EMPLOYMENT TRIBUNALS

Claimant Ms Lorraine Naidoo

Respondent Haringey Sixth Form Education

HEARD AT: Watford

ON:20 to 24 February 2023, 21 to 23 March 2023
and in Chambers on 17 April and 2 May 2023

BEFORE: Employment Judge J Lewis KC
Ms Jessica Hancock
Mr Ian Murphy

Representation

For the Claimant: In person

For the Respondent: Mr S Peacock

JUDGMENT

The Claimant's claim of indirect age discrimination succeeds in relation to the following provision, criterion or practices:

1. In relation to ventilation:
   1.1 Using a classroom (G26) where windows could not be opened.
   1.2 Not undertaking a formal assessment by a person qualified in H&S of ventilation and aerosol transmission in those rooms (G26 and F28) or more generally.
2. In relation to overcrowding:
   2.1 Not limiting numbers in classes so as to facilitate one metre social distancing between students, or one student per desk.
   2.2 Not having someone with health and safety experience assessing whether the distancing could be applied either between students or between students and teacher
   2.3 Not setting any cap on the 16 to 19 ESOL class prior to agreement to do so on or around 9 October 2020, and then not setting an explicit maximum on the number of students in that class.
3. Relying on the Respondent's generalised Covid safety measures without taking adequate steps to put in place additional measures (a) related to age and (b) generally, or giving adequate consideration to this.

REASONS

1. This was a hearing of the Claimant's claims of indirect direct age discrimination. We heard evidence from the Claimant and her witness Ms Amanda Lawrence, and on behalf of the Respondent from Lisa Westray (Principal of Haringey Sixth Form College ("the College") and Russell Lawrance (Chief Executive Officer of the College). We have received and have considered written submissions and have heard oral submissions from both parties.

ISSUES AND PROCEDURAL HISTORY

2. This matter previously came before the Tribunal at a preliminary hearing ("PH") on 18 March 2022. In the list of issues set out in the Case Management Order ("CMO") sent to the parties on 18 March 2022, the first issue in relation to indirect discrimination was stated to be:

> "Did the Respondent operate a provision, criterion or practice (PCP) of requiring all employees to return to work and continue working on and after 26 August 2020?"

3. That was not the PCP that had been set out in the Particulars of Claim. The Claimant wrote to the Tribunal and Respondent making it clear that it was not a PCP on which she sought to rely. Instead she relied on a PCP consisting of "Covid safety measures at my place of work which were applied to all staff" [**17**]. She subsequently submitted an application for permission to amend the Particulars of Claim on 29 March 2022, and in the Amended Particulars of Claim ("APOC") identified the PCP (at para 3.2) as

> "generalised Covid safety measures at my place of work which were applied to all staff irrespective of age and did not take my increased vulnerability due to age into account." [**82**]

4. In response the Respondent indicated that it did not object to the application for permission to amend, but suggested that the final determination of the PCP be determined at this hearing. By a letter dated 10 May 2022 EJ Kurrein acceded to that course.

5. Prior to this hearing there was no decision following the PH giving permission to amend. However, paragraph 2 of the CMO of 18 March 2022 had permitted the Claimant to send an amended Claim by 8 April 2022. We take that as having encompassed the APOC and the parties were content to proceed on that basis. If permission was formally required, the balance of hardship and injustice was clearly in favour of this, and we gave permission.

6. It has been an unfortunate feature of the procedural history, therefore, that the PCP had not been specifically identified prior to this hearing. This was not just a matter of the choice between that formulated in the PH and that set out in paragraph 3.2 of the APOC. There was also a lack of clarity at to what was understood by the formulation in clause 3.2 when read together with the remainder of the APOC. The Claimant's was not merely complaining about

what was in the generalised procedures but also about what more was not done. Further, the Respondent had expressly set out in the Amended Grounds of Resistance that it was unclear which matters included in the POC were included as background and which matters were intended to be allegations of indirect age discrimination. Its position was that this continued to be unclear up to the point where that was clarified at this hearing as further set out below. However the consequence has been that considerable time had to be taken up at this hearing in clarifying the issues.

7. At the outset of the hearing we provided the parties with a more detailed draft list of issues to discuss with them, with a view to seeking to itemise based on the APOC what matters were being relied upon either as evidencing the PCP or applying it, or in contesting proportionality, and what was meant by generalised measures. After an initial discussion with the parties about this, we allowed them time to review this whilst the Tribunal completed our pre-reading. There was extensive discussion of it on the first day of the hearing, and revisions made to it. Both parties confirmed their agreement to the revised version, and re-confirmed that on the morning of the second day of the hearing.

8. In relation to the particular disadvantage of the application of the PCP to her, the Claimant's contention was that the PCP was inadequate for her needs as an older teacher. One issue raised in the course of clarification of the issues concerned the absence of a requirement for staff or students to wear masks. That was raised in Ms Lawrence's statement but not specifically mentioned in the APOC. Mr Peacock confirmed that he had no objection to reliance being placed. In those circumstances and for reasons given verbally at the hearing we directed that in so far as permission was required to rely upon this, essentially as a further particular of what was already set out in APOC para 3.4, this was given on that basis that the balance of hardship and prejudice was clearly in favour of doing so.

9. We canvassed with Mr Peacock whether, in the light of the further clarification of the Claimant's case, there was any revision to the way he sought to put his case as to whether the PCP was proportionate means of achieving a legitimate aim. He confirmed that he did not wish to do so and was content with how this was put in the List of Issues.

10. Initially the Claimant maintained that her pleaded criticism of the Respondent's approach to her data subject access request ("DSAR"), at paragraph 4.19 of the APOC, was also relied upon both as evidencing the existence of the PCP and as an instance of its application. However in the course of cross-examination the Claimant indicated that this was no longer pursued. It was therefore deleted from the List of Issues.

11. In the course of the Claimant's evidence she raised a contention that she should have been provided with advice of a qualified person in order to complete the risk assessment. Her contention was that this was part of the recommended processes on the HSE website. This was a point that had been included her list of issues for the preliminary hearing but was not set

out in the APOC (and therefore not included in the List of Issues). On the Tribunal raising that with her she sought permission to add it by way of amendment of her claim (in the same terms as in her draft issues for the PH). Mr Peacock indicated on behalf of the Respondent that it did not object. On the basis that there was no objection or indication of any prejudice to the Claimant, we permitted the amendment applying the test of the balance of hardship and prejudice. It was also indicated that if the Respondent's witnesses sought to give supplemental evidence to deal with the amendments they would be permitted.

12. Towards the end of the cross-examination of the Claimant by Mr Peacock, on the third morning of the hearing, the Claimant indicated that paragraph 2(2)(a) of the List of Issues did not correctly capture the PCP which she wished to assert. Having confirmed with Mr Peacock that he had no objection to this course, we allowed the Claimant a short break in order for her to formulate the precise terms in which she wished to frame that paragraph. Mr Peacock confirmed that he had no objection. He also helpfully volunteered that he would not object to the Claimant discussing the formulation with Ms Lawrence notwithstanding that the Claimant was in the course of giving her evidence. On that basis we allowed her to do so. There were in fact two further short breaks which followed on our seeking clarification as to the formulations put forward, including whether it was being said that there was a practice of inadequate measures specifically in relation to adjustments related to age, or generally in the College or both in the alternative. This was in the context that Mr Peacock had indicated from his line of cross-examination that he would be seeking permission for Ms Westray to give evidence as to measures taken in relation to others which was not in her statement. Ultimately the Claimant settled on the formulation set out in the list of issues appended to this Judgment (at paragraph 2(a)) which put this in the alternative. Mr Peacock specifically confirmed that he had no objection to this formulation, and on that basis we permitted it to be re-framed in those terms.

13. On reviewing what had been said about this overnight, the Employment Judge was concerned as to whether there was an ambiguity left, particularly by the formulation based on not "taking adequate steps to put in place additional measures", and therefore put together (what was, at that point) a one page summary document to reflect what we understood was being relied upon under each of the aspects of the reformulated paragraph 2(a) with a view to confirming this with the parties. In raising this with the parties on the morning of the fourth hearing, we emphasised that we recognised that it was for the Claimant to formulate her PCP but we were concerned that if there were different understandings of what was meant by what had been formulated the was an interested in flushing this out now. Both parties confirmed that they were content with the approach of pulling the elements together in the summary table and confirming the elements with the parties.

14. On dealing with the first line of the summary table (which related to using rooms where windows could not be opened), and checking the Claimant's position, she made clear that she was relying on this as a practice which

applied to her and others (whether others using those rooms or staff in the College), which she contended gave rise to the need for individual measures to avoid discrimination. Before proceeding any further, we paused to check with Mr Peacock whether he had any objection (either with what the Claimant was now seeking to put forward, or with continuing to proceed through the table in the same way) given that the Claimant was identifying a practice or sub-practice specifically in relation to this element. Mr Peacock confirmed that he did not object and noted that it was helpful in giving clarity. We therefore proceeded to work through the remainder of the table. The final version of the table reflects the product of the discussion with the parties (with a column added to the table as originally put before the parties to reflect what was said as to who the alleged practice related to). Both parties were content for this to stand as part of the case as to PCP and that there was no need for the Claimant to give further evidence in relation to it.

15. In relation to the first heading, the Claimant had added in relation to Room F28 that she contended that there was not enough air coming through the window. We raised with the parties that we did not believe that this was something that had been said during the Claimant's evidence. Mr Peacock indicated that he was content to proceed on the basis that this was part of the Claimant's evidence, without objection to the Claimant being permitted to raise it or needing her to be recalled or seeking to cross-examine on it (but without accepting that the assertion was correct). The Claimant was also content with that course. We therefore proceeded on that basis.

16. The outcome of that process was that the table identified a number of PCPs, or sub-PCPs, in the constituent elements of what was relied on for the purposes of paragraph 2.2(a) of the list of issues. On the basis that there was no objection from the Respondent this was incorporated in the list of issues (in terms which the parties were shown and agreed) and amendment permitted to rely on the reformulation of the PCPs in so far as permission was required.

17. We set out relevant extracts from the final agreed form of the list of issues, and the table of sub-PCPs, in the Discussion section of these Reasons. Permission to amend was given (in so far as required) to rely on the formulation of the PCP in the final list of issues and Table, by an Order sent to the parties on 1 March 2023 to which those documents were appended.

18. The hearing had been listed to deal with liability and remedy. However in relation to remedy there had been a development that the Claimant had recently been dismissed on 3 February 2023 on the grounds of ill health. The Claimant indicated (on the first day of the hearing) that she was not currently intending to appeal that decision or bring a further claim in relation to it. Her claim was already framed on the basis of loss of her earnings because her period of sick pay had expired. It continues to be her case that she claims losses to the date she states she would have stopped working, which she says is at age 75, on the basis that the discrimination caused her ill health which led to her dismissal. The Respondent's case however is that it may wish to advance a case that there has been a break in the chain of

causation and there may be additional witness evidence to call in relation to this. It also contends that there are causation issues in relation to remedy arising from the Claimant's case that she had been caused psychiatric damage. There are also issues which now arise following dismissal relating to the duty to mitigate loss.

19. The Claimant's position was that she had not understood from the PH that there would be a need for medical evidence, and had been given to understand that was the case at the PH on the basis that this was not a disability claim. However that was before her schedule of loss set out a claim in relation to psychiatric damage. It was that contention which raised the potential issue as to whether medical evidence or further medical evidence would be needed in support of the contention that the Claimant had suffered psychiatric damage.

20. In those circumstances, and given the time taken in clarification of the issues, we indicated that we would proceed by hearing the evidence as to liability (subject to the points below). We indicated that we were minded to accept that the issues as to quantum, both financial loss and injury to feelings would be addressed at a separate remedies hearing if required, together with directions for further disclosure and witness evidence if relevant arising from the dismissal. That was the preference of both parties.

21. The Claimant had also sought recommendations that:

    21.1 The Respondent should run a training session for managers on age discrimination; and
    21.2 The Respondent should adjust their internal policies to make it easier for them to comply with the Equality Act 2010.

22. It was explained to the parties that under s.124(2)(c),(3) EqA the Tribunal only has powers to make a recommendation that within a specified period the Respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the Claimant of any matter to which the proceedings relate. The dismissal also appeared to bear on whether the suggested recommendations could be said to obviate or reduce the adverse effect on the Claimant. We acceded to the Claimant's request to have more time to consider what if any recommendation are sought in the light of this. Having done so she asked that this be a matter for the Remedies hearing. The Respondent was also content with that course and we proceeded on that basis, with it being a matter to be addressed in an updated schedule of loss and remedy in the event the claim succeeds.

23. It was agreed with the parties and we directed that the following remedy issues be addressed in the evidence at the same time as the liability issues:

    23.1 Was the PCP not applied with the intention of discriminating against the Claimant. (para 11 of the LoI).

23.2 Whether the Claimant unreasonably failed to comply with the ACAS code and whether it is just and equitable to uplift any award. It was agreed that we:

(a) would not make a final decision as to the percentage of any uplift on the basis that it may be appropriate to consider the absolute level of any award as a final cross-check (***Sir Benjamin Slade v Biggs*** [2022] IRLR 216 at [77(iv)]), but

(b) we would (if relevant) set out our conclusions as to the percentage of uplift (if any) which we would award subject to that issue, on that basis that this may assist the parties in considering settlement if the event that the claim succeeded on liability.

24. We also permitted Ms Westray to give supplemental evidence as to the College's practice in providing individual measures for others. This was not in her statement, as it should have been even without the reformulations of the PCP. Mr Peacock explained that the need for the comparative evidence had been prompted by instructions he had been given by Ms Westray in response the reformulations, thought he accepted that it should have been in her statement as part of the Respondent's answer to the case in any event. We accepted that the interests of justice were in favour of allowing this evidence to be adduced, particularly in the light of the various late revisions made to the PCP. Any injustice was avoided by the Respondent giving further disclosure in relation to this in advance of the resumed hearing on 21 March 2023.

25. There were a series of documents in relation to which the Respondent agreed to give further voluntary disclosure. For clarity these were set out in a letter from the Tribunal of 1 March 2023. The letter also required disclosure of one additional category of documents relating to an issue the Claimant had raised in her questioning (documents evidencing any testing carried out in relation to ventilation and aerosol transmission, other than the test in 2018).

MATERIAL FACTS

26. The Claimant's continuous employment with the Respondent commenced on 21 August 2008, though she was initially employed by Haringey Council. She turned 71 on 22 August 2020. She retired in 2012, but continued working two days a week, on Mondays and Tuesdays. She was ultimately dismissed on 3 February 2023, having not returned to work after commencing a period of sickness absence on 28 September 2020. There is no claim in relation to dismissal before us.

27. The Claimant worked as a teacher of English for Speakers of Other Languages (ESOL) at the College. There were two other ESOL teachers; David Alexander and Amanda Lawrence, who was the 14-16 ESOL Coordinator until she left the Respondent in August 2021. Their line manager was Florina Iosif, who was Director of A Levels, Creative Industries and Young College. Ms Iosif in turn reported in to Ms Westray, who was appointed as Principal from 1 September 2020. Prior to that Mr Lawrance

had been the Principal and CEO, and Ms Westray had been the deputy Principal.

28. At all material times, the Claimant was the only the member of staff at the School aged over 70. The other two ESOL teachers were in their lower 50s or around that age as of August 2020. Neither was classed as clinically vulnerable in relation to Covid.

29. On 18 March 2020 the College closed due to the first Covid pandemic. The Claimant continued to teach her students from home via Zoom. From 15 June 2020 the College moved from very limited opening (such as for children of critical workers), to a wider opening to provide some face to face contact for 16 to 19 year olds [**53**]. This was to involve more teachers working in the College, but did not involve the Claimant returning at that stage. She returned as part of the full return of teachers was for the new school year on 26 August 2020. The full opening of the College for the academic year, with the return of students, was on Monday 7 September 2020.

30. It was common ground before us that those aged 70 or over were at higher risk from Covid that younger people. The risk was all the more of a concern in the period before the rollout of the vaccine programme in 2021. The Respondent conceded that even after being vaccinated those in the Claimant's age group were more vulnerable to becoming seriously ill from Covid.

College wide Covid Risk Assessments

31. For the purposes of the return to College a Covid risk assessment was for formulated, in consultation with staff, the local authority and trade unions. We refer to this as the Covid general risk assessment ("GRA") by way of distinction from the individual risk assessment ("IRA") form to which we refer below. The first such College wide GRA in evidence before us was dated 19 August 2020, and there were a series of subsequent updated Covid GRAs.

32. In each version of the GRA, as part of the introductory wording, the following was stated:

> "**Staff who are clinically vulnerable or extremely clinically vulnerable**
> Where we apply the full measures in this guidance the risks to all staff will be mitigated significantly, including those who are extremely clinically vulnerable and clinically vulnerable. This will allow most staff to return to the workplace, although the advice is those in the most at risk categories to take particular care while community transmission rates continue to fall." [**162, 202, 280**]

33. In the update of 1 February 2021 (during the second lockdown) the introductory message was updated so as to make express reference to IRAs. It then included that sentence that:

> "It is hoped that most ECV if not CV staff will have been vaccinated but even so Individual RA if needed will be updated in discussion with their line manager." [**360**]

34. In the material before us the first documentation from the College which expressly recognised that those over 70 were classed as clinically vulnerable was in a staff bulletin on 9 November 2020 [**309**] and an updated IRA form at around that time. It was said in the 9 November bulletin that the clinically vulnerable should (a) be especially careful to follow the rules and minimise their contacts with others and (b) continue to wash their hands carefully and more frequently than usual and should maintain thorough cleaning of frequently touched areas in their home and/or workspace [**309**]. Both these measures therefore focussed on the existing guidelines or taking care by the clinically vulnerable person.

35. The remainder of the GRA set out preventative and protective measures of general application under various headings.

36. Under the heading "minimise contact between individuals and maintain social distancing wherever possible", it was provided that staff must do everything possible to minimise contracts and mixing while delivering a broad and balanced curriculum. There was provision for bubbles and that if cohort groups were not compatible with offering a full range college experience, then a large group bubble could be implemented, and that steps should be taken to ensure that groups or bubbles were kept apart from others as much as possible [**166-167**]. In practice the scope for this was limited because students who had achieved less than a grade 4 in English or Maths had to undertake resits and these subjects had to be setted, although mixing was minimised by having larger bubbles to keep groups of students together

37. Under the heading, "measures within the classroom" in the 19 August version it was provided that:
    37.1 Staff should maintain distance from the students and others adults in the classroom,
    37.2 Staff should avoid face to face contact and minimise time spent within 1 metre of others.
    37.3 Classrooms should be adapted to support distancing where possible, seating side by side and forwards.
    37.4 Unnecessary furniture should be moved out of classrooms. [**168**].

38. The updated version of 7 September 2020 added that "Clear space is provided at the front of all classrooms, staff have the option of face visors" [**205**]

39. Although the GRA referred to minimising contact spent within 1 metre, the general rule applied was that where possible teachers should maintain 2m social distancing. Mr Lawrance referred to this in a staff bulletin of 28 September 2020 in which he emphasised the need to follow the measures in the GRA and highlighted keeping to 2m social distancing where possible, and that if not PPE had been provided. [**271-272**]

40. In the updated version of 7 September 2020 there was a substantially expanded section on "Cleaning of college and resources". [**204**]. It recorded that:
    40.1 The College had purchased an electric fogging machine to enhance the cleaning and it was used to kill airborne pathogens which land on hard surfaces, and that all cleaning was done in line with revised guidance [**204**].
    40.2 "To assist with removing pathogens from the air, we ensure that you have good ventilation throughout, i.e. keeping windows and doors open (not fire doors) staff have had clear instructions and are provided with door wedges for example" [**205**]
    40.3 "John Mansfield Director of Campus and Estates ensures any ventilation systems are working properly and kept on." [**205**]

41. In relation to PPE it was provided from the first GRA that the majority of staff would not require PPE beyond what they would normally require for their work [**171**]. The update of 7 September 2020 added that the College was following Government guidance and included a link to it, including how and when PPE should be used [**208**]. It noted that PPE was available for any member of staff and referred to having purchased "500 face masks, 130 Face Shields, 55 tubs of 200 heavy duty disinfectant wipes, 55 disinfectant spray bottles for classroom use, 20 hand sanitiser dispensers." [**208**]

42. In the message to staff in the staff bulletin which provided the 19 August 2020 GRA, Russ Lawrence (CEO) explained in relation to the face coverings that:

> "Public Health England does not (based on current evidence) recommend the use of face coverings in schools or further education settings. This evidence I assume will be kept under review. Face coverings … are not required in further education settings as learners and staff are mixing in consistent groups, and because misuse may inadvertently increase the risk of transmission.
> … if required we will put in place measures that suit any particular circumstances." [**156**]

Departmental Risk Assessment for June 2020 wider opening

43. As part of the additional disclosure produced in March 2023, the Respondent produced a risk assessment undertaken for the A-level, STEM and Young College area, in which the Claimant taught. The document was dated 1 June 2020 in the context of the wider opening from 15 June 2020.

44. One of the actions set out in the 1 June 2020 risk assessment was for there to be daily check-ins with the team to ensure staff were coping and had the opportunity to request support if needed. We do not however accept that this risk assessment continued to be in operation for the return to School in August 2020. It was expressed as applying to the wider opening. If it had been in operation for the return in August it is to be expected it would have

been disclosed before the very late disclosure in March 2023. Nor was there any mention in the witness evidence, prior to the late disclosure or in any contemporaneous documents, of any practice of daily check ins being followed. It was not what occurred in practice in relation to the Claimant. There were also other provisions that were not followed by August 2020, notably that classes should be limited to 15 students, with desks spaced as far apart as possible.

Individual Risk Assessments

45. In addition to the Covid GRA, the Respondent also adopted a template Covid IRA form, having been provided with a template by the local authority. This was initially adopted by the College in June 2020 in preparation for the wider opening. It was still the form being used at the time when the Claimant returned to the College in August 2020.

46. The Claimant did not come in to the College for the wider opening and did not fill in an individual IRA at that time. The reason for the Claimant not having attended at that time was not explored in evidence before us and neither party placed any weight on this.

47. Mr Lawrance introduced the IRA in an email of 1 June 2020 to the leadership team including Ms Iosif. He explained that, in addition to the measures to support everyone:

> "We will also support each individual member of staff that requires an individual risk assessment, the purpose here is to guide and support conversations between Senior Leaders, Managers and individual staff so that the individual employee circumstances can be reviewed within the context of the services existing risk assessments and government guidance. We will put in control measures that are reviewed on an individual basis. This is to support you as well as all our team."

48. The front page of the IRA form also stated that it was to guide and support conversations so that individual employee circumstances could be reviewed within the context of the existing risk assessments and Government guidance and that control measures were reviewed on an individual basis and that the assessment should be reviewed whenever changes occur. The form included a column with the heading:

> "With the Government guidance and the General Covid – 19 Workplace Risk Assessment controls in place, is the likelihood of infection sufficiently managed
> Will the groups listed below require additional controls or arrangements."

49. The IRA was therefore on its face designed to identify where more was required beyond the general measures. The form identified that age, gender and ethnic background were relevant when assessing the risk factors. It set out six categories of group in relation to which consideration of this issue was

appropriate. However these did not expressly include a group defined by reference to age. In relation to the clinically vulnerable it identified two categories (pregnancy and long term conditions) but made no mention of age. On its face the only basis on which those over 70 would be covered would be if they fell within the residual category of "other risks considerations highlighted by staff member". As explained by Ms Westray in her evidence this reflected the template provided by the local authority. It was not until November 2020 that an updated version of the form, in the context of outlining the Government guidance on shielding from 5 November 2020, referred to those over 70 as being included in the category of clinically vulnerable [**S12**].

50. The only document we were shown drawing the attention of non-management staff to the IRA prior to the return to College in August 2020 was an email from Ms Iosif of 9 June 2020 which set out arrangements for the wider opening in June. This asked staff to state if they intended to come into the College and to fill in the IRA if they could not do so due to "risk factors". It did not contain any broader explanation of the opportunity to complete and IRA or of the process in relation to it. Nor was there any documentation shown to us evidencing this being drawn to the attention of staff in preparation for the return to College in August 2020.

51. Other than the documentation sent in relation to the wider opening in June 2020, the first reference in the material before us to an IRA was in a message from Mr Kaplan to NEU members of 31 August 2020. He emphasised that anyone who was clinically vulnerable needed to complete and IRA so that the College could put safeguards in place to protect them. [**184**].

52. Mr Kaplan took up the issue of IRAs, amongst other matters, in an email to Mr Lawrance (copied to Ms Westray) of 2 September 2020 [**595-596; 217-218**]. Amongst other matters he asked when vulnerable, extremely vulnerable and BAME staff would be given the opportunity to complete IRAs [**596**]. Mr Kaplan followed this up with an email to Mr Lawrance of 7 September 2020 in which he recorded Mr Lawrance as having said to him when they met that these needed to be completed so that staff vulnerabilities were taken into consideration [**216, 217**]. In response Mr Lawrance declined to confirm Mr Kaplan's record of his responses [**216**]. However in a staff bulletin on 7 September 2020, Mr Lawrance noted that:

> "The trade unions feel strongly that people in two vulnerable groups (*Clinically Extremely Vulnerable* and *Clinically Vulnerable*) should receive mandatory individual risk assessments.
>
> As you know I have communicated that the college position remains that staff are to be offered personalised risk assessments."

53. Although this referred to a previous communication of the offer of a personalised risk assessment, it did not indicate when that was or whether it was an option that had been reiterated since the reference to IRAs as part of

the wider opening in June 2020. We are not satisfied on the material before us that there had been any communication to staff by the Respondent since then. There was no documentation before us evidencing any such communication. We would have expected any such communication such as in the staff bulletin, to be produced by the Respondent in accordance with its disclosure obligations. As set out below, it was not something mentioned to the Claimant by Ms Iosif when the Claimant expressed concerns to her at the start of the term, before the Claimant herself raised it. It is to be expected that Ms Iosif would have done so had there been a reiteration of the facility for a personalised risk assessment prior to 7 September 2020. Mr Kaplan's question in his email of 2 September as to when staff would be given the opportunity to complete IRAs also tends to indicate that staff had not already been informed by the Respondent of the opportunity to do so.

54. The Respondent's Grounds of Resistance contend that on or soon after the start of the academic year all its staff including the Respondent were invited to attend a presentation, part of the purpose of which was to ask staff to complete a Covid IRA. We are not satisfied that there was such a presentation to staff. The Claimant was not challenged in relation to her evidence that she had no recollection of it. Whilst that might be explained on the basis of a presentation being on day when the Claimant was not in attendance, there was also no specific mention of it in the statements for the Respondent.

55. Ms Westray recalled Mr Lawrance holding an information session with directors and managers when they returned as to what they should be doing with IRAs. This did not refer to any broader presentation to staff as a whole. If there had been a broader invitation communicated to staff as to the opportunity to fill in an IRA it is surprising that Mr Kaplan needed to ask when staff would be given that and that Mr Lawrance made no mention of it in his response.

56. We are not in any event satisfied that Ms Westray had a reliable recollection as to this. She suggested that the correct process was for the line manager to sit down with the member of staff and have a discussion to complete the IRA and identify what was required, calling in additional help if this was needed. We are not satisfied that any such process was put in place. If it had been done on the return in August 2020 as suggested, it would have been familiar to Ms Iosif when the Claimant raised the issue of completing an IRA on 8 September. Yet, as noted below, Ms Iosif merely asked the Claimant to complete the form and send it back to her [**229**]. Ms Iosif's uncertainty as to the process is also indicated in relation to the only other IRA disclosed from at around this time, which Ms Iosif forward to Ms Westray asking if she should send it to John (Mansfield) or just keep a record for herself [**S17**].

Teaching rooms

57. The classrooms used by all ESOL teachers upon the return to the College (and in the previous year) were F28 and G26. The Claimant taught two

groups of students. A 14 to 16 years group in room G26 and a 16 to 19 year old group in room F28 (other than when she was moved to room F5 as addressed below). She taught from 10.30am to 3.30pm on Mondays, with a lunch break at 12.30pm to 1.25pm and a further short break from 2.25pm to 2.30pm [**139**]. On Tuesdays she taught from 9.15am to 3.30pm, with the same lunch and afternoon break, and an additional morning break from 10.15am to 10.30am.

58. F28 was a larger room with 15 large desks. A seating plan prepared by the Claimant for the year 2019/20 shows it with 33 students, with two or sometimes three students per desk [**141**]. The only window was a narrow window near the ceiling at the back of the room. The room was entered from the door in the front left hand corner. There was also a whiteboard at the front of the room and a teacher's desk on the right hand side front of the room.

59. G26 was smaller, with 8 desks. The other teachers using G26 at the start of the 2020-21 school year were Ms Alexander and Mr Lawrence. The seating plan prepared by the Claimant for 2019/20 shows it with 20 students, again with either two or three per desk [**142**]. It was entered by a door in the right hand front corner, and again had a whiteboard at the front. There was a window in the right hand rear of the room but it was sealed shut, as had been the case for more than a year by September 2020 [**600**]. It was the only classroom in the College without an openable window. It tended to become stuffy and smelly in the Summer (as the Claimant noted in her email of 25 September 2020 [**268**]). HSE guidance indicates that was an indication of poor ventilation [**B3/410**].

60. The Respondent's normal practice was to have what was referred to as a room auction towards the end of September each year. This would be an opportunity for directors of departments to swap rooms where, given the size and capacity, a room was considered not fit for purpose for a particular class. Consistently with this, in a staff bulletin on 28 September 2020, Mr Lawrance noted that from 1 October the numbers, rooming, timetables and groups should be settled [**271**]. The auction was set for around the end of September to reflect the fact that, generally, by then numbers enrolled became clearer, since students could trial a number of different colleges at the start of the year.

Numbers in the classes

61. However in ESOL numbers would continue to rise throughout the year. In 2019/20 it reached 33 in the 16-19 group and there were 20 or 21 in the younger group, which was capped at 20, being the maximum for which the College was funded by the LEA. The numbers were lower in the period that the Claimant was at work in 2020/21 (up to 22 September 2020). In relation to the 16-19 group there were 15 on the register and 12 marked as present on 22 September 2020. There were 4 students in the 14-16 group on 22 September 2020, which rose during the year to 17 (which it had reached by

January 2021), with funding available for a maximum of 20 students in this age group.

62. An email from the Claimant to Mr Kaplan of 22 September 2020 recorded that there were currently 20 in the 16-19 group. However the Claimant did not have a direct recollection that this was the case. It may be that it reflected the size of the full group, which as the Claimant noted in her email of 17 September 2020 had been split into two in the week prior to that email. We accept Ms Westray's evidence whilst there might have been the odd student who was not marked in the register, there would not have been more than one or possibly two. If students were not on the register they were supposed to be taken straight downstairs to register. Further if there had been so many students not marked on the register it is likely that would have been something the Claimant would have recalled. In any event, the expectation was that the numbers would rise over the course of the year.

Humanities staff room

63. The staff room used by the ESOL staff consisted of one large room and a small room which it was necessary to walk through to get to the larger room. The staff room was shared with other humanities subjects. The larger room did not have an openable window. However the Claimant used the small room, which did have an openable window (albeit that she had to stand on a chair to do so), and she did not need to go into the larger room. Staff were in any event encouraged to use their class rooms as a base rather than the staff room.

Initial concerns raised by the Claimant on return to the College

64. On two occasions in August 2020 the Claimant raised informally with Ms Iosif, in her office, concerns about her age and potential risk from Covid. The concerns were raised in general terms. On the first occasion she made a comment along the lines of: "*In view of everything that's going on, you do know how old I am, don't you?*" On the second occasion she made reference to an English teacher having texted a colleague to say she was off with Covid and expressed anxiety given her (the Claimant's) age and because they worked in close proximity and that no one had notified her. The Claimant was unable to recall the response other than that it was vague.

65. Although the Claimant's recollection was that both these discussions took place when she stopped off at Ms Iosif's office on the way to a lesson, it is more likely in our view that the first was in a discussion before the Claimant returned to the College on 26 August. That is consistent with her evidence that she had raised her concerns prior to an email from Ms Iosif to the Claimant on 24 August 2020 in which she noted that she had not added the Claimant to a rota (being an enrolment rota in which staff would interview prospective students) on the basis that "I think it is best if you avoid crowds as much as we can, at least until we start teaching." [**148**] We accept that this is likely to have been in reference to the concern which the Claimant had expressed informally as to her vulnerability in the light of her age. However

despite indicating that the Claimant was excused from the rota, Ms Iosif did not draw the Claimant's attention to the IRA process or take any step to investigate in more detail what further measures might be needed in her individual circumstances once teaching started.

Concerns raised by Mr Alexander re ventilation

66. In advance of the return to school, on 8 July 2020 David Alexander emailed Ms Iosif on the subject of ventilation [**146-147**]. He copied in David Kaplan, who was the school-based College union (NEU) representative. The email was forwarded to the Clamant and Ms Lawrence on the same day, since it concerned one of their classrooms, G26 [**143**]. In the email to Ms Iosif, Mr Alexander raised a concern that, in his experience, the ventilation was very poor in some parts of the College. As one instance he referred to the large Humanities staff room, noting that it did not have an opening window and that the ventilation system no longer worked there. He noted that he had raised this in the previous summer with the Estates Manager, John Mansfield, and in response had been told to use fans when it was getting hot. He highlighted the worry about this with the Covid situation if the ventilation did not work. Although, as noted above, the Claimant did not use the large room in the Humanities staff room, the observation as to the state of the vent raised a wider concern as to the effectiveness of the ventilation system and the monitoring of it.

67. In the same email Mr Alexander also highlighted the concern about lack of ventilation in room G26 because the window was sealed shut. He noted that since these were only two random rooms, he suspected that there might also be other areas which needed additional ventilation. He expressed the hope that this could be assessed systematically and works done over the Summer to remedy the situation as necessary.

68. Following a chasing email from Mr Alexander on 17 August 2020, Ms Iosif replied on 21 August 2020 [**145-146**]. She relayed the information received from the maintenance team that:

    68.1 "The ventilation system in the college is working properly and the air quality test carried out supports this."
    68.2 "As the ventilation is part of the fabric of the building, we cannot change it to suit different areas."
    68.3 "The window has been fixed again, but due to the damage caused by the students it will have to remain closed."

69. As Ms Westray explained, the window in G26 had had to be sealed and the nature of the work needed was such that to repair this would require work to the whole wall and was not feasible.

70. Mr Alexander forwarded this exchange about ventilation to the Claimant on 28 August 2020 [**144-145**]. He commented that he thought the response about the ventilation system in the College having been checked was rubbish as the vent in the ceiling of the main room of the Humanities office was

caked with dust and "clearly not a breath of air comes through it". He expressed his view that the ventilation throughout the College was old and very patchy in its functioning and expressed concern as to whether it was just a "circulation" type system. He added that they had been reporting the issue about the window in G26 for over 12 months.

71. In his email to the Claimant Mr Alexander noted that he had emailed Ms Iosif back with his response to Mr Mansfield's comments but had heard nothing back [**145**]. That response was not included in the bundle before us. We infer that it is likely to have made similar points to those in the email to the Claimant. Mr Alexander also raised his concern with Mr Kaplan (copying in the Claimant), again noting that he had responded to the points raised by Mr Mansfield but not yet received any response [**600**]. He asked amongst other things to see the results of the air quality test and whether every room was inspected.

Initial concerns raised by the Claimant about ventilation

72. Mr Alexander's email was prompted by an email from the Claimant earlier on the morning of 28 August 2020 when she had also raised a concern about ventilation. Her email had been sent to Mr Mansfield, copying in Mr Alexander, Ms Lawrence, Mr Kaplan and Ms Iosif [**179**]. She noted that she had read recently about the importance of air flow and ventilation in preventing the spread of the virus and asked whether it had been discussed because it did not seem to be addressed in the risk assessment in the staff bulletin. This was a reference to the GRA of 19 August 2020. She noted that there was no openable window in the big Humanities staff room, that F28 only had a narrow window high up at the back of the room despite having taught classes of over 30 in the previous year, and that she understood that it was now not possible to open the window in G26 [**179**]. She followed this up with a further email with a link to the article she had read in relation to ventilation.

73. Mr Mansfield replied later that afternoon, copying in additional recipients including Mr Lawrence (CEO) and Lee Pedder (site manager, and responsible for health and safety in the building). He noted that the College had an Air Handling Unit ("AHU") system as opposed to air conditioning. He explained that rather than re-circulating air, the AHU system drew in fresh air and then the extracted air was pumped back out into the atmosphere. He stated that they would be monitoring and adjusting as required the filtration and flow rate and he would keep all staff updated with the progress. [**180**]

Monitoring of ventilation

74. Although in the response from Ms Iosif to Mr Alexander of 17 August 2020 she recorded the response that the air quality test showed that the ventilation system was working properly, there was no evidence before us of any such testing having been carried out since 2018. This was despite the Tribunal having recorded, in the letter of 1 March 2023, that the Respondent was required to provide any documents evidencing such testing.

75. As part of its original disclosure the Respondent disclosed an Indoor Air Hygiene Survey dated 16 November 2018 [**478-511**]. The report tested sample locations in the College against various measures of air quality: air temperature, relative humidity, carbon dioxide, carbon monoxide, total inhalable dust and airborne microbiological activity. In each case they were found to be at satisfactory levels, but also recommended continued monitoring. The conclusion included that:

> "Continued regular monitoring of the indoor air quality is recommended in order to best assess the fresh air provision and quality throughout the served environment."

76. An email from Mr Mansfield to Jacqui Grant (CFO) of 8 March 2022 describes this as "the last air quality report that we had for the college" [**477**]. He noted however that whilst the report showed that "all areas were within required parameters" at the time it had been set to 50% re-circulation whereas due to Covid there was a change to using only fresh air rather than re-circulation (though it had now been changed back).

77. As noted above, in Mr Mansfield's response of 28 August 2020 he stated that they would be monitoring and adjusting as required the filtration and flow rate and he would keep all staff updated with the progress. [**180**] No such updates were provided.

78. Mr Lawrance's evidence was that the College did not have the means to carry out testing of the air quality because they did not have the kit to do so under CO2 monitors were purchased in around September 2021. The November 2018 report itself recorded that: "carbon dioxide contamination has been widely used as an indicator of indoor air quality." [**504**]

79. Given the absence of documentation showing any testing of ventilation in particular rooms, and the suggestion that there was no means of testing this before the CO2 monitors were obtained, we conclude that there was no such testing prior to September 2021 other than monitoring the filtration and flow rate of the AHU, and no air quality test other than that carried out in 2018. Indeed it was implicit in the message in the September 2021 bulletin that the CO2 monitors were needed to check the ventilation quality in particular rooms.

80. We accept Mr Lawrance's evidence that the College applied for CO2 monitors as soon as these were offered by the Government, and that they then purchased their own when there was a delay in their being received. That itself indicates a recognition of the need to test the air quality. However he was unable to identify when these were first offered. Nor was there any evidence to explain why the College could not have purchased their own CO2 monitors earlier given the concerns raised as to ventilation, or carried out an updated test to follow on from the last one conducted in 2018, including testing rooms of particular concern such as G26 where there was no openable window. In any event, if the College did not have the means to

check the air quality in particular rooms, that of itself was an important factor to take into account in relation to whether a clinically vulnerable person was timetabled to work in a room where there were particular concerns about ventilation. Yet her classes continued to be in that room.

81. In Mr Mansfield's email of 8 March 2022 he noted that the CO2 monitors showed an average count well below the threshold [**477**]. Whilst that was a reference only to an average, Ms Westray's evidence was that every room was checked at that point with the monitors. However by the time the CO2 monitors were received the partition between G25 (which did have an openable window) and G26 had been removed and they were being used as a single large room with an openable window.

82. We were also referred to a print out from the HSE website, headed "Ventilation during the coronavirus … pandemic) [**B3/410-411**]. The Respondent did not suggest that the substance of the guidance was unavailable as of August 2020. We accept that it evidences the importance of identifying and specifically checking areas of potentially poor ventilation. It includes the recommendation that as part of the risk assessment to protect workers and others from Covid, poorly ventilated work areas should be identified. As noted above, it suggested identifying areas "that feel stuffy or smell bad". The suggestion is also made of using a CO2 monitor to identify poor ventilation. It is noted that the more people who use or occupy an area, the greater the risk of aerosol transmission and that the risk increases if an area is poorly ventilated and occupied by more than one person. In relation to air cleaning and filtration units it comments that these can be used to reduce airborne transmission of aerosols where it is not possible to maintain adequate ventilation but that:

> "These units are not a substitute for ventilation. You should prioritise any areas identified as poorly ventilated for improvement in other ways before you think about using an air cleaning device"

83. We accept also that the mere fact of having an AHU did not of itself necessarily overcome the greater risk if there was a lack of air flow through being able to open windows or the need to check the air quality in particular areas where concerns were raised as to the air flow. Indeed, as Ms Westray accepted, this was implicit in the instruction that was given to the site team to go round the College each morning opening windows with poles and that door wedges were bought so that doors were kept open. However keeping windows and doors open was not an answer in relation to a room such as G26 where the only window was sealed and with the door opening to a long corridor down to a fire door.

Spacing and suggestion as to using exam desks

84. Also on 28 August 2020 Mr Alexander sent an email to Mr Pedder asking if it would be possible to get individual exam desks instead of big double desks in F28 so as to be able to maintain 1m+ distancing [**182**]. As he noted in the

email, at that time there were more than 20 students in the 16-19 group using the room.

85. At Mr Pedder's suggestion, Mr Allexander followed this up with Ms Iosif on 1 September 2020, copying in the Claimant, and stating that both he and the Claimant were concerned that they could not keep any kind of distance between students given the large desks in F28 [**182**]. Ms Iosif replied later that day, also copying in Mr Marshall. She stated that they were not processing any changes to room furniture at that time. She suggested that students could be asked to sit at the end of desks since they were more than 1m long, and that rooming and furniture would be reviewed when they had final numbers that Friday.

86. In response Mr Alexander explained, on 2 September 2020, that sitting at the end of desks would not work as they would then be right next to the person at the next desk. He pointed out that the desks were too big for the room (F28) and asked that his concern be passed on. Ms Iosif agreed to do so. There was no further response in evidence before us, and the desks were not replaced, but later in September the group was split (as had also been done in previous years).

87. Although this was not explained at the time, in evidence Ms Westray explained in evidence, and we accept, that the suggestion of changing to smaller exam style desks would not have been acceptable given the need to take into account the student experience. The desks were very narrow so as only to be enough for an A4 piece of paper and a pencil case and a few pencils, and were quite rickety. She did not consider moving them into F28 would be a long term solution for good learning. However she noted in her evidence that there were other desks that were smaller than the very large desks in F28, though not as small as the exam desks, which could have been put in those rooms. The numbers in the class using F28 did not warrant this as of September 2020. Again however this was not something that was explained to the Claimant at the time and it was not offered as something that could be done if, as had previously occurred, the numbers grew during the year.

The Claimant's IRA

88. In an email to Ms Iosif and Mr Kaplan early on 8 September 2020, the Claimant asked whether she was eligible for a "personalised risk assessment" [**228**]. That was a phrase that had been used in the staff bulletin on 7 September 2020, which had said that staff were to be offered personalised risk assessments, and as such it is likely that it was this which prompted the question [**222**].

89. Both Mr Kaplan and Ms Iosif replied shortly afterwards. Mr Kaplan affirmed that she was eligible to do so and referred to the note in the staff bulletin [**228**]. He also issued an email to NEU members on 9 September 2020 asking them to let him know if they had completed an IRA with their line

manager and emphasising that the College was obliged to complete these [**231**].

90. Ms Iosif's reply simply attached the IRA form, stating "please complete and send it back to me and I will pass it on." [**229**] There was no offer to meet with the Claimant to discuss the content. The Claimant then met with Mr Kaplan on or about 9 September 2020 for advice on completing the IRA [**340**].

91. As noted above, the IRA form used by the College at that time did not identify that those over 70 were included within the clinically vulnerable category [**255**]. As a result the Claimant emailed Ms Iosif on the morning of 17 September 2020 (copying in Mr Kaplan, Ms Lawrence and Mr Alexander) saying that she had been unable to fill it in for two reasons in that:

> "1. I do not fit any of the categories listed in the first column, Risk Factors. I think this might be an oversight, as NHS guidance classifies people (men and women) aged over 70 as being at 'Moderate Risk'.
> 2. I don't feel qualified to fill in the 3rd column, relating to additional controls or arrangements, as I don't know what Health & Safety measures are available." [**251**]

92. She noted that she had been reassured in the previous week that the 16-19 group had been split into two groups but noted that there had since been more enrolments and expressed concern that the number of students in her group may increase. She asked if it would be possible to put a cap of 20 on the number of students in the group and noted that this would be in the interest of good ESOL teaching practice as well as health and safety considerations.

93. The Claimant also referred to there having been some mention in the previous department meeting (on 15 September 2020) that the teaching room for that group, F28, may change. Ms Iosif had mentioned that the room could be used for a larger group [**340**]. She asked for reassurance that the new room would allow for one student to each desk to allow physical distancing. She also asked to meet with Ms Iosif to discuss these issues soon.

94. Ms Iosif replied an hour later [**249-250**], adding Ms Westray and Mr Mansfield to those copied in. She stated that she would pass the information on to the H&S team but that the Claimant should complete the IRA if she felt that she was at risk even if the information did not fit perfectly into any of the categories. She confirmed that all the Claimant's lessons with the 16-19 group would take place in F28, being a large room but said that they could not cap enrolment on ESOL courses especially now that the group had been split.

95. The Claimant completed the IRA and emailed it to Mr Iosif (and Mr Kaplan, Mr Mansfield, Ms Lawrence and Mr Alexander) on Sunday 20 September 2020 [**249, 252-257**]. In column 6 of the IRA, she set out an additional risk

category as being "Moderate risk: Men and women over age 70" (referring an NHS guidance document) and stated:

> "- Teaching rooms, (currently G26 and F28), to have an openable window to increase airflow and improve ventilation.
> - One student to each table to facilitate physical distancing between students, and between myself and students."
>
> The above measures reflect the most recent findings of senior scientists highlighting the role of aerosol transmission and ventilation in the increasing spread of coronavirus infection. [as to which she added a link to an article in the Guardian]" [**256**]

96. There was no reply from Ms Iosif acknowledging receipt of the IRA or inviting her to a meeting to discuss it. Nor has there been disclosure of any further internal correspondence within the Respondent discussing or forwarding the IRA. As noted above, Ms Iosif's email of 8 September sending the IRA to the Claimant had simply said that when it was returned to her she would pass it on. That is likely to have been a reference to passing it on to Mr Mansfield in the H&S team. In an email to Ms Westray on 15 September relating to another IRA, Ms Iosif had asked whether she should send it to John (Mansfield) or just keep it on file [**S17**]. It was not necessary for Ms Iosif to send the Claimant's IRA to Mr Mansfield as he had been copied it to the Claimant's email sending it to Ms Iosif, having been added to the chain in Ms Iosif's previous email. Ms Iosif's email of 8 September, together with the absence of any offer to discuss the IRA with the Claimant, suggests that she saw it as a matter for Mr Mansfield, rather than her, to deal with. Nor was there any reply or acknowledgement of the IRA from Mr Mansfield or any of the other recipients.

Event of 22 September 2020

97. Despite the assurance that Ms Iosif had given in her email of 17 September 2020 as to remaining in F28, when the Claimant went to F28 to teach her group on Tuesday 22 September 2020, she found there was another teacher already there, who informed her that there had been a room change and she should go to room F5. This was a smaller room. As the Claimant explained in her subsequent grievance, as a result of its lay out students were bunched around tables and it was not possible to keep a 2 metre distance from students. [**341**]

98. The Claimant emailed Ms Iosif at 9.25am that morning noting that she had been told by the teacher at F28 to go to F5 and asking if that would be for every lesson. [**267**]

99. Ms Iosif replied to the Claimant late that evening. She apologised for not having sent out a separate email about F28, but stated that all the changes should be reflected on the week's timetable. She said that there had been some room changes in order to accommodate the large vocational groups, that the changes only affected her first two periods on Tuesday mornings,

and she apologised "for the inconvenience". [**267**] There was no mention of the previous assurance that there would be no change, nor any acknowledgment of her IRA or the measures suggested within it. In her subsequent grievance the Claimant complained that the use of the word "convenience" indicated a lack of understanding that teaching conditions were a matter of personal safety [**341**].

Claimant's 25 September 2020 Email

100. The Claimant replied early on Friday 25 September 2020, copying in Ms Westray, Mr Lawrance and Mr Kaplan [**266, 268-269**]. She noted that she was at increased risk of Covid as a teacher in her 70s, and that she had not yet had any acknowledgement of her IRA. She reminded Ms Iosif of the assurance she had given that her lessons for the 16-19 group would be in F28, and picked up on the fact that in Ms Iosif's reply of 17 September there had been no reference to the Claimant's request for a meeting. She then referred to what had happened on 22 September. She commented that Ms Iosif's comment about the change only being for two periods seemed to indicate that the points she had made about her "safety in relation to ventilation and physical distancing" were not clear. In the light of this she repeated that two measures identified in her IRA and added further comments in relation to each.

101. In relation to the first measure (teaching rooms to have an openable window to increase airflow and improve ventilation) the Claimant referred to the sealed window in G26 and that it was a small room that could become "stuffy and smelly". She provided a link to a SAGE environmental modelling group research paper highlighting ventilation as an important factor in reducing risk.

102. In relation to measure 2, she stated that she insisted on "one person, one table" in the classroom. She explained that in a typical lesson, having given the students activities to practice, whilst they were doing this she would walk around the room to check and correct the work individually. She said that this was possible in F28 where there was more space, but that because of the small size and layout of F5 it was not possible to keep her distance from the students or for them to distance from each other.

103. The Claimant concluded that the lack of a response to the IRA and to her request for a meeting had left her feeling unsupported and that the room change decision indicated that her concerns about her safety as an older teacher was not being taken seriously.

Invitation to meeting from Ms Westray

104. In response, on 25 September 2020, Ms Westray sent the Claimant and Ms Iosif an invitation to a meeting on the Claimant's next day in, which was to be Monday 28 September 2020 [**275**]. The invitation was to discuss the Claimant's "concerns regarding rooming" [**S3-4**]. At 6.42am on the morning of 28 September 2020 the Claimant emailed Ms Iosif and Mr Kaplan saying that she would not be in work that week as she was experiencing symptoms

that she believed were the result of stress [**273**]. She also therefore declined the meeting with Ms Westray [**S2**].

Sickness absence

105. The Claimant was subsequently signed off by her doctor with work related stress [**278**]. She did not return to work.

Ms Iosif's apology (30 September 2020)

106. Ms Iosif sent the Claimant a text on 30 September 2020 apologising for the upset caused. She stated that:

> "I would like to reassure you that whatever you decide, I will support you. I just want you to feel safe. When you're to come back I will ensure all your lessons are back to big classrooms. But please only do what makes you feel safe. I am really sorry for upsetting you." [**277**]

107. Notwithstanding the reference to "big classrooms" we do not consider that this is to be read as indicating that the Claimant would no longer be in G26. The reference to being "back to" big classrooms indicates a reversion to the position before the move to F5. Further if the Claimant was no longer required to work in G26 it is to be expected that, in the light of the particular concern about a non-opening window, this would have been specifically mentioned. Nor was there any mention of moving from G26 in any of the subsequent correspondence with the Claimant.

Request for return to work plan

108. Initially whilst the Claimant was off sick communications with the Respondent were through Mr Kaplan. Having been advised by her GP to ask her managers to provide a formal detailed return to work plan, the Claimant raised this in a call with Mr Kaplan on or around 7 October 2020 [**294**]. She explained that she was insisting on a formalised, detailed plan based on the IRA and highlighted that she had not yet had a reply to her IRA. She emphasised that by not responding she felt they were brushing her concerns away, that management needed to be prepared to put in additional measures as far as possible, and should make clear exactly what they would do.

Ms Westray's 9 point plan (9 October 2020)

109. Ms Westray met with Mr Kaplan on the Claimant's behalf and Ms Iosif on the morning of 9 October 2020. Following this she emailed the Claimant setting out what has been referred to in these proceedings as a "nine point plan" as to the things that would be put in place for her return [**295**], as follows:

> "1. We can cap your group size to ensure that there is enough space for all learners in the classroom in line with the guidance.
> 2. You can at any time request any additional PPE that you require to ensure you feel safe.

> 3. We will move you back to the original room you came from (which I think you said was the right size).
> 4. You should feel free to adapt your practice so that you are not circulating the room in between students and desk. Please do keep a 2m distance from students at all times.
> 5. Students should be sitting facing the front to ensure no face-to-face close contact. They can sit beside one another but please adapt your teaching activities for students to ensure that they are not required to face one another (ie., discussions in pairs, etc).
> 6. If you would like any additional wipes or other additional means of sanitising, we are happy to provide this.
> 7. In addition to the enhanced cleaning routines, rooms are also being 'fogged' on a rota basis, which I hope will give you more peace of mind.
> 8. If you wish to wear a mask and/or visor in class, that is fine. If you wish students to wear masks, you can ask them to do so.
> 9. You are welcome at any time to raise any issues in relation to your safety at the college and I will be happy to meet with you to go through any of these concerns."

110. Ms Westray added that although face covering were not a requirement of the Government guidance, they would be mandatory after half term when moving around the college for both staff and students.

111. Mr Kaplan had sent a text to the Claimant earlier that morning, at 8.59am, referring to having spoken to Ms Iosif on the previous day, and relaying that they had agreed to cap her class to 26 [**296**]. Since this referred only to a discussion with Ms Iosif (on the previous day) we infer that it was sent shortly before Mr Kaplan met with Ms Westray and Ms Iosif on the morning of 9 October. The Claimant replied to Mr Kaplan's text stating:

> "That doesn't sound like the detailed formalised plan I requested. …"

112. We infer that this would have been relayed to Ms Westray and Ms Iosif in the meeting that followed shortly afterwards, and that the formulation of the nine points was in response to this. The points were noted down as they discussed them in the meeting on that morning. Ms Westray understood them to have been agreed by Mr Kaplan. If he did agree, it was wholly inappropriate for him to do so without consulting with the Claimant in relation to what was proposed. It ought equally to have been obvious to Ms Westray that any such agreement could only be on putting these to the Claimant to take instructions on them, since they were formulated at the meeting before he had discussed them with her and since failed to engage specifically with the measures that the Claimant had requested in her IRA and the 25 September letter. Although the first measure in the IRA raised the need for an openable window, the nine point plan did not address at all the issue in relation to G26. The reference to the Claimant moving back to her "original room" indicates that the issue about G26 was either overlooked or ignored.

113. In large part the nine points were merely a restatement of existing practice and guidance rather than being additional measures to be put in place for her

return. Thus the references to availability of PPE and being able to request this, maintaining 2m distancing, adapting the classroom, and rooms being fogged were all measures of general application or guidance already in place. The only specific measures were the agreement to move back to F28, which had already been foreshadowed in Mr Iosif's text of 30 September 2020 [**276**], and the agreement to cap the group size to ensure sufficient space. However there was no cap specified.

114. Ms Westray's evidence was that the cap mentioned in Mr Kaplan's text was the maximum for any room at that time. No such maximum had been communicated to the Claimant. We address further below whether there was any such maximum. In any event there was no specific maximum communicated to the Claimant as the outcome of the meeting on 9 October or confirmation of the figure mentioned in Mr Kaplan's text. In the meeting Ms Westray had said that she would need to physically go and check but that it would be around 26. Mr Lawrance was subsequently told by Ms Westray, when he scoped the Claimant's grievance, that the limit for F28 would be 24, but again this was not communicated to the Claimant. Ms Westray's own evidence was that the maximum in F28 which would allow for safe distancing would be around 20, and would also require smaller desks than the very large desks in room F28 (albeit not as small as the exam desks that Mr Alexander had proposed). Again, however, other than the number mentioned in Mr Kaplan's text, there was no specific cap communicated to the Claimant.

Claimant's response to the 9 point plan (29 October 2020)

115. The Claimant replied to the 9 point plan under cover of an email of 29 October 2020 to Ms Westray (copying in Ms Iosif, Mr Kaplan, Mr Lawrance and Mr Harlow [NEU District Secretary]) [**303-305**]. She reiterated that on the advice of her doctor she was requesting a detailed formalised plan to specify the measures to be put in place before her return and that her IRA had never been acknowledged and nor had she had a reply to her email of 25 September 2020.

116. The Claimant also expressed her disappointment at Ms Westray's list and that it did not constitute a "detailed, personalised plan" specific to her needs It was Ms Westray's contention in her evidence that even after receiving this message she was unclear as to what the Claimant was seeking in this respect. However the Claimant's email identified specific respects in which what was provided fell short of what she was seeking. In particular:

    116.1 She highlighted the failure to mention her increased risk as an older member of staff. It ought to have been obvious from this that she was seeking express acknowledgment of her increased vulnerability, so as to have reassurance that it had been taken into account.

    116.2 She noted that some of the information was generalised and not specific to her. She proceeded to identify the points in the 9 point plan to which this applied.

116.3 She noted the lack of detail regarding rooming arrangements and student group numbers. Further, she asked specific questions to elicit the detail in relation to this, asking what the cap would be on students in the group, and specific questions about the rooming.

116.4 She highlighted the failure to address her concerns about ventilation and the lack of an opening window in G26.

116.5 She responded to each of the nine points, identifying further information required and proposing steps to be taken. In particular:

(a) She asked what the cap would be and whether the college was continuing to enrol students for the two ESOL groups she taught.
(b) She took issue with the comment that the Claimant had said that F28 was "the right size". She pointed out that she was not qualified to comment and asked that this be determined by someone with H&S experience with reference to her needs.
(c) She asked whether anyone had checked whether it was possible to keep a 2m distance from students at all times. She stated that from memory it would be difficult to do this when standing at the front of the class as the students' tables were so big and referred to the refusal of Mr Alexander's request that the desks be replaced with exam-type folding individual desks.

Ms Westray's response to Claimant's 29 October letter

117. Ms Westray responded to the Claimant's email an hour later, not with a substantive response but with an email inviting her to come into work on the following Monday. She explained that this was an inset day so no students would be around, and suggested that they could do a walk through with Ms Iosif and Mr Kaplan to alleviate any concerns the Claimant had [**302**].

118. The Claimant replied that afternoon stating that she was unable to attend the meeting as she was experiencing symptoms of work related stress and had been advised by her GP that she was not yet fit to return to work. She added that she had requested, verbally and in writing, that a formalised detailed plan for her return to work be drawn up and asked Ms Westray to inform her if she was unable to do that. [**300**]

119. On 3 November 2020 Ms Westray attempted to contact the Claimant by phone, and left a voicemail. However the effect was to cause the Claimant to suffer a panic attack. She therefore informed the Respondent, via Mr Kaplan and Mr Harlow, that she would not return Ms Westray's call [**342**]. Mr Kaplan informed Ms Westray that the call had made the Claimant have a panic attack and had suggested that communication be with the union representatives, and in particular suggested that this be with Mr Harlow.

120. Ms Westray spoke with Mr Harlow on around 16 November 2020, stating that she wanted to know what the Claimant wanted to be contained in the detailed personalised plan.

121. Although in Ms Westray's written evidence she referred broadly to having made unsuccessful attempts via the Claimant's union representative to elicit positive engagement, it was only in her oral evidence that she referred to having reverted to Mr Harlow asking what the Claimant wanted to be contained in the personalised plan and that she did not receive a substantive response. Nor was any point as to this put to the Claimant in cross-examination. As such it is not clear on the evidence before us whether anything was raised as to this by Mr Harlow with the Claimant. In any event the Claimant had already explained in detail in her 29 October letter what she was seeking and the further information she required.

1st Occupational health report

122. The Claimant attended a telephone occupational health ("OH") consultation on 3 December 2020. The report of the same date [**334-335**] indicated that the Claimant was not considered to be disabled because once the identified stressors were addressed the symptoms she was experiencing would resolve. However it was said that at present she was not well enough to have any administrative acting or hearing. Whilst that did not specifically refer to an informal discussion just to discuss measures to be put in place, nor did it provide any basis to doubt the position the Claimant had made clear as to being unable to take part in a discussion. Nor did the Respondent seek clarification as to this.

Ms Westray's explanation for failing to respond to the 29 October email

123. Ultimately Ms Westray never provided the Claimant with a response to her letter of 29 October 2020. She wanted to meet with the Claimant which she believed was the best way of avoiding misunderstandings. She felt that what she had provided on 9 October would at least provide a basis for a discussion but that it was seen by the Claimant as being all wrong. She further contended that she felt that simply having a back and forth communication by email with the Claimant would not enable the Claimant to feel supported. Plainly though there was more chance of this being effective than not responding to the Claimant at all. Ms Westray would have been well aware of this.

124. Ms Westray contended that whilst the various questions raised by the Claimant in her letter of 29 October 2020 were clear, she did not have clarity on what the Claimant wanted by way of a "formalised, detailed plan". She contended that it raised questions in her mind such as to what was the format that the Claimant was looking for and whether she wanted those points of general application removed. She wanted to discuss this with the Claimant to have more clarity over what the plan should contain so she was not seen to have got it wrong again and that she was awaiting a response from Mr Harlow as to what should go into the detailed plan. She stated that

when she was unable to meet with the Claimant and had no further clarification from Mr Harlow she felt "a bit lost". She contended that from 5 December, after receipt of the OH report, Mr Lawrence "picked up the attempts to engage with" the Claimant.

125. We do not wholly accept that account. Whilst Ms Westray no doubt hoped that her nine point plan would be acceptable to the Claimant, or at least provide the basis for discussion, she would also have been aware that it had either ignored the Claimant's requested measures (as in relation to measure 1) or been vague about or rejected them (as in measure 2) and that any apparent agreement from Mr Kaplan was before reverting back to the Claimant. To the extent that she sensed that what she had written was seen as all wrong that reflected her failure to address what the Claimant had requested. The Claimant's response of 29 October did provide specifics of what had not been addressed and what input the Claimant was seeking.

126. We accept that it was not unreasonable in the first instance to seek to meet with the Claimant. Although the Claimant was signed or work with stress, it did not necessarily follow that she could not have a discussion to resolve the issues or come in on an inset day. However, whilst it was no doubt frustrating for Ms Westray that a meeting with the Claimant was not possible in the light of the OH response, and seeking clarification from Mr Harlow did not produce further input, there was an obvious need for the Claimant to be provided with a substantive response. We reject as implausible the suggestion that uncertainties as to what was required in the personalised/ formalised plan, let alone uncertainties as to such matters as the format of it, provided a good or plausible reason for not replying, or that not replying at that point was out of a concern about simply having a back and forth communication by email. The Claimant had asked a number of specific questions and pointed to specific matters such as in relation to G26 that had not been addressed. It was obvious a response was needed and that not doing so would leave the Claimant feeling even more unsupported and without any understanding of the Respondent's position.

127. Ms Westray suggested in her evidence that she understood that the Claimant did not want to hear from her at all and wanted her to communicate with her union representative. Whilst any correspondence was to be sent via the union, we do not accept that this meant or was understood as meaning that Ms Westray could not put her responses or any questions about them in writing to passed on by the union to the Claimant. Clearly the Claimant was asking for a written response. That was the essence of her letter of 29 October. There was no question addressed to the OH about being able to write to her via the union and not communicate to the Claimant via the union asking whether this could be done.

128. Nor do we accept that the question raised with Mr Harlow provided any good or plausible reason for not providing the Claimant with a substantive response. Simply asking for more input as to what the Claimant wanted in relation to the detailed personalised plan was unlikely to be helpful in any event given the careful explanation that had already been provided in the 29

October letter and without any explanation of what was unclear about what the Claimant had requested. In any event, once further clarification was not forthcoming, the obvious need was to provide a substantive response to the 29 October letter.

129. A partial explanation for the failure to take matters further at the point when, following the OH report, it was clear that there could not be a discussion with the Claimant, is provided by Ms Westray's belief that she had passed the matter over to Mr Lawrance to deal with (albeit as addressed below any steps he took to do so were wholly inadequate). Ms Westray's contention that she felt lost and her perception that what she had done was seen as all wrong begs the question as to why she did not then take the obvious course of providing a substantive response in writing albeit via the union. It was not a reason for making matters worse by not replying at all. If it was in the hope that the Claimant would feel able to meet with Mr Lawrence but not her (which is not something Ms Westray expressly suggested in her evidence), as set out below it would quickly have been apparent that was not the case. Ultimately Ms Westray was not prepared to provide the Claimant with a substantive written response. Rather than doing so passed the matter on to Mr Lawrance. We are not satisfied that there has been a satisfactory response for doing so.

Mr Lawrance's involvement from December until submission of the Claimant's grievance

130. Mr Lawrance's contention was that following the OH report he had become involved in dealing with the issues relating to the Claimant's concerns in relation to return to work and to end he had asked Marcella Kirby (PA and Senior Executive) to arrange a meeting between himself and the Claimant.

131. In fact there was nothing to indicate to the Claimant that the attempts by Ms Kirby to arrange a meeting related to anything to do with this. Separately from the Claimant's Covid related concerns, she had also raised concerns as to pay and pensions, which were not matters in issue in her claim. In an email to the Claimant of 5 December 2020 Mr Lawrance suggested that she schedule a call in relation to those matters with Ms Kirby [**327**]. He followed that up with an email noting efforts by Ms Kirby to contact the Claimant. The Claimant responded by an email of 9 December stating that due to her symptoms of work-related stress she preferred to communicate by email, and setting out points in relation to her pay and pension issues in which she required a response [**325**]. Mr Lawrance did not provide a substantive response. He instead emailed Mr Harlow, in an email still with the subject pay and pensions, suggested that to "alleviate the stress", whoever was looking after the Claimant met with Ms Kirby [**333**]. That was plainly dealing with the pay and pension matters as stated in the email.

132. Even if Mr Lawrance understood that the efforts by Ms Kirby to arrange a meeting included a meeting in relation to the matters Ms Westray had been (or should have been) dealing with, it was clear to him from the Claimant's email of 9 December 2020 that she wished to communicate by email.

Although the Claimant's email to that effect related to pay and pension matters, his own evidence was that he did not regard it as limited to this and that he understood that the Claimant was asking for communications to be in writing. His response was to do nothing more in relation to the Claimant's concerns prior to her raising a grievance. His own evidence was that he did not see any of the correspondence relating to the Claimant's concerns until after the Claimant's grievance. If so that of itself speaks to a wholesale failure to seek to understand or look into the Claimant's concerns.

133. In his evidence Mr Lawrance sought to pin blame on the Claimant's union representation. He contended that it was clear at that time that all communications had to be through the union. He stated that he challenged Mr Kaplan on his offloading his duties to Mr Harlow. He claimed that communications continued with Mr Harlow but that having to communicate with a third party was difficult. He had no note of any such conversations with Mr Harlow other than later text messages produced to which we refer further below. The representation the Claimant received from her union, and particularly Mr Harlow does appear to have been very poor. We refer to that further below. It does not however excuse Mr Lawrance's own failings. The Claimant had expressly asked to communicate by email. We are not satisfied that Mr Lawrance was seeking clarification via the union at that time in the absence of any documentation evidencing such discussions and in circumstances where the written communications from him at that time were in relation to the pay and pension issues. However if Mr Lawrance had been seeking clarification or input directly from the union and felt this was not forthcoming, the obvious course was to put in writing what clarification was needed. In any event if it is right he had not taken the trouble to see any of the correspondence, that of itself is inconsistent with any serious attempt to understand the Claimant's particular concerns.

134. Mr Lawrance also contended that he did not want to "exasperate" the stress that the Claimant was under. That was consistent with his email of 9 December in relation to pay and pension matters. However whatever the position so far as concerns the pay and pension issues, the approach made no sense in relation what the Claimant was seeking in relation to safety measures. The obvious stressor was the Respondent's failure to provide a substantive response to her correspondence. The same applies to the contention in his evidence that he was not an advocate of conducting a discussion by email because they are often misconstrued and can result in "email tennis". That provides no excuse for failing to provide any substantive response to the Claimant.

135. Mr Lawrance's position was that he regarded the Claimant as refusing to engage. There was no reasonable basis for that contention. If he saw the correspondence, including the absence of a substantive response to the letter of 29 October 2020, it should have been obvious that it cried out for a response. If he did not see the correspondence, then it was a view formed without any meaningful effort to apprise himself of the facts. Simply seeking to arrange a meeting, despite the absence of any indication in the OH report that the Claimant was well enough to attend and without seeking further

clarification of the OH view, and in the face of the Claimant's request to correspond by email, and without taking the trouble to review the correspondence to understand the issues raised, was a wholly inadequate approach. It was the Respondent that failed to engage by failing to provide a substantive response.

Ms Lawrence's concern raised about G26 (16 December 2020)

136. By an email to Ms Iosif of 16 December 2020, Amanda Lawrence again raised a concern about Room G26 [**337**]. She expressed her concern about there being 20 or 21 students in G26 in the 14-16 group with so little space and no window, especially if the Claimant was to return in the new year. She noted that it would be packed and very difficult to move around. In the event, following a further lockdown from 4 January to 8 March 2021, there was a move to a different room when they returned in March 2021. Ms Alexander's evidence was that the new room was "nice". The windows opened and there was more space. However the Respondent did not inform the Claimant of the change of room, and nor did she otherwise become aware of it prior to Ms Alexander giving evidence in these proceedings.

Further exchange with Ms Iosif (31 December 2020, 7 January 2021)

137. On 31 December 2020 Ms Iosif emailed the Claimant with best wishes for the New Year and asking the Claimant to let her know if there was anything she needed in order to support her [**597**]. In response, on 7 January 2021, the Claimant referred to her communications on 17, 20 and 25 September 2020 and her request for a return to work plan and asked that any further communications be directed to her union representative. [**597**]

First Grievance

138. By a letter dated 25 January 2021 to the Chair of Trustees, David Wyatt, the Claimant raised a formal grievance, both in relation to the response to her Covid concerns and the pay and pension issues [**339-349**].

139. At the outset of the letter of grievance the Claimant identified the managers involved, including Mr Lawrance, Ms Westray and Ms Iosif. She also stated that she was raising a formal grievance having asked for support from her line manager and senior managers, and noted that the failure to resolve the matters was having a detrimental effect on her health.

140. In the first part of her grievance the Claimant set out a chronology of events leading up to her being off work sick and the requests relating to a return to work plan since then. In relation to the nine point plan she reiterated her concern that it consisted of general measures with no recognition that she was in a vulnerable group or that her safety needs as an older teacher had been seriously considered and failed to refer to the issues she had raised in her email of 25 September 2020.

141. Whilst in her email of 25 September 2020 the Claimant's explanation of her concerns had primarily focussed on G26, her grievance made clear that it also related to F28. She explained that she was worried about ventilation and group sizes in both classrooms and the difficulty of ensuring physical distance between herself and the students, and between students, in F28 [**340**]. In relation to the F28 she referred to the narrow horizontal window at the top of the back wall, and that the possibility of physical distancing depended on the number of people in the room and the space between the large tables and the space between her at the front and the students in the front row [**340**]. She also referred to the refusal of Mr Alexander's request to replace the large tables. She noted that in room G26 the possibility of maintaining a 2m distance from students also depended on the group size [**344**].

142. The second part of the grievance was directed specifically at lack of support from Ms Iosif [**343**]. The Claimant identified four instances of this:

    142.1 Not responding to her request for a meeting in her email of 17 September 2020.
    142.2 Not acknowledging or making any attempt to discuss her IRA.
    142.3 Not replying to her email of 25 September 2020.
    142.4 Moving her to a smaller teaching room on 22 September without notice, despite the Claimant's expressed concerns about ventilation and physical distancing, leading her to feel exposed to risk and that here concerned about safety at work were being ignored and dismissed.

143. In her conclusions to this aspect of her grievance the Claimant reiterated her concern at the failure to refer to her IRA and request for an action plan. She referred to a report by "Independent Sage" of 27 November 2020 (which we were shown) and identified the following as being the sort of measures she expected to have incorporated into a return to work action plan:

> "o Specify exactly which classrooms I will teach in and give a firm assurance that they will not be changed.
> o A person qualified in Health & Safety to carry out a formal assessment of ventilation and aerosol transmission in those rooms in order to establish that the level of ventilation is adequate for my needs.
> (G26 has no openable window as the existing window has been sealed shut. F28 is a larger room with a narrow horizontal window near the ceiling at back of room.)
> o Be explicit about the maximum number of students I would teach in those rooms, as well as the possibilities for physical distancing.
> (In the past, the college has recruited ESOL students throughout the year, so group sizes have continued to increase.)
> o H&S to measure up and assess whether it would be possible for me to maintain 2m physical distancing from students in those classrooms. Online tools make this a straightforward process.
> (I do not believe that distancing of 2m is possible in F28. The possibilities in G26, a smaller room, depend on group size."

144. Even if, as the Respondent sought to contend, it had been awaiting further clarification as to what the Claimant was seeking by way of a detailed personalised plan (which as set out above we do not accept justified the failure to respond to the 29 October 2020 letter), this was therefore now provided.

145. In addition the Claimant set out a series of eight points that she asked be specifically addressed [**344**]. These included:
    145.1 What discussions took place regarding the solutions and measures in her IRA and in relation to support plans, and safety measures, and minutes of meetings in relation to this.
    145.2 What was the process of analysing and ranking, on the basis of the Claimant's IRA, the severity and seriousness of the potential risk from Covid as teacher over 70; how was this done and by whom.
    145.3 How and when her risk was monitored and reviewed and by whom.
    145.4 Details of discussion or communications between management, HR or anyone else regarding her request for a formal return to work plan to be drawn up.

146. These were important questions as they were directed to issues to enable the Claimant to understand whether the Respondent was taking seriously the need to consider steps required to protected the Claimant's safety in her particular individual circumstances. However there was no answer provided. Nor was there any convincing evidence of this before the tribunal.

147. Having addressed her complaint in relation to pay and pensions, the Claimant, concluded with the contention that:

> "By ignoring my individual risk assessment and failing to respond to my request that they produce an agreed action plan in order to keep me as safe as possible at work, my employers breached their duty of care towards me as a teacher over 70. This made me feel that I was alone in dealing with the increased serious health risks I was being exposed to at work. Since the start of the pandemic, information from scientists and government has highlighted age as the biggest risk factor of death from Covid. The fact that my risk assessment has never been acknowledged, referred to or acted upon by my managers suggests that I have been discriminated against on the grounds of age." [**349**]

148. The Claimant also returned to the theme of her preferred means of communication. She noted that she had told her managers that due to her symptoms she preferred to communicate with them by email rather than phone, yet some of the emails she had sent had been ignored and there seems to be a reluctance to provide her with detailed information [**349**].

149. It was made clear therefore that the Claimant wanted a written response and was not merely a verbal response to the union and that she was specifically complaining that her correspondence had been ignored and that this left her

feeling unsupported and that her safety concerns were not properly considered. She also explained in terms that she was initiating the grievance to avoid worsening of the effects on her health and requested a substantive response to all the issues set out in the grievance letter.

Mr Lawrance's scoping exercise

150. A copy of the grievance letter was provided to Mr Lawrance. The Respondent's pleaded contention was that he conducted an investigation into the concerns raised (GoR para 40) [**45)**]. Mr Lawrance's own evidence was that he was not conducting a grievance investigation but had been asked only to "scope out" the grievance by Mr Wyatt. We do not consider that there is any significance in that purported distinction. We consider that it was a misguided attempt to deflect from the (justified) criticisms of his role and involvement in relation to the grievance (as addressed further below). It was not a distinction raised in his written evidence, where he stated that he had been asked to "consider" the grievance (para 48). The distinction between that and a purported investigation was in any event obscure. We accept that in principle there may be circumstances in which it is appropriate to carry out a preliminary exercise to clarify aspects of the grievance or remedy sought and possibly to determine who should investigated aspects of the grievance. However Mr Lawrance did not suggest that was his role. Instead when asked to explain what it meant he explained it as looking at the circumstances to see if anything was done that was not appropriate.

151. At least in relation to the pay and pension matters Mr Lawrance himself was plainly the subject of the grievance which he was purporting to investigate (or "scope"). Mr Lawrance's own evidence in cross-examination was that his interpretation was that it was not a grievance about him, and that if he had thought it was he would not have been appropriate for him to be investigating. However he was named in the first paragraph as a manager involved in the matters subject to the complaint. In substance the pay and pensions element of the grievance involved a complaint as to Mr Lawrance's actions in failing to respond, adequately or in some instances at all, to her correspondence or requests. Indeed part of the remedy she sought was a full reply to her letter of 5 December 2020 to Mr Lawrance. [**346-348**]. Further she stated that at the end of the letter of 5 December 2020 she had asked him to send her copies of all the correspondence and communication about her pay and pensions between the Respondent, current and previous payroll providers and Teachers' Pensions [**347**]. She stated that she now believed that her employers were deliberately avoiding giving her this information. As such, we do not consider that Mr Lawrance genuinely considered that he was not the subject of the grievance or that he could reasonably have held that view. There was no credible explanation provided for that position.

152. Further, although Mr Lawrance was not expressly mentioned in relation to the safety matters, that was likely to be as a result of the having been nothing to communicate to the Claimant that he had taken over responsibility for dealing with it in early December, and that he therefore shared the

responsibility for the failure to provide her with a substantive response. To her correspondence. In any event the two elements of the grievance were linked by the Claimant in her conclusion where she contended that on both elements the Respondent seem reluctant to provide her with detailed and meaningful advice.

153. Mr Lawrance's suggested in evidence that there was no one else to undertake the investigation. We reject that contention. We accept that there was a difficulty in appointing an alternative senior manager, given those already named and issues as identified in his evidence as to ill health, competence and capacity of other senior managers. However the Respondent had a Board of trustees, including Mr Wyatt, to whom the grievance had been raised, and retained an HR consultant. In so far as Mr Wyatt required support in investigating the grievance, that could have been provided by the HR consultant.

154. Nor do we accept that Mr Lawrance conducted anything approaching a sufficient investigation into the grievance. He spoke to Ms Iosif and Ms Westray but made no note of those discussions. That was notwithstanding the obligation under the Respondents own grievance procedure to keep notes (para 2.7.3 [**541**]). His recollection was that Ms Iosif spoke about classrooms, capping of group sizes and measures that she took to reassure the Claimant. However, unsurprisingly given his failure to take any notes, his evidence as to this was vague. There were specific complaints in the letter as to Ms Iosif moving classrooms and failing to respond to correspondence or acknowledge the IRA. Yet even on Mr Lawrance's own account he accepted that he had not gone through the letter which set out the Claimant's concerns.

155. In relation to Ms Westray his contention was that she took him through the detail of the correspondence with the Claimant, notably the nine point plan. There was no satisfactory explanation offered as to why he rejected the complaint as to failing to respond to the concerns raised in the 29 October letter in response to the nine point plan. His own evidence was that he first saw the nine point plan when he spoke to Mr Westray and did not think he saw the response to it. However the Claimant expressly stated in her grievance that she had replied to each point in the nine point plan on 29 October 2020 [**342**] and she referred back to it in her conclusion to that part of the grievance [**343**]. She also concluded her grievance by asking Mr Wyatt to let her know if he needed copies of any correspondence or any further information. If it was indeed the case that Mr Lawrance conducted his "scoping" exercise without even obtaining and reviewing the correspondence to which the Claimant expressly refers that reflects very poorly not only on his professionalism but also the sincerity of his contention to have looked into the issues. It also points to the superficiality of both of his approach and of what was discussed with Ms Westray if there was no discussion of the Claimant's response to the nine point plan.

156. Mr Lawrance claimed that he was reassured on the first three of the points that the Claimant wanted including in a detailed plan, in that he was satisfied

that classrooms would not be changed, he accepted that a qualified assessment of classrooms had taken place and was reassured that student numbers had been capped at around 24. Yet, even if that was said, it was not relayed to the Claimant or formulated into a return to work plan.

157. As set out further below, when Mr Lawrance set out his thoughts on the grievance (in an email of 28 January 2020) he set these out only in vague and broad terms, claiming that all measures had been taken throughout the pandemic to safeguard employees and to that measures were taken in relation to the Claimant in consultation with the NEU and the Claimant had refused to engage. That was then repeated by Ms Wyatt in his response. It wholly failed to engage with the points made in the Claimant's grievance. In the absence of any notes of the discussions with Ms Iosif and Ms Westray we do not accept that there was any adequate investigation of issues she had raised or that there was any feedback to Mr Harlow in any greater detail. No more specific findings were relayed by Mr Harlow to the Claimant. If Mr Lawrance had investigated and identified answers to the specific points and questions raised in the Claimant's grievance it is likely that that they would have been documented, related to Mr Wyatt and set out in his response. That was not done.

Mr Lawrance's comments on First Grievance

158. Mr Lawrance set out his thoughts on the grievance in an email of 8.52am on 28 January 2021 to Ms Westray and Mr Harlow (copying in Jacqui Grant (CFO), Mr Wyatt and Fliss Baird (Board and Company Secretary) [**355**] Although copied to Mr Harlow it was not shown to the Claimant.

159. Mr Lawrance's first point was that this was the first time a grievance had been raised so could not be formal. We regard that as an unsustainable, and in any event excessively technical and unhelpful approach. In any event it provided no excuse for the course adopted by the Respondent. In particular:

    159.1 The Claimant had already raised her concerns at least in relation to the approach to ventilation and space and a return to work plan in her letter of 25 September and 29 October 2020. As above, whilst Mr Lawrance claimed not to have seen the letter of 29 October 2020, it was clearly set out in the Claimant's grievance that she had set out a point by point response to the nine point plan. Further she specifically quoted from her statement in that letter that she was disappointed with the points in the nine point plan "as they do not constitute a detailed, personalised plan, specific to my needs" and referred to the lack of detail.

    159.2 The only respect in which it could be said that it was the first time a "grievance" had been used was that the previous correspondence had not previously been expressly labelled as a grievance. There was no such requirement in the policy and it was a wholly pedantic and unhelpful approach in circumstances where the Claimant was

emphasising the failure to provide a substantive response was damaging her health.

159.3 Further, even if it had been right that there needed to have been a document which was headed as a grievance, then it followed that when the Claimant was dissatisfied with the response and raised as second grievance, to which we refer below, this should have been permitted to proceed. It was not.

159.4 Paragraph 7.1.4 of the grievance policy expressly provided that the formal grievance procedure could be invoked if an informal approach had failed to resolve the matter (as the Claimant considered to have been the case with her previous correspondence) or where the matter was considered too serious for informal resolution. As to the latter, the concerns were plainly very serious, being expressed as being around the Claimant's safety at work, and raising concerns as to age discrimination, and given the range and seniority of those status who were the subject of the grievance.

159.5 The Claimant had indicated that her preferred means of communication was in writing. As such, whether the matter was classed as formal or informal, a substantive written response was plainly needed which engaged with the specific the matters she had raised. [**540**] The Respondent wholly failed to do so. It was equally obvious, given that the complaint was in part of ignoring the Claimant's correspondence, that the matter could not be resolved informally without providing a substantive written response which engaged with those issues so that even if her points were rejected, she could see that they had been addressed and why they were rejected and what the specific responses were to the questions she had raised.

160. Mr Lawrance proceeded to assert that all measures had been taken throughout the pandemic to safeguard all employees, and that further communications with the Claimant had been attempted but she had failed to engage and that it was not clear what her expectations were now. Again, that was a wholly inadequate response which essentially ignored important aspects of the Claimant's grievance:

160.1 It wholly failed to engage with the four specific suggestions that Claimant had raised in relation to ventilation and spacing without any explanation of what the answer was. Nor did it respond to her specific questions or explain the failure to respond to her correspondence.

160.2 The assertion that the Claimant had failed to engage ignored her explanation as to why she felt unable to attend a meeting, her request to deal with the matter in writing and the fact that she had engaged in writing by her comments on Ms Westray's nine point plan (which on his own evidence he had not even looked at), as well as within the information in the grievance itself as to what she wished to have included in a return to work plan. It was the Respondent that had not engaged by failing to provide a substantive response to the issues the Claimant had raised.

160.3 The statement that it was not clear what the Claimant's expectations were ignored the fact that she had expressly stated that

she wanted a substantive response to all the issues set out in the grievance letter

161. We also regard it as telling that Mr Lawrance emphasised that measures had been taken "to safeguard all employees". That indicated a re-emphasis on the general measures, which was consistent with the approach in the nine point plan. The Claimant had emphasised her concern as to the failure to put in place additional measures specific to her circumstances arising due to her age. Whether or not it was the case that general measures would mitigate the risk for all members of staff, it remained important to consider carefully whether in the particular circumstances more was required. Yet without providing the Claimant with a substantive response which engaged with the Claimant's proposals, the Respondent could not have the benefit of the Claimant's input by way of response to those points and could not be said to have given adequate consideration to her position. Nor was it any answer to say that all measures had been taken with the approval of the workplace representatives. That provided no excuse for the failure to provide the Claimant with any substantive response either to the points in her IRA or 25 September letter or the 29 October letter or her grievance.

Invitation to meetings re First Grievance and Claimant's response

162. Mr Lawrance asked Ms Westray to meet with the Claimant in relation to the Covid protection issues, and Marcella Kirby to do so in relation to the pay and pension issues. This was despite the fact that the Claimant had specifically asked that communications be in writing.

163. By an email to Mr Harlow of 11.27am on 28 January 2021, Ms Kirby stated that the Respondent wanted to arrange a meeting with the Claimant, Mr Harlow and Ms Westray to discuss her grievance and suggested that this be by way of team meeting **[357-358**]. In response to Mr Harlow the Claimant asked him to inform Ms Kirby that she was unable to attend meetings due to illness. In response to Mr Harlow asking if she would be happy to answer any questions in writing, she confirmed that she would, and indeed would prefer to communicate in writing [**357**]. This was in any event consistent with what the Claimant had previously said as to her preferred method of communication being by email.

164. By a letter to the Claimant dated 4 February 2021 Ms Westray followed this up, noting that she had received no response to the invitation of 28 January 2021 and invited the Claimant to a meeting to discuss the concerns in her grievance. The letter did not state who the meeting would be with, but since the letter was from Ms Westray the implication was that it was with her.

165. In an letter sent to the Respondent (Mr Lawrance and Mr Wyatt) via Mr Harlow on 12 February 2021, the Claimant noted that having a meeting with Ms Westray and Ms Kirby did not seem to be a fair way to follow the grievance procedure because they were part of the grievance. She emphasised that she wanted Mr Wyatt to carry out the grievance as an impartial person. She did however offer that if a face to face meeting was an

essential part of the grievance procedure it should be arranged with someone who was not involved in the case, and noted that this would demonstrate a commitment to a fair process as would a full reply to grievance letter. [**387**]

166. Both Ms Lawrance and Ms Westray (who also received a copy of the grievance) disputed that they were aware that she was the subject of the complaint in the grievance. We reject that evidence as wholly implausible. Ms Westray was identified as one of the managers in the opening paragraph of the grievance. A core aspect of the Claimant's complaint was her contentions as to failing to provide an adequate return to work plan. That was plainly directed at Ms Westray. Further she concluded her grievance by complaining that ignoring the IRA and failing to respond to her request for an action plan involved a breach of the duty of care to her and that failing to acknowledge her IRA or to act upon it "by my *managers*" (our emphasis, referring to managers in the plural) suggested that she had been discriminated against on ground of age. Again that was plainly directed at least in part at Ms Westray. Ms Westray herself, in her evidence, accepted that she was not now able to understand why she had not appreciated that the grievance was against her.

167. Ms Westray considered that matters had moved on by January 2021 and wished to discuss the position with the Claimant. At that time there was a further lockdown and students would not be returning to the College until March. The vaccine programme had started to be rolled out and there was the prospect that by March or soon afterwards the Claimant would have been vaccinated. She wanted to discuss this with the Claimant. Ms Westray contended in her evidence that she wished to have a discussion with the Claimant as to what measures should be put in place in the changed situation at that time and that she felt there had been a misunderstanding which she wanted to resolve. However that was in a context where she had failed to provide the Claimant with any response to the points raised in her letter of 29 October 2020. It was clear from the Claimant's grievance that a principal concern was to have assurance that measures would be put in place to meet her particular individual circumstances. Yet there was no acknowledgment of this in Ms Westray's correspondence and no substantive response or written explanation provided to the Claimant.

168. We accept however that in the light of the Claimant's objection to meeting with Ms Westray and statement that it involved a conflict of interest, that Ms Westray's genuine belief at that stage was that she was not the appropriate person to engage in correspondence with the Claimant (vie the union) or provide the written response. She was content to leave it to Mr Lawrance and Mr Wyatt to respond.

Mr Wyatt's response of 22 February 2021

169. By a letter dated 22 February 2021 Mr Wyatt wrote to the Claimant in terms which in substance ignored the points made in the Claimant's grievance letter and wholly failed to respond to the points raised in her grievance [**391**].

The letter broadly reflected the content of Mr Lawrance's email of 28 January 2021 and we are satisfied that its content was in substance suggested by Mr Lawrance. Mr Lawrance's influence over the content of Mr Wyatt's responses is indicated by the tenor of his text messages with Mr Harlow. In one text message, on 5 March 2021, he commented the he had advised Mr Wyatt to write back via Mr Harlow "closing this down". Although this post-dated the letter of 22 February 2021, we regard it as reflecting the approach Mr Lawrance was adopting and was advising Mr Wyatt to adopt, and which he did adopt. It was in substance the effect of the letter of 22 February 2021. Further although Mr Lawrance had access to HR support through an HR consultant he chose not to involve him at all in advising on the process. Again, we regard that as consistent with the approach taken of simply seeking to close down the grievance.

170. Mr Wyatt asserted that the College had taken measures throughout the pandemic to safeguard all employees and students and contended that the Claimant had failed to engage. The assertion that measures had been put in place "to safeguard all employees" appears to have been a rebuttal of the contention that there had been no consideration of steps required in the light of the Claimant's age. However a generalised assertion of that nature was wholly inadequate with dealing with the specific points and questions raised in the Claimant's grievance or her IRA or correspondence of 25 September and 29 October 2020.

171. The letter concluded, by stating that the College would like to arrange a meeting with the Claimant, her NEU representative Mr Harlow, Ms Westray and Ms Kirby so that the matter could be resolved. That was thoroughly disingenuous. The letter was the implementation of Mr Lawrance's advice to shut the grievance down. It wholly ignored the Claimant's request for a substantive response in writing, her objection to the meetings being with Ms Westray (and Ms Kirby) and the explanation of why she preferred to communicate by email.

172. In substance this entailed a wholesale failure and refusal to deal with the grievance or even to acknowledge or engage with the concerns the Claimant had raised. Nor was the Claimant offered a right of appeal. Mr Lawrence's position in his evidence was that it was not appropriate to do so because there had not been a grievance decision. We reject that evidence. The letter was a rejection of the grievance without any proper process or anything like adequate reasons for doing so. Contrary to Mr Lawrance's evidence, we infer that the reason for not offering a right of appeal was because it was the implementation of Mr Lawrance's advice to close the grievance down, wholly ignoring what she had said about wanting to communicate by email and the reasons for this. Nor do we accept that this is explained by Mr Lawrance's contention that he was not a fan of communications by email and that it could lead to misunderstandings or wanting to avoid causing stress. Whatever the issues which such correspondence, it was plainly better than failing to respond at all or engage at all with the Claimant's concerns.

173. Mr Lawrance maintained in his evidence that he could not see what more Mr Iosif and Ms Westray could have done. There was however no adequate explanation as to how that was reconciled with the failure to provide any response to the Claimant's 29 October letter. Further, even if that was Mr Lawrence's view, it was not a legitimate basis for closing down the grievance without either identifying in writing any areas on which he sought clarification or further information (as the Claimant had offered in the grievance itself) or providing a substantive response so that she could explain her position in the light of it.

174. We return in our conclusions below to the inference which we draw in those circumstances from the decision to close down the grievance, the reliance on the generic assertion that the College had taken all measures to safeguard employees and students and the attempt to depict the Claimant as failing to engage, whereas it was the Respondent that had done so by refusing to respond substantively to her correspondence or the grievance or take up her request for communications to be in writing or if there was to be meeting, to hold this other than with someone who was the subject of her grievance.

Claimant's Response to Mr Wyatt

175. The Claimant replied directly to Mr Wyatt. There were two replies contained in the material before us, one of 24 February 2021 [**392-394**] and one of 1 March 2021 [**395-397**]. Although they were in similar terms, the Claimant's recollection was that both were sent. However we were not given any explanation of why both letters would have been sent with such a large amount of duplication. We infer that the Claimant's recollection is incorrect on this point, that the 1st March email was an updated draft from 24 February 2021, and that it was only the latter communication that was sent. In practice little of substance turns on this. The draft of 22 February 2021, but not the letter of 1 March 2021, expressly stated that if a face to face meeting was regarded as an essential part of the grievance procedure that the meeting should be arranged with someone not involved in the case to demonstrate commitment to a fair process. However that point had in any event already been main in the Claimant's email of 12 February 2021 where it was said that holding the meeting with someone not involved in her case would show consideration for ongoing work related stress. She expressly referenced this in her letter of 1 March 2021 and noted the failure to address her concerns about a meeting with managers who were part of her grievance. However, consistently with Mr Lawrance's advice to shut down the grievance, the suggestion that if there was to be a meeting it should be other than with a manager subject to her grievance was ignored by the Respondent.

176. The Claimant also noted that Mr Wyatt's letter of 22 February 2021 made no reference to her grievance, nor to her IRA. She took issue with the allegation as to a refusal to engage. She referred to her stated preference to communicate by email and her explanation for not attending a meeting. She also highlighted the failure to address her concern about being required to meet with managers who were part of her grievance and the continuing impact on her health. [**395-397**] In the 24 February but not the 1 March

2021 version the Claimant made the point expressly that the letter of 22 February was not a substantive response to her grievance. However that was implicit in the point that her grievance had not been mentioned, and in any event it was obvious that there had been a wholesale failure to address it. Again, the Respondent chose to ignore this.

177. By an email of 5 March 2021 the Claimant sought advice from Mr Harlow on the grievance process. This was followed up with a discussion with Mr Harlow on 10 March 2021. She sought clarification as to the purpose of the proposed meeting and explained that what she wanted was a full reply to her grievance letter [**401**]. Mr Lawrance denied that this was communicated to him. We regard Mr Lawrance's evidence as to this as unreliable in the absence of any contemporaneous notes of his discussions with Mr Harlow other than his text messages and his comments about shutting down the grievance. In any event whether or not this was communicated to him by Mr Harlow the Claimant had set out in her grievance that she was looking seeking a substantive response, and in her email sent on 12February 2021 made clear that a full reply to her grievance letter would show her that her employers had listened to her grievance [**387**]. Essentially the same point was made in the Claimant's second grievance of 29 March 2021 as further addressed below. Mr Lawrance can have been in no doubt that this was what the Claimant was seeking. He declined to respond or to advice Mr Wyatt to do so.

178. The Claimant also sent a follow up email to Mr Harlow on 12 March 2021 stating that when he was making arrangements for the proposed meeting she wanted him to ask for time to be allowed for her to talk about the managers who she had asked for support from and had not replied to her [**402**]. As that indicates, she was not ruling out a meeting, consistent with her previous indication that she would attend a meeting but not with the managers who were subject of her grievance.

179. The Claimant followed this up with an email to Mr Harlow of 24 March 2021, seeking an update on her request for a substantive response to her grievance letter and request that the investigation meeting should be with an impartial person, and asking that this be dealt with without delay for the sake of her mental health [**407**].

180. Mr Harlow replied later that day. He explained that he had met with Mr Lawrance on the previous day and that both he and Mr Wyatt maintained that they had responded to her grievance, had undertaken proper health and safety measures, and stood ready to meet with her to find a way forward to alleviate her concerns [**406**]. He ventured the view that "this may need to go to ACAS for conciliation". We do not accept that Mr Lawrance provided any more information by way of response than this. Had there been a detailed substantive response there would have been no reason not to put it in writing as the Claimant had requested. Instead Mr Lawrance continued to do no more than repeat the generalities in Mr Wyatt's letter.

Second grievance

181. The Claimant had a further discussion with Mr Harlow on around 25 March 2021. Following this, as she informed Mr Harlow in an email of 29 March 2021, she should submit a 2nd grievance, asking a different person to carry out the investigation. She had not been given the option of appealing a decision on the first grievance. She also mentioned to Mr Harlow that she thought that there were time limits for a tribunal application and that if she went down the route of a second grievance she did not want time to run out [**488**] It was not her understanding that she pursuing the second grievance would lead to her being out of time.

182. The second grievance, dated 29 March 2021, was forwarded to the Respondent by Mr Harlow on 31 March 2021 [**409-411**]. As to this:
    182.1 In response to the assertion to Mr Harlow that proper safety measures had been undertaken, she referred to the detail set out in her first grievance as to her vulnerability not having been taken seriously by managers, the failure to acknowledge her IRA or to discuss it with her, failures to respond to her requests for support and her contention that an agreed return to work plan had been ignored.
    182.2 In response to the assertion that her grievance was responded to, she referred to the failure to respond to the particular matters set out in the grievance or provide the information requested, or even to mention her grievance, and took issue with the contentions as to refusal to engage. She also reiterated that if a meeting was considered essential it should be with someone not involved in her case and she should in any event have a full reply to her grievance. She noted that as Mr Wyatt was the subject of her second grievance it would now be necessary to have a different person investigate.

183. Neither of those matters had been addressed in the response she had been sent to her first grievance.

DSAR

184. On 19 April 2021 the Claimant forward a data subject access request to Mr Harlow, for him to submit to the Respondent [**414-416**]. In response to it, Mr Lawrance commented to Mr Harlow that it was "becoming tedious now", to which Mr Harlow replied "You're telling me" [**353**] In his evidence Mr Lawrance claimed that the reference to becoming tedious was because he had been unable to get people round the table. We do not accept that evidence. Mr Lawrance had approach had consistently been to shut down the grievance and resist the giving of a substantive response. He was fully aware that the Claimant had explained that she was not well enough to meet with those who were the subject of her grievance and had asked to correspond in writing. We regard the comment that matters were becoming tedious as reflecting of his refusal to engage with the Claimant's concerns or to treat them with the seriousness that was required.

Response to Second Grievance

185. Mr Wyatt responded to the second grievance by a letter dated 28 April 2021 [**418**]. The terms of the response were again driven by Mr Lawrance. Mr Wyatt asserted that the Claimant had not followed the grievance procedure in that she did not raise the issues informally with her manager. He asserted that "it would therefore be inappropriate to formally consider your grievances at this stage." As set out above, that position was unsustainable. It was a bare refusal to deal with the grievance. It does the Respondent no credit. Even if there was anything in the point in response to the first grievance (which there was not) by the time of the second grievance it could no longer be said that the Claimant had not previously raised the grievance. She had done so expressly in her first grievance even if the earlier correspondence was not seen as raising a concern, and in her second grievance she made clear that she was dissatisfied with the response. Further, the Claimant had made clear that a substantive response to the grievance was important to avoid worsening the effects on the Claimant's mental health. It was obvious that simply to repeat the generalities as in Mr Wyatt's response to the first grievance and to refuse to provide a detailed substantive response would aggravate the Claimant's feeling of being unsupported.

186. Mr Wyatt reiterated his assertion that the College would do everything to help the Claimant to return to work. He said he recognised that he Claimant did not feel well enough to attend a meeting but expressed the hope the solutions could be found through Mr Harlow.

187. That was a hopelessly inadequate response. The failure to respond substantively to the points raised in the Claimant's grievance was an obvious barrier to the Claimant feeling that she could return to work. She had said as much in her first grievance.

188. The Claimant replied to Mr Wyatt (through Mr Harlow) by a letter dated 5 May 2021 [**422-423**]. She documented the occasions on which she had raised the issues with Mr Iosif and with Ms Westray, and her reference to this in the first grievance. She repeated that the failures on the part of her managers had caused her mental health problems that led to her absence from work. She reiterated her request for her grievances to be investigated by an impartial person and that she be notified of the outcome in writing. [**422-423**]

189. The Claimant received no substantive response. Instead by an email of 11 June 2021, Mr Lawrance reiterated the Colleges position that it wished to have a meeting. He claimed that throughout the Claimant's absence, they had "looked carefully at her requests investigated fully and reported back to her, her work placed rep and your good self." [**429**] The contention that they had reported back on her requests was untrue. If there were answers to be given, the obvious course was to set those out in writing. It chose not to do so.

190. The offers of a meeting in the letter of 22 February 2021 and subsequently were made in the knowledge that the Claimant had made clear that she was not well enough to do so and had requested a response in writing and also offered to meet with someone not the subject of her grievance. They were an aspect of shutting down the grievance, refusing to provide a substantive response and seeking to deflect from that refusal.

191. On 13 July 2021 the Claimant emailed Mr Harlow, amongst other matters requesting that he insist that a formal ACAS compliant grievance process take place to be heard by a neutral person. She recorded her understanding as to time limits that she needed to submit the claim by 5 August, being a month from the ACAS certificate. [**432**]

192. Mr Harlow subsequently made clear that because the Claimant had approach a private solicitor the NEU could not support her in her prospective tribunal claim. Her previous requests for access to the union solicitor had been met with the response that this was only available for unfair dismissal claims. She had then approached a solicitor because she did not feel what he could proceed with a tribunal claim without first doing so. Following the rejection of the second grievance she researched solicitors in her area, and approached a solicitor on 27 May 2021.

Further request for second grievance to proceed and response

193. The Claimant emailed Mr Lawrance on 17 July 2021 insisting that the Respondent follow an ACAS compliant grievance procedure by a neutral person and the outcome communicated in writing, and repeating that the first grievance was mishandled and the second refused [**434**]. Mr Lawrance replied by email of 24 July 2021 [**437-438**]. He again repeated the contention (albeit in relation to the pay and pension issue) that she had not engaged. He contended that he and Mr Wyatt had investigated the grievance and found that staff acted in accordance with procedures and guidelines in a rapidly changing and challenging year. He contended that as he had been unable to discuss further with the claimant he did not know what her expectations were and neither did the trade union.

194. Again, that failed to respond to the specific points in the Claimant's grievance or in her prior correspondence. The assertion that he did not know the Claimant's expectations was thoroughly disingenuous. They were clearly set out in her grievance, where she had also asked to be told if any further information was needed and expressed her preference to communicate by email and explained the reason for this.

Mr Harlow's role

195. In around October 2021, when the Claimant relayed her dissatisfaction with the nine point plan, Mr Kaplan had informed her that he was escalating the matter to Mr Harlow. From then it was Mr Harlow who had provided her union representation.

196. However despite purporting to represent her, unbeknown to the Claimant, in his communications with Mr Lawrance Mr Harlow was far from being supportive of her. This started at least by 12 February 2021 when an exchange of texts between him and Mr Lawrance included the following:

> Mr Lawrance: "… I will get Dave and Fliss to write back to you ref Lorraine." [**351**]
>
> Mr Harlow: "Thanks. I'm tearing my hair out with her. It's impossible to help people when they don't know what they want, or what they want me to do." [**351**]

197. The comment that the Claimant did not know what she wanted is surprising given that the specific request for responses and suggested measures set out in the Claimant's grievance. The proper course was instead for him to emphasise that the Claimant's central request was to have a full written response to her grievance and to the questions she had raised within it.

198. There was then the following exchange on 5 March 2021:

> Mr Lawrance: "… I have advised my Chair to write back to LN via you closing this down with an offer to meet you on her behalf but we need clarity on any expectation …" [**351**]
>
> Mr Harlow: "Yes sorry. It's bullshit. She can't say what she actually wants, I've been trying to keep it canned until schools are back." [**352**]
>
> Mr Lawrance: "Right thanks Ed I will get David to do this …"

199. Rather than pushing back on Mr Lawrance's admission that he was advising Mr Wyatt to close down the grievance, Mr Harlow therefore weighed in with his own criticisms behind the Claimant's back, whilst again failing to press the essential point that the Claimant was looking for a substantive response to her letter. Further, rather than seeking to resolve the matter in the time available before the schools returned, Mr Harlow referred on 5 March 2021 to "trying to keep it canned" until then, without any disagreement from Mr Lawrance. [**351**] He added that once the schools were back he would have more time to find out what the Claimant "wanted to achieve", whereas the Claimant had clear set that out in her grievance.

200. In a subsequent text, on 28 June 2021, after Mr Lawrance relayed that the Claimant had instructed a solicitor, Mr Harlow commented "I'd start the formal sickness absence process one we have an OH report if I were you." Essentially he therefore turned on the member he was supposed to be representing, encouraging the commencement of the formal process which culminated in the Claimant's dismissal. [**354**]

201. In the course of his evidence Mr Lawrance placed considerable blame on the input from the union. He said he had expressed his dissatisfaction with Mr Kaplan for offloading responsibility to Mr Harlow, and that he was also

frustrated with Mr Harlow. His contention in his evidence was that he ignored Mr Harlow's comment when he called the Claimant's grievance "bullshit" and wanted to him to do his job in representing his member. He contended that it was for that reason that despite the views Mr Harlow was expressing to him, he continued to support the approach, as with Mr Wyatt's response to the second grievance on 28 April 2021 [**418**], that if the Claimant could not meet with the Respondent that they meet with Mr Harlow.

202. We do not wholly accept that. It may be that Mr Lawrance was pressing for Mr Harlow to revert with some clarity as to what the Claimant would accept to resolve her grievance other than what she had set out in her grievance letter. That is consistent with Mr Lawrance's assertion on 5 March 2021 that he had advised his Chair to close the grievance down with an offer to meet but wanted clarity as to expectations. However the text messages as a whole paint a picture of Mr Harlow undermining the Claimant, and feeling comfortable with communicating with Mr Lawrance in those terms, and of Mr Lawrance being comfortable telling Mr Harlow amongst other things that he had advised shutting down the grievance, which he must have expected would not be relayed back to the Claimant. Mr Harlow's approach made it easier for Mr Lawrance to pursue the strategy of shutting down the Claimant's grievance and not providing the Claimant with a substantive response engaging withing the measures that she had asked to be implemented. However it remained Mr Lawrance's decision, in conjunction with Mr Wyatt, to do so. Given the lack of constructive input from Mr Harlow, it was plainly all the more important to take up the Claimant's request of communicating in writing. Instead he chose to close down the grievance and propose a way forward of meeting with Mr Harlow who he knew regarded the Claimant's complaint as "bullshit".

Presentation of Claim

203. The Claimant presented her claim on 19 August 2021, having made an ACAS notification on 10 June 2021 and the ACAS certificate having been issued on 22 July 2021 [**2,3**].

Reduction and cessation of pay

204. The Claimant's pay reduced to half pay from 11 March 2011 [**400**]. Her sick pay ended on 5 October 2021 [**464**].

Second OH report

205. An OH report of 1 March 2022 [**472-476**] recorded that the Claimant believed that her requests to have social distancing and adequate ventilation in the classrooms were either ignored or not taken seriously enough to protect her and that her health and safety was compromised by her manager's failure to provide personalised safety measures for her. The Claimant reported that she had been continually experiencing symptoms of low mood, increasing anxiety, panicky and having panic attacks and had problems with her breathing, nausea and vomiting, suffering with intrusive thoughts, feelings of

wanting to be increasingly more reclusive and episodes of insomnia and inability to obtain restorative sleep. The report concluded that the Claimant was not currently fit for work and nor could it accurately be predicted for how long she would be off work sick. When she was fit to work "at a guess" she would need to work in a room that was large enough so that everyone could socially distance, where there was proper ventilation and a window could be opened and wear students were requested to wear mask. It was also noted that she may be disabled within the meaning of the Equality Act.

Third OH report

206. A further OH report of 9 November 2022 concluded that a successful return to work, with or without adjustments, was unlikely until her concerns were addressed or the outcome of the tribunal proceedings was known and that she was likely to be considered a disabled person [**607-608**]

Sickness management process and dismissal

207. By letter dated 29 April 2022 from Geoff Mitchell (HR Consultant) the Claimant was invited to attend an informal review meeting under the Colleges Sickness Absence Management Policy ("the Absence Policy") [**516-517**]. The letter stated that the College had attempted to engage with the Claimant but that she had not been prepared to meet with the College to discuss this and that her union representatives had been unable to provide insight on what further measures could be adopted. He indicated that part of the meeting would be to discuss the adjustments and safety measures that could be made to the workplace to facilitate her return to work, and suggested that the measures in Ms Westray's 9 October 2020 email as a starting point.

208. The Claimant replied by letter dated 3 May 2022 [**518-519**]. She explained that she was unable to attend due to ill health and cross-referred to the second OH report. By way of explanation for not having met with her managers during the process after going off sick, she explained that:

> "Throughout my absence, I have felt so undermined, stressed and ignored by my managers that I felt too emotional for in-person meetings or phone calls and better able to express myself in writing, without the humiliation of crying when talking to managers. I have tried to keep the lines of communication open and have always been willing to engage in email contact." [**519**]

209. She commented that since August 2020 she had been "virtually begging" her managers to address her request for support and additional Covid protective measures in consideration of her increased risk due to age. She attached her IRA and 7 letters evidencing this including her letters of 25 September 2020, 29 October 2020, 10 February 2021, 24 February 2021 and 1 March 2021 [**519**].

210. The Claimant was invited to a Stage 2 meeting under the Absence policy by letter dated 11 July 2022. She responded requesting a reply to her letter of 3 May 2022. It appears that there was further such correspondence including a letter dated 29 November 2022 inviting her to a sickness absence management procedure absence hearing. She submitted written representations on 13 December 2022 rehearing the history [**609-617**]. She was ultimately dismissed on 3 February 2023.

IRAs and covid related adjustments for other members of staff

211. Although the Claimant was the only member of staff who was aged over 70, in total there were about 20 or 25 members of staff who were either themselves clinically vulnerable or associated with someone who was such as by reason of living with them. The Respondent did not keep a central record of who fell within that category or who had completed an IRA. Any IRAs completed were retained by the line manager responsible for the member of staff concerned. Nor was there a general requirement for all staff in that category to complete an IRA. However staff could take up the option of completing an IRA if they wished to do so. As set out above, having initially sent out the IRA in June 2020, the offer for staff to complete this was set out set out in the staff bulletin of 7 September 2020.

212. In some cases requested measures were put in place simply by way of acceding to a request without completing an IRA. That was the case in a number of cases involving putting up a Perspex screen. The HR officer was provided with a Perspex screen around her desk because she lived with her parents who were extremely clinically vulnerable. A Perspex screen was also put in front of the reception area where there was a member of staff whose son was extremely clinically vulnerable, and in front of the coffee shop in the canteen area. In each of these cases there was no IRA completed; it was simply a matter of acceding to the request. Similarly a member of the teaching staff whose partner was extremely clinically vulnerable requested and was provided with a Perspex screen for their desk in the classroom. No IRA was produced. Ms Westray explained that the teacher in question has since left and the manager did not have a copy of it. However it may also be that as in the other cases the adjustment was made without completing an IRA. Consistent with the Respondent's practice it would be for the member of staff to choose proactively complete an IRA if they wished to do so.

213. In an email of 8 July 2020 the Claimant had also requested a screen between her desk and that of another member of staff in the Humanities office [**S47-48**]. She reiterated the request in a further email on the same day to Ms Iosif, asking for confirmation that it had been received. Ms Iosif had already forwarded the request to Lee Pedder [**S47**] and she responded to the Claimant's second email confirming that she had done so. However it was not actioned. Nor was it followed up by the Claimant. So far as concerns the request for a screen, the Respondent position was that it moved to teachers basing themselves in classrooms rather than the staff room. As to the visor, ultimately the Claimant brought in her own mask. That does not however fully explain the failure to provide the Claimant with a response. Whilst it was

no doubt an oversight, that it occurred was also consistent with a failure to act in a manner such as might be expected if taking on board and being sensitive to the Claimant's vulnerability given her age.

214. Mr Lawrance also gave evidence as to a further instance where later in the academic year a colleague with underlying liver damage was allowed to work from home, information having been received from his GP. However there was no documentation in relation to that case before us. It was not clear on the evidence whether he would have been classed as extremely clinically vulnerable, which would depend on what information was submitted from his GP [**S11**].

215. There were very few cases in which a Covid IRA was completed. The Respondent produced evidence of only three instances of this on a covid specific IRA form, one from September 2020 (using the same form as completed by the Claimant) and one in November 2020, which related to a pregnant employee (and included within the clinically vulnerable category by reason of this) and used the updated form. We were also shown a later example relating to another pregnant employee, who completed a form specifically developed by way of a pregnancy risk assessment.

216. In the first of these the member of staff identified the risk factors and risk rating but did not suggest any specific adjustments, and nor were we informed whether any were made. Ms Iosif forwarded it to Ms Westray on 15 September 2020, asking whether she should forwarded it to John Mansfield or just keep a copy herself. That suggests that she was still feeling her way as to the practice to be followed, since in relation to the Claimant she did copy Mr Mansfield.

217. In relation to IRA completed in November 2020 by the pregnant member of staff, it was recorded that no additional controls or arrangements were required at that time, but that she would avoid busy/ peak times in the public areas of the College and that there was a need to ensure activities such as college evacuation drills were planned and communicated so that avoidance measures could be put in place [**S14**].

218. By the time of the IRA for the pregnant member of staff in March 2021 there was a new form for pregnant staff and which was not Covid specific. This expressly included additional columns for actions to be taken by managers and by when. The column relating to action by the manager was completed by the manager (not Ms Iosif), in some instances recording what action had been taken and in others raising relevant questions as to whether action could be taken. One instance was asking whether, if public transport was being used, the staff member's start and finish time could be changed to avoid rush hour. Consistently with this, one of the adjustments made for a pregnant member of staff was that she was permitted to come in later and leave earlier in order to avoid congestion on transport and to take a couple of lessons from home so as to facilitate a shorter day.

RELEVANT LEGAL PRINCIPLES

Relevant legislative provisions as to indirect discrimination

219. Section 5 EqA provides that:

> "(1) In relation to the protected characteristic of age—
> (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
> (b) a reference to persons who share a protected characteristic is a reference to persons of the same age group.
> (2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."

220. It is a matter for the Claimant to identify the age group upon which she relies. In this case that is put as being those of 70 or over (though Mr Peacock confirmed that no point is taken on any distinction between that and those of over 70).

221. Section 19(1),(2) EqA provides:

> "(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
> (c) it puts, or would put, B at that disadvantage, and
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim."

222. Section 23(1) EqA provides that:

> "On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case."

223. In relation to the burden of proof, s.136 EqA provides, so far as material:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

224. In relation to the first three elements of the s.19 test (and the existence of the PCP) the burden of proof rests on the Claimant. If established the burden shifts to the Respondent to show the PCP was a proportionate means of achieving a legitimate aim.

PCP

225. The EHRC Employment code provides that:

> "4.5 The phrase 'provision, criterion or practice' is not defined by the Act but it should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. A provision, criterion or practice may also include … a 'one-off' or discretionary decision.
> …
> 4.6 The provision, criterion or practice must be applied to everyone in the relevant group, whether or not they have the protected characteristic in question. On the face of it, the provision, criterion or practice must be neutral. …"

226. The assertion that a one-off decision may suffice requires qualification. In **Ishola v Transport for London** [2020] ICR 1204 (a copy of which we provided to the parties) the Court of Appeal rejected a submission that all one off acts of unfair treatment could be a PCP. Simler LJ explained that:

> "35. The words "provision, criterion or practice" are not terms of art, but are ordinary English words. I accept that they are broad and overlapping, and in light of the object of the legislation, not to be narrowly construed or unjustifiably limited in their application. I also bear in mind the statement in the statutory code of practice that the phrase PCP should be construed widely. However, it is significant that Parliament chose to define claims based on reasonable adjustment and indirect discrimination by reference to these particular words, and did not use the words "act" or "decision" in addition or instead. …. If something is simply done once without more, it is difficult to see on what basis it can be said to be "done in practice". It is just done; and the words "in practice" add nothing.
>
> 36. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee. The PCP serves a similar function in the context of indirect discrimination, where particular disadvantage is suffered by some and not others because of an employer's PCP. In both cases, the act of discrimination that must be justified is not the disadvantage which a claimant suffers (or adopting Mr Jones' approach, the effect or impact) but the practice, process, rule (or other PCP) under, by or in consequence of which the disadvantageous act is done. To test

whether the PCP is discriminatory or not it must be capable of being applied to others because the comparison of disadvantage caused by it has to be made by reference to a comparator to whom the alleged PCP would also apply. I accept of course … that the comparator can be a hypothetical comparator to whom the alleged PCP could or would apply.

37. In my judgment, however widely and purposively the concept of a PCP is to be interpreted, it does not apply to every act of unfair treatment of a particular employee. That is not the mischief which the concept of indirect discrimination and the duty to make reasonable adjustments are intended to address. If an employer unfairly treats an employee by an act or decision and neither direct discrimination nor disability-related discrimination is made out because the act or decision was not done/made by reason of disability or other relevant ground, it is artificial and wrong to seek to convert them by a process of abstraction into the application of a discriminatory PCP.

38. In context, and having regard to the function and purpose of the PCP in the Equality Act 2010, all three words carry the connotation of a state of affairs (whether framed positively or negatively and however informal) indicating how similar cases are generally treated or how a similar case would be treated if it occurred again. It seems to me that "practice" here connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises. … although a one-off decision or act can be a practice, it is not necessarily one."

39. … in the case of a one-off decision in an individual case where there is nothing to indicate that the decision would apply in future, it seems to me the position is different. It is in that sense that Langstaff J (President) referred to "practice" as having something of the element of repetition about it. In the ***Nottingham*** case [2013] Eq LR4 in contrast to ***Starmer***, the PCP relied on was the application of the employer's disciplinary process … There was nothing to suggest the employer made a practice of holding disciplinary hearings in that unfair way. This was a one-off application of the disciplinary process to an individual's case and by inference, there was nothing to indicate that a hypothetical comparator would (in future) be treated in the same wrong and unfair way."
(Our emphasis)

227. In ***Ishola*** the issue arose in the context of a disability discrimination case relating to failure to make reasonable adjustments. However an element of the claim still required the identification of a PCP. The claimant had been dismissed on grounds of medical incapacity following a long period of sick leave. He contended that the employer applied a "practice" of requiring him

to return to work without concluded a proper and fair investigation into previous grievances he had raised. The EAT concluded that the ET had been entitled to find that the particular timing and circumstances of the claimant's grievance explained why it had not been investigated before dismissal, and that it was therefore a one-off decision in relation to the particular employee rather than a state of affairs indicating how similar cases would generally be treated if it occurred again.

228. As the reasoning in ***Ishola*** makes clear it also applies to indirect discrimination claims. As Swift J put it, in the context of an indirect discrimination claim in ***Gan Menachem Hendon Ltd v De Groen*** [2019] ICR 1023 (EAT) at [60]

> "… while it is possible for a provision, criterion or practice to emerge from evidence of what happened on a single occasion, there must be either direct evidence that what happened was indicative of a practice of more general application, or some evidence from which the existence of such a practice can be inferred. What is relied on must have what Langstaff J referred to as "something of the element of repetition about it"

229. In so far as the Claimant relies on the specific aspects of the way she was treated in relation to her own situation, we should consider whether, considering all the circumstances, it is to be inferred, or there is direct evidence, that this is indicative of the way things are or would generally be done.

Comparative and "particular" disadvantage

230. So far as concerns comparative disadvantage, as explained in **Essop v Home Office** [2017] 1 WLR 1343 (SC) at [41]:

> "41. Consistently with these observations, the Statutory Code of Practice (2011) , prepared by the Equality and Human Rights Commission under section 14 of the Equality Act 2006 , at para 4.18, advises that:
>
> > "In general, the pool should consist of the group which the provision, criterion or practice affects (or would affect) either positively or negatively, while excluding workers who are not affected by it, either positively or negatively."
>
> In other words, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on the group with the relevant protected characteristic and its impact upon the group without it. This makes sense. It also matches the language of section 19(2)(b) which requires that "it"—ie the PCP in question—puts or would put persons with whom B shares the characteristic at a particular disadvantage compared with persons with whom B does not share it. There is no warrant for including only some of the persons affected by the PCP for comparison purposes. In

general, therefore, identifying the PCP will also identify the pool for comparison."

231. As further explained in ***Essop*** the need to justify a PCP arises where, as a matter of causation, it puts those sharing a protected characteristic (and puts the Claimant) at a "particular disadvantage" compared to those who do not share the protected characteristic. There is no additional requirement to show that age is the reason for the treatment.

232. At to the meaning of "particular disadvantage", the following further principles are relevant:

232.1 The individual disadvantage must correspond to the disadvantage suffered by the group, as indicated by the requirement of being put to "that disadvantage": ***Ryan v South Western Ambulance Service NHS Trust*** [2021] ICR 555 (EAT) at [55(ii), (v)].

232.2 The disadvantage does not need to be shown to be by reason of age. It is sufficient that there is a causative link between the PCP and the group or individual disadvantage: ***Ryan*** at [31, 55(iii),(iv)]. However if the reason for the disadvantage is known that may be material in establishing the requisite evidential link (***Ryan*** at [55(vii)]).

232.3 There is no requirement that the PCP puts every member of the group sharing the protected characteristic at a disadvantage. However as explained in ***Ryan*** at [56]:

> "(i) In general terms, if the disadvantage is expressed as a likelihood of a particular outcome in respect of a particular group, then any person in that group suffers that disadvantage. In other words, a disadvantage expressed as a likelihood of an outcome will generally affect more people. (See para 31 of ***Essop*** and also the end of para 32.)
> (ii) If the disadvantage is framed in terms of achievement of a particular event, or of an event occurring, only those who actually achieve that event or in respect of whom the event occurs will suffer the same disadvantage."

232.4 The phrase "particular disadvantage" does not connote a particular level or threshold of disadvantage: ***Pendleton v Derbyshire County Council*** [2016] IRLR 580 (EAT) at [31]. Similar to the meaning of detriment, it has a wide meaning, which does not require any physical or economic consequence; it would be sufficient if a reasonable worker would or might feel that they were disadvantaged and that was the worker's genuine view: see eg ***Jesudason v Alder Hey Children's NHS Trust*** [2020] ICR 1226 (CA) at [27,28]; para 4.9 of the ACAS Code.

232.5 It would be sufficient if the practice also placed others in the group at a disadvantage but it, or the consequences, placed those with the protected characteristic at a greater disadvantage or in an additional respect: see eg ***Pendleton*** at [42].

232.6 It is sufficient if the measure "applies or would apply" also to persons with whom the claimant does not share the protected characteristic. It can

therefore cover where the practice would be applied in future: see ***Pendleton*** at [26].

233. We also consider that comparative advantage might in principle be established on the basis of limits to protections even though those protective steps are beneficial. In relation to this we have considered the decision of the EAT in ***Cowie v Scottish Fire and Rescue Service*** [2022] IRLR 913, a copy of which was provided to the parties. There the claimant's complaint related to a requirement to use up time off in lieu of leave (TOIL) when the claimant sought to access a right to special leave to which the claimants were only entitled by reason of their disability. Special leave was a benefit which only arose by reason of the disability. The EAT upheld the ET's analysis that the requirement to use up TOIL was not separable from that benefit because it only arose when accessing special leave. Therefore because this was beneficial it was neither less favourable treatment for the purposes of a claim of discrimination arising from disability, nor a particular disadvantage for the purposes of indirect discrimination. It was not sufficient that the benefit was less beneficial than it could have been. However the crucial element of the analysis was that it was that the restriction was tied to a benefit to which there was only access by reason of being disabled. The issue did not arise therefore of treatment being less beneficial for the comparator group.

234. In principle if the measures, or limits to them, put in place provide less adequate protection for those not sharing the relevant protected characteristic that is capable of amounting to a comparative disadvantage.

Proportionality

235. The proportionality defence involves consideration of the following elements:

235.1 Whether the PCP is in pursuance of a legitimate aim sufficiently important to justify limiting a fundamental right?

235.2 Is the PCP rationally connected to that aim?

235.3 Are the means no more than necessary to accomplish the legitimate aim; could a less intrusive/ discriminatory approach have been used?

235.4 Bearing in mind the discriminatory effect (and its consequences), the importance of the aim and the extent to which the measure will contribute to the aim, has a fair balance been struck between the discriminatory effect and the pursuant of the legitimate aim.

236. The burden is on the employer to establish justification. As set out in ***Ryan*** (at [39]) (citing dicta in ***Hardy & Hansons plc v Lax*** [2005] ICR 1565) at [32]):

> "The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working

> practices and business considerations involved, as to whether the proposal is reasonably necessary."

237. As explained in ***The City of Oxford Bus Services Ltd t/a Oxford Bus Company v Harvey*** UKEAT/0171/18/JOJ, 21 December 2018 at [22]

> "(1) Once a finding of a PCP having a disparate and adverse impact on those sharing the relevant protected characteristic has been made, what is required is (at a minimum) a critical evaluation of whether the employer's reasons demonstrated a real need to take the action in question (**Allonby**).
> (2) If there was such a need, there must be consideration of the seriousness of a disparate impact of the PCP on those sharing the relevant protected characteristic, including the complainant and an evaluation of whether the former was sufficient to outweigh the latter (**Allonby**, **Homer**).
> (3) In thus performing the required balancing exercise, the ET must assess not only the needs of the employer but also the discriminatory effect on those who share the relevant protected characteristic. Specifically, proportionality requires a balancing exercise with the importance of the legitimate aim being weighed against the discriminatory effect of the treatment. To be proportionate, a measure must be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so (**Homer**).
> (4) The caveat imported by the word "reasonably" allows that an employer is not required to prove there was no other way of achieving its objectives (**Hardys**). On the other hand, the test is something more than the range of reasonable responses (again see **Hardys**)."

238. As explained in ***Oxford Bus Company*** (at 23,24), there is a distinction between justifying the application of a rule to a particular individual, and justifying the rule in the particular circumstances of the case. If the PCP results in unjustified discrimination because the discriminatory effect is disproportionate to the aim, then all adversely effected must be treated equally.

239. It may however be relevant to consider whether there are or could have been exceptions to a PCP. If exceptions or adjustments could be made to protect the position of those adversely impacted that may be highly material to whether there are less discriminatory means of achieving a legitimate aim: see eg ***G v Head Teacher and Governors of St Gregory's Catholic Schene College*** [2011] EWHC 1452 (blanket nature of a school's uniform policy preventing boys from wearing their hair in cornrows was not proportionate as the school could have allowed for exceptions to accommodate a genuine cultural or family practice). That would not be a matter however of only looking at exceptions for the Claimant but of looking at how the policy applied more broadly including if other staff over 70 were to have been employed.

Time Limits

240. As to time, limits, s.123 EqA provides, so far as material:

> "(1) … proceedings … may not be brought after the end of—
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
> (b) such other period as the employment tribunal thinks just and equitable.
> (3) For the purposes of this section—
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
> (a) when P does an act inconsistent with doing it, or
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

241. In ***Galilee v Commissioner of Police of the Metropolis*** [2018] ICR 634 the EAT held (at [109(a)]), that amendments to pleadings in the Tribunal which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend (or it may be when the application was made), rather than when the Claim Form was first presented. However that was in the context of an amendment to add a wholly new claim based on new facts; in that case by adding claims of disability discrimination, harassment and victimisation to an unfair dismissal complaint. On behalf of the Respondent Mr Peacock accepted that in relation to the matters introduced by way of amendment, as with the matters originally pleaded, if the act occurred or continued on or after 11 March 2021 (three months before the ACAS notification) they were within the primary time limit.

242. As to the approach to the just and equitable test for extension of time:

242.1 The burden rests on the Claimant to persuade the tribunal that it is just and equitable to extend time. There is no presumption in favour of granting an extension but nor is there any requirement for exceptional circumstances. All that is required is that it is just and equitable in all the circumstances that the extension be granted.

242.2 As re-emphasised in **Adedeji v University Hospitals Birmingham** [2021] EWCA Civ 23, at para 37, the tribunal has "a very broad general discretion" and should "assess all the factors in the

particular case which it considers relevant to whether it is just and equitable to extend time".

242.3 As explained in ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICS 1194 (CA) (cited in **Adedeji** at para 38:

> "factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

242.4 In ***Miller and others v The Ministry of Justice and others*** UKEAT/0003/15/LA, 15 March 2016, the EAT distinguished between forensic prejudice which is caused by such things as fading memories, loss of documents and losing touch with witnesses and the prejudice which arises from loss of a limitation defence. The EAT made clear that there is no necessary requirement for forensic prejudice. If there is forensic prejudice that may be crucial but the converse does not necessarily follow.

242.5 Ignorance of rights is a relevant (though not necessarily determinative) consideration but it is necessary to consider whether the ignorance is reasonable, which may involve consideration whether the claimant has or should have made enquiries, undertaken any research and/or sought advice.

242.6 It may be also relevant to take into account the claimant's prospects of success and evidence necessary to establish or defend the claim, but it is for the tribunal to determine what weight to give this in all the circumstances.

242.7 In **Adedeji** (at para 24) Underhill LJ commented that it was unexceptionable for the ET to direct itself that there was a public interest in the enforcement of time limits.

Remedy

243. In relation to remedy, s.124 EqA provides, so far as material at this stage:

> "(2) The tribunal may—
> (a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;
> (b) order the respondent to pay compensation to the complainant;
> (c) make an appropriate recommendation.
> (3) An appropriate recommendation is a recommendation that within a specified period the respondent takes specified steps for the purpose of obviating or reducing the adverse effect on the complainant of any matter to which the proceedings relate.
> (4) Subsection (5) applies if the tribunal—
> (a) finds that a contravention is established by virtue of section 19, but

> (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the complainant.
>
> (5) It must not make an order under subsection (2)(b) unless it first considers whether to act under subsection (2)(a) or (c)."

244. Accordingly if indirect discrimination is made out, the tribunal must first consider whether to make a recommendation or a declaration unless it is satisfied that the PCP was not applied with the intention of discriminating against the complainant. However even if there was no intention to discrimination, this does not prevent an award of compensation being made or even give one type of remedy a priority over the other: **Wisbey v Commissioner of London Police** [2021] IRLR 691 (CA). Indeed the Court of Appeal noted (at [40)] that if loss or damage has been sustained as a consequence of the indirect discrimination, it is to be expected that compensation will be awarded and that it will be adequate to compensate for the loss and damage suffered and proportionate to it.

245. We return below to the approach to where indirect discrimination is intentional.

ACAS Code

246. In relation to adjustments in awards due to non-compliance with an ACAS Code, including the ACAS Code, s.207A TULRCA provides:

> "(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
>
> (b) the employer has failed to comply with that Code in relation to that matter, and
>
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".

247. The issue of an ACAS uplift therefore arises where there has been both non-compliance with a relevant Code and the failure is unreasonable. In ***Sir Benjamin Slade v Biggs*** [2022] IRLR 216 (EAT), at [77], Griffiths J suggested the following four stage approach that might be applied where those conditions are met:

> "i) Is the case such as to make it just and equitable to award any ACAS uplift?
>
> ii) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?
>
> Any uplift must reflect "all the circumstances", including the seriousness and/or motivation for the breach, which the ET will be able to assess against the usual range of cases using its expertise and experience as

a specialist tribunal. It is not necessary to apply, in addition to the question of seriousness, a test of exceptionality.
iii) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings; and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage of those awards in order to avoid double-counting? …
iv) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made? …"

248. Further guidance was set out as to the third and fourth stages which are not material for the present the present judgment.

DISCUSSION

Para 3 of the list of issues

249. The PCPs ultimately relied upon were set out at paragraphs 1 and 2 of the list of issues, and the table of sub-issues, namely:
    249.1 "The Respondent's Covid safety measures applied at the College from 26 August 2020 (the start of the 2020/21 academic year), consisting of generalised Covid safety measures applied to all staff irrespective of age", being generalised "in the sense that they applied to all staff and did not take (or largely did not take) increased vulnerability due to age into account".
    249.2 Relying on the generalised measures without taking adequate steps to put in place additional measures (a) related to age and/or (b) generally, or give adequate consideration to this and not taking increased vulnerability due to age into account.
    249.3 The alleged sub-practices set out in the separate table.

250. Before turning to consider our conclusions in relation to this, we first address in turn the matters set out in paragraph 3 of the list of issues which the Claimant relied upon as individually or cumulatively evidencing the alleged PCPs.

3.1 Omitting from the general risk assessment (as originally formulated on 19 August 2020 and in subsequent iterations) any specific reference to vulnerability due to age, or having taken it into account, or any measures to be taken in relation to this. (Amended Particulars of Claim ("APOC") §3.2)

251. The GRA, whether as originally formulated or subsequently, did not include any express reference to vulnerability due to age. We do not however consider that this of itself establishes that vulnerability due to age was not taken into account. The GRA did make reference to those who are clinically vulnerable, and made the point that application of the full measures in the GRA would significantly mitigate the risks to all staff including the clinically vulnerable and that those in the most at risk categories should take particular care. We accept that this evidences that, as is to be expected, some

consideration had been given to the fact that there were categories of people at higher risk and that this had been taken out in considering the impact of the general policies. Whilst the GRA set out measures that were generally applicable, it did not of itself indicate that other measures could not be taken in individual circumstances either in response to requests or as a result of the IRA process.

252. Until it was updated in November 2020, the IRA did contain an indication of who fell within the category of being clinically vulnerable. It set out two categories and did not include those over 70 even though it was accepted it evidence that those over 70 did fall within that category. Although age was identified as a risk factor together with gender and ethnic background, that did not equate to recognising the risk was such as to be regarded as clinically vulnerable. We regard the omission in the IRA as some evidence of a lack of appreciation or alertness to or focus on the need to treat those over 70 as in a similar category as others who were recognised as being clinically vulnerable. Whilst it is one part of the picture we do not regard it by itself as determinative.

253. We take into account that the IRA template was supplied by the local authority, albeit that it was available to the College to amend it, and indeed Mr Lawrance stated that he had been working on an IRA template [**S53**] Ms Iosif's message of 24 August 2020 stating that the Claimant had been left off the enrolment rota is also an instance of a step having been taken having regard to concerns which the Claimant had expressed informally relating to her age.

254. We also take into account our findings as to the lack of proactivity in drawing attention to and encouraging the use of the IRA, both generally and in relation to the Claimant, and the passive approach adopted by Mr Iosif even when providing the Claimant with the IRA, with no offer to do any more than pass it on when the Claimant had completed it.

3.2 Failing to respond to the Claimant's request to Ms Iosif for a meeting made in her email of 17 September 2020 [251] (APOC §4.4).

255. The Claimant concluded her email of 17 September 2020 by stating that she would like to meet with Ms Iosif soon to discuss the issues she had raised. Ms Iosif's response failed to answer this. We recognise that there is a danger in attaching too much weight to the precise wording of the response in one email, sent shortly after receipt of the Claimant's email. We also take into account that the Claimant was encouraged to complete the IRA. As against this we note that:
    255.1 The Claimant was plainly seeking assistance with the process and wanted to discuss this with Mr Iosif. That was made expressly clear in her comment that she did not feel qualified to fill thein the third column relating to additional controls or arrangements as she did not know what health and safety measures were available.
    255.2 This came against the context that when the form had been sent to the Claimant Mr Iosif had simply asked her to complete it and send it

back and that she would pass it on. That presented Ms Iosif as simply being a go between rather than actively engaging with and discussing the risks with the Claimant and supporting her in completing the assessment. The failure to take up the Claimant's request for a meeting was consistent with that approach. As noted above, it strongly indicates that there had been no training or process set down as to the approach to be applied in relation to completing IRAs. It also came against the context that the Claimant had twice informally made clear her concerns as to her risk related to her age, and that had also been made clear when asking if she was eligible to complete an IRA.

255.3 In response to the Claimant's request to put a cap of 20 on the total number of students in the group Ms Iosif stated that they could not cap enrolment and declined to answer to request to confirm that there would be a limit to one student per desk other than to assert that F28 was a large room. These options were therefore rejected without even discussing with the Claimant or awaiting the IRA form. Whilst it might be said that not limiting enrolment did not rule out other steps to limit the class size, such as a further split, there was no indication that any such steps were a possibility.

255.4 Ms Iosif's reply that the Claimant should still fil in the IRA "if you feel you are at risk" essentially put the onus on the Claimant, rather than conveying an understanding and acknowledgement that as a person over 70 she was in an at risk category and offering to discuss with her the risks in the light of this.

3.3 Moving the Claimant from teaching in Room F28 to Room F5 (a smaller room with large furniture and less scope for distancing) despite having been assured that her classroom would not be changed, and without prior notice and despite the Claimant having previously raised concerns about her safety at work, twice informally in Ms Iosif's office in August 2020 and in writing on 28 August 2020, 17 September 2020 and 20 September 2020 (APOC §§4.2 to 4.6).

256. The Claimant was indeed moved from teaching in Room F28 to F5, despite the assurance that she would not be moved and despite it being a smaller room with less scope for distancing.

257. We accept that Ms Iosif told Ms Westray that she had overlooked that she had told the Claimant that she would not move her, and that, as Ms Iosif explained in her email to the Claimant of 22 September 2020, the change was made to accommodate a larger group. However the fact this was overlooked was indicative of a failure to focus on identifying the steps required to protect the Claimant given her greater vulnerability associated with her age. It did not stand in isolation. It was consistent with the lack of a proactive response, or suggestion of completing an IRA when the Claimant had previously raised her concerns, the absence of any offer to discuss the IRA either when providing the form in response to the Claimant's request or when this was specifically requested, and the out of hand rejection of capping numbers before even discussing the matter. Further it was done despite having received the Claimant's IRA and despite this have been sent

against the context of the concerns the Claimant raised as to her own safety in the context of a pandemic.

258. That was compounded by Ms Iosif's response which, without acknowledging the Claimant's IRA, or giving any assurance about discussing the Claimant's safety needs, simply asserted that the move was to accommodate a larger group and apologised for the "inconvenience". The Claimant's requests relating to rooming were clearly expressed to be matters of safety rather than convenience, whereas Mr Iosif's response. Given the absence of any assurance in the email as to taking on board those concerns or even acknowledging the IRA, we do not consider that can be dismissed as merely a poor turn of phrase.

3.4 In relation to the Individual Risk Assessment ("IRA") supplied by the Claimant on 20 September 2020 [252-257]:

(a) Failing to acknowledge the Claimant's IRA or discuss it with the Claimant (APOC §1.3), and

(b) Not acting upon or implementing the measures set out in the IRA (APOC §3.5, 4.1) and

(c) Failing to offer advice from a qualified person to the Claimant in order to complete that risk assessment. (The Respondent contends that it was the Respondent that asked staff to complete a Covid individual risk assessment, which sought information on the Covid risk factors identified by the Government? (AGOR §19) and that on 20 September 2020) Ms Iosif specifically encouraged the Claimant to complete an individual risk assessment by her line manager, Ms Iosif (AGOR §24))

259. None of the responses, including the 9 point plan, made any reference to the IRA. None of the measures requested by the claimant were implemented or offered and nor was the Claimant provided with any explanation for failing to do so. Ms Westray did schedule a meeting with the Claimant for 28 September 2020 with a view to discussing the concerns raised in her letter of 25 September 2020 and made subsequent attempts to meet or discuss with her. Communication was made more difficult because the Claimant was unable to meet or speak directly with Ms Iosif or Ms Westray. Equally however that should not have prevented Ms Westray from expressly acknowledging the IRA, engaging with and responding in writing to the issues and concerns which the Claimant raised.

260. As to offering advice from a qualified person, we address that below in addressing the alleged PCP in relation to it.

3.5 Failing (by Ms Iosif, Mr Lawrance and Ms Westray) to provide the Claimant with a response to her email to them of 25 September 2020 (APOC §4.7). (The Respondent contends that following receipt of the letter Ms Westray invited the Claimant and Ms Iosif to a meeting on Monday 28 September 2020 (the next working day) to discuss the content of the letter but that the Claimant declined to attend and called into work sick (AGOR

§§26,27) and that the matters were discussed with the Claimant's union representative (on her behalf) at a meeting on 9 October 2020 (AGOR 28).)

261. Again, this is addressed in our findings of fact above. We do not accept that the 9 point plan constituted an adequate response to the Claimant's letter of 25 September 2020 or the IRA. It did not engage with the measures suggested or explain why they were rejected. In very large part it was a rehash of the existing guidance and measures without addressing the Claimant's specific concerns and the measures proposed. Although a cap was accepted in principle, what that would be was never confirmed despite the express request for clarification, and with no mention of the Claimant's proposals or the reason for rejecting it. It is not a sufficient answer to say that the numbers in the class were low at the time. The Claimant's concern was that they would rise and there was no assurance of further measures to cover that situation.

262. The agreement to move "back to the original room" also wholly overlooked or ignored the concern as to G26. The reference to students facing the front and sitting beside one another may implicitly have been a rejection of the request for one student per desk, but again that was not specifically addressed and the reason for rejecting it was not explained. Facing the front might be relevant to whether infection would be passed between students, but did not resolve the concern as to the risk to the Claimant from potential overcrowding when the numbers grew, taken together with her concerns as to ventilation.

263. That is to no say that it was in any way impermissible to draw on the guidance and measures within the GRA as part of setting out a plan as to how the Claimant would be protected on her return. But to do so without addressing the measures the Claimant had requested and her specific concerns as set out in the letter of 25 September and the IRA, gave the overall impression of a list cobbled together largely from general guidance without being framed around and giving due consideration to the Claimant's individual circumstances, concerns and vulnerability in the light of the matters she had raised, and the measures she had proposed.

264. The paucity of the response may have been influenced by the impression that Mr Kaplan was going along with and agreeing it. However the Claimant having taken the time to set out her concerns in some detail, and being off sick for reasons related to her concerns, it was obviously important that the response specifically address them. Further, even if Mr Kaplan's involvement encouraged Ms Westray and Ms Iosif to believe that the approach taken was acceptable, the Claimant's response of 29 October made the position clear yet there was still no substantive response even to the specific requests made for further information and explanation.

3.6 Failing, including in Ms Westray's email of 9 October 2020 [295], to draw up a formal detailed return to work ("RTW") plan with measures based on the Claimant's individual risk assessment (APOC §4.8, 4.10,4.11). In particular in relation to the email of 9 October 2020:

(a) Did the proposed measures consist of general guidelines applicable to all staff?

265. This is addressed above. The only exceptions specific to the Claimant were moving back to the large classroom (which ignored the other points raised in relation to that room and the concerns as to G26) and possibly the suggestion that the group could be capped, though the cap was never confirmed being specifically requested on 29 October 2020.

(b) Were the proposals not specific to the Claimant's needs as an older teacher?

266. The relevance of the Claimant being an older teacher was her heightened vulnerability to serious harm if she caught Covid, and also greater need of reassurance as to the sufficiency of steps put in place having regard to her individual circumstances. The steps proposed could not meet that objective without engaging with the measures requested by the Claimant and her explanation of the need for them. There was a need for an explanation of what consideration had been given to them in the light of her circumstances, and if not accepted why they were rejected or not feasible or had already been implemented. Instead there was nothing even to acknowledge the particular points that the Claimant had raised.

267. We are not satisfied that consideration had been given to the particular concerns that the Claimant had raised. The failure to mention G26 at all strongly indicates that was not the case. Further, due consideration would require providing a reasoned response to the Claimant's requests so that her comments on this could be taken into account. That would be the obvious course had there been specific consideration of the issues the Claimant had raised. Without providing a reasoned response and considering any comments the Claimant provided in response to this it could not be said that there had been adequate consideration of what was required.

(c) Did they lack sufficient specificity regarding room arrangements and student group numbers?

268. Yes. This is addressed above.

(d) Did the email fail to address the Claimant's concerns about classroom ventilation?
[The Respondent contends that Mr Mansfield specifically advised the Claimant that the College had an Air Handling Unit (AHU) which drew in fresh air and extracted it back into the atmosphere rather than recycling air and that the Respondent would be monitoring and adjust the filtration and flow rate within the College (AGOR §23).]

269. The email failed to address the Claimant's concerns about classroom ventilation. The previous response from Mr Mansfield as to the AHU preceded the points identified in the Claimant's 25 September letter, including the absence of an opening window in G26 and that it was a small

room that becomes "stuffy and smelly". Nor was there any further response provided by the Respondent after the Claimant expanded on these concerns in her grievance.

(e) Did the email fail to demonstrate that vulnerability related to the Claimant's age had been understood and taken into account?

270. Yes. Fundamentally the email failed to demonstrate that the Claimant's particular circumstances and concerns had been acknowledged and considered. It made no reference to them, and appeared to ignore what the Claimant said, notably in relation to G26. It provided no explanation of why the measures suggested had been rejected or whether they had been considered at all and, if it was the case, why they were not considered necessary.

(f) Did the email indicate that the Claimant's previously stated concerns had not been recognised and involve a failure to put in place a substantive RTW plan with specific measures to reduce the potential risk to the Claimant's health from Covid as an older member of staff?
(The Respondent contends that the email of 9 October 2020 set out an RTW plan which was formulated in the light of the explanation by Mr Kaplan of the Claimant's concerns at the meeting on 9 October 2020 and that the measures were supported by Mr Kaplan, and provided reassurance that the Respondent was acting with relevant guidelines and offered to meet the Claimant to discuss any concerns (AGOR §§28 to 30).)

271. It would be going too far to say that the nine point plan did not include measures to reduce the potential Covid risk to the Claimant. Measures of general application, such as rooms being fogged on a rota basis, were also of benefit to the Claimant. In addition there was the plan to move back to F28, and agreement to the principle of a cap on numbers in the which, though unspecified, was a change from what Ms Iosif had said on 17 September and also a change from the situation in the previous year.

272. However the failure to engage with and respond to the particular concerns and suggested measures expressed by the Claimant, including the failure to engage with the concerns as to ventilation and Room G26, did indicate a failure to understand and take into account the Claimant's concerns. The email did not indicate that the measures were based on or took into consideration the Claimant's IRA (as supplemented by her letter of 25 September 2020), or tailored to her particular circumstances. It failed to show that her suggested measures had been considered and why they had been rejected The impression instead was of cobbling together aspects of the general guidance to give the appearance of an itemised detailed plan without engaging with the Claimant's individual circumstances and her specific concerns or proposed measures to address them. As set out above, or are we satisfied that the IRA and 25 September letter had been properly and fully taken into account.

273. We do not accept that the measures suggested were based on an explanation given by Mr Kaplan of the Claimant's concerns. Ms Westray did not give evidence of anything said by Mr Kaplan to that effect, merely that she contended that he agreed with the measures suggested and that she contended (in her evidence) that she was meeting the Claimant "half-way". We see no reason to infer that Mr Kaplan gave a description of the Claimant's concerns that was materially different to what she had herself written in her 25 September email. There was no reason for him to do so. Nor is it a sufficient answer that there was an offer to meet with the Claimant and for her to raise any concerns. Concerns had already been raised by the Claimant and required a response which engaged specifically with those concerns and suggestions. In any event this was required when the areas of disagreement were further explained in the response of 29 October 2020 it became apparent that the Claimant did not feel able to meet with Ms Westray.

3.7 Failing to reply, or reply in writing, to the Claimant's email of 29 October 2020, sent to Mr Westray, Ms Iosif and Mr Lawrance (and the Claimant's union representatives) [303-305] (APOC §4.11, 4.13). (The Respondent relies on invitations by Ms Westray for the Claimant to attend a meeting when no students were present, a voicemail of 3 November 2020 in response to which the Claimant asked that future communications be via her union representative (Mr Harlow) and a follow up email of 11 November 2020 from Ms Westray to Mr Harlow (AGOR §§32 to 35), and an OH report of 3 December 2020 that the Claimant was not well enough to return to work (APOC §§36, 37).)

274. It is correct that there was no substantive response to the Claimant's email of 29 October 2020. This is addressed in our findings of fact above. Whilst Ms Westray wished to have a discussion with the Claimant, once it was apparent that was not possible, it ought to have been obvious that a substantive response to the Claimant's 29 October 2020 letter was essential, acknowledging and engaging with the issues and suggested measures referred to in that letter and the 25 September letter. Simply asking in general terms for further clarification as to what was required in the detailed plan was unlikely to be helpful given what had already been set out in the 29 October letter. In any event there was a failure to respond to the Claimant even when it was apparent that seeking clarification through Mr Harlow was not bearing fruit, and rather than doing so the issue was passed to Mr Lawrance, whose failings in dealing with the matters are set out in our findings above.

3.8 Failures in dealing with the Claimant's grievance raised on 25 January 2021 (in relation to concerns as to manager's alleged failures to respond to the Claimant's request for support, and failure to implement the Claimant's IRA and drawing up an RTW plan) in the following respects:

(a) Failure to hold a grievance meeting or to offer a meeting with someone who was not subject to the grievance (APOC §4.15, 5.3 to 5.5)

(b) Failure to respond to the grievance other than inviting and/or requiring the Claimant to meet with Marcella Kirby and Ms Westray, despite their being the subject of the grievance (APOC §5.3, 5.4, 5.5).
(c) Failure to conduct an investigation (APOC §4.15).
(The Respondent contends that Mr Lawrance conducted an investigation into the concerns by speaking to Ms Westray and Mr Harlow and concluded that (i) the Respondent had followed the relevant guidelines, rules and regulations and that a RTW plan had been drawn up and approved by the Claimant's union representative and shared with the Claimant and (ii) the Claimant had failed to engage either directly or via her union representative on what additional measures/ support could be provided to support her return to work and (iii) Mr Harlow could not provide any further insight (AGOR §§40-41).)
(d) Failure to provide a substantive decision on the Claimant's grievance or substantive response to the issues or questions raised in the grievance (APOC §§5.2, 5.6).
(The Respondent contends that:
(i) a decision was provided to the Claimant by a letter from Mr Wyatt of 22 February 2021 [391] and that he suggested a meeting with Ms Westray Ms Kirkby and with the Claimant's union representative to ascertain what measures the Claimant wanted the Respondent to adopt but that the Claimant was not prepared to attend a resolution meeting (AGOR §§42-44).
(ii) Mr Lawrance met with Mr Harlow on 23 March 2021 to discuss the Claimant's concerns and the measures that could be implemented to support any RTW but Mr Harlow was not clear what the Claimant's expectations were (AGOR §45).
(e) Not affording the right to appeal (APOC §§5.2, 5.6).
(f) Failure to discuss or act upon the additional protective measures suggested by the Claimant (APOC §3.5).

3.9 Not investigating the Claimant's second grievance raised on 29 March 2021 or permit it to proceed, on the false basis that the Claimant had not raised the issue with her manager, and not replying to the Claimant's response of 5 May 2021 [422-423] taking issue with that contention (APOC §§4.17, 5.5 to 5.12). (The Respondent relies on Mr Wyatt's response of 28 April 2021 [418] and its contention that in a follow up meeting between Mr Lawrance and Mr Harlow, it was stated by Mr Harlow that he had been unable to get the Claimant to engage with him (AGOR §§47-49).)

3.10 By the terms of the response by Mr Lawrance of 24 July 2021 [437-438] to the Claimant's email of 17 July 2021 [434]:
(a) Failing to address the points made in the Claimant's letter of 17 July 2021 or mention the Claimant's grievance (APOC §7.2).
(b) Repeating that the Claimant had "refused to engage" (APOC §7.3).
(c) Claiming that Mr Lawrance did not know what the Claimant's expectations were and nor did the trade union (APOC §7.4).
(d) Thereby avoiding responsibilities in relation to age discrimination and indicating that there was no intention of complying with the grievance procedure (APOC §7.5).

3.11 Falsely accusing the Claimant of having "refused to engage" (by Mr Wyatt in a letter of 22 February 2021 [391] (APOC §5.3, 5.4) and Mr Lawrance in emails of 28 January 2021 [355] and 24 July 2021 [437-438] (APOC §§7.2,7.3)).

275. We have addressed these matters in our findings above. Rather than engage with the grievance Mr Lawrance decided to close it down and Mr Wyatt did so. It was the Respondent that failed to engage, and the allegation that the Claimant did so was wholly unjustified.

Table section B. Other matters relied upon re not giving adequate consideration to additional measures/ not taking age vulnerability into account
B7: Failure to respond to request for meeting on 17.9.20
B8: Being moved without notice on 22.9.20
B9: Not discussing the IRA
B10: Failure to respond to email of 25.9.20
B11: Failure to respond to 29.10.10
B12: Alleged failures in dealing with grievances
B13: Omission of specific reference to age or measures (as above) in relation to it in general risk assessment

276. We have addressed B7 to B12 in our comments on section 3 and in our findings of fact.

PCP

Table A1. Ventilation:
A1.1: Using rooms where windows could not be opened (either due to being sealed or because they could not be reached or where it is said as in F28 there not enough air coming from it). In particular F28 and G26 and the Humanities staff room and/or more generally in the College.

(a) Was this a PCP?

277. We accept that there was a practice of using rooms with windows that did not open. That was the case both with G26 and the large Humanities staff room. At least with G26 it was not an immutable feature of the building, but was a choice. Even if repair of the window was not feasible, there was a partition to another room which could be opened. Indeed that was what was ultimately done on the return to the College in March 2021.

278. The window in F28 did open. The allegation here is in substance of using a room where the windows did not allow sufficient air to come through it. We are not satisfied that the evidence before us makes out that contention. It was not the case, unlike G26, that there was some objective indicator of poor quality air because of the smell in the room and the absence of any opening window at all. When the CO2 monitors were acquired after September 2021 each room was checked (by which time G26 was not being used as a separate room). Mr Mansfield's email of 8 March 2022 referred to an

average count well below the 1500 threshold. Whilst that only referred to an average there was no mention of any rooms being below the threshold. Further the natural air coming through the window was being supplemented by an AHU system which used only fresh air at that time.

279. We return below to the issue as to the significance of the narrow window in the context of our consideration of the alleged PCP relating to testing ventilation quality.

280. There were no other rooms in the College without openable windows. Further, the real issue relates to G26 because the Claimant did not use the large Humanities staff room, and in any event staff were encouraged to base themselves in classrooms rather than the staff room.

281. So far as concerns G26 this was no longer used as a separate room, and in any event no longer used by ESOL, after the end of the 1st term in 2020-2021. The PCP in our view continued to apply until the decision was made not to use G26 as a stand-alone room, which though we were not given the precise date must have been at some point prior to the return in March 2021. That is because of the future looking element of the PCP that it is sufficient if it would cause group or individual disadvantage. However nothing in our view turns on the precise date when the PCP came to an end so far as concerns G26 because the Claimant was not informed of this and did not become aware of it. We return to this when we come to consider the application of time limits.

A1.2: Not undertaking a formal assessment by a person qualified in H&S of ventilation and aerosol transmission in those rooms or more generally.

282. We refer to our findings above in relation to ventilation. We are not satisfied that the Respondent carried out a formal or any assessment of ventilation and aerosol transmission in the rooms used by ESOL or in any other rooms from 2018 when the test was carried out until the CO2 monitors were obtained in or after September 2021. We accept that it was the Respondent's practice, at least until September 2021, not to carry out such an assessment. Checking the air filtration rate did not entail a check on individual rooms; hence the need subsequently recognised to obtain CO2 monitors.

283. The Respondent did arrange for someone to go around opening windows. However that did not assist for G26. On the contrary it underlines the reason for concern as to the lack of an opening window, notwithstanding the AHU.

284. So far as concerns F28 the Claimant had raised her concern that it only had a narrow window high up at the back on 28 August 2020, and reiterated this in her letter of 25 September 2020. F28 was not a room that had been tested in 2018. since then there had been objective factors to point to doubt as to the effectiveness of the AHU unit given that Mr Alexander's observation as to the vent in the Humanities staff room. In any event in the light of the very serious potential risks, particularly to those who were clinically

vulnerable, there was an obvious importance of checking the air quality in those rooms where there was reason to doubt the adequacy of the ventilation. That included where there were concerns such as specifically raised by the Claimant as to there only being a narrow window. It is not a sufficient answer to say that it subsequently turned out that there was sufficient ventilation when it was tested in or after September 2021. That does not address the need for staff, particularly clinically vulnerable staff, to have assurance that they were safe in the midst of a pandemic and all the more so before any vaccine roll out.

AT2. Overcrowding
A2.1: Not limiting classes to one person per desk or otherwise such as to allow sufficient distancing (2m staff/ 1m for students) or not doing so for ESOL
A2.2: Not changing the desks to smaller ones to enable social distancing (sub-category of 2.1)

285. We accept that there was a practice of not limiting classes to one person per desk or placing limits on classes such as to enable distancing of 1m between students, whether for ESOL or across the College. The Claimant requested a limit of one student per desk in both the IRA and the 25 September 2020 letter. The Respondent was not willing to agree this. Nor is there any evidence to indicate that this was atypical of the practice in the College. The policy was that classrooms should be adapted to support distancing where possible and to move any unnecessary equipment out (though in relation to ESOL this did not extend to changing desks in the room), and that students should sit side by side facing forwards [**206**]. However numbers in the classroom were not limited to allow for 1m distancing or one student per desk.

286. So far as concerns F28, the issue of not limiting classes was closely related to the issue of desk sizes. That point was made in Mr Alexander's email of 1 September 2020 in which, on behalf of himself and the Claimant, he expressed the concern that with well over 20 students in the group at that time it was not possible to keep any kind of distance between students with the large double desks [**182**]. No changes were made to the desks, but the group was split in the week prior to the Claimant's email of 17 September 2021 [**251**] (as had also been done in previous years). That would have dealt with the immediate issue. It was not at that time necessary to change the desks in order to enable social distancing. But nor was there any assurance given that this would be considered if numbers rose as they had in previous years.

287. Given the likely rise in numbers the split in the class was only likely to be a short term answer. In her email of 17 September 2020 the Claimant had explained her concern that despite the split in the class, there had been further enrolments and the numbers in the group may increase, and she reiterated that point in her grievance. The Claimant was plainly seeking assurance as to the position going forwards taking into account the likelihood of numbers increasing. However no assurance was given as to the position

if and when numbers rose. Nor did the Respondent convey that the responses given to the Claimant were based on the class size as it stood at that point in time.

288. The reference in point 1 of Ms Westray's 9 October email to capping group size to allow enough space for learners in line with the guidance had little meaningful content in the absence of clarification either of what the cap would be or what guidance she was referring to. In any event whether the cap was 26 as Ms Iosif had told Mr Kaplan, or 24 as Mr Lawrance later understood, it was far more than would allow for 1m distancing or one student per desk. As set out above, Ms Westray's own evidence was that the maximum in F28 which would allow for safe distancing would be around 20, and that this would also require smaller desks than the very large desks in room F28. At no stage was there any communication to the Claimant that such a cap would apply or that the desks would be changed to facilitate it, and we do not accept that any such cap was applied.

289. Some different considerations arise in relation to distancing at the front. As to this:

289.1 The policy was that a 2m distance should be maintained and that where this was not possible PPE should be used [**271**]. The 9 point plan itself stated that the Claimant should maintain a 2m distance.

289.2 It was the Claimant's belief that 2m distancing was not possible if there were students on the front row. She was well placed to assess this having taught in the class. In Ms Westray's evidence she accepted that she could see why, if there were the same number of students as in the previous year it would not be possible to stay 2m away. We accept, on the balance of probabilities, that was the case.

289.3 The Claimant explained in her grievance that in G26 whether it was possible to maintain a 2m distance also depended on group size [**344**]. It was also Ms Alexander's evidence that G26 was a small room with 21 students in it where it was impossible to remain 2 metres from students. She was not challenged on that evidence. We regard her recollection of there being 21 in the class as of September 2020 as being unreliable in the light of the evidence of the numbers on 22 September 2020. That does not in our view detract from the unchallenged corroboration of the Claimant's concern that ability to maintain a 2m distance depended on numbers in the class.

289.4 At the time of the 9 point plan no issue had yet been raised as to whether it was possible to maintain a 2m distance at the front. In Mr Alexander's email of 1 September 2020, the point he had made was that he and the Claimant were concerned that the large double desks meant that they could not keep "any kind of distance between students", rather than between students and the teacher. Further, in her letter of 25 September 2020 the Claimant had noted that in F28, in contrast to F5, she was able to walk round the room to check work individually because there was more space [**269**].

289.5 The issue as to the feasibility of keeping a 2m distance in the light of the size of the desks was first raised in the Claimant's letter of 29 October 2020. There was no substantive response either to that letter or to the grievance in which the same point was made. The Claimant was left with no reassurance. Although Mr Kaplan indicated a maximum class size of 26, even that was not confirmed. Nor was there any evidence to indicate that the desks were changed even when numbers rose, and we therefore infer that did not happen. If it had been the case that unlike in previous years numbers did not continue to grow substantially through the year, such that there was no need for concern as to distancing, we would have expected the Respondent to adduce evidence as to this. It did not do so before us and nor did it provide any reassurance to the Claimant as to this. In the absence of such evidence we do not accept that pattern of numbers growing over the year would have differed significantly from previous years.

289.6 Ms Westray's evidence was that the maximum for any classroom had been assessed at 26. No such limit was communicated to the Claimant at least prior to Mr Kaplan's text of 9 October 2020. Nor do we accept that there was such a limit applicable to the ESOL group in F28 prior to around the time of Mr Kaplan's text. As to this:

(a) There was no documentation evidencing that maximum, even though this was one of the categories in relation to which the Respondent had agreed to give disclosure by 14 March 2023. Ms Westray explanation was that she had been unable to locate this in time, having had to deal with a sudden Ofsted inspection and because her Director of Facilities was on annual leave and that it might have been deleted, and that although there had been a further week before the hearing resumed she did not continue looking beyond the agreed date for disclosure in the belief that this was the cut-off date. We do not regard that as being a wholly satisfactory explanation. Even aside from the amendment of the PCP, one of the specific measures sought in the grievance had been an explicit maximum number of students in the class. As such if there was documentation evidencing that such a limitation had been implemented it should have been disclosed as part of the original disclosure exercise.

(b) Even if there had been an assessment made by the Estates team, it does not follow that this was used in order to limit the number of students. The experience in the previous year had been that the numbers had been allowed to grow to well over 30 students in the class. No such maximum per class had been communicated to the Claimant prior to Mr Kaplan's message of 9 October 2020. Nor was there any evidence of any maximum being communicated to other staff. That was in contrast to the position for the June opening where a maximum of 15 per group or class was communicated as part of the risk assessment.

(c) When the Claimant had expressly asked about capping the16-19 group in her email to Ms Iosif on 17 September 2020 this was flatly rejected even before discussing the IRA. The response was that there it was not possible to cap enrolment. It might be that there was a distinction between enrolment and the class size. However the Claimant's concern was plainly in relation to numbers in the class, and in that context a fair reading of Ms Iosif's response was similarly directed to that issue. There was no suggestion that the classes could be split again or numbers in a classroom could be capped. Whilst there had been a split in the group we do not regard that as evidencing a cap, since there had also been a split in the previous year yet the numbers had been allowed to climb beyond 30.

(d) Mr Kaplan's text of 9 October 2020 suggests that the cap of 26 was presented to and understood by him as a concession.

289.7 We accept however that at around the time of the nine point plan there was a change in that there was agreement in principle to a cap to allow distancing "in line with the guidance" and that this entailed that in principle the cap should allow for 2m distancing. The 9 point plan also envisaged that this would be achieved by, along with that cap, providing that the Claimant would vary her teaching practice and stay at the front of the class. However there was a failure in taking steps to ensure that this was the case or to give necessary certainty or assurance as to this by virtue of the failure to provide the clarification sought by the Claimant, and by reason of the matters we address under A2.3 below

290. We conclude that there was a practice of not limiting numbers in classes, or alternatively in ESOL classes, so as to facilitate 1m social distancing between students, or one student per desk (including if necessary changing the desks). There was a policy that 2m social distancing should be kept between students and the teacher, although the principle that numbers should in principle be capped to facilitate this was not communicated until the nine point plan. Even then there was a failure to provide any confirmation as to the level at which the cap would be set.

A2.3: Not having someone with H&S experience assessing whether the distancing could apply

291. It was the Respondent's evidence that the maximum for each room was assessed at the start of each year by the Estates team, which included Lee Pedder who had an H&S qualification, and that Mr Kaplan also had an inspection regime. However we were shown no evidence of how the maximum was assessed or what distances were checked, if any. It is unlikely that there was a check for 1m distancing because there was no requirement to apply such distancing. However that adds nothing to the PCP accepted above under A2.1.

292. We also consider it is likely that any checks made of the rooms did not include specifically checking that the 2m distancing could be maintained. As set out above, we accept on the balance of probabilities that 2m distancing was not possible if there were students on the front row of F28. As such if there had been a specific assessment of the distance it is to be expected that it would have been flagged up by the H&S team that the distancing could not be maintained unless the front row (or perhaps part of it) was not used. There was no evidence of any such communication. There is no reason to suppose that the checks carried out in F28 were atypical. It is more likely that the practice was not specifically to carry out an assessment to verify that a 2m distance could be maintained.

293. The specific checks carried out by the Respondent was a matter within its knowledge. If there was a specific process followed of assessing distances, it was available to it to adduce that evidence, even if only by way of second hand evidence relaying what was said by the H&S team. We received no such evidence or explanation as to why the issue noted by the Claimant as to distancing in the classrooms had not been picked up.

294. When in the Claimant's letter of 29 October 2020 the Claimant specifically raised the question as to whether there had been a check on whether the 2m distance could be maintained she received no response. Nor was there any response to the request for this to be done in her grievance. Had it been the case that there had already been such an assessment the obvious course would have been to reply to that effect. In one sense that takes matters little further, since there was no substantive response at all to the Claimant. However we are also satisfied that Ms Westray was given no assurance in response to the points raised by the Claimant that there had been an assessment of 2m distancing by the H&S team which verified that this was possible. Ms Westray's own evidence that she could see why it would not be possible to maintain the distancing if the class was of the same size as the previous year indicates that there had been no such assurance that the distance could be maintained from the front row. Nor did she suggest that there had been an assessment that there could be distancing if the front row was not used.

295. Nor was there any evidence that having received the Claimant's correspondence asking for the assessment to be carried out (or asking whether it had been done), such an assessment was then carried out at that stage. We have considered whether the failure to act on the Claimant's request at that stage is to be regarded as a one off act of poor treatment rather than a practice of not carrying out the assessment. We do not consider that was the case. Despite having been notified of the issue as to distancing the Respondent declined to take steps to have the H&S team measure up and verify that distancing was possible and would remain possible if the numbers grew (if they had not already grown). Whilst the request for reassurance was specific to the Claimant, the approach of not causing the distancing to be assessed affected all those who used the rooms in question. In any event, it involved the continuation of, and failure to rectify,

the practice which on balance we have concluded previously applied that the distances at the front were not specifically measured and assessed.

296. We also take into account that, as framed, this PCP referred only to assessing whether there distance was maintained, and that an assessment might take many forms from a broad brush view to specifically measuring the distance. We do not consider that this affects our conclusion. First, in context it is clear that the issue was as to the failure to make specific checks. Indeed in the grievance the Claimant referred to the availability of online tools to do this and in her Details of Claim (at 4.15) she referred to measuring the distances. In any event there was no satisfactory evidence of any process of assessing the distances or explanation as to why, if there was, it did not flag up where there was an issue as with F28.

A2.4: Not setting an explicit maximum number of students in classes

297. As set out above, we accept that the practice at least until the Claimant went off sick was not to set a cap for the 16-19 group in F28. Mr Kaplan's email and the nine point plan communicated a willingness to change to this. However even then Ms Westray and Respondent failed to respond to requests to clarify what the maximum cap was. Although Mr Kaplan's email suggested that a cap of 26 had been agreed, that preceded the meeting on 9 October when no such cap was stated. As such, given the failure at any stage to revert stating what the cap would be, even when pressed in the letter of 29 October to state the cap, the position remained that this was no explicitly stated. Even if internally amongst management a maximum had been identified, it was not communicated, to the Claimant. In the absence of any evidence to the contrary before us, we infer that nor was any such maximum communicated to, and in that sense made explicit, to any of the other ESOL teachers. As such we accept that the practice continued to be not to do so.

A3: RTW plan: Not drawing up a detailed personalised plan for staff off work due to Covid related concerns.

298. As set out in our findings of facts there were serious flaws in the approach adopted by the Respondent in response to the Claimant's request for a detailed personalised risk assessment. Crucially it failed to engage with the Claimant's IRA and 25 September letter. It failed to show that consideration had been given to the measures requested and why they had not been accepted, and there was then a wholesale failure to respond to the request for clarification.

299. We address below in relation to the more general PCP relied upon by the Claimant as to not putting adequate safety measures in place, whether there was a practice of not giving adequate consideration to the need for individual measures beyond the IRA. The Respondent's approach to the return to the work plan for the Claimant is an element in our overall consideration of that issue. In the light of the conclusion which we have reached on that issue we do not consider that matters are taken further by whether this entailed a

specific practice relating to return to work plans. We incline to the view that there was not such a practice. Ms Westray wished to discuss the issues with the Claimant. In other cases had it been possible to meet it may well have been a detailed personalised plan would be drawn up and agreed even if framed by reference application of measures in the GRA. The failure to engage with the specific additional measures that the Claimant requested is appropriately considered in the context of our assessment of the more general PCP asserted by the Claimant. We return to this issue in the light of our conclusions on the more general PCP.

A4: Not giving an assurance re changing rooms without notice or prior discussions

300. We do not accept that there was such a practice. Ms Iosif did give an assurance about not changing rooms. We accept that it is likely that the failure to keep to it is likely to have been an oversight in terms of overlooking the assurance that had been given, and that this is what Ms Iosif told the Claimant. We address this further in considering the more general PCP asserted by the Claimant. In any event, that the assurance was broken does not demonstrate a practice of not giving such an assurance.

A5: Not providing a qualified person to assist in individual risk assessments/ List of Issues para 3.4(c): "Fail to offer advice from a qualified person to the Claimant in order to complete that risk assessment"

301. The reference to a qualified person to assist was to a person qualified in relation to health and safety. Thus in her grievance the Claimant requested a person qualified in health and safety to carry out a formal assessment of ventilation and aerosol transmission in the rooms where she worked and also that the health and safety function measure up and assess whether it would be possible for her to maintain 2m physical distancing. Essentially the same point had been made in the 29 October 2020 letter where she had requested that ventilation assessments be carried out by a qualified person and that the assessment of whether Room F28 was the right size to be made by "someone with H&S experience".

302. The Claimant did have access to support from her trade union representative, Mr Kaplan. He was afforded facility time by the Respondent in order to be able to assist staff. Mr Kaplan was the Health and Safety representative for the NEU. We accept that, as noted in Mr Lawrance's evidence, in the light of that role, it is likely that he would have undergone some health and safety training. However there was no evidence before us as to the form or extent of that training would have taken or what if any H&S qualification he had. In relation to the Claimant his input was limited to suggesting that she create an additional row on the IRA form. The Claimant was not aware of his having any health and safety qualification and, reasonably, simply regarded him as her trade union representative. She sought his advice in that capacity. At no stage, when the Claimant was pointing to the need for expert health and safety input, did the Respondent reply suggesting that Mr Kaplan was a person who could provide this.

303. In those circumstances, whilst as part of our overall assessment we take into account that Mr Kaplan was given facility time and was someone from whom the Claimant could seek advice, we are not satisfied that, by allowing Mr Kaplan facility time, the Respondent can be said to have offered advice from a qualified person. Nor do we accept that this involved providing a qualified person to assist. We are not satisfied that Mr Kaplan was held out to staff, by the Respondent or otherwise, as being a person qualified in health and safety, or that he would have been understood as such by staff..

304. There is limited evidence available from cases other than the Claimant. Ms Westray's own evidence was that in most cases the measures requested could simply be actioned without the need to fill in an IRA, let alone providing assistance in doing so from an H&S qualified person. In the few examples we had of IRAs it is not apparent that H&S input was provided but nor is it apparent whether it was requested or there was an identified need for it.

305. On Ms Westray's evidence the process that should have been followed was for a discussion of the IRA with the line manager, and then to call in additional help as required arising out of that discussion, which could involve calling on Lee Pedder who had an H&S qualification. That would not entail involving Mr Pedder in the initial stage of filling out the form, but what matters is the substance of involving someone who could bring H&S knowledge to bear as part of the overall risk assessment. That is also consistent with how the PCP is framed.

306. We have concluded the process stated by Ms Westray was not the practice followed at least in relation to those managed by Ms Iosif. Instead it was left for the Claimant to fill in the IRA which would then be posted onto the Estates team. That did however still entail involving the H&S/ Estates team albeit with the Claimant filling out the IRA form first without assistance from her line manager.

307. The first indication that the Claimant was seeking guidance as to what should be in the IRA was in her email of 17 September 2020 [**250-251**]. At that stage she expressed that she did not feel qualified to fill in the column relating to additional controls and arrangements as she did not know what health and safety measures were available and asked to discuss the issues. In her response Ms Iosif did not respond to the request to discuss the issues. Nor did she suggest that Mr Kaplan was someone who could provide the Claimant with guidance as to what H&S measures were available. She did however indicate that she would pass the information on to the H&S team (which included Mr Pedder). Mr Mansfield was copied into her response (with the inference being that he was the representative of the H&S team). Having been copied into an email with Mr Mansfield, it was available to the Claimant had she wished to do so to contact him and ask to discuss with him or someone in his team what could be done.

308. In the Claimant's case there is no satisfactory evidence of any steps by the H&S team to give feedback or advice about the measures proposed by the

Claimant, whether to the Claimant directly or indirectly to any other person. However in considering what can be inferred more generally about the Respondent's practice it is relevant to take into account first the nature of the measures sought. The position might have been otherwise for example if there had merely been a request for putting in place a Perspex screen as was done in other cases. Second, it is relevant that the Claimant went off work shortly after submitting her IRA and was not able to attend the School even on an inset day or to have a discussion with her managers. That does not however explain adequately why there could not have been a written dialogue in relation to the proposals.

309. In our view however those are matters that feed more into our overall assessment of the more general PCP relied upon by the Claimant as to reliance on the GRA and inadequate consideration given to individual measures. An obvious purpose of copying in the H&S team would be for them to be involved in considering or implementing the measures proposed or giving feedback if that could not be done. To that extent in the ordinary course there would be involvement of a qualified person in the process, though the nature of that involvement might turn on what was set out or requested in the IRA. If for example the Claimant had simply asked about a Perspex screen we see no reason why, as in other cases, this would not have been implemented or advice fed back as to the practicality of what could be done.

310. Taking these matters into account in the round, whilst there were deficiencies in the practice followed by Ms Iosif, particularly in not having a discussion as part of the process of completing the IRA, we are not satisfied that more generally there was a practice of not providing a qualified person to assist with or advice in relation to the IRA. That assistance need not be at the outset when completing the form. The process did include involving the H&S/ Estates team. The nature of their involvement was likely be affected by what was sought from them, and we take into account that the Claimant was put in touch with them by email, albeit that there was no specific suggestion that the Claimant could contact them directly. The way in which the Claimant's situation was dealt with was unsatisfactory, with a lack of evidence of any substantive consideration given by the H&S team to her IRA or the measures she suggested. However we conclude that is appropriately considered further in the round in the context of the more general PCP asserted by the Claimant.

A6: Absence of requirement on staff or students to wear masks

311. The practice at the time of the return to the College in August 2020, and throughout the period until the Claimant went off sick, was that there was no requirement on students to wear masks either in the classroom or elsewhere in the College. There was a change after half term that face coverings became mandatory when moving around the College for both staff and students, but it remained the case that there was no such requirement in the classroom. The Claimant was informed of this in the 9 point plan, and the bulletin of 9 November 2012 reinforced this with the message that all staff,

not just the leadership, were expected to challenge students who were not wearing masks in common areas. By the date of the GRA of 1 February 2021, this had been extended to classrooms unless if impacted on learning.

312. Ms Westray gave evidence that during induction students had been informed that various teachers for one reason or another might require them to wear a mask and that if told to do so they were required to comply. We do accept that was the case. The Claimant was not aware of any such instruction. Whilst that might be because she was not present at the College on the day of the inductions, had there been such an instruction it is to be expected that staff would have been informed of it and that they could require students to wear a mask. Further, it is to be expected that there would be some mention of it in the GRA. It was not. Even when the GRA was updated to record that masks were to be worn in all communal areas after half term, there was no mention that staff could choose to require wearing of masks in the classroom. When the Claimant was told in the nine point plan that she could ask students to wear masks, there was no mention that they had been told that they must comply if required to do so by a teacher. In Ms Lawrence's statement she set out that the position in September 2020 was that the issue of mask wearing was deemed to be a personal choice and that staff were told that they could not enforce mask-wearing by students. She also stated that she had witnessed one student arguing with a teacher (whose husband was over 60) over a request to wear a mask. We attach less weight to that since there might be various reasons why a particular student claimed to be exempt from having to wear a mask even if they had been told to comply with a teacher's request to do so. However Ms Lawrence was not challenged in cross-examination in relation to her evidence on this issue, including her evidence that staff were told that they could not enforce mask wearing.

313. We therefore accept that the practice (amounting to a PCP) was that there was initially no requirement to wear a mask at all, and subsequently at least until this was changed at some point prior to the February 2021 GRA, no requirement to wear a mask in classrooms, albeit that staff could ask students to do so.

The Respondent's Covid safety measures applied at the College from 26 August 2020 (the start of the 2020/21 academic year), consisting of generalised Covid safety measures applied to all staff irrespective of age.

A practice of relying on the generalised measures without taking adequate steps to put in place additional measures (a) related to age and/or (b) generally, or give adequate consideration to this and did not take increased vulnerability due to age into account

314. We turn to the broader PCP asserted by the Claimant relating to the Respondents Covid safety measures of general application. It is convenient to consider this together with the elaboration set out in paragraph 2(a) of the Agreed List of Issues. The Respondent accepted that the general safety measures amounted to a PCP. The key difference between the parties was

as to whether there was a practice of placing reliance on those general measures in a way which involved not sufficiently taking into account individual circumstances and taking sufficient steps to put in place or giving consideration to putting in place additional measures.

315. Whilst this PCP set out the alternatives of not taking adequate steps to put in place additional measures or not giving adequate consideration to this, these elements are closely related. Taking adequate steps to put in place the measures would include steps to identify and explore what measures were required in the individual circumstances having regard to the general measures in place. Without taking care to ascertain the relevant circumstances, or at least doing so where there was cause to suspect that there were individual circumstances meriting further exploration, there was unlikely to be adequate consideration of whether individual measures were required.

316. As it stated on its face, the GRA was considered to provide a range of measures applicable to everyone but which also "mitigated significantly" the risk to those who are clinically vulnerable [**162**]. However there remained a need to consider whether there were individual circumstances which were such as to require additional measures. That was reflected in the IRA form. The purpose of that document was to "guide and support conversations" between individual staff and managers so that the individual circumstances could be reviewed, against the context of the measures in the GRA, so as to determine whether additional measures were required in the particular circumstances. Put broadly, whilst the GRA involved some consideration of the protection that would be provided to everyone including the clinically vulnerable, as reflected in the view that it would significantly mitigate the risks, it did not remove the need to consider whether more was required in the individual circumstances. Further, in order to give adequate consideration to what may be required in individual circumstances, an important step was to gather in relevant information as to this and to carry out an assessment of whether in the light of this the general controls were adequate.

317. In considering the alleged PCP it is an important consideration that the IRA form was adopted and that, when introducing the IRA form in the context of the wider opening in June 2020 (albeit prior to the introduction of the updated GRA relating to full opening of the College), Mr Lawrance informed management staff that they would support each individual member of staff that required an IRA and recorded the purpose of the IRA form [**53**].

318. We have also considered the submission on behalf of Mr Peacock that the Respondent's approach was that if any member of its staff required anything to be done to keep them safe, it was considered, discussed and done or offered or, as it was put in his written submissions, implemented in so far as reasonably practicable.

319. We remind ourselves first that we must consider the PCP put forward by the Claimant. The issue is not, at least directly, whether there was an alternative

PCP as framed by the Respondent. Nor does it necessarily follow that if the alternative put forward by the Respondent is not made out that the Claimant should succeed in her formulation. But clearly if the Respondent were correct in its contention that would be material evidentially to our assessment of whether the PCPs as formulated by the Claimant was made out. It would not necessarily negative it because placing the emphasis on staff requesting specific additional measures would leave the issue of whether this entailed adequate consideration of individual circumstances in order to identify whether more is required.

320. It was necessary for Mr Peacock to add the "in so far as reasonably practicable" qualification, since it was plainly not the case that if a member of staff required something to keep them safe it was done or offered. A clear instance of that in the Claimant's case was her request that the classes be limited to one student per desk. Although the nine point plan did not refer to it in terms, it was not offered and in substance it was rejected since it was inconsistent with a cap or either 24 or 26. Ms Westray accepted in her evidence that it was not implemented, but contended that she had met the Claimant "half way" and that they "we reasonably could".

321. Nor however is it the case that the Respondent did all that was reasonably practicable to keep its staff safe. It certainly did not do that with the Claimant. It failed to engage with the measures the Claimant requested, failed to provide any response to the 29 October letter and refused to permit her to pursue a grievance. The consequence of not providing a substantive response to the Claimant's 29 October letter or her grievance, or entering into any written dialogue in relation to the substance of those matters, was that it was not in a position to consider any points that she might have raised in response, and it failed to take reasonable step to give her assurances that her safety needs were being properly considered.

322. As to whether it followed a practice of discussing those measures, we accept that it sought to arrange meetings to do so. However when it ought to have been apparent that there needed to be written communication because the Claimant did not feel able to meet with her managers, and the communications via the union was not bearing fruit, it unreasonably refused to correspond about the substance of the issue raised.

323. Nor is there convincing evidence to justify a contention that the practice contended for by Mr Peacock was followed in other cases. We refer to our findings above as to the limited evidence of measures taken in other cases and still more limited evidence of following the IRA process, and the lack of proactivity in relation to that process in the run up to the re-opening in August 2020 and the flaws in the approach adopted by Ms Iosif.

324. Further there are a series of matters which cumulatively paint a picture of reliance on the generalised measures without giving adequate consideration to additional measures that may be required in individual circumstances or taking steps required in order to be able to give adequate consideration to such matters.

325. Whilst the IRA was designed to be used as a focus for discussion in relation to this, it was rarely used and in the approach to the return in August there was a lack of information and proactivity in encouraging its use. As to this:

325.1 Although staff had been sent the Covid IRA in June 2020, it was presented to staff in the covering email as being a document that they had to complete if they could not come in to work due to risk factors [**S107**]. We were not shown any document at that time explaining that, more broadly, staff were encouraged to complete the form so that individual circumstances could be considered for the purposes of identifying any additional measures required.

325.2 The Respondent then failed to take steps in the lead up to the full opening to draw the attention of staff to the IRA and its purpose and to encourage staff to complete it so that individual circumstances could be taken into account. Indeed in his email of 2 September 2020 Mr Kaplan was driven to ask when vulnerable staff etc would be given the opportunity to complete an IRA [**596**]. It was only after being pressed by the union that, on 7 September 2020, the staff bulletin made reference to an offer of personalised risk assessments [**222**].

325.3 We have rejected the contention that management were specifically trained at or around the time of the return in August on the process to be followed in relation to completing the IRA, including having a discussion about it between the line manager and staff member. Had importance been attached to the IRA process it is to be expected that such guidance would have been given to staff and that Ms Iosif would have followed that process with the Claimant instead of simply asking her to return the form and saying she would pass it on.

325.4 Although there were about 20 or 25 members of staff who were either themselves clinically vulnerable or associated with someone who was such as by reason of living with them, very few IRAs were completed. The Respondent produced only two other covid IRA forms, plus a (non-Covid specific) risk assessment for a pregnant worker from March 2021. There was evidence before us of only one Covid IRA form which was completed prior to November 2020. This did not record any proposed additional measures and the only evidence of what was done with it was an email from Ms Iosif asking if she should send it to Mr Mansfield or just keep a record herself [**S17**]. We take on board that there may be various reasons why other workers may not have wished to complete an IRA form or seen the need to do so. However together with the other matters to which we refer below, the lack of evidence of IRA forms being completed is consistent with a willingness to rely on the general measures without taking care to identify individual circumstances bearing on the adequacy of those measures and to consider in the light of those whether additional measures were required.

325.5 The instance of an individual who was allowed to work from home occurred later and in any event appears to have been as a result of specific input from his GP, though there was no detail as to this before us. The other individual measures identified by the Respondent (without in most cases being specific as to the time frame when they were implemented) all involved various instances of putting up a Perspex screen. In each case there was no IRA produced and this was merely done in response to a request. Whilst this evidences instances of individual steps, it is also consistent with putting an onus on the staff member to request anything further rather than pursuing the mechanism (the IRA form) that was designed to gather full information about the circumstances and guide conversations as to what further individual steps may be required.

326. The lack of proactivity in relation to the IRA process in the preparations for the full opening, and of steps taken specifically to draw attention earlier to the IRA and its potential importance, is indicative of a lack of importance or emphasis attached to identification and consideration of the need for additional measures in individual circumstances beyond the general measures in the GRA. The approach to the IRA in our view points to an inference of less weight being given to the IRA process and focus on what was required in the individual circumstances of staff, or staff who were more vulnerable, as a result of reliance on the GRA. As noted above, that is not to say that there were no individual measures taken. Indeed in relation to the Claimant she was not included in the enrolment rota. However adequate consideration of whether additional measures were needed required an assessment of any factors bearing on the Claimant's individual circumstances and, in the light of this, identification of any measures in consultation with the staff member concerned. The IRA was meant to guide this but was little used, and not mentioned to the Claimant by Ms Iosif until the Claimant specifically asked about it.

327. We turn to the position more specifically in relation to the Claimant and ESOL at around and after the return to full opening in August 2020 up to the Claimant going off sick in September 2020. As to this:

327.1 Even when the Claimant specifically raised concerns about ventilation in her email of 28 August 2020 [**179**] and when Mr Alexander specifically stated the Claimant as well as Mr Alexander were concerned about the number of students in F28 and asked about exam desks [**182**], and despite the fact that this followed on from the Claimant's earlier informal concerns, she was not encouraged by her manager to complete an IRA, or told that she could do so, until the Claimant raised this on 7 September 2020.

327.2 When the Claimant did ask about a personalised risk assessment, there was no offer from Ms Iosif to discuss it with her or any indication that this was the process to be followed. On the contrary her email indicated that it would simply be passed on without Ms Iosif discussing it with the Claimant. Given the concerns already expressed by the Claimant, and having specifically asked about a personalised risk

assessment, and the seriousness of the issues amidst a pandemic, there was an obvious importance and urgency in carrying out such an assessment in order to be satisfied that adequate consideration had been given to her situation and whether additional steps were required and what further input was required as part of the assessment. That should have involved Ms Iosif prioritising meeting the Claimant to go through and discuss the issues raised by the risk assessment and identifying whether any further input was required. Indeed that was the process which Ms Westray herself contended in evidence was to be followed, but which we conclude was not implemented. Whilst Mr Mansfield was copied in, and the Estates/ H&S team were therefore involved, there was a passivity as to the approach to this involving merely passing on the form or copying them in. There is no evidence of any discussion between Ms Iosif or Ms Westray and the H&S team following up the IRA, or any feedback from them, and we are not satisfied that this occurred. The mere fact that the Claimant went off sick soon afterwards was not a good reason for failing to do so. If anything, it made it more important to do so given the importance of providing assurance that it was safe for her to return.

327.3 We infer that the manner in which Ms Iosif dealt with the request from the Claimant, in terms of simply asking for it to be completed for her to pass on, is likely to reflect how she would have acted if there had been other cases of IRAs being requested. There was no evidence before us sufficient to indicate that there were reasons particular to the Claimant for adopting that approach. Although the Claimant went off work fairly shortly after submitting her IRA, the process of simply forwarding it on to the H&S/Estates team had already been flagged up. We have considered the cover email to the other IRA completed in September 2020 in which the staff member, when forwarding it, said it was “attached as per our discussion”. However there was no evidence before us as to what was discussed and why (eg whether it merely mentioned in passing or referred to that staff member relaying what she intended to write) and, as noted above, there was in any event no indication in the form of consideration of any additional control measures.

327.4 We accept that in the email of 17 September 2020 Ms Iosif encouraged the Claimant to complete the IRA form if she felt she was at risk. However:

(a) That formulation put the onus on the Claimant to say that she felt at risk rather than encouraging her to complete the form in any event as the basis for a discussion given her age related vulnerability.

(b) There was a failure to respond to the request for a discussion. Whilst it is possible that this was simply missed in responding quickly, it was consistent with the approach initially flagged up of simply forwarding the document on. Further, it failed to offer guidance in response to the concern expressed based on not knowing what H&S measures were available. Again that was consistent with a lack of focus or emphasis on Ms Iosif identifying and considering any adjustments required, and instead simply

intending to pass this on to Mr Mansfield. Whilst the Claimant might have herself followed up with Mr Mansfield in the light of his having been copied into the email, there was no guidance from Ms Iosif to suggest that course.

(c) Before even awaiting receipt of the IRA form, Ms Iosif responded to the Claimant's request to put a cap of 20 on the total number in the 16-19 group by stating that there could not be a cap on enrolment.

327.5 We accept that the decision to move the Claimant's class to F5 is likely to have been an oversight in the sense of overlooking the assurance the Claimant had been given. However it is unlikely that would have happened had there been greater engagement by Ms Iosif in the process of identifying what was required in the Claimant's individual circumstances, taking on board the concerns that had been expressed not only by virtue of submitting the IRA and in the 17 September email, but also in the previous informal concerns and in the previous emails. It was the product of a failure to give adequate consideration to what steps were required in the Claimant's individual circumstances and before there had been any discussion with the Claimant of the issues raised in her IRA.

327.6 The failure to give weight to the need to consider the Claimant's individual circumstances was further reflected by Ms Iosif's email of 22 September 2020 stating that the changes were made to accommodate the large vocational groups and only affected the Claimant's first two periods on Tuesday mornings and apologising for the "inconvenience" [**267**], which wholly failed to acknowledge the Claimant's concerns related to her age, or to give any assurance as to the process that would be followed relating to the IRA or even to acknowledge the IRA.

327.7 We take into consideration that having received the IRA form from Ms Iosif on Tuesday 8 September 2020, it was not until Sunday 20 September that the Claimant returned it with her comments. However that is in our view to be seen in the context of the lack of support and guidance as to how to deal with it, as well as seeking guidance from Mr Kaplan in relation to it and confusion caused by the absence of any reference to age in the categories covered. It ought to have been apparent from the Claimant's email of 17 September 2020 that, for the reasons she gave, she had been struggling with how to complete the assessment form and as to what to include. In any event, it was a matter of safety at work in the midst of a pandemic, and required priority attention by the Respondent.

328. Standing back in relation to the position at this stage, up to the Claimant's last day at work, we do not accept that the Respondent could have given adequate consideration to her individual circumstances without going through the process of consulting her in relation to them which it had not done or done adequately at the stage. The failure to do so was not simply the result of one off decisions. Nor was it the product of any ill will towards the Claimant. On the contrary Mr `Iosif and the Claimant had a good relationship. It was a consequence of the failures and delays in drawing the attention of staff to the importance of completing an IRA, or indeed of the

opportunity to do so, and the process followed by Ms Iosif even when the Claimant enquired about the IRA of simply asking that the form be completed, without further input or guidance. The lack of other IRAs, which ought to have been the mechanism used to enable the Respondent to give adequate consideration to individual circumstances, is consistent with this. It was in the context of a lack of emphasis and proactivity in identifying and consulting upon whether there were individual circumstances requiring individual measures that could result in decisions such as that made to move the Claimant away from F28, overlooking the particular factors that should have avoided such a course without consultation with her and in relation to her IRA. In the absence of evidence satisfying us of any other plausible explanation for the approach adopted, we infer that it was symptomatic of an approach in which reliance on the GRA entailed a lack of emphasis or priority placed on the IRA process and identifying any further steps required in the individual circumstances of any staff member, including in the circumstances of the Claimant's age.

329. Turning next to the position from the Claimant's last day at work up to the submission of her grievance, we take into account Ms Westray's invitation to the Claimant to a meeting on 28 September 2020 and the subsequent invitation to attend on the inset day. Had the Claimant been well enough to attend, or otherwise to discuss the issues when she was called by Ms Westray, that would have provided the opportunity to discuss the concerns raised in her letters of 25 September and 29 October and the IRA. Clearly it is an important point of distinction between her case and others (actual or hypothetical) who were vulnerable by reason of age or otherwise but were able to have such a discussion. We also take into account the role of the Claimant's union representative, to the extent that Mr Kaplan did not push back on or appeared to agree with the content of the nine point plan, and Mr Harlow failed to provide further constructive input after his conversation with Ms Westray on 16 November 2020.

330. We do not however regard those elements as fully or adequately explaining the inadequacy of the respond to the issues raised by the Claimant We refer to our findings above in relation to Ms Westray's explanation for failing to response to the Claimant's letter of 29 October 2020. As to this:

    330.1 The nine point plan plainly did not engage with what the Claimant had requested in her IRA and letter of 25 September 2020 or even acknowledge those requests or explain why they were not accepted. There was no mention at all of the concern about ventilation in G26. Instead it relied largely on the generalised measures. Whilst there might be room for disagreement as to whether further measures were required in the Claimant's individual circumstances, that did not explain failing to even acknowledge them or to explain the reasons why they were not considered necessary.

    330.2 To the extent that Ms Westray sensed that the Claimant regarded what she had done as all wrong that was not a reason for compounding the issue by failing to provide any response at all to the letter of 29 October 2020. That letter had carefully explained the areas where she

was disappointed with the response and what she required. By contrast Ms Westray's nine point plan had failed to engaged with the Claimant's previous correspondence. Whilst it was not unreasonable in the first instance to see if the Claimant was able to meeting with Ms Westray, the fact that Ms Westray recognised that the Claimant was not happy with what had been supplied provided no basis for then failing to provide any further response at all to the specific matters raised in the 29 October letter.

330.3 Ms Westray's unwillingness to provide a substantive response to the Claimant may in part have reflected her frustration at not being able to discuss with the Claimant in person. Again, however, we do not accept that provides a full or adequate explanation. It was obvious that failing to provide the Claimant with a substantive response would increase her sense of not being supported and risk further damaging her health. Yet despite this Ms Westray was not willing to provide a substantive response.

330.4 We regard it as implausible that Ms Westray's concern was as to matters such as the layout of the detailed personal plan requested rather than its substance. In any event that was a plainly inadequate reason for failing to reply at all.

330.5 In the absence of a satisfactory explanation for the failure to provide any substantive response to the 29 October letter, and the failure to engage with the specific measures raised in the 25 September letter, we infer that part at least of the explanation for Ms Westray's position was that the Claimant was requesting measures specific to her given her increased vulnerability, and which showed that there had been consideration of her vulnerability due to her age, whereas Ms Westray had sought to focus her response on the existing general measures. However without engaging with the measures suggested by the Claimant, the Respondent was not in a position to consider any response from the Claimant and therefore fully to take into account her concerns and to give adequate consideration to what individual measures may be required.

331. Further, there was no reasonable explanation for the approach taken by the Respondent in relation to the Claimant's grievance. Mr Lawrance maintained the position that the Claimant had refused to engage. On the contrary it was the Respondent that had failed to provide the Claimant with a substantive response to her IRA and subsequent correspondence. There was no good reason for refusing to permit the Claimant to pursue a grievance process and advising or procuring that Mr Wyatt shut down the process without providing any substantive response which properly engaged with the issues raised, or engaging in correspondence seeking clarification or further information, and not allowing a grievance hearing before someone who was not the subject of the grievance or affording a right of appeal. Again that was done even though it was obvious that the course adopted would leave the Claimant feeling even more unsupported. The view of the Claimant as refusing to engage was in part influenced by the Claimant being unable to attend a meeting with Ms Westray. That does not however provide a full or adequate explanation. There was no evidential basis for having doubted that the

Claimant was able to attend such a meeting and in any event it was not an adequate reason for refusing to explore the issues further in correspondence or to provide a substantive response. It made little sense to talk of the risks in corresponding by email, when the alternative was a breakdown in communications and no substantive answer or explanation given to the Claimant. In any event the Claimant did offer to attend a meeting, albeit not with those who were subject to her grievance and this was rejected.

332. We also regard it as material that Mr Lawrance in his email of 28 January 2021 and then, we conclude at Mr Lawrance's instigation, Mr Wyatt in his response of 22 February 2021, responded to the Claimant's grievance with the assertion that the College had taken measures throughout the pandemic to protect all employees. That was not however based on a reasoned response to the particular measures the Claimant requested. Taken in the round we regard Mr Lawrance's approach as entailing a refusal to accept the legitimacy of the Claimant's concerns without a reasonable foundation for that approach and where it was the Respondent, rather than the Claimant, that was refusing to engage. Offering a meeting with those who were the subject of the grievance did not indicate a sufficient willingness to engage. Nor was it an answer to seek to rely on the NEU having approved the measures. That was not a passable excuse for failing to explore the position with the Claimant, whether by entering into correspondence over it or conducting a grievance hearing with someone not the subject of her grievance or providing a substantive response explaining the Respondent's position in relation to the Claimant's concerns and the measures sought.

333. In those circumstances and in context we regard the assertion of having taken measures for all not only as being a refutation of the Claimant's complaint as to the failure to consider and put in place particular measures having regard to the Claimant's particular vulnerability due to her age, but also as indicative of a resistance to the need to do so in the light of GRA.

334. Consistently with this, in the context of discussing what individual measures were taken by the Respondent College, Mr Lawrance emphasised in his evidence that the Guidelines were followed and that the moment the College stepped away from the guidelines it would be on its own. However guidelines of general application did not negate the need to consider whether more was required in individual circumstances for those who were clinically vulnerable. Again, Mr Lawrance's approach was indicative of a refusal to accept the legitimacy of the Claimant's concerns and of her seeking to press the Respondent to do so.

335. In all the circumstances we infer that Mr Lawrance's obstructive and unreasonable approach to the grievance, and that of Mr Wyatt at his instigation, was driven by his view that all guidance had been followed in the general measures, that the Respondent had gone as far as could be expected through the GRA, and a consequent refusal to accept the legitimacy of the matters raised by the Claimant.

336. We accept therefore that there was a serious failure to give adequate consideration to whether additional measures were required in the individual circumstances of the Claimant's case. Without engaging with the Claimant's grievance and providing the Claimant with a substantive response the Respondent was not in a position to give adequate consideration to the issues raised within it as to the individual measures the Claimant was seeking.

337. We have given careful consideration to whether we should draw an inference that this reflects a wider practice as alleged by the Claimant, taking into account in particular the points of difference specific to her case, taking into account in particular the .circumstances specific to her case. We also take into account that there is no PCP asserted specifically in response to the grievance process. Instead the way it was handled was relied upon as a basis for drawing inferences as to the other PCPs relied upon.

338. However the approach taken during the grievance was the culmination of a pattern of failing to take adequate steps to ascertain measures required in the individual circumstances of the Claimant's case, and more generally, dating back to prior to the return to College in August 2020. It was also, we infer, a reflection of a pattern of failing to attach weight to the importance of identifying any further steps required in individual circumstances) and, subsequently, resistance to accepting the need for individual measures not based on the GRA. Ultimately that entailed the absurdity of the Respondent's witnesses protesting that communicating by email was imperfect and could lead to misunderstanding, yet failing to respond substantively at all to the 29 October letter and grievance, which was bound to leave the Claimant feeling unsupported.

339. We conclude that whilst the measures within the GRA may of themselves be regarded as beneficial and an important part of providing Covid protection, the reliance placed on the GRA also influenced the Respondent into a practice of failing to place emphasis on individual circumstances and to give adequate consideration to putting in place individual measures shaped by reference to those circumstances.

340. For a practice to exist, whilst there must be an element of it being the way the Respondent does things or would generally do things, it need not be one that is followed in every case. Something may be a practice if it carried with it an indication that it will or would be done again in future if a hypothetical similar case arises. It is not necessary that further individual measures would never be taken. That there might be exceptions is not inconsistent with a practice of reliance on the GRA at the expense of taking adequate steps to put in place or give adequate consideration to individual measures. That said, as set above, the evidence of the Respondent putting in place individual measures following completion of an IRA to assess fully the relevant individual circumstances was very limited, and all the more so until substantially after the return in August 2020.

341. Although not necessary for our decision, there is a further reason why it is no sufficient answer to assert that there would only be a practice of not giving adequate consideration to individual measures in cases where, like the Claimant, the staff member did not feel able to meet with the manager concerned and asked instead to communicate by correspondence. Under s.23 EqA there should be no material differences in circumstances between the Claimant's case and that of others in the pool of comparison. If the pool to whom the PCP applied is limited to those who similarly were limited in the means by which they could engage with the Respondent, that would in our view still be consistent with the comparison required by s.23 EqA. We draw the inference that the Respondent's approach would similarly be not to give adequate consideration to additional measures in those circumstances. Essentially there was a refusal by the Respondent without good reason to engage with the Claimant from 29 October 2020, and even in the nine point plan there was a failure to engage with the particular measures the Claimant sought. Against the context of the pattern since the return and in preparation for the return in August 2020, that was consistent with a state of affairs of failing to attach importance to the investigation of whether further measures were required beyond those generally applicable, other than where it was a straightforward matter of acceding to a request such as a Perspex screen.

Failing to take increased vulnerability due to age into account

342. We turn to whether there was a failure to take increased vulnerability due to age into account.

343. We have considered first whether a PCP which includes failing to take increased vulnerability due to age is inconsistent with the requirement for a neutral PCP. We do not consider that it is. It was common ground that age was a factor that should be taken into consideration. A practice of not doing do would be apparently neutral as between different age groups but have a disadvantageous affect on those over 70 due to their greater vulnerability.

344. We take into account it was no part of the Respondent's case or evidence to call into question whether those over 70 were all material times to be regarded as clinically vulnerable. It was accepted that they were. It is notable however that the IRA form adopted and in place up until November made no reference to any group being regarded as clinically vulnerable by reason of their age. It is a partial but not a sufficient answer to rely on the template having been received from the local authority. It was adopted by the College, it was available to the Respondent to amend it and indeed Mr Lawrence, in his email of 1 June 2020, referred to having been working on it [**S53**]. As set out above, whilst not determinative, we regard it as providing some indication or a lack of appreciation or focus on the need to treat those over 70 as being in a similar category of vulnerability as the two groups mentioned in the form as being clinically vulnerable. We take into account that ultimately, prompted by updated Government guidance on shielding, there was an express recognition that those over 70 were in the clinically vulnerable category, both in the Bulletin and in the updated IRA form. However this was not until November 2020.

345. In other cases where either a member of staff was clinically vulnerable or associated with someone who was, although the IRA process was still not followed, there was a Perspex screen put up, including one instance of this being done in the classroom. The Claimant also requested a screen but although her request was forwarded to the Facilities team there was no response. There are points of distinction in that the Claimant did not make a request for a screen in the classroom and so far as concerns the screen in the staff room the approach taken was for teachers to base themselves in a classroom. The distinction is not however wholly convincing. It does not adequately explain the failure to respond to the Claimant's request. That failure was consistent with the impression of a lack of attention to the Claimant's vulnerability.

346. We have accepted that the Ms Iosif's email of 24 August 2020 and the step of not adding the Claimant to the rota indicated some recognition of the Claimant's concern as to her vulnerability due to age [**148**]. As against that, it is indicative that Ms Iosif was aware of the Claimant's concerns yet despite that failed to take any steps to draw the Claimant's attention to the IRA process or to initiate a discussion as to what further measures may be required, particularly in relation to the position once teaching started, to provide the Claimant with assurance in the light of both her vulnerability due to age and expression of concern in relation to it.

347. We take into account also Ms Iosif having encouraging the Claimant to complete the IRA once the issue was raised with her. As against that however there was a passive approach with no offer of discussion with the Claimant until after what was in effect a letter of complaint on 25 September 2020. Again, Ms Iosif did continue to encourage the Claimant to complete the IRA form when the Claimant specifically highlighted the flaw in it in her email of 17 September 2020, and Ms Iosif said she would pass on the Claimant's comments to the H&S team and copied in Mr Mansfield. However this did not involve an acknowledgment of the Claimant being in a category of vulnerability. Instead the Claimant was told to complete the IRA if she felt she was at risk and her request to cap the numbers in the group was met with the response, even before seeing the IRA, that enrolment could not be capped. As set out above we also consider that, whilst in deciding to move some of the Claimant's classes to F5 Ms Iosif had overlooked the assurance she had given the Claimant, that was also consistent with a lack of appreciation of or focus on the Claimant not only having expressed concern but also being clinically vulnerable by reason of her age.

348. We take into account also that despite the Claimant repeatedly drawing attention to her vulnerability due to her age, at no stage was this expressly acknowledged by the Respondent in its correspondence with the Claimant. The age related vulnerability was specifically highlighted in the Claimant's email of 25 September 2020, but there was no mention of this in the nine point plan which as above largely focussed on measures of general application and an assertion of operating within the guidance. The Claimant's 29 October 2020 letter made expressly clear that a concern was

that there had been no mention of her increased risk as an older member of staff. Whilst we take into account the reference to those over 70 being clinically vulnerable in the November Bulletin and IRA form (as part of reciting the latest guidance), there was no response to the Claimant explaining how the Respondent's response to the measures required to account of her being clinically vulnerable.

349. Nor was there any adequate explanation for the approach of seeking to close down the Claimant's grievance without a full response or right of appeal. Fundamentally that reflected a refusal to recognise the legitimacy of the Claimant's concerns and to address them. Whilst we regard that as having been influenced by a view that the Respondent had done what it needed to do by applying guidance in the GRA, it is also consistent with a failure to recognise or accept that the Claimant's age was of itself something which required closer consideration of what further individual measures were needed.

350. We have concluded above that the Respondent's approach was to place reliance on the GRA and in doing so adopted an approach which involving a failure to take adequate steps to put in place additional measures for Covid protection to those whose individual circumstances of vulnerability required this. If we are wrong in our conclusion that this applied generally, having regard to the matters set out above and in the previous section we infer that in any event it applied in relation to putting in place additional measures on account of age or giving adequate consideration to this.

351. It does not however following that increased vulnerability due to age was not taken into account at all. As set out above, the GRA gave some consideration to the position of the clinically vulnerable in general and that there would be a significant mitigation of risk. We prefer instead to rest our conclusion on the way the PCP consisting of the GRA was operated, and the practice of reliance on the generalised measures without taking adequate steps to put in place additional measures (a) related to age and/or (b) generally or to give adequate consideration to this.

Conclusion as to PCPs

352. We conclude therefore that there were the following relevant PCPs, in relation to which we consider below the further questions as identified in the list of issues:
    352.1 In relation to ventilation:
        (a) Using a classroom (G26) where windows could not be opened.
        (b) Not undertaking a formal assessment by a person qualified in H&S of ventilation and aerosol transmission in those rooms (G26 and F28) or more generally.
    352.2 In relation to overcrowding:
        (a) Not limiting numbers in classes so as to facilitate 1m social distancing between students, or one student per desk.

(b) Not having someone with H&S experience assessing whether the distancing could be applied either between students or between students and teacher.

(c) Not setting any cap on the 16-19 ESOL class prior to the agreement to do so on or around 9 October 2020 and then not setting an explicit maximum on the number of students in that class.

352.3 Not requiring staff or students to wear a mask in the College, and from after half term in or Autumn 2020, not requiring wearing of masks in classrooms.

352.4 Relying on the Respondent's generalised Covid safety measures without taking adequate steps to put in place additional measures (a) related to age and (b) generally, or giving adequate consideration to this.

5. Did the Respondent apply that PCP to the Claimant? Did the matters set out in paragraph 3 above involve the application of the PCP to her?

353. Each of the practices applied to the Claimant at least from the return to the College on 26 August until the Claimant went off sick. They did so either by timetabling the Claimant to teach in classrooms to which the practices related (as in the practices relating to overcrowding, ventilation and mask wearing in classrooms) or by virtue of being a member of staff working at the School.

354. Whilst we have not separately upheld the PCPs under A3 and A4 of the Table, we regard that practice as having fed through into the failure to provide an RTW Plan which adequately engaged with the Claimant's individual circumstances and engaged with the measures she sought to address this, and in failing to act on the requests as to steps to be taken by a qualified H&S person as set out in the 29 October letter and grievance or to give any feedback in relation to this.

355. Similarly, whilst the decision to move some of the Claimant's classes to F5 is likely to have been an oversight in the sense of overlooking the assurance the Claimant had been given, as set out above we consider that it is likely that it was in turn the product of a failure to give adequate consideration to what steps were required in the Claimant's individual circumstances and in that sense followed from the PCP we have found applied in relation to this. We regard the manner in which Ms Iosif dealt with the IRA process, the failures to engage with the measures sought in the nine point plan and then to respond substantively to the Claimant even when it was apparent that there could not be a meeting and when seeking clarification through the union was not fruitful, and the failures in relation to the grievance, as also reflective of this PCP, involving failures in giving adequate consideration or taking steps to put in place additional measures influenced by reliance on the GRA.

356. As to the PCPs we have upheld in the Table, we do not consider that it followed from the fact that the Claimant was not at work during her sick leave that any of the practices ceased to apply to her. On the contrary, taking the examples relating to overcrowding and ventilation, the practices, and the failure to provide adequate assurances, were a barrier to returning to work should her health recover to enable her to do so. The Claimant's concern as to lack of safeguards, including arising from those practices, was also an obvious impediment to her health recovering (as indicated by the first OH report).

357. So far as concerns the practice in relation to using rooms where windows could not be opened, only the use of G26 applied to the Claimant since she did not use the large Humanities staff room. This practice in relation to G26 was not continued upon the return to the College in March 2021, though the Claimant was not informed of this. As set out above, we do not regard Ms Iosif's text of 30 September 2020 as indicating that on the Claimant's return she would not continue to be timetabled in G26. The text referred to being "back" in big classrooms, and there was no mention in the nine point plan or otherwise that the Claimant would not be teaching in G26 despite the specific concerns raised about that classroom.

Comparative disadvantage

6. Did the PCP put or would it put persons who share the same age or age group as the Claimant at a particular disadvantage compared to others? The protected characteristic relied upon by the Claimant is being aged 70 or over and the comparator group is in each case staff who were younger.
(It is the Claimant's case that older staff were at greater risk of serious illness and death if they caught coronavirus and were less adequately protected by the Covid measures applied pursuant to the PCP.
The Respondent contends that the measures taken by it were to ensure that people of all ages were as safe as could reasonably be achieved in the circumstances and were reasonably successful in reducing incidents of serious illness across the wide range of staff ages and did not put Claimant or persons of the Claimants age group at a particular disadvantage compared to others (AGOR §§58-63).)

358. We are satisfied that those in the Claimant's age group were at a comparative disadvantage. Whilst younger staff could also be clinically vulnerable or associated with someone who was, that only applied to some younger staff; about 20 or 25 in the College not including any other ESOL teachers. The same analysis applies whether the comparator group consisted of ESOL staff, or staff at the College more broadly or includes those who may potentially be employed at the College or within ESOL, or is limited to those within those categories who were also limited in the ways that they could engage such as requiring that engagement be in writing.

359. It was common ground that all staff over 70 were more vulnerable. The context was of a global pandemic and initially there being no vaccine roll out.

Ventilation and numbers in the classroom and distancing were all relevant risk factors. As such we are satisfied that in relation to each of the practices, the consequent limits to the protections placed those in the Claimant's age group at comparatively greater risk. That applied to each of the practices individually, but also cumulatively.

360. In relation to using a classroom (G26) where windows could not be opened, it is not an answer that the AHU system was set at 100% recirculation. As set out above, such systems were recognised as a less satisfactory alternative than natural air, and that was reflected in the policy of going round opening windows and doors. Further the context for G26 was that it was at the end of a corridor with a fire door and nor was there assurance of testing the air quality specifically in G26.

361. In relation to not undertaking a formal assessment by a person qualified in H&S of ventilation and aerosol transmission in G26 and F28, the particular disadvantage is not in our view dependent on whether such a test would have revealed the air quality was good or poor. It lay in the fact that without such a test there was a lack of assurance as to the air quality which was liable to be of particular concern to those who were more vulnerable. Further, it impacts on the other PCPs as decisions were made without information based on testing air quality in the particular rooms.

362. The practices in relation to numbers in the room can be considered together. It is not an answer that numbers were lower at the time that the Claimant was working in September 2020. The impact of the practices was that there was a lack of assurance as to the numbers that would be occupying the class going forward with the consequent concern liable to arise as to the impact on safety at work. Whilst that was a particular concern of the Claimant we accept that it was more likely to impact on staff over 70 more generally by reason of being more vulnerable. Whilst in some respects the distance between students might more directly affect the students than the teacher, if numbers rose this would contribute to the sense of crowding in the room, taken together with the uncertainty as to numbers going forward.

363. The absence of a requirement to wear masks in the College similarly impacted on the risk in relation to aerosol transmission. Whilst the risk of a student refusing a request to wear a mask applied also to younger teachers, the impact of such a refusal involved greater disadvantage to older teachers due to greater vulnerability. We address further under the heading of individual disadvantage the impact of what was said in the nine point plan as to being able ask that students wear a mask in class.

364. Equally a failure to take adequate steps to consider or to give adequate consideration to additional individual measures was disadvantageous to older teachers as a group because it was in relation to those who were clinically vulnerable that such measures were liable to be required.

365. In addressing the above points we have focussed on the position considering the likely impact not only on the Claimant but also were there to be another

teacher or member of staff recruited in her age group. In fact though she was the only member of staff in that age group.

7. Did the PCP put the Claimant at that disadvantage?
The Claimant alleges that she was put at a personal disadvantage as her age put her at particular risk of serious illness and death if she caught coronavirus and was not adequately protected by the generalised Covid safety measures applied pursuant to the alleged PCP which she contends was inadequate for her individual needs as an older teacher (POC §3.4). In particular, the Claimant relies on her contentions as to issues relating to ventilation and difficulties of distancing and overcrowding in the rooms used by ESOL (F28, G26 and F5) and the need for adjustments to be made as set out in her IRA and first grievance and her letters of 25 September 2020 and 29 October 2020, the absence of a requirement for staff or students to wear masks and failure to show that vulnerability in relation to age had been take into account by the Respondent in its Covid safety measures.

366. Subject to one issue relating to mask wearing, we accept that the PCPs we have found placed the Claimant at a particular disadvantage, essentially for the same reasons as set out above in relation to comparative disadvantage.

367. In relation to the requirement to wear a mask in class, we take into account that when it was said in the nine point plan that students could be asked to wear a mask, although the Claimant responded to each point, she did not raise any issue in relation to mask wearing other than that it was no different to that which applied to all staff. In our view if the Claimant had identified that there was a problem with students not complying with a request she would have raised it in her reply to the nine point plan, or indeed in the proceedings as some point prior to the hearing. The Claimant stated in oral evidence that students could be asked to wear a mask, sometimes they would not do and that this was a problem throughout the College. However there was no specific evidence of that having happened to the Claimant, and if there had been or it was a concern we would expect it to have been raised at that time and in her written evidence. We conclude that it is more likely that the Claimant did not have a reliable recollection of this distinct from what was asserted in Ms Lawrence's evidence.

368. In all we are not satisfied that the approach to mask wearing in the class operated to the Claimant's disadvantage at least after the nine point plan highlighted that it was available to her to ask students to wear a mask. We are not satisfied that the issue as students refusing the request was one that was of concern to her or occurred to her at the time, or that it was a factor in relation to the concern as to inadequate steps being taken for her to be able to return safely.

Proportionality

8. If so, was the PCP a means of achieving a legitimate aim? The Respondent contends that the legitimate aim is to take reasonable steps and put in place reasonable measures, compliant with the relevant guidelines,

rules and regulations in response to the Pandemic, in order to keep staff and students safe following the decision of the Government to return to and continue substantive classroom teaching for the 2020/2021 academic year.

369. We accept that this would be a legitimate aim. Indeed that was not substantively disputed. The substantive issue was in relation to whether the PCPs were a proportionate means of achieving that aim.

9. Was the PCP a proportionate means of achieving that aim?

9.1 The Claimant says that it was not because the Respondent did not put in place, or take adequate steps to put in place, specific individual plans or assessments tailored to, or consideration of concerns as to, her individual circumstances and those of others in her age group, as to which she relies on the matters at paragraph 3 above as establishing that the means adopted by the Respondent were not proportionate to the above aim.

9.2 The Respondent relies on the matters set out as to its position in paragraph 4 above and its further contentions that:

(a) It had to react quickly and on a continuing basis to an unprecedented situation, and where the Pandemic guidelines, rules and regulations were subject to regular update and change, often on a daily and weekly basis, and do its best in difficult circumstances to ensure that staff and students were safe. (AGOR §§14, 15).

(b) It did all it reasonably could to ensure compliance with the relevant guidelines (AGOR §15)

(c) It has adapted and evolved its policies and measures over time in response to the relevant guidelines, rules and regulations (AGOR §16).

(d) It regularly consulted with the recognised unions regarding its policies and measures and obtained advice from Haringey Council regarding its COVID risk assessments and those assessments were shared with its staff (AGOR §17).

(e) The polices and measures were regularly monitored and reviewed to ensure compliance with changing guidelines, rules and regulations.

370. A proportionate approach in our view required that there be reasonable steps to ensure that any greater protections having regard to individual circumstances were adequately considered. That required specific consultation with those in greater risk categories. Whilst the IRA form was designed to facilitate that, we have found that there were flaws in implementing this. It was not drawn to the attention of staff in preparation for the return in August 2020 or thereafter until mentioned in the Bulletin of 7 September 2020, and there was a lack of management support from Ms Iosif and guidance in relation to completing it. That was despite the Claimant raising her concerns as to her position as an older teacher.

371. A consequence of that approach was a failure to take on board and take into account the Claimant's particular concerns arising from her individual

circumstances and as a clinically vulnerable person. There was then a fundamental failure to engage with her in relation to measures she suggested. Each of those matters in our view undermine several of the Respondent's contentions. It undermines its contention that the policies were adequately monitored (the scope for which was further limited by failing to maintain any central record of IRAs), in circumstances where there was a lack of proactivity in consulting with the most vulnerable staff, using the process to guide those discussions. It also undermines any contention that the Respondent did all that could reasonably be expected to protect staff, even allowing for the difficult circumstances. It is also material to weighting the impact on those disadvantaged by what was done with the aim pursued.

(1) Using a classroom (G26) where windows could not be opened

372. We accept that the College had a need to make use of its available space. However we do not accept that it was proportionate to have someone aged over 70 teaching in G26, and still less in the face of her concern expressed in relation to this as in her email of 28 August 2020. There was no necessity for G26 to be a room without an openable window. The room could have been used without a partition, as it was from March 2021. That would have meant moving the ESOL class elsewhere in the College as ultimately occurred. Again however that could have been done. Ms Westray's own evidence was that whilst the move would need agreement from the local authority, that would not have been a big issue. The College had been alerted well before the return to the issue that G26 was sealed shut. The issue was raised in Mr Alexander's email of 8 July 2020. This was not therefore an issue which was not picked up amongst the flurry of matters to be considered. The Respondent ought to have appreciated and been alert to the particular risks of inadequate ventilation to those at greater risk from Covid including the Claimant as a person over 70. There was an appreciation that the AHU did not do away with the benefit of having a fresh air stream as reflected in its direction to open all doors and windows. It was therefore plain that there was a greater risk in being based in a room such as G26. A proportionate approach required consideration of whether even if G26 was used without the partition removed it was necessary for the Claimant (or others who were clinically vulnerable) to teach in that classroom. We are not satisfied that there has been any convincing evidence as to what that was necessary or proportionate. We do not consider that it was.

373. The issue ought to have been all the more stark in the light of the Claimant's comment in her email of 25 September 2020 that G26 could become stuffy and smelly, which ought to have been recognised as a red flag in relation to air quality. It is no answer that this was only specifically stated after the Claimant's last day at work. First, it remained important to address the issue in relation to G26 as part of showing that the Claimant was supported and could safely return to work. In any event, it was an issue that could have been addressed earlier had there been a more proactive approach to the IRA process or discussion with the Claimant in relation to the concerns she had raised at the end of August.

(2) Not undertaking a formal assessment by a person qualified in H&S of ventilation and aerosol transmission in those rooms (G26 and F28) or more generally

374. Again, in considering proportionality we consider it is relevant that the concern as to ventilation was raised by ESOL teachers at an early stage, including by the Claimant. Although Mr Mansfeld referred to monitoring the filtration and flow rate, that did not involve assessment of the air quality in the particular rooms, which were to be used by a person who it should have been appreciated was more vulnerable.

375. The need for a check on air quality at least in room G26 should have been apparent in any event from the Claimant's email of 25 September 2020. Even when the Claimant expressly asked for a ventilation assessment to be carried out in her rooms that was not done and nor was there any explanation for not doing so.

376. Nor do we accept that it is an answer that the College did not have any CO2 monitors. There was no evidence before us that these could not have been obtained, whether due to cost, availability or otherwise. The Respondent also had a dedicated Facilities team who ought to have been able to identify the need for a means of testing air quality in individual rooms.

377. Given the obvious importance of ventilation and the concerns raised in relation to it, the Respondent should have been looking into what steps had been taken to assess air quality in the rooms. The information was of obvious importance to be able to give reassurance and confidence as to safety at work.

378. The burden rests on the Respondent in relation to proportionality. In all we are not satisfied that failure to do so was proportionate to any legitimate aim.

379. We add that this also bears on proportionality in relation to other PCPs we have found applied. Thus in relation to the sealed window in G26 our conclusion as to lack of proportionality is reinforced by the fact that no assessment of air quality in that room was carried out until September 2021 (by when the partition had been removed).

(3) Overcrowding

380. In general It may not have been unreasonable to allow students to sit closer than 1m together but facing the front where there was not sufficient space to distance, and not to replace the desks in F28 before it was necessary to do so given the numbers in the room at the time. However it was also important to approach this in a manner which took account of and addressed the concerns of those who were clinically vulnerable, and in relation to ESOL, the concerns of the Claimant arising from her greater vulnerability. It was not necessary for Ms Iosif to reject the request for a cap on the group even before receiving the IRA or to fail to set out an explicit maximum for the class size so as to give the Claimant an assurance for the future. Nor are we

satisfied that without engaging with the Claimant's measures proposed by the Claimant and explaining why they were not considered either feasible or necessary, the other PCPs under the heading of overcrowding were proportionate. Proportionality required adequate consideration of individual adjustments for those who were more vulnerable, Having regard to our findings as to the flaws in the IRA process followed and in engagement with the issues that the Claimant raised, we are not satisfied that the Respondent implemented an adequate process for doing so, or for doing so for those with greater vulnerability related to age. In addition these matters are properly to be viewed alongside our conclusions in relation to ventilation, such that there was a failure to test the effect of the approach adopted by testing the air quality in specific classrooms, or those use by ESOL, including a classroom (G26) with no opening window.

(4) Mask wearing

381. We accept that the College was following guidelines in relation to the approach it adopted to mask wearing. We also accept that there were concerns as to feasibility in relation to initially imposing a ban on mask wearing in the corridors. Nor was this a specific concern that the Claimant had raised. We accept that the initial approach to mask wearing in corridors was therefore proportionate to the legitimate aim asserted having regard to the consultation process followed including with the union and local authority and that this was kept under review and revised after the first half term.

382. So far as concerns the practice in classrooms, we accept for similar reasons that it was proportionate not to have a general prohibition on wearing masks in classrooms. In the light of our conclusion above as to individual disadvantage, and our further conclusion below in relation to time limits, the further issue as to whether the proportionality defence fails due to failure to give a specific instruction to students to comply with teacher's requests to wear a mask does not arise.

(5) Generalised measures without taking adequate steps to put in place additional measures (a) related to age and (b) generally, or giving adequate consideration to this

383. In the light of our conclusions as to the failure to take adequate steps to put in place additional measures, and to give adequate consideration to this, we are satisfied that the approach taken by the Respondent was not proportionate to any legitimate aim.

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Time limits

1. Does the Tribunal have jurisdiction to consider the Claimant's claim of indirect discrimination in so far as it relates to events that took place before 11 March 2021 (being the date three months before the ACAS notification)? In relation to this:

1.1Was the discrimination a continuing act extending at least up to 11 March 2021?

1.2 If not, was the claim made within such other period as the Tribunal thinks is just and equitable?

384. As to the application of time limits, we address first the position other than in relation to mask earing. In relation to this we are satisfied that the PCPs we have found were continuing up to 11 March 2021 other than the issues in relation to G26. We do not accept the Respondent's submission that they ceased to apply on the basis that it was that fact of the Claimant's certified sickness absence that was preventing her from returning. That is to overlook the failure to address the Claimant's concerns adequately was an obvious barrier to her health recovering, as she expressly noted in her grievance.

385. However in the event that is wrong, and if the PCPs or their application to the Claimant or disadvantage from them did not continue beyond the Claimant ceasing to work, and in relation to the PCPs relating to G26, we are satisfied that it is just and equitable to extend time. We take into account in particular our findings as to the Respondent's serious failures to engage with the issues raised by the Claimant, and refusal to provide her with a substantive response to her grievance or to permit her to pursue a grievance. Whilst the Claimant potentially had access to advice from her union (but not its legal adviser), and had raised the issue of time limits with them, it was reasonable for her to press for an internal resolution and for the Respondent to address her concerns substantively, including pressing for it to do so though the internal grievance process. We regard that as providing a reasonable explanation for much of the period of any delay in bringing the claim. We do not consider that the short delay from the rejection of the second grievance affects this, having regard to the need to seek legal advice having been denied this through her union. It was not suggested by the Respondent that there was any prejudice to the Respondent arising from the delay other than loss of a limitation defence. Further, as to G26 the Respondent failed to inform the Claimant that it was no longer being used.

386. In all the circumstances we are satisfied that it is just and equitable to extend time to the extent necessary.

387. Mr Peacock accepted that the relevant date is for the act to have continued until 11 March 2021. However we would have reached the same conclusion if it was necessary to extend time up to the date of the application to amend or the date of permission to amend being given.

388. Some different considerations arise in relation to mask wearing in class. We have concluded that at least from receipt of the nine point plan this did not place the Claimant at an individual disadvantage. We take into account the Respondent's wholesale failures in relation to the grievance process. However the potential issue as to a distinction between asking and requiring that students wear a mask, and/or the issue as to students refusing the request, did not operate on the Claimant's mind and was not one of the factors in relation to the concern as to lack adequate measures to safeguard her safety and therefore a barrier to her return to work. Given that the Claimant herself highlighted in her 29 October 2020 letter that the

information that she could request that students wear a mask was not specific to her, it may be that the position was the same prior to receipt of the nine point plan.

389. In any event, even if the Claimant was subject to individual disadvantage up to receipt of the nine point plan referring to being able to ask students to wear a mask, we do not consider that it would be just and equitable to extend time in relation to this point. That Claimant did not raise any issue as to mask wearing until the application to amend on the first day of the hearing, other than its having been raised in Ms Lawrence's evidence. It was not raised in any of her correspondence. Part of the evidence bearing on this was oral evidence as to what is alleged to have been said to students on induction, which is now nearly three years ago. In considering the overall prejudice it is also relevant that it is not a factor that the Claimant identified as sufficiently significant to include in her claim until the clarification of issues at the start of the hearing. In all the circumstances we do not consider that it is just and equitable to extend time in relation to the PCP relating to mask-wearing.

Remedy issues to be addressed at this stage

11. Was the PCP not applied with the intention of discriminating against the Claimant?

390. We were not referred to any authority on the meaning of whether indirect discrimination is to be regarded as intentional. However following the completion of submissions we have identified that guidance was set out in ***JH Walker Ltd v Hussain*** [1996] ICR 291 (EAT). The EAT stated that "intention" refers to the employer's state of mind with regard to the consequences of its actions, and that there would be the relevant intention if the employer (a) wanted to bring about a state of affairs that constituted the prohibited treatment and (b) knew that the prohibited result would follow. We have also referred to the commentary in the IDS booklet on Discrimination, where there is a discussion as to whether constructive knowledge would suffice and whether it is sufficient if the employer was expected to know just that the unfavourable outcome would result or whether it would have to know that the employer knew that the prohibited result would follow. There is also reference to dicta in ***BMA v Chaudhary*** [2007] IRLR 800 (CA) suggesting (at [224]) that blind eye knowledge is not enough.

391. Since the parties have not had the opportunity to comment on these authorities, and given that it is likely that little turns on the issue in any event in the light of the guidance in ***Wisbey***, we consider that the appropriate course, rather than finally determining the issue at this stage, is for the parties to have the opportunity to make further submissions as to this issue, and indeed whether it is necessary for us to decide it in the light of ***Wisbey***, should they wish to do so in the Remedies hearing.

16. Did the Respondent unreasonably fail to comply with [the ACAS Code] by the matters specified at paragraphs 3.8 and 3.9 above. The Claimant relies on the following provisions of the ACAS code:

16.1Para 4, 1st bullet point: The obligation to deal with the issues raised in the grievance promptly. The Claimant contends that the Respondent did not deal with the issues in the appeal.

16.2 Para 4, 3rd bullet point: The obligation to carry out all necessary investigations.

16.3 Para 4. 6th bullet point: The obligation to allow an employee to appeal.

16.4 Para 33: The obligation to hold a formal grievance meeting.

16.5 Para 34: That employees should be allowed to explain their grievance and how they think it should be resolved (subject to whether that is specific to the grievance meeting).

16.6 Para 40 The obligation to communicate a decision on the grievance in writing and to inform the employee of the right of appeal.

392. The following material provisions of the ACAS Code of Practice on Disciplinary and Grievance Procedures ("the Code") are relied upon by the Claimant:

> "4. … whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:
>
> • Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.
> …
> • Employers should carry out any necessary **investigations**, to establish the facts of the case.
> …
> • Employers should allow an employee to **appeal** against any formal decision made.
> …
>
> 33. Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received.
>
> 34. … Employees should be allowed to explain their grievance and how they think it should be resolved. …
>
> …
>
> 40. Following the meeting decide on what action, if any, to take. Decisions should be communicated to the employee, in writing, without unreasonable delay and, where appropriate, should set out what action the employer intends to take to resolve the grievance. The employee should be informed that they can appeal if they are not content with the action taken."

393. It follows from our findings that there was a wholesale and wholly unreasonable failure to comply with ACAS code including in each of the

respects identified in the list of issues. The Respondent did not deal with the issues raised promptly. There was no adequate investigation, not least because of the refusal of the Respondent to correspond substantively in writing in relation to the grievance, either by way of seeking clarification or further information or to provide a substantive response so as to elicit the Claimant's comments in relation to it. Nor was the scoping exercise an adequate investigation. No notes were taken, and in the absence of these and given Mr Lawrance's stance of seeking to close the investigation down, we are not satisfied that the matters raised were sufficiently explored. Indeed his own evidence indicates he did not even review all the relevant documentation including the letter of 29 October 2020. Nor was the Claimant afforded an appeal. The proposed meeting with Ms Westray, whether or not Mr Lawrance attended, was not held out as a grievance hearing and in any event there was no offer of a grievance hearing with someone who was not the subject of the Claimant's grievance. The consequence of the refusal to do so and the refusal to accept the request to engage substantively in writing or to provide a substantive response for the Claimant to comment upon, was that she was not afforded a reasonable opportunity to explain her grievance or engage in relation to how it should be resolved.

394. Ultimately, despite the fact that it was obvious that refusing to respond substantively with the issues raised by the Claimant was likely to be a bar to any prospect of the Claimant feeling safe in returning to work, the Respondent chose not to do so or to permit the grievance to proceed. Mr Lawrence caused it to be shut down.

395. We are not satisfied that there is any significant mitigation arising from the fact that the Claimant did not feel able to meet with those who were the subject of her grievance. There was no medical evidence obtained to indicate that this was unreasonable. In any event the Respondent should have explored any clarification or further information required in writing or provided a substantive response to which the Claimant could reply. Given the safety issues concerned this was a very serious breach of the ACAS code.

396. We are satisfied therefore that there was an unreasonable failure to comply with the ACAS Code. Having regard to the matters set out above, applying the first two steps of the four step guidance in ***Slade***, we are satisfied that the nature of the failures and seriousness of the issues in relation to which those failures occurred is such that it is just and equitable to make an award of an ACAS uplift and, prior to considering steps 3 and 4 of the guidance, we would be inclined to make a maximum uplift of 25%. However we will hear further submissions in relation to that at the remedy hearing, taking into account the third and fourth steps of the guidance in ***Slade***,

Conclusion

397. Accordingly we conclude that the Claim of indirect age discrimination succeeds in relation to the following PCPs:

397.1 In relation to ventilation:

(a) Using a classroom (G26) where windows could not be opened.

(b) Not undertaking a formal assessment by a person qualified in H&S of ventilation and aerosol transmission in those rooms (G26 and F28) or more generally.

397.2 In relation to overcrowding:

(a) Not limiting numbers in classes so as to facilitate one metre social distancing between students, or one student per desk.

(b) Not having someone with health and safety experience assessing whether the distancing could be applied either between students or between students and teacher

(c) Not setting any cap on the 16 to 19 ESOL class prior to agreement to do so on or around 9 October 2020, and then not setting an explicit maximum on the number of students in that class.

397.3 Relying on the Respondent's generalised Covid safety measures without taking adequate steps to put in place additional measures (a) related to age and (b) generally, or giving adequate consideration to this.

Employment Judge J Lewis KC
Date: 2 May 2023

ORDER SENT TO THE PARTIES ON:

Order sent to the parties on:

6 June 2023

FOR THE TRIBUNAL OFFICE:

GDJ