that the Application on this ground must still fail for the following reasons.

199. In considering how the previous Tribunal approached Mr Frechette's Article 8 rights issue, the EAT held (at [101])

> *"….The reference to the second respondent's "subjective fears" as not being sufficient to engage article 8 ECHR might suggest that the ET was, wrongly, requiring some objectively verified evidence to establish the potential risk to the second respondent's article 8 rights, when the subjective nature of those fears might be very relevant to any assessment of a risk to his enjoyment of his right to a private and family life. Moreover, the right to a private and family life can extend to workplace relationships (**Niemietz v Germany**, at paragraphs 29-31) and has been held to be wide enough to protect against a person's fears of verbal or physical attack in the workplace, either for themselves or for their colleagues (**Abbasi v Newcastle** [2021] EWKC 1699 Fam, at paragraphs 105-107)….."*

200. The CoA (at [65] – [68]) confirmed that the EAT's conclusions on this issue were correct.

201. I accept that if Mr Frechette still enjoys Article 8 rights, the disclosure of the Information could interfere with his Article 8 rights. However, before moving to consider whether the interference is justified, I need to examine the nature and extent of such interference.

202. Article 8(1) of the ECHR states: "*Everyone has the right to respect for his private and family life, his home and his correspondence*".

203. It was not argued that the disclosure of the Information would interfere with Mr Frechette's right to respect for his home or his correspondence. There was no evidence or arguments advanced by the Respondents that the disclosure of the Information would interfere with Mr Frechette's family life. Therefore, the only Article 8 right that it said the disclosure would interfere with is Mr Frechette's right to respect for his private life.

204. The nature of the interference is said to be that the disclosure of the Information would cause Mr Frechette "*to live in fear of a physical or verbal attack on him or his former Millicom colleagues*". For the reasons explained above (see paragraphs 152 - 164) I find Mr Frechette's "*subjective fears*" are exaggerated, and do not attain the level of "*living in fear*".

205. Moreover, although Mr Frechette says in his fourth witness statement [**WSF4 p.44**] that the risk of physical violence or arbitrary detention if the Information enters the public domain remains "*a source of real fear and concern*", he does not explain how those fears and concerns affect or will affect his personal life. The only example he gives is in his first witness statement [**WSF1 p.34**]: "*I may never be able to return to Tanzania if these matters are disclosed, which will prevent me doing my job properly*".

206. Although at the time of making the first statement Mr Frechette was still employed by Millicom and therefore the reference to "*doing my job properly*" must necessarily be taken as referring to his previous job at Millicom, I accept his evidence that at his new job he expects that he will need to travel to Tanzania on business on a regular basis [**WSF4 p.31** and **WSF5 p.12**].

207. Mr Frechette further explains [**WSF4 p.31**] that:

> *"… In the event that my dealings on behalf of Airtel expose me to risk similar to that experienced during my employment with Millicom, I expect that Airtel will provide enhanced security measures as necessary. While I take some comfort in the fact that such security measures would likely be implemented by Airtel should the need arise in the context of my work for Airtel, I remain very concerned about the threat and risk I face as an individual formerly providing services to Millicom. This is not least because, for reasons of confidentiality, I have been unable to disclose to Airtel the nature of the security concerns I face if information related to the Tundu Lissu matter was to become public. This makes me even more vulnerable. …*".

208. Therefore, it appears that as things stand now potential consequences for Mr Frechette's personal life if the Information becomes public, are that either Mr Frechette decides not to travel to Tanzania, or he travels there but

with enhanced security to be provided by Airtel, while remaining "*very concerned about the threat and risk*" he believes he faces in Tanzania.

209. If Mr Frechette decides not to travel to Tanzania, he gave no evidence what that decision would mean to his ability to do his job and what (if any) knock-on consequences that decision would have on his personal life.

210. If, however, he decides to travel despite being "*very concerned*", again, he gave no evidence as to what that would mean to his personal life. In other words, beyond saying that he will remain very concerned for his safety, Mr Frechette did not give any cogent evidence as to how him being "*very concerned*" would affect his personal life, for example: his health, his wellbeing, his relationships with his family and friends, his relationships at work, his sense of self-worth, etc.

211. I, however, do not disregard the fact that feeling very concerned and having apprehensions and fears in and of itself is likely to make anyone enjoying their personal life less. The question, however, is - to what extent? And that will vary from person to person. Mr Frechette's evidence as to the severity of such impact on him was conspicuously absent.

212. Moving to the second step and considering whether the interference with Mr Frechette's Article 8 rights is justified. This requires me to conduct a balancing exercise against the competing Conventions rights, including the Claimant's Article 6 rights, his, the press' and the public's Article 10 rights. For the same reasons, as I have explained when examining where the balance lies under the common law interests of justice limb (see paragraphs 172-183), I find that the interference is justified and Mr Frechette's Article 8 rights (to the extent he still enjoys them) must give way to those competing Convention rights of the Claimant and the others.

213. This outcome of the balancing exercise is further reinforced by the requirement under Rule 50(2) for the Tribunal "*to give full weight to the principle of open justice*". For the reasons I have explained in detail when dealing with the common law interests of justice balancing exercise, my conclusion is that it is not necessary in the interests of justice to derogate from the open justice principle to accommodate Mr Frechette's "*subjective fears*". I do not see any plausible reason why on the present facts the outcome should be any different when the balancing exercise is considered by reference to Mr Frechette's Article 8 rights.

Confidentiality

214. The final ground upon which the Respondents seek the derogations is confidentiality. As the CoA explained at [69]

> *"The third issue raised by the rule 50 application was whether the derogations sought fell within the "the circumstances identified in section 10A of the [1996 Act]". Read literally, the question posed is whether the hearing would involve taking*

> *"evidence from any person which in the opinion of the tribunal is likely to consist of . . . information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person."*
>
> *But the wording of rule 50(1) suggests that the test is whether a restriction on open justice is necessary in order to protect information of these kinds. That would be the test at common law. For both these reasons I think that is the right basis on which to approach this limb of rule 50."*

215. At [72]-[74] the CoA explained the correct approach to be adopted and the factors to be considered.

216. Ms Callaghan submits that the following four factors are relevant in conducting the balancing exercise and that they weigh in favour of the Application being granted:

a. The highly sensitive nature of the Information and its potentially incendiary effect if released into the public domain;
b. The Information was acquired by the Claimant in confidence under an express contractual duty to keep it confidential, which duty continues;
c. Mr Frechette's evidence that if disgruntled former Millicom investigators can treat their contractual duty of confidence as optional and can disclose confidential information acquired during the course of an investigation into subsequent public employment tribunal proceedings, then it is likely to compromise Millicom's ability to conduct effective internal investigations in future because it will undermine trust and confidence in Millicom's investigators and the investigative process itself; and
d. Because the Tribunal will not be determining the question who was responsible for the assassination attempt on Mr Lissu and whether the assailants were assisted by the data supplied by Millicom, the disclosure of the Information "*will not make a material contribution to any debate of general public importance*".

217. I think it is worth me starting by having a closer look and the confidentiality terms upon which the Respondents rely, and what information the Respondents say falls within the protection of those terms.

218. The Claimant contract of employment contains the following relevant provisions:

> "15.2 The Employee hereby undertakes that he will not, during or after the termination of his service under this Agreement, without, proper authority by the Company, disclose or communicate to any person or legal entity, or make use of or divulge to any person, either directly or indirectly, **confidential information of any kind whatsoever** of the Company or its associated companies or its respective clients **which he may acquire in the course of his service hereunder or which he may hereto forth have received or obtained whilst at the service of the Company**,
>
> 15.3 This clause shall not apply to information which:
>
> (a) is used or disclosed in the proper performance of the Employee's duties and obligations under this Agreement or with the prior written consent of the Company;
>
> (b) becomes publically (sic) available through no fault of the Employee; or
>
> (c) is ordered to be disclosed by a court of competent jurisdiction or otherwise required to be disclosed by law.

15.4 **All notes, reports, listings, documents, contracts of whatsoever nature and kind relating to the Company** shall remain the sole property of the Company and shall be created, prepared and held by the Employee in strict confidence for the exclusive account of the Company and shall furthermore be returned to the Company upon termination of this Agreement, for whatever reasons, together with all duplications or reproductions of such materials in the Employee's possession, or control and the Employee hereby undertakes to use his best efforts to assist the Company in recovering and collecting all such property which may be beyond the control of the Employee." (**my emphasis**)

219. The Millicom Global Investigations Policy says:

2.0 Millicom's Key Principles of Investigations

2.1 Investigations are conducted pursuant to the key principles listed below. Investigators in local Operations, Group investigators, and external investigators should all follow these key principles. If an investigator is unable to abide by the principles, for example because of a conflict of interest, he/she must immediately take the appropriate steps to find a substitute.

2.1.1 **Fairness.** The investigator and the investigation process should be fair and objective. Investigators should treat the subject of an investigation with respect.

2.1.2 **Impartiality/Independence**. Investigations must be conducted in an independent and impartial manner. No company department or individual should attempt to interfere with, obstruct, or otherwise improperly influence an investigation. Investigators should not face interference, pressure, or retaliation for conducting investigations pursuant to this policy.

2.1.3 **Efficiency**. Although investigations should not be rushed or curtailed, allegations should be investigated with deliberate speed and minimal waste of time or resources.

2.1.4 **Thoroughness**. Investigators should be thorough and expend adequate preparation and effort to conduct each investigation.

2.1.5 **Confidentiality**. Maintaining confidentiality throughout an investigation is paramount. Investigators cannot give Employees a guarantee of secrecy, but they should assure Employees that confidentiality will be maintained consistent with good business practices and to the extent provided by law. Employees involved in an investigation should not discuss the investigation with others.

2.2 All Employees and company leaders, especially at the Group Executive Committee and Operation General Manager level, have a responsibility to ensure that the individuals responsible for conducting investigations can do so consistently with the above principles.

6.0 Confidentiality

6.1 **Importance of Speaking Up**. Millicom's Code of Conduct and Speak Up Policy require Employees to report in good faith any wrongdoing discovered during the course of their work with Millicom.

6.2 **Importance of Confidentiality for Investigative Integrity and Success**. Employees who contact the Ethics & Compliance Department or the Ethics Line expect and deserve confidentiality. Neither investigators nor Employees should talk about an investigation (even one that is closed) in casual conversation. Although co-workers may be curious about Ethics & Compliance Department Investigations, it is crucial to keep these matters confidential. Investigators cannot give Employees an unconditional guarantee of secrecy but can assure Employees that confidentiality will be maintained consistent with good business practices and to the extent provided by law.

6.3 **Anti-Retaliation and Whistleblowing Framework**. Employees may feel reluctant to address concerns to the Ethics Line out of fear of retaliation. Protecting Employees from retaliation is critical to our success and complying with the law. Millicom has implemented a Speak Up! Policy that addresses non-retaliation and protection for Employees and others raising compliance concerns. The policy states that, among other things, "Millicom strictly prohibits anyone from retaliating against a Reporter who raises a concern in good faith."

> Retaliation is a serious violation of the Code of Conduct, and any such retaliation will be subject to investigation and disciplinary action, up to and including termination. (my underlying)

220. The Millicom's Code of Conduct or Speak-Up policy were not included in the hearing bundle.

221. The Information, in relation to which the Respondents seek a Rule 50(1) order is as follows:

> *"(1) The name and identity of Tundu Lissu;*
> *(2) Any reference to the shooting and/or attempted assassination of Tundu Lissu in Tanzania on 7 September 2017;*
> *(3) Any reference to the alleged connection between MIC Tanzania or any of its employees and that event;*
>
> *or any information likely to lead to identification of those matters, primarily by use of a code to refer to relevant persons, events and dates."*

222. In paragraph 4 of the Confidential Schedule the Respondents list such other persons, events and dates and specify the codes that must be used when referring to those – 17 in total.

223. Notably, the Respondents do not seek a Rule 50(1) order in relation to any other confidential information acquired by the Claimant in the course of his employment, including while conducting his investigation into the sharing of Mr Lissu's mobile phone/location data with the Tanzanian authorities. The Order the Respondents is asking the Tribunal to make specifically states:

> *"3. For the avoidance of doubt, nothing in this Order shall prevent any person from publishing in any report of or otherwise in connection with these proceedings the following:*
>
> *(a) that a Millicom subsidiary or its employees tracked a customer's mobile telephones, and supplied that customer's mobile telephone call data and live tracking data showing the customer's location to the authorities of an African country, allegedly without authorisation or lawful authority;*
>
> *(b) that subsequently, a very serious criminal offence was committed against that customer;*
>
> *(c) that there may be a causal link between the supply of the mobile telephone call data and live tracking data and the commission of the offence;*
>
> *(d) that the Claimant was instructed to investigate the actions of the Millicom subsidiary."*

224. This information is undoubtedly too Millicom's confidential information, which the Claimant is under the express contractual duty not to disclose. In other words, the Respondents do not object to the Claimant's using Millicom's confidential information in his evidence in a public hearing, provided the use of such confidential information does not allow the press and public to identify Mr Lissu, the attempt on his life, and the possible connection between Millicom supplying Mr Lissu's mobile phone/location data to the authorities and the assassination attempt.

225. I shall also observe that "*the name and identity of Tundu Lissu*", and "*any reference to the shooting and/or attempted assassination of Tundu Lissu in Tanzania on 7 September 2017*" by themselves cannot constitute

confidential information belonging to Millicom. Those facts are in the public domain and were never Millicom's confidential information in the first place.

226. I accept that the information acquired by the Claimant during the investigation about the possible connection between the supply of Mr Lissu's mobile phone/location data and the shooting does fall within confidential information covered by his employment contract. I also accept that he continues to be bound by his confidentiality obligations to his former employer with respect to that information.

227. However, as I have already said, the Respondents specifically authorise the use of such confidential information, subject to one and only condition. That is that the press and public cannot identify from that information that "*the customer*" in question was Mr Lissu and "*a very serious criminal offence*" was the assassination attempt on him. Furthermore, subject to that condition, the Claimant is at liberty to say that he had acquired that information in the course of his investigation for Millicom, i.e., "*whilst at the service of the Company*".

228. This, in my view, significantly undermines Mr Frechette's evidence [**WSF4 p.46, 47**] and Ms Callaghan's submissions that the protection of the confidential information is required in order to prevent undermining confidentiality and integrity of Millicom investigation process thus "*compromising its ability to conduct effective internal investigations*" in future. Or because, as Mr Frechette puts it: "*Confidentiality is the bedrock of any investigation*" **[WSF4 p.46]**.

229. On the contrary, I do not find that the Claimant using the Information in evidence in these proceedings will go against the Millicom's Global Investigations Policy. The Policy expressly encourages employees to speak up and prohibits any retaliation. It says that maintaining confidentiality throughout an investigation is paramount. It explains that confidentiality will be maintained "*consistent with good business practices and to the extent provided by law*", but secrecy cannot be guaranteed.

230. The Claimant's case is that in the course of his investigation he had discovered serious wrongdoings by Millicom employees', however, when he spoke up, he was subjected to various retaliatory actions, ultimately resulting in his dismissal. The Claimant also alleges a cover-up by various senior Millicom's employees of the discovered wrongdoings[8].

231. The Respondents do not say that the Claimant misused the Information during his investigation, thus breaching the Policy. They seek to prevent him using the Information <u>in these legal proceedings</u>. The Claimant is not seeking to publish the Information outside these proceedings. Therefore, in so far as Millicom not being able to maintain confidentiality of the individuals interviewed by the Claimant as part of his investigation, that seems to me squarely falling within the exception of "*to the extent provided by law*".

[8] I, of course, make no findings whether that is true or not. That will be a matter for the future Tribunal.

232. Furthermore, I do not find anything inconsistent between the Claimant using confidential information he had acquired during the investigation in these proceedings to prove his case, and the stated Key Principles and the anti-retaliation provisions in the Millicom's Global Investigations Policy. Investigators can also be "Reporters" under the Policy and the same principles should apply to them speaking up. Therefore, I do not accept Mr Frechette's evidence that the Claimant using the Information in these proceedings creates "*a broader risk that the investigative process itself will be undermined.*" On the contrary, it appears to me that "whistleblowers" knowing that the company would not be able to "bury" their concerns by the use of the confidentiality provisions could only increase confidence in the investigative process.

233. Considering the type of information the Respondents seek to prevent from being used in evidence in these proceedings, I fail to see the relevance of Mr Frechette's evidence about the risk of individual privacy being "invaded", or individual sensitive personal information, such as medical data, being inappropriately access or misused.

234. Finally, dealing with Mr Frechette's evidence that the maintaining confidentiality over the Information is necessary "*as a shield to reputational damage for implicated individuals, other staff members, and even employers. If, for instance, false or unverified information concerning an individual investigation subject or employer is made public, this can have long-lasting and seriously damaging reputational effects, even if untrue*."

235. Firstly, it does not sit well with the Respondents' case, supported by Mr Frechette's evidence he gave at the hearing when being re-examined by Ms Callaghan, that them seeking the Rule 50(1) order was nothing to do with the Respondents wishing to avoid reputational damage.

236. Leaving that to one side, as far as the substance of this argument goes, in my view, it is best answered by the aforementioned dicta by Lord Wolf in *R v Legal Aid Board, ex p Kaim Todner* [1999] QB 966 at [8]:

> *"….In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule."*

237. Moving on, while I accept Ms Callaghan's submission that the Information is of a "*highly sensitive nature*", for the reasons explained above (see paragraphs 115-133) I do not agree that its release into the public domain will be "*incendiary*".

238. I also reject Ms Callaghan's submissions that because the Tribunal will not be determining the question who was responsible for the assassination attempt and whether the assailants were assisted by the data supplied by Millicom, the disclosure of the Information "*will not make a material contribution to any debate of general public importance*".

239. I start by observing that this argument properly belongs to the balancing exercise between the competing Article 8 and Article 10 rights (see *In re Guardian News and Media Ltd and others* [2010] 2 AC at [48] – [50]. Nevertheless, I accept that whether the confidential information sought to be used in the proceedings will or will not make a material contribution to a debate of general public importance is a legitimate factor to consider in the balancing exercise under this third limb too. However, in my judgment, on the facts it does not shift the balance in favour of the Respondents.

240. Firstly, just because the Tribunal will not be making a factual finding about the identity of the assailants and whether they used Mr Lissu's mobile phone/location data supplied by Millicom to the Tanzanian authorities does not mean that the Information about these events aired in open court would not contribute to a debate of general public importance. The very fact that Millicom tracked Mr Lissu's (a leading opposition figure) mobile phones and supplied his mobile phone/location data to the authorities, without authorisation or lawful authority, in my view, by and of itself constitutes information that undoubtedly can contribute to a debate of general public importance, regardless of whether the data was then used by the assailants.

241. Secondly, the fact whether or not Millicom sought to suppress the investigation into this matter and retaliated against the Claimant for whistleblowing about that, which matters the Tribunal will need to decide to resolve this dispute, also in and of itself could be a material contributor to a debate of general public importance. For the reasons explained above (see paragraphs 172-182 above) I find that using the Information in the evidence will be important for a fair determination of these issues.

242. Finally, this submission fails to recognise that the balancing exercise in this case is not merely weighing the Millicom's right to keep its confidential information from disclosure to the public against the Claimant's, press and public Article 10 rights.

243. In *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57, the judgment, referred to by the EAT and the CoA as establishing the relevant principles to be applied in this case, the court was concerned about striking the right balance between Article 8 and Article 10 rights only. It was not a whistleblowing or another type of employment dispute. The issue was whether *Mail on Sunday* should be allowed to publish extracts from the HRH Prince of Wales private travel journal, which the publisher had obtained from an employee of the Prince. The employee, in supplying the copies the publisher, had breached her express duty of confidence to her employer. The employee was not a party to the proceedings. Unlike in the present case, there was no issue of interference with anyone's Article 6 rights or derogations from the principle of open justice. The judgment itself contains a very detailed account of the content of the journal.

244. It is in that context (i.e. balancing the competing Article 8 and Article 10 rights) that the Court of Appeal said:

> *"65. […]* ***Whether a publication, or threatened publication, involves a breach of a relationship of confidence, an interference with privacy or both, it is necessary to consider whether these matters justify the interference with article 10 rights that will be involved if the publication is made the subject of a judicial sanction. A balance has to be struck. Where no breach of a confidential relationship is involved, that balance will be between article 8 and article 10 rights and will usually involve weighing the nature and consequences of the breach of privacy against the public interest, if any, in the disclosure of private information****.*
>
> *66 What is the position where the disclosure relates to "information received in confidence?" The authors of The Law of Privacy and the Media, edited by Sir Michael Tugendhat and Iain Christie, in their Second Cumulative Supplement (2006), para 6.111 express the view that it would be surprising if this consideration was ignored. We agree. It is a factor that article 10(2) recognises is, of itself, capable of justifying restrictions on freedom of expression.*
>
> *67 There is an important public interest in the observance of duties of confidence. Those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential. Before the Human Rights Act 1998 came into force the circumstances in which the public interest in publication overrode a duty of confidence were very limited.* ***The issue was whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, "necessary in a democratic society". It is a test of proportionality. But a significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence that are created between individuals. It is not enough to justify publication that the information in question is a matter of public interest.*** *To take an extreme example, the content of a budget speech is a matter of great public interest. But if a disloyal typist were to seek to sell a copy to a newspaper in advance of the delivery of the speech in Parliament, there can surely be no doubt that the newspaper would be in breach of duty if it purchased and published the speech.*
>
> *68 For these reasons,* ***the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached.*** *The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.*
>
> *69 In applying the test of proportionality, the nature of the relationship that gives rise to the duty of confidentiality may be important. Different views have been expressed as to whether the fact that there is an express contractual obligation of confidence affects the weight to be attached to the duty of confidentiality. In Campbell v Frisbee [2003] ICR 141, para 22, this court drew attention to this conflict of view, and commented:*
>
> *"We consider that it is arguable that* ***a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the restriction of the right of freedom of expression****, than a duty of confidentiality that is not buttressed by express agreement . . ."*
>
> *We adhere to this view. But the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case.*" (***my emphasis***)

245. In other words, in my view, the Court of Appeal limited its pronouncement in relation to both factors (whether it is in the public interest that the duty of confidence should be breached, and the relevance in the balancing exercise that the duty of confidentiality has been expressly assumed) when these factors are applied in the balancing exercise against the competing Article 10 rights. It said nothing about these factors having the equal application or weight when the countering considerations are of

the application of the principle of open justice and/or Article 6 rights of the claimant or others.

246. The EAT Judgment and the CoA Judgment do make this point. The CoA said (at [73]):

> *"… And, in those that do, the ET will have to conduct a fact-specific analysis, to answer the questions just identified,* ***and to determine whether restrictions on disclosure are compatible with open justice****. Again, Eady J was clearly correct on this point." (****my emphasis****)*

247. The remittal Order says:

> "*….whether it was in the public interest for the duty of confidence to be breached,* ***taking into account the ECHR rights of others." (my emphasis)***

248. As the EAT and the CoA noted, not all whistleblowing claims will involve information protected by a contractual duty of confidentiality. However, considering the ubiquity and the usually very broad drafting of confidentiality provisions in employment contracts (as the Claimant's contract demonstrates:- "*of any kind whatsoever*", "*of whatever nature and kind*"), it will be almost inevitable that any employment tribunal claim (whether whistleblowing or not) will technically involve the employee breaching his/her express contractual duty of confidentiality when giving evidence about matters that brought them to the Tribunal. This could be ranging from their salary and position in the corporate structure to the employer's operational procedures and financial circumstances, and from their employer's business plans to all kind of incidents and accidents at work they may get to know about "*in the course of [their] services*".

249. It would be a very strange result indeed if in a regular tribunal case the employer would routinely be able to stop any confidential information being aired in open court by arguing that it is not in the public interest for the express duty of confidence to be breached by the claimant, and the Tribunal would then need to determine this issue as a preliminary issue before the case could proceed to a final hearing.

250. I do, however, accept that both the EAT and the CoA directed me to apply this test in the present case, and I shall do that.

251. Considering what I have said above about the nature and extent of the confidential information the Respondents seek to protect (see paragraphs 221-237) and my finding (at paragraph 183) that the proposed derogations will seriously interfere with the Claimant's, the press' and the public's Article 10 rights, I find that even when balanced just against Article 10 rights of the Claimant and others, the Application must be refused for the reasons articulated in those paragraphs.

252. However, and more importantly in this case, it is not just Article 10 rights that fall to be considered against Millicom's interest to keep the Information confidential. The Claimant's Article 6 rights are equally important. My finding that the derogations sought by the Respondents will interfere with his

Article 6 rights (see paragraph 176) is too a relevant and weighty counterbalancing factor. Moreover, as I have found (see paragraph 188) the interests of justice will not be served by the derogations sought. Considering all these additional factors, I find that they resolutely outweigh Millicom's interests in keeping the Information confidential, and for the same reasons it will be in the public interests for the Claimant to be allowed to breach his express duty of confidentiality by giving evidence to the Tribunal containing the Information.

253. It follows, that the Respondents' Application on this final third ground fails too.

Overall conclusion

254. The Application has failed on each of the three grounds. However, for completeness, I shall also consider whether, when these three grounds are considered together and not individually, they bear more weight. In other words, whether the Application should succeed when all the factors advanced by the Respondents in support of the Application are looked at in the round and not by compartmentalising them into their respective three limbs.

255. I find that looking at all these factors taken together, they still fall far short from outweighing the competing consideration of open justice, the Claimant's Article 6 rights, and Article 10 rights of the Claimant, the press and the public. I do not find that my earlier analysis, when looking at the factors by reference to each of the three limbs, could sensibly lead to a different outcome when I look at all these factors cumulatively.

256. Finally, I heard evidence and arguments as to the true motivation behind the Application and the Claimant's opposition, with the Claimant arguing that the Respondents were simply concerned about their reputation and were seeking to stop the highly embarrassing information entering the public domain, and the Respondents alleging that by resisting the Application the Claimant was seeking to force the Respondents to settle on unfavourable terms.

257. To determine this Application I do not need to make any positive findings of fact as to what motivates the parties in their respective pursuit of and opposition to the Application. It was not being argued that either applying for a Rule 50(1) order or opposing the Application was an abuse of process or otherwise scandalous, unreasonable or vexatious conduct of the proceedings.

258. What matters is not why the Application was made and resisted, but whether the grounds for making the sought Rule 50(1) order are made out. I find they are not.

259. The Application fails and is dismissed.

Employment Judge Klimov

30 March 2024

Sent to the parties on:
2nd April 2024

For the Tribunal Office: *Melanie*