EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr D Bland	**V**	**Pier Management Limited**

Heard at: **East London Hearing Centre (by video)**

On: **30 November 2021**

Before: **Employment Judge P Klimov (sitting alone)**

Representation

For the Claimant: Mr J. Lewis (of Counsel)

For the Respondent: Ms L. Robinson (of Counsel)

JUDGMENT having been sent to the parties on 30 November 2021 and written reasons having been requested by the respondent on 6 December 2021 in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. I aplogise for the delay in providing written reasons. Regrettably, the request for written reason has been passed to me only on 17 February 2022.

2. This was an open preliminary hearing to decide whether the File Note dated 13 February 2020 recording a telephone conversation between Mr D. Harrison of the respondent and Ms F. McAnaw of BTMK solicitors ("the **File Note**") should be admissible in evidence for the final hearing is allowed.

3. The claimant was represented by Mr J. Lewis (of Counsel) and the Respondent by Ms L. Robinson (of Counsel). I am grateful to them both for their helpful submissions.

4. The Claimant, and for the respondent - Mr D. Harrison and Ms F. McAnaw, gave sworn evidence to the Tribunal and were cross-examined. I was referred to various documents in the bundle of documents of 216 pages (including witness statements) the parties introduced in evidence.

Findings of Facts

5. This is a case for unfair (constructive dismissal) and breach of contract (notice pay). The claimant was employed as a Head of Litigation at the respondent, an asset management company specialising in management of ground rent investments. He had 13 years continuous service at the date of his resignation on 15 July 2020. He is a Chartered Legal Executive and a Chartered Institute of Legal Executives ("CILEX") qualified lawyer since 2013.

6. During 2019 the respondent developed concerns over the claimant's performance, which led it to initiate in October 2019 a formal performance management process.

7. On 13 February 2020, in preparation for the disciplinary hearing Mr Harrison had a telephone conversation with Ms McAnaw. Mr Harrison recorded the content of that conversation in the File Note.

8. The File Note read:

Phone Note:

Date: *13/02/2020*

Between: *Daniel Harrison & Fiona McAnaw of BTMK*
Subject: *Capability hearing procedure for DB*

Fiona advised that Kristie has been hospitalised and will no longer have conduct of the file. Fiona and Samantha Hyslop will take conduct.

Dan provided Fiona with an overview of the process to date:

- *Several informal meetings to discuss concerns with David's performance and to question if there were areas he wanted additional training or assistance.*
- *Minimal improvement seen over 3 months and so the formal capability procedure was instigated by way of a letter.*
- *Numerous performance management meetings took place over the following 6 months with formal objectives being set and reviewed at each.*
- *Following each meeting minutes would be produced and sent to David to amend and sign. The minutes from the initial meetings were agreed but minutes of latter meetings were disputed and not agreed.*

- *The final performance management meeting took place on the 7th Jan. During this meeting we reviewed each and every objective previously set and asked David to demonstrate his ongoing compliance with this.*
- *No formal conclusions were given during the final meeting and instead David was advised that we would provide a separate formal conclusion (post discussion with BTMK).*

Fiona confirmed that we have followed the capability process exactly as we should.

Fiona also advised that a disciplinary hearing now needs to follow the capability procedure and that this is separate and distinct from the previous capability/ performance management meetings.

Dan questioned the need for an independent party to conduct the disciplinary hearing. Fiona advised that the 'belt and braces' approach would be to have someone independent conduct this but in the circumstances she feels Jemma and Dan are suitable (and she would make the same decision if in our position). There is also a commercial reality to consider and it may not be justified to involve a third party who has to spend hours reading up on the matter.

Fiona advised her stance may differ slightly if it was our intention to terminate David's employment but as the intention is to issue a formal written first warning followed by additional monitoring the risk is low. Dan advised that David will likely be accompanied by a barrister, Fiona advised that her advice remains unchanged.

Fiona advised that the letter to David will need to outline the intention of the disciplinary hearing and provide him with sufficient notice of the meeting. It was agreed that Fiona would draft the letter for us as Dan did not have a suitable template and doesn't want to fall down on a technicality. Intention is to set the hearing for the w/c 24th Feb.

Fiona advised that at the hearing it will be necessary to review each objective set and provide a conclusion as to whether David has met this based upon the previous evidence supplied. David will be afforded the opportunity to respond. The hearing will conclude with our decision to give a first written warning, explain the reasons why and advise of the consequences of not improving over the forthcoming 6 months.

Fiona advise that there is likely to be a high volume of repetition from our last performance management meeting.

Fiona requested the following documents in order to proceed with her drafting:

- *A copy of the minutes from the last performance management meeting (both Dan/ Jemma's copy and David's amended version).*
- *A copy of the email from Jemma to David attaching the minutes from the 7th January meeting.*
- *A copy of the email from David to Jemma returning the minutes of the meeting (7th January).*

Dan advised that Jemma will supply these.

9. On 7 April 2020, there was a disciplinary hearing into allegations of poor performance and breaches of the CILEX Conduct Rules by the claimant. The hearing was chaired by Mr D Harrison, the Managing Director of the respondent. On 20 April 2020, following the hearing, the claimant was issued with a first written warning. The claimant wished to appeal the warning, but initially was told that he was out of time. The respondent subsequently suggested that the claimant could appeal, but the claimant by that time was on sick leave, and on 15 June 2020 he resigned, claiming constructive dismissal.

10. On 8 July 2020, the claimant sent to the respondent a data subject access request (the "**DSAR**"). On 6 August 2020, the respondent, as part of answering the DSAR, disclosed the File Note to solicitors (Messrs. Sternberg Reed) then acting for the claimant. The disclosure contained around 400 documents. The DSAR disclosure was prepared by Mr Harrison. He knew that he was not obliged to disclose the File Note because it was a legally privileged document, but by mistake added it in the disclosable documents by placing it in the "disclosable" folder. By agreement with the respondent, the disclosure was not checked by the respondent's solicitors.

11. It appears that the claimant's solicitors did not examine the disclosed documents and therefore did not spot the File Note due to the solicitor working on the matter being initially off sick and then somehow missing the disclosure email from the respondent. The claimant was unaware that the File Note had been disclosed in the DSAR response.

12. On 3 November 2020, the claimant initiated this tribunal claim against the respondent. The respondent's solicitors prepared a list of documents for disclosure. The DSAR documents (which included the File Note) were listed as one item on the respondent's list of documents. By agreement with the respondent the respondent's solicitors did not examine the DSAR documents included by the respondent for disclosure.

13. The disclosure took place on 24 March 2021. By that date the claimant had changed his solicitors. By agreement with the claimant, his new solicitors, Messrs. Branch Austin LLP, sent to the claimants all disclosed documents without reviewing them. On 26-28 March 2021, the claimant reviewed the disclosed documents and discovered the File Note.

14. On 20 April 2021, the claimant's solicitors wrote to the respondent's solicitors regarding the disclosure of the File Note in the following terms:

We write further to the above matter and to mutual disclosure which took place in March.

Please find attached a document entitled "20200213 - phone note with BTMK".

Upon receipt of disclosure from yourselves our Mr Hammer forwarded your disclosure bundle to our client. Our client then proceeded to consider the

large amount of disclosure which took him a considerable amount of time in order to ascertain which documents were relevant with a view to liaising with our Mr E Hammer in order to liaise with yourselves in relation to producing a draft trial bundle. Following our client completing this exercise he informed our Mr Hammer that the attached attendance note had been disclosed.

Our client informed our Mr E Hammer that the phone note reveals that the disciplinary hearing was a "fait accompli" and that irrespective of the evidence or what our client would say in the disciplinary hearing, a decision had already been made to give a first written warning to our client.

As you will be aware, our client's pleaded case throughout his particulars of claim, including paragraph 27b-d, is that a fair procedure was not followed during the disciplinary hearing. The grounds of resistance aver that it conducted a fair and reasonable capability hearing (in paragraph 23c.

We would be grateful if you would please confirm whether the telephone note was disclosed inadvertently and if it was disclosed inadvertently, the reasons for this inadvertent disclosure.

We look forward to hearing from you as a matter of urgency.

15. On 29 April 2021, the respondent's solicitors replied stating that the File Note had been disclosed in error and that privilege had not been waived. That was not accepted by the claimant's solicitors, which resulted in this dispute on the issue of whether the File Note should be admissible in evidence in these proceedings.

16. The claimant wants to rely on the File Note in support of his constructive dismissal claim, in particular that, contrary to the respondent's pleaded case, the File Note shows that the outcome of the disciplinary hearing had been pre-determined and therefore the disciplinary procedure was not fair and reasonable.

17. On 25 May 2021, the claimant applied for the File Note to be admitted in evidence. There was a telephone preliminary hearing on 28 May 2021 in front of Employment Judge Burgher, who directed that the respondent must send its response on the claimant's application. On 19 June 2021, the issue was listed to be determined at a preliminary hearing.

The Law

18. CPR 31.20 provides: "*Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the Court*."

19. Rule 41 of the Employment Tribunals Rules 2013 states that: "*The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts*".

20. Where one party comes into possession of privileged material of the other, it is necessary to consider whether the privileged material can be retained and used. There are two situations to consider. One is when the lawyers of one party inadvertently disclose privileged documents. The other is where a party comes into possession, through accident or malice, of the privileged documents of the other party.

21. The leading modern authority is **Goddard v Nationwide Building Society** [1987] Q.B. 670. There, May LJ set out the following principle (at para 743):

"*If a litigant has in his possession copies of documents to which legal professional privilege attaches he may nevertheless use such copies as secondary evidence in his litigation: however, if he has not yet used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them.*"

22. **Goddard** was not a case in which the documents were disclosed in error as part of the procedures during the proceedings. There was thus no question of waiver of privilege. The rights of the party whose privileged documents have been disclosed do not in such circumstances depend on the good faith of the recipient. As Nourse LJ said in **Goddard** at para 685:

"… t*he right of the party who desires the protection to invoke the equitable jurisdiction does not in any way depend upon the conduct of the third party into whose possession the record of the confidential communication has come. Thus several eminent judges have been of the opinion that an injunction can be granted against a stranger who has come innocently into the possession of confidential information to which he is not entitled … This view seems to give effect to the general rule that equity gives relief against all the world, including the innocent, save only a bona fide purchaser for value without notice. It is directly in point in the present case and our decision necessarily affirms it*."

23. The remedies are remedies for breach of confidence and the issues are issues which arise in cases of breach of confidence.

24. In **Webster v James Chapman & Co** *[1989]* 3 All ER 939, at 946-947, Scott J said (***emphasis added***):

"*[…] If a document has been disclosed, be it by trickery, accident or otherwise, the benefit and protection of legal privilege will have been lost. Secondary evidence of the document will have come into the possession of the other side to the litigation. The question then will be what protection the court should provide given that the document which will have come into the possession of the other side will be confidential and that use of it will be*

unauthorised. If the document was obviously confidential and had been obtained by a trick or by fraud, it is not difficult to see that the balance would be struck in favour of the party entitled to the confidential document. ***If the document had come into the possession of the other side not through trick or fraud but due to mistake or carelessness on the part of the party entitled to the document or by his advisers, the balance will be very different from the balance in a fraud case****.*

Suppose a case where the privileged document has come into possession of the other side because of carelessness on the part of the party entitled to keep the document confidential and has been read by the other party, or by one of his legal advisers, without realising that a mistake has been made. In such a case the future conduct of the litigation by the other party would often be inhibited or made difficult were he to be required to undertake to shut out from his mind the contents of the document. It seems to me that it would be thoroughly unfair that the carelessness of one party should be allowed to put the other party at a disadvantage."

25. In **ISTIL Group Inc v Zahoor** [2003] 2 All ER 252 at para 74, Lawrence Collins J said(***emphasis added***) :

"the position on the authorities is this. ***First, it is clear that the jurisdiction to restrain the use of privileged documents is based on the equitable jurisdiction to restrain breach of confidence****. The citation of the cases on the duty of confidentiality of employees makes it plain that what the Court of Appeal was doing in Lord Ashburton v Pape was applying the law of confidentiality in order to prevent disclosure of documents which would otherwise have been privileged, and were and remained confidential.* ***Second, after a privileged document has been seen by the opposing party, the court may intervene by way of injunction in exercise of the equitable jurisdiction if the circumstances warrant such intervention on equitable grounds****. Third, if the party in whose hands the document has come (or his solicitor) either (a) has procured inspection of the document by fraud or (b****) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene by the grant of an injunction in exercise of the equitable jurisdiction. Fourth, in such cases the court should ordinarily intervene, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy, e.g. on the ground of delay****."*

26. In **Fadairo v Suit Supply UK Lime Street Ltd** UKEAT/0282/13/JOJ Mr Justice Singh, having reviewed relevant authorities held (***emphasis added***):

70. First, the starting point is that the essence of legal professional privilege is that it entitles the client to refuse to produce documents or to answer questions about privileged matters. ***Once a privileged document is***

disclosed the privilege itself is lost. The question then becomes one of admissibility and not privilege*.*

71. Secondly, since the line of authority beginning with Lord Ashburton v Pape involves the equitable jurisdiction to grant injunctions to protect confidence, it follows that the normal rules relating to the grant of equitable remedies apply….. As the Court of Appeal observed in ***Al Fayed v Commissioner of Police for the Metropolis*** *[2002] EWCA Civ 780 at para 16,* ***since the court is exercising an equitable jurisdiction, there are no rigid rules****.*

79. First, ***there is a distinction, as the authorities and the helpful analysis in Phipson on Evidence make clear, between a situation where one party to litigation mistakenly discloses a privileged document in the context of that litigation and the situation where it inadvertently discloses such a document to another person who has not yet embarked on litigation but now wishes to use that document in litigation****. The present case falls into the latter category and is governed by the principles set out in the leading authority of* ***Goddard****.*

27. In **Al-Fayed and others v The Commissioner of the Metropolis** [2002] EWCA Civ 780 the Court (at para 16) set out the following leading guidance (***emphasis added***):

"i) *A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and that he does not.*

ii) *Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.*

iii) ***A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived****.*

iv) ***In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief****.*

v) *However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.*

vi) ***In the absence of fraud, all will depend upon the***

circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake*.*

vii) ***A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:***

a) ***the solicitor appreciates that a mistake has been made before making some use of the documents; or***

b) ***it would be obvious to a reasonable solicitor in his position that a mistake has been made; and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief****.*

viii) ***Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court****.*

ix) In both the cases identified in vii) a) and b) above ***there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances****.*

x) ***Since the court is exercising an equitable jurisdiction, there are no rigid rules****."*

28. Reference to "*making some use of the documents*" in paragraph 16(vii)(a) in **Al Fayed** must have a wide meaning. It is sufficient for the recipient to have "read and evaluated" evidence (see **Single Buoy Moorings Inc v Aspen Insurance UK Limited** [2018] EWHC 1763 (Comm) at paras 15-17).

29. In **Pizzey v Ford Motor Co Ltd** [1994] P.I.Q.R. P15. Mann LJ said: "*Cases of mistake are stringently confined to those which are obvious, that is to say those which are evident. This excites the question: Evident to whom? The answer must be to the recipient of the discovery. If the mistake was evident to that person then the exception applies, but what of the case where it was not evident but would have been evident to a reasonable person with the qualities of the recipient? In this context the law ought not to give an advantage to obtusity, and if the recipient ought to have realised that a mistake was evident then the exception applies*."

30. The "*obviousness*" must be of the mistaken disclosure, rather than that the document is privileged. In **Rawlinson & Hunter Trustees SA v Director of the Serious Fraud Office** [2014] EWCA Civ 1129 at para 15, Moore-Bick

LJ said: "*The judge laid some emphasis on the letters to which I have referred, but the essence of his thinking seems to have been that it was obvious that the document had been disclosed by mistake because it was obvious that it was privileged. That seems to me to confuse two things: whether the document was privileged and whether, even if privileged, it had obviously been disclosed by mistake. It is only if the court is satisfied of the latter that it will consider whether to prevent the use of the document in the litigation*."

31. In **MMI Research Ltd v Cellxion Ltd and others** [2007] EWHC 2456 (Ch) at paras 14-15, where Mann J emphasised that: "*The test is not whether, having done a detailed comparison and then agonised and perhaps made some further enquiries, the mistake would have become apparent. The question is whether it is "obvious". This must flow from the logic of Clarke L.J.'s argument in 16(iii), where he says:*

> *"A solicitor considering documents made available by the other party to litigation … is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived."*

That is the prima facie position. That can only be undermined in circumstances by the obviousness of mistake – absent the obviousness of the mistake, the receiving solicitor is entitled to assume that privilege has been waived."

32. If it is apparent that disclosure has been carried out in a hurry or cheaply so that it is likely that a proper review of the documents has not been made, then the mistake is more likely to be found to be obvious (see **IBM Corpn v Phoenix International** [1995] 1 All E.R. 413.).

33. The onus is on the respondent to satisfy the court that the recipient of the privileged document ought to have realised that there had been a mistake. Where it was the client that inspected the document, the relevant question in relation to whether the mistake was obvious is whether the client in fact appreciated or it would have been obvious to a reasonable person with the qualities of that person that there had been a mistake (see ***Pizzey v. Ford Motor Company Ltd)***.

34. In **Al Fayed** the Court added (at para 25): "*there may be many circumstances where it would not be just to grant an injunction on the facts of a particular case. One such case might be where B's solicitor sends the documents for consideration by B before considering them himself and B learns a fact from the document which it would be unjust to prevent him from using in the litigation, even though it would have been apparent to B's solicitor that a mistake had been made. All depends upon the circumstances of the particular case.*"

Submissions and Conclusion

35. Mr Lewis for the claimant submits that applying the above principles there is no proper basis for excluding the File Note. He accepts that although the File Note had initially been disclosed as part of the DSAR response before this litigation commenced, because it was disclosed again by way of disclosure in these proceedings, the matter does not fall under the **Goddard** line of authorities.

36. I think that is the correct position, because even through the File Note had initially been disclosed as part of the DSAR response, the claimant was unaware of it until it was again disclosed as part of disclosure in these proceedings. Therefore, it should fall within the first situation described in paragraph 79 of the **Faidaro** judgment (see paragraph 26 above).

37. Accordingly, I have dealt with this matter on that basis. However, I should add that if the claimant's application were run on the **Goddard** principles, my conclusion would have been the same. As I found, applying the principles in **Al Fayed** that it would not be just and equitable to prevent the claimant from adducing the File Note in evidence for the reasons explained below, the same result must follow applying the principles of exercising the equitable jurisdiction to restrain breach of confidence. For the same reasons I find that it will be ***"****thoroughly unfair that the carelessness of [the respondent] should be allowed to put the [claimant] at a disadvantage"* (see **Webster v James Chapman & Co** above).

38. Now, applying the **Al Fayed** guidance, the following picture emerges:

39. The File Note was created by Mr Harrison recording the content of his conversation with Ms McAnaw, who is a solicitor and advises the respondent on employment law matters. The conversation was in relation to the forthcoming disciplinary hearing of the claimant's case. The File Note records a communication between a client and his external legal adviser, who is a solicitor, and therefore is *prima facia* attracts legal professional privileged, and accordingly is not disclosable in legal proceedings. Mr Lewis accepts that.

40. However, the File Note was disclosed by the respondent's solicitors to the claimant's solicitors thus losing the privileged status. Therefore, the issue is not one of privilege or breach of confidence, but admissibility of the File Note in evidence.

41. The respondent argues that the note was disclosed inadvertently, it did not waive privilege, it was a mistake and that was obvious for the claimant (as a trained CILEX lawyer) and his solicitors. The claimant disputes that.

42. The starting point is for me to decide whether the disclosure of the File Note was inadvertent.

43. The respondent claims that the document was included in the wrong electronic folder by mistake because Mr Harrison was undertaking the

DSAR exercise in a hurry, having one month to complete a response to the DSAR, and since then remained there and no one checked the folder before it was again sent to the claimant as part of disclosure in these proceedings.

44. There was some detailed discussion at the hearing about how much time it took Mr Harrison to prepare a response to the DSAR, and whether he could have used more time to finalise it. I find that to be of little relevance. The question is not whether that document was inadvertently disclosed as part of answering the DSAR, but whether it was inadvertently disclosed as part of disclosure in these proceedings. The disclosure was made 24 March 2021 and there was no evidence presented by the respondent that it was done in a hurry.

45. I accept, however, the respondent's evidence that the DSAR documents had not been reviewed prior to the disclosure by the respondent's solicitors but simply added to the electronic file in a wholesale way. This seems to be an ill-advised way of going about one's disclosure obligations and is likely not to be in accordance with the tribunal's orders. However, I accept that it is what happened in this case.

46. I also accept Mr Harrison evidence that he knew that the File Note was privileged, he knew that he did not have to disclose it in answering the DSAR and did not disclose it on purpose either in answering the DSAR or in these proceedings.

47. Therefore, I find that the disclosure was inadvertent. The fact that the File Note was disclosed as part of the DSAR before the proceedings had been initiated further supports my conclusion that the disclosure was inadvertent. It was suggested by the claimant that Mr Harrison, having read the first few paragraphs of the File Note and omitting to spot the unhelpful paragraphs later in the documents, might have thought it was a helpful document for the purposes of the proceedings and decided to waive legal privileged and disclose it. However, as the proceedings had not been initiated at that stage, there was no reason for Mr Harrison to include that document in the DSAR response on the suggested basis, knowing that it was privileged, and he did not have to disclose it.

48. The next question is whether it was an obvious mistake. To answer this question, I must look not at whether it was an obvious mistake from the point of view of the disclosing party, but whether it was obvious for the claimant that the document was disclosed to him by mistake.

49. The document was received and reviewed by the claimant himself. I find that the claimant, as a trained lawyer with substantial experience in litigation work and training in legal professional privilege, would have realised that the document was legally privileged. He knew that BTMK were the respondent's solicitors, and that Ms McAnaw was their employment law specialist.

50. I do not accept his evidence that when reading the document, the question of privilege has never crossed his mind. His evidence to the tribunal was that having gone on a training course on legal privilege it was "*drummed repeatedly into him*" that one had to be diligent about sharing legal advice because privilege "*may not cover certain people (Dan Harrison in this case)*". He goes on to say that when he read the File Note he thought that the client was Pier Management and Dan Harrison was not a qualified lawyer and the matter was non-contentious. This plainly shows that the issue of privilege did cross his mind, but he decided to read on because based on his understanding of the ***Three Rivers*** authority, the legal privilege did not cover Mr Harrison because Mr Harrison was not a qualified lawyer. That was a wrong reading of the ***Three Rivers***, but nothing turns on that. The fact is the claimant must have realised what he was reading could be a privileged document. In any event, I find that a reasonable legal executive in those circumstance would have realised that they are looking at a legally privileged document.

51. This, however, does not mean that it automatically follows that it was obvious to the claimant that the document was disclosed by mistake.

52. The File Note came as part of disclosure from a firm of solicitors representing the respondent in these proceedings. The covering email said that the link contains "*all disclosable documents in this matter*". The File Note did not contain any usual markers of a privileged communication. Therefore, there was nothing that should have immediately alerted the claimant that the File Note was disclosed by mistake.

53. Further, reading the first few paragraphs of the File Note could have given the claimant a possible and reasonable impression that the respondent intended to disclose the File Note, as it contained helpful passages for the respondent's case.

54. However, having read the File Note in its entirety, and knowing that he was reading a privileged document (as I found), in my judgment, it was obvious to the claimant, as it would have been obvious to a hypothetical reasonable legal executive, that the disclosure of the File Note was an obvious mistake.

55. I accept Mr Lewis submission that the obvious mistake must be a mistake as to the disclosure of the document, and not an error of judgment on the part of the disclosing party to waive privilege and disclose a document because the party erroneously thought the document was helpful to its case. However, having found that the disclosure was inadvertent, this point does not arise.

56. I say that the mistake was obvious because the document, read as a whole, is clearly unhelpful to the respondent's case. It is privileged, it records the discussion with the respondent's external lawyer advising on the disciplinary matter related to the claimant. In these circumstances, I find that the only sensible explanation that could reasonably have been made by the claimant or a hypothetical reasonable legal executive, having read the entire

document, was that something had gone wrong on the respondent's side and the documents had been included in the disclosure file by mistake.

57. I do not accept the claimant's evidence that reading the document did not lead him to think that the respondent had not intended to disclose it. His explanations that he would have expected the respondent's solicitors to double-check the disclosed documents or that a simple search check could have been run on "BTMK" against the whole file to pick up potentially privileged documents appear to me to be an attempt to retrospectively justify his, in my view, unreasonable refusal to accept that the File Note was disclosed by mistake. Just because a mistake could have been avoided does not mean one could readily and reasonably conclude that it was not made, when one sees obvious signs of a mistake, which, in this case, was the content of the File Note and its legally privileged status.

58. Turning to the final issue, whether in the circumstance it would make it unjust or inequitable not to allow the File Note to be used in evidence.

59. I do not accept Ms Robinson submission that allowing the document would be allowing the claimant to benefit from his wrong of reading the document when he should have stopped when he saw the header.

60. For the reasons explained, I find that it only became obvious to the claimant that the document was disclosed by mistake after he had read the entire document and there was nothing on the face of the document that should have alerted him that he should not be reading it. Even though, as I found, he knew the document could be privileged, the mistake in disclosing the document only became obvious to him once he had read the entire document.

61. On the other hand, not allowing the claimant to introduce the File Note in evidence would put him in an invidious position, whereby he knows of the existence of a piece of evidence, which is highly relevant and intrinsically linked to his primary case, and yet he cannot use it to support his case, and somehow needs to find a way of "dancing around that elephant in the room".

62. The matter of "pre-determination" or "fait accompli" will have to be dealt with at the final hearing one way or another. Irrespective of whether the File Note is allowed, I do not see on what basis the claimant could be prevented from asking what was on Mr Harrison's mind when he came to decide his disciplinary matter and to what extent he approached it with open mind. The respondent's pleaded case states that ".. *Mr Harrison listened carefully to the Claimant and considered the points put forward by him during the [disciplinary] hearing*" (at para 15). Mr Harrison on cross-examination said that he was confident that the respondent ran the disciplinary process in a fair and transparent way. His witness statement for the final hearing (para 58) further supports that contention.

63. Therefore, it is likely that Mr Harrison will maintain that position at the final hearing. In the circumstances, I find that it will be unjust if the claimant, who is most likely to challenge that position, was not allowed to put the File

Note to Mr Harrison in support of his contention that in fact Mr Harrison had decided to issue a written warning to the claimant well before the hearing.

64. Ms Robinson argues that the File Note must not be allowed because the claimant did not know of its existence prior to resigning and issuing the claim, and therefore it could not have been an active or relevant factor for consideration. The issue of the pre-determined written warning is not part of his pleaded case, and therefore, she argues, there is no inequity in a decision to refuse to allow the claimant to use the note in evidence in these proceedings.

65. I disagree. The claimant's pleaded case (before he was allowed to amend it) is that his employment contract was fundamentally breached by the respondent due to, *inter alia*, "h*aving a procedurally and substantially defective and unfair poor performance warning (breach of express term of contract and implied term of mutual trust and confidence)*" and "f*ailure to abide by the ACAS code of practice during the disciplinary hearing (breach of the implied term of mutual trust and confidence)*". Therefore, the issue of the pre-determined written warning does not introduce a new head of claim or materially alters the pleaded case. It amplifies the already pleaded case and introduces evidence in support of it.

66. Further, whether the claimant knew or did not know of the content of the File Note is not relevant as far as the questions of fundamental breach and fairness of the dismissal are concerned. To the extent, it might be relevant it goes to the issue of causation, i.e. whether the claimant resigned in response to the alleged fundamental breach. However, this by itself is not a reason to disallow it. It is clearly relevant evidence to the issues in the case.

67. In any event, I do not accept that because the claimant was not aware of the existence of the File Note at the time of his resignation or when he submitted his claim, there is no inequity in a decision to refuse him to allow to use it. To follow that argument would mean that in any such situation the court would have to refuse the equitable relief simply on the basis that the party did not know of the existence of the document, even if otherwise the principles of equity favour granting the relief. Invariably in such cases the party seeking the relief would not have known of the document before it had been disclosed to it in the proceedings. Therefore, the result would be that the equitable relief would never be available to such party, which defeats the whole purpose of this remedy.

68. The claimant did not obtain the File Note in some improper way, but through the DSAR process and the process of disclosure ordered by the tribunal. Therefore, under the "clean hands" doctrine, in obtaining it he is not guilty of any "immoral or deliberate" misconduct (see **Fiona Trust & Holding Corp v Privalov** [2008] EWHC 1748 at paras 17 to 20)

69. For these reasons, I find that the File Note must be admissible in evidence.

70. Although, not necessary, given my primary finding on the obvious mistake issue, for the sake of completeness, I shall say that I find that the claimant

did put the File Note to use by consulting Mr Hammer on it and seeking to amend his pleadings based on its content, however that was after he had realised that it had been disclosed by mistake.

Employment Judge P Klimov
Dated: 21 February 2022