IN THE EMPLOYMENT TRIBUNAL

Claim No. 35/2019

BETWEEN:

JONAS ADAM MOHAMED OSMAN

Claimant

-AND-

GIBRALTAR FINANCIAL SERVICES COMMISSION

Respondent

PRELIMINARY HEARING JUDGMENT

Held in public on Monday, the 22nd day of November 2021

Before: Gabrielle O'Hagan, Chairperson

Appearances:
For the Claimant: in person attending by video call
For the Respondent: Mr Mark Isola QC and Mr Nicholas Isola, of Isolas LLP

UPON THE APPLICATION OF THE RESPONDENT DATED 21 MAY 2021, IT IS ORDERED THAT:-

1. The Respondent's application for disclosure by the Claimant of the following documents (only) is allowed, to be provided to the Respondent by copies of original (not redacted, cut, modified, or amended in any way) documents, correspondence, emails, et alia, as sent or received (at any time before and after termination of the Claimant's employment by the Respondent):

   (i) all correspondence from and to Star Actuarial Futures Limited (and associated documentation), including in connection with the Claimant's application to be represented by them, with his CV and actuarial qualifications / memberships documents / details, correspondence with them settling his CV on their letterhead, his job application to the Respondent, his request that the title of the job offer be changed by the Respondent, and any communications with them after his employment was terminated; and

   (ii) all correspondence from and to (and associated documentation) the English Faculty of Actuaries and Institute of Actuaries and the Swedish Society of Actuaries, including in connection with his memberships of / qualifications by those entities, why they ceased and/or were rescinded and when, to include the full content of the DSAR responses provided by those entities (subject to paragraph 2).

2. If the Claimant does not disclose the full content of the DSAR responses set out in paragraph 1.(ii), then:

   (i) he must forward the DSAR responses access links, emails, etc, to the Respondent with the access details provided to him by the senders and he must serve on the Respondent a witness statement (with a Statement of Truth) attesting to the fact that he has not accessed the content of the DSAR responses; but

   (ii) if the Claimant's position is that the DSAR responses access links, emails, etc, are inoperable or defective or are irretrievable by him and so not within his control, then he must serve on the Respondent a witness statement (with a Statement of Truth) attesting to the same.

3. Unless the Claimant complies with paragraphs 1. and 2. of this Order by Friday, 31 December 2021, the Claimant's Claim will be dismissed without further Order under Rule 37 of the Employment Tribunal (Constitution and Procedure) Rules 2016.

4. The Respondent's application for disclosure by the Claimant of the following documents is dismissed: post-termination correspondence/documents evidencing how the Claimant mitigated his losses.

5. Conditional upon the Claimant's compliance with paragraphs 1. and 2. of this Order:

   (i) The parties to exchange lists of all witnesses upon whose oral evidence they intend to rely in relation to any issues of fact on or before Friday, 14 January 2022.

   (ii) The parties to file and exchange all witness statements of the oral evidence upon which they intend to rely in relation to any issues of fact by Friday, 11 February 2022.

   (iii) The Claimant to include in his witness statement details of any paid work he has undertaken in the period from termination of his employment by the Respondent to the date of his witness statement, including but not limited to in each case the employers' / contractors' (for self-employed roles) names, his job title(s), the period(s) of the work and the reasons for termination, and any income accrued therefrom, and a Schedule of his past monetary losses (loss of earnings from the date of termination less any income accrued in that period).

   (iv) The evidence in chief of the witnesses for each party to be contained in the witness statements so that the witnesses shall be tendered for the purpose only of cross-examination.

   (v) A pre-trial review hearing to be listed for the first available date after 11 February 2022.

   (vi) Not later than 28 days before the Hearing of the Claim, the Respondent to send to the Claimant a draft hearing bundle index. Not later than 21 days before the

Hearing of the Claim, the Claimant to notify the Respondent of any additional documents he requires to be included in the hearing bundle.

(vii) Not later than 14 days before the Hearing of the Claim, the Respondent to prepare the hearing bundle and to file the same with the Tribunal and provide the same to the Claimant.

(viii) Not later than 10 days before the hearing of the Claim, the parties to exchange with each other and file with the Tribunal their skeleton arguments and bundles of authorities.

(ix) The Hearing of the Claim to be listed for 4 days for the first available date after 28 March 2022.

6. Liberty to apply.

REASONS

Background

1. The Claimant commenced employment with the Respondent as "Technical Expert Prudential" (as per the Response Form) on 23 April 2019. Just over 7 weeks later, on 12 June 2019, he was suspended and on 5 July 2019 he was summarily dismissed for gross misconduct (without notice or pay in lieu) by the Respondent.

2. The suspension letter dated 12 June 2019 stated that the Claimant was: "*suspended from work until further notice while an investigation is done into the following: 1. There is a strong suspicion that you are not a fully qualified Actuary and that you have misrepresented yourself and your qualifications.*" The Respondent's invite to a disciplinary hearing dated 28 June 2019 which followed referred to "*areas of misconduct*", including "*fraud, theft or dishonesty*" and "*falsification of records*" and stated that the Respondent would rely on "*the following evidence: Deliberately misrepresenting your Actuarial status and qualifications.*"

3. The Claimant filed a Claim Form on 17 July 2019 claiming unfair dismissal, arrears of pay, arrears of notice pay, breach of contract, bullying at work and "*whistleblowing protection*". He claimed that the reason for his dismissal was that from early May 2019 he had raised concerns inside and outside the Respondent about the Respondent's regulatory supervision of various regulated entities and "*corruptions*".

4. The Respondent filed a Response Form on 8 August 2019 denying the Claimant's Claims and making an employer's contract claim in the sum of £2,685.70. The Response stated that the Claimant was dismissed for gross misconduct, namely, that he had misrepresented his qualification status and "*himself*" in the job application process and that he was not a qualified actuary: the Claimant's CV, which the Claimant's recruitment agent, Star Actuarial Futures Limited (**the recruitment agent**), had submitted for the job on the Claimant's behalf on 28 February 2019, included representations that the Claimant was (i) a "qualified actuary" and (ii) held a Diploma from the English Faculty of Actuaries

and Institute of Actuaries (**the English Institute**) and was a Fellow of the Swedish Society of Actuaries (**the Swedish Society**). Shortly after the Claimant commenced employment on 23 April 2019, following almost immediate performance concerns and a performance meeting with the Claimant, in May 2019 the Respondent requested the Claimant for copies of his actuarial certificates, the recruitment agent not having been able to produce them. The Respondent repeated its request on 5 June 2019 and the same day the Claimant provided documentation including a "Diploma in Actuarial Techniques" issued by the English Institute dated 28 September 2002 and a Certificate of qualification as Full Member (Fellow) of the Swedish Society dated 26 October 2004, with a cover email from the Claimant: "*Please find the attached qualifications*". However, the Respondent was concerned about the authenticity of the documentation and carried out further enquiries, which revealed that the Claimant was "*no longer*" a member of the English Institute (by an email from them dated 12 June 2019) and was "*no longer a member of the Swedish Society of Actuaries and he lapsed his membership in November 2010*" and had never obtained their diploma which accords EU mutual recognition (by an email from them dated 18 June 2019). Further the Swedish Society had confirmed that the wording on the Swedish Society certificate provided by the Claimant, "*Full Member (Fellow)*", was not wording it would use.

5. In October 2019, both the English Institute and the Swedish Society reported to the Respondent that they had recently received data subject access requests (**DSARs**) from the Claimant and requested permission from the Respondent to provide the correspondence they had had with the Respondent described above.

6. In the Response Form, the Respondent further alleged that in a telephone call on 25 June 2019, the Claimant stated that the recruitment agent was fully aware that the Claimant was not a Fellow of either the English Institute or the Swedish Society, but this was subsequently denied by the recruitment agent.

7. A case management Preliminary Hearing was held on 13 April 2021, which the Claimant attended by telephone, and a Case Management Order was made, including that simultaneous disclosure by way of exchange of lists and copy documents was to be effected by the parties by 21 May 2021. An application by the Respondent to amend its Response to withdraw its original submissions in its Response Form that the Tribunal had no jurisdiction to hear the Claim was also granted.

8. At the Preliminary Hearing on 13 April 2021, I explained to the Claimant the duty of disclosure and the scope of his obligations, in particular, that he was required to disclose documentation in any media on which he relied, which adversely affected his or the Respondent's case or which supported the Respondent's case. I should say that the Claimant has since said that he had problems hearing all of what was discussed as the telephone connection was poor.

9. By letter from Isolas for the Respondent to the Claimant dated 7 May 2021, the Respondent put the Claimant on notice that the Claimant should disclose:

   "*a. All relevant correspondence and documents with the Institutes of Faculty of Actuaries in Sweden and the United Kingdom (together, the "Institutes") including, but not limited to, that relating to the extent of your membership with those Institutes, why these memberships ceased and/or were rescinded and what claims*

you threatened/intimated against those Institutes and vice versa. ...

b. *Documents evidencing how you have mitigated your losses following the termination of your employment, including, but not limited to, job applications submitted, what job offers you declined or accepted and correspondence relating thereto..."*

10. In the period from 13 April 2021 to 20 May 2021, the Claimant sent a number of emails to Isolas and the Tribunal, making submissions and attaching email correspondence between him and the Respondent as well as third parties at the time of his dismissal. For example, by email dated 7 May 2021, he stated that: "*the position I had in GFSC has changed to be nonactuary role and actuary is not a reserved word so I will answer only what is relevant to the case of whistleblowing*". He also stated: "*... currently I have no work ... I have some roles on a temp basis so I tried to mitigate months without work*".

11. On 17 May 2021, Isolas wrote again to the Claimant as follows:

"Your email above [dated 7 May 2021], together with your emails sent ... this morning, suggest that you have no intention of properly and fully complying with the Employment Tribunal's direction on disclosure and, in particular, correspondence/documents with the Institutes of Faculty of Actuaries in Sweden and the United Kingdom ... which the GFSC considers are most relevant to your termination, and significantly adverse to your position, namely that the sole or principal reason for your dismissal was not that you made a protected disclosure."

12. The Claimant responded by email on the same day that he had: "*sent all letters and disclosed all that is relevant to the case and it [is] your client who made this institute case ..,. you said to have evidence about membership from international please disclose all and please disclose all my business email regarding to the whistle blowing and all the HR related letter to me and to other parties about me.*"

13. By letter from Isolas to the Tribunal (copied to the Claimant) dated 21 May 2021, the Respondent made the instant application that:-

"1. The Employment Tribunal provides a direction setting out the Claimant's disclosure obligations;

2. The Claimant specifically disclose as part of his disclosure obligations the (a) relevant correspondence/documents with the recruitment agent and the Institutes; and (b) post-termination correspondence/documents evidencing how he mitigated his losses;

3. The Claimant provide the original emails to the Respondent rather than forwarding email correspondences;

4. Disclosure be extended to 14 days from the date of this Order with sequential extensions of 14 days to the following dates for exchange of lists of witnesses and exchange of witness statements; and

5. In the event of non-compliance by the Claimant, the Claim would be struck out."

14. In its letter of application dated 21 May 2021, Isolas stated that at the Preliminary Hearing on 13 April 2021, Counsel for the Respondent made submissions that the Claimant had made data subject access requests (**DSARs**) to various organisations, including the English Institute and the Swedish Society, and would have received their responses, which thereby would be within his control for the purposes of disclosure. At the Preliminary Hearing on 22 November 2021, the Claimant stated that he had received these responses to his DSARs, but had not been able to access them because the access links did not work.

15. The 21 May 2021 application letter also referred to the fact that the disclosure required was of unmodified original material, and referred to the fact that one of the emails which had been provided by the Claimant: "*appears to have been modified by the Claimant, as the email refers to the recruiter's name but then specifies the Claimant's email address*".

16. On 4 June 2021, the Respondent filed and served on the Claimant its disclosure.

17. The application was listed for Hearing on 5 July 2021. In its notification email to the parties dated 9 June 2021, the Tribunal reminded the Claimant of the nature of the application and set out again the duty of disclosure. The Claimant requested a postponement of the Hearing by email dated 28 June 2021. The Respondent objected, but this was granted by the Tribunal by email dated 1 July 2021 with reasons whilst including the Tribunal's expression of displeasure at the lateness of the request. More emails from the Claimant and then the Respondent in response followed, including an email from the Claimant dated 1 July 2021 in which the Claimant appeared to allege possible bias on my part. I replied to this on 6 July 2021, advising that it was open to the Claimant to apply for me to recuse myself, which the Claimant declined to follow up. The Hearing was re-listed and took place on 22 November 2021.

Law

Duty of disclosure

18. The Employment Tribunal (Constitution and Procedure) Rules 2016 provide:

"30. The Tribunal may order any person to disclose documents or information to a party (by providing copies or otherwise) ... as might be ordered by the Supreme Court".

19. Part 31 of the Civil Procedure Rules (**CPR**), which apply in the Supreme Court and so the Tribunal, sets out rules about the disclosure and inspection of documents, including that an Order may be made that a party give standard disclosure. Standard disclosure (CPR 31.6) requires a party to disclose only– (a) the documents on which he relies; and (b) the documents which – (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case. Under CPR 31.7, when giving standard disclosure, a party is required to make a reasonable search for documents falling within CPR 31.6(b).

20. The fairly standard Case Management Order made on 13 April 2021 reflected this and provided that simultaneous disclosure by way of exchange of lists and copy documents was to be effected by the parties by 21 May 2021.

21. CPR 31.8 provides that a party's duty to disclose documents is limited to documents which are or have been in his control. A party has or has had a document in his control if –
(a) it is or was in his physical possession;
(b) he has or has had a right to possession of it; or
(c) he has or has had a right to inspect or take copies of it.

22. CPR 31.9 provides that a document that contains a modification, obliteration or other marking or feature shall be treated as a separate document i.e. from the document without the modification, obliteration or other marking or feature, which must be disclosed in its entirety.

23. The duty of disclosure continues until judgment or settlement (CPR 31.11(1)). If any disclosable documents come to a party's attention at any time after service of the list of disclosed documents, the party must immediately notify all parties (CPR 31.11(2)).

24. The UK Employment Tribunals President has issued the following guidance in respect of disclosure in the Tribunal:

"**What is the disclosure of documents?**

6. Disclosure is the process of showing the other party (or parties) all the documents you have which are relevant to the issues the Tribunal has to decide. Although it is a formal process, it is not a hostile process. It requires co-operation in order to ensure that the case is ready for hearing.

7. Relevant documents may include documents which record events in the employment history: for example, a letter of appointment, statement of particulars or contract of employment; notes of a significant meeting, such as a disciplinary interview; a resignation or dismissal letter; or material such as emails, text messages and social media content (Facebook, Twitter, Instagram, etc). The claimant may have documents to disclose which relate to looking for and finding alternative work.

8. Any relevant document in your possession (or which you have the power to obtain) which is or may be relevant to the issues must be disclosed. This includes documents which may harm your case as well as those which may help it. To conceal or withhold a relevant document is a serious matter."

Loss and mitigation

25. Under Section 71 of the Employment Act:

"Where an Employment Tribunal makes an award of compensation for unfair dismissal under section 70 the award shall consist of–
(a) a basic award, and
(b) a compensatory award."

26. The Employment Tribunal (Calculation of Compensation) Regulations 2016 provide that:

"3.(1) Subject to the provisions of this Regulation, the amount of the compensatory award shall be such amount as the Employment Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

... 3.(4) In ascertaining the loss referred to in subregulation (1) the Employment Tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of Gibraltar."

27. In practice, where a respondent alleges that a claimant has failed to mitigate his losses, as here, and that any compensatory award should thereby be reduced, the claimant will wish to submit evidence of how he has mitigated his losses, most usually, by submitting evidence of any work obtained and income earned since termination, and of his job seeking efforts (ideally, documentary e.g. job applications and correspondence) and applications for available state benefits. However, the claimant does not have to prove that he mitigated his losses: the burden of proof is firmly on the respondent to establish that the claimant failed to mitigate his losses or that he acted unreasonably in failing to mitigate. If the claimant wishes to dispute such evidence, then it is open to him to submit evidence of mitigation. The burden of proof is not neutral. If the respondent does not put forward evidence to the Tribunal establishing that the claimant has failed to mitigate, the Tribunal has no obligation to make that finding (*Tandem Bars Ltd v Pilloni* UKEAT/0050/12).

Findings

28. I find that, as described at paragraphs 2.-6. above, a material issue to this Claim, as detailed in the Claimant's Claim Form and the Respondent's Response Form, is the reason for the Claimant's dismissal, specifically, whether the Respondent dismissed the Claimant because he had whistleblown about the Respondent's regulatory supervision of various regulated entities and "*corruptions*" or because the Respondent believed that the Claimant had misrepresented his qualifications and status as a qualified actuary in the job application process.

29. The Claimant's CV which the recruitment agent had submitted for the job on the Claimant's behalf on 28 February 2019 expressly included statements that the Claimant was (i) a "qualified actuary" and (ii) a member of the English Institute and the Swedish Society. The recruitment agent repeated the statement that the Claimant was "a qualified actuary" in its pre-interview email correspondence with the Respondent in March 2019 and the job offer when made (on 27 March 2019) was for "Actuary". The Respondent's case (which of course will need to be proved) is that in May 2019 the Respondent began to question these representations and in June 2019 established that they were false and that this was the reason for its decision to dismiss the Claimant.

30. The Claimant's position set out in the Claim Form, his subsequent email correspondence and at the Preliminary Hearings is that he had not misrepresented himself because he had asked the Respondent (through the recruitment agent) for the title of the role offered to be changed from "Actuary". This request is borne out by the documentation which has been disclosed, with the Respondent initially indicating it would prefer not to change the job title and querying the reason for the request and the recruitment agent

responding: "*He felt it better reflected the responsibilities of the role, as feels it is wider than an Actuary role*". This issue, and the extent of the Respondent's conclusions at the relevant time as a result (if any), is plainly one of the crucial issues in dispute, to be examined at the substantive Hearing of the Claimant's Claim, as well as the Claimant's claim in his Claim Form: "*I told the GFSC HR and agency about I am no longer member...*".

31. The Claimant has also claimed in the Claim Form and thereafter that the term "Actuary" is not a "*reserved word*". In an email to the Tribunal and Isolas dated 17 May 2021, he submitted: "*the actuary word is not regulated or protected and anyone can call himself an actuary ... your statement that I call myself an actuary is triggered ending my contract is a big misstatement from GFSC and in law I challenge them to show me the regulation of protection of word an actuary at this time.*" But I do not see the relevance of this submission to the issue of whether or not the Claimant misrepresented himself on his CV and in the application process as a "qualified actuary" and the Respondent's reaction to discovering the same. The same is true of the Claimant's claims in the Claim Form that his superiors were not Fellows of any actuary societies and that his qualifications are superior to that of an actuary. What is relevant is the Claimant's statement in his Claim Form that he "*was fellow of the Sweden of actuaries society and when they changed my status due to unknown reason I decide to cancel my membership as I protest from what they have done*", since this strongly suggests that the Claimant knew very well that he was not a "*Fellow of Swedish Society of Actuaries*" as stated in his CV submitted to the Respondent.

32. Given the parties' respective cases as pleaded in the Claim Form and Response Form, as summarised above, all correspondence between the Claimant and the recruitment agent, as well as between the Claimant and the English Institute and the Swedish Society, and associated documentation, falls squarely within the CPR Part 31 duty of disclosure as documentation which adversely affects the Claimant's case and/or supports the Respondent's case that it dismissed the Claimant because he misrepresented himself as a qualified actuary in the job application process.

33. However, from the Claimant's submissions at the Preliminary Hearings and in his correspondence to the Tribunal and Isolas, in particular his email of 7 May 2021 – "*I will answer only what is relevant to the case of whistleblowing*" - is that he either still does not understand or does not accept that the duties of disclosure encompass not only material which the Claimant believes are relevant to his case, but equally encompass material which are relevant to the Respondent's case, even if the Claimant does not consider that case has any merit and /or is without grounds. He seems still not to understand that each of his and the Respondent's opposing cases are exactly what will be scrutinised at the substantive Hearing, by reference inter alia to the documentation disclosed by each of them. Thus, all documentation relevant to the cases of both parties must be disclosed, regardless of whether or not the disclosing party believes the other side's case to be valid - the Claimant's view of the authenticity, validity or strength of the Respondent's case is irrelevant to whether the Claimant must disclose all material within his control which relates to it in any way. The Claimant should note that proper disclosure might even support his case rather than the Respondent's, for example, if he were able to produce evidence that he: "*told the GFSC HR and agency about I am no longer member...*", as stated in his Claim Form. But it is essential that the Claimant understands that if a party unlawfully withholds relevant evidence, the Tribunal will be unable to

assess all of the evidence when making its decisions. This is self-evidently unfair and prejudicial to a fair disposal of the Claim.

34. Having reviewed the limited material which has been disclosed by the Claimant to date, I am satisfied that the Claimant has not complied with his duties of disclosure or the Order dated 13 April 2021 which required him to give standard disclosure by 21 May 2021. I spent some time at the Preliminary Hearing on 13 April 2021 explaining these duties to him, as well as in writing by the Hearing listing notification email to the parties dated 9 June 2021. The Respondent has also clearly explained what is required of the Claimant more than once. If the duties remain unclear to the Claimant, then this is disappointing, but ignorance is no excuse, particularly in these circumstances where both the Respondent and I have set out the scope of the duty of disclosure as clearly as possible. Against this background, I take the view that in the interests of justice any further non-compliance by the Claimant in this regard must be viewed as deliberate and must therefore result in the Claimant being prevented from pursuing his Claim. I have therefore included an Unless Order above. I consider this to be reasonable and necessary as any further non-compliance by the Claimant will prejudice fair disposal of the Claim, put the Respondent and the Claimant on unequal footing, and may result in another postponement of the substantive Hearing.

35. In respect of the responses to the Claimant's DSARs to the English Institute and the Swedish Society and the Claimant's submissions at the 22 November 2021 Preliminary Hearing that he had not been able to access the contents, I find that these are nevertheless within the Claimant's control for the purposes of CPR Part 31 as being or having been in his physical possession (and he has or has had a right to possession of them and he has or has had a right to inspect or take copies of them) and the Claimant must now take steps to access and disclose the contents to the Respondent. If the Claimant maintains that he is unable to access these responses, then he should comply with paragraph 2. of the Order above.

36. The Claimant is additionally reminded that his disclosure obligations require him (under CPR 31.7) to make reasonable searches for disclosable material, not just forward on emails he has to hand, but rather undertake an organised search of all of his hard copy documentation and electronic data, including communications from and to all the Claimant's email addresses, and held on computers / laptops, servers, back-up systems and the Cloud, as well as mobile phones and any other electronic devices or media that may contain such data. The duty of search encompasses deleted data and temporary data, to the extent they are recoverable.

37. I additionally hold that the material to be disclosed by the Claimant should be in original and unaltered format e.g. in respect of emails, the original email as sent or received, not forwarded extracts, and certainly not modified, amended or redacted in any way. I am obliged to make this direction because on the limited disclosure provided by the Claimant to date, which Counsel for the Respondent took me through in some detail at the 22 November 2021 Preliminary Hearing, it is clear that a number of the emails provided by the Claimant have not been provided in their original unaltered form and appear from their face to have been subject to modification, for example, an email chain between the Claimant and the recruitment consultant of 28 March 2019 (in which an email address appears to have been amended) and an email to the Gibraltar Audit Office dated 10 June 2019 (which has no introduction or explanation at the beginning, but rather a large space,

and is also apparently mis-dated by reference to the Claimant's statement therein that he has been employed by the Respondent for nearly 3 months). For the avoidance of doubt, the Claimant's disclosure subject to paragraph 1. of the Order must include all of the emails the Claimant has already provided, but in their original (unmodified) format. In this regard, after the 22 November Preliminary Hearing, the Claimant sent to the Tribunal the original version of the email dated 28 March 2019 referred to above with the correct unamended email address.

38. On this subject, I pause to comment on the submissions made by Counsel for the Respondent at the Preliminary Hearing on 22 November 2021 and the evidence to which he referred me supporting a case that the Claimant falsified responses to reference checks made by the Respondent in 2019. Counsel's case was clearly and convincingly put. However, at this time, I make no findings, as it seems to me that this issue has limited bearing on the Respondent's instant disclosure applications, save that, if proven, it further strengthens the Respondent's allegations of lack of probity and credibility generally on the Claimant's part, which it may of course explore further at the substantive Hearing.

39. In respect of the Respondent's application that the Claimant be Ordered to disclose "post-termination correspondence/documents evidencing how the Claimant mitigated his losses", this part of the Respondent's application was debated between me and Counsel for the Respondent at the Preliminary Hearing on 22 November 2021, as I was initially minded to dismiss it on the basis that the substantive Hearing would be split (liability and quantum to be decided separately). However, Counsel for the Respondent reminded me that the 13 April 2021 Case Management Order expressly provided for the opposite and for both issues to be heard together. I therefore heard arguments from Counsel for the Respondent in support of this part of the application. On consideration of these, I am of the view that this part of the Respondent's application has been made incorrectly, since it is based on submissions and evidence apparently showing that the Claimant has found some work since termination, in other words that he has mitigated his losses (not failed to do so), with so far as I understand it a submission that the Claimant may be misleading the Tribunal with regard to his losses claimed. I bear in mind that a claimant does not have to prove that s/he mitigated his/her losses and that the burden of proving that s/he failed to do so falls firmly first on the respondent and only then Is it for the claimant to dispute this and then only if s/he wishes. In this case, I find that the Respondent has so far not made any submissions nor put forward any evidence that the Claimant has failed to mitigate, in fact quite the opposite: it has rather made submissions and put in evidence of the Claimant apparently obtaining work i.e. mitigating his losses. I therefore dismiss the Respondent's application for disclosure by the Claimant of mitigation evidence, although the Claimant is of course free to submit this if he wishes, particularly if the Respondent does at some later stage go on to allege failure to mitigate on his part.

40. However, given that the 13 April 2021 Case Management Order expressly provided for the issues of liability and quantum to be heard together, and that the Claimant has not to date provided any details or made any disclosure in respect of his alleged losses should the Tribunal come to make a compensatory award in his favour, save for an email to the Tribunal and Isolas (dated 7 May 2021) in which he stated that he had *"some roles on a temp basis"*, the directions part of the Order will now include a provision (paragraph 5.(iii)) that the Claimant must include in his witness statement details of any paid work

he has undertaken in the period from termination of his employment by the Respondent to the date of the witness statement and a Schedule of his past monetary losses (loss of earnings from the date of termination less any income accrued in that period).

Gabrielle O'Hagan

Gabrielle O'Hagan, Chairperson

2 December 2021