CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 UNIT 4 – EMPLOYMENT LAW

JUNE 2023

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

In relation to Section A, all of the questions, when attempted, produced comparable results in terms of quality of responses given. There was an overall good level of identification of the statute supporting areas examined, as well as, to a slightly lesser extent overall, citation of relevant case law. The supporting laws formed the basis of most responses, which is good. However, only higher scoring papers then used that law to import critical application, per the command verb used within the question i.e., analyse, evaluate etc. Lower scoring but passing papers included a few basic but relevant critical points, usually within the concluding passages of the responses given. Failing papers did not correctly identify the area of law examined or provided nominal detail thereon. These papers also failed to include any critical aspects or entirely overlooked the command verb.

In relation to Section B, passing papers identified the majority of legal issues raised within the scenarios presented. Higher scoring papers addressed all such issues, with supporting application and law. Many passing but lower scoring papers identified the issues examined, with some law, but failed to consistently provide question-specific application per all of the details of the question posed. However, while only higher scoring papers identified all legal issues to a strong standard, the option of sub section questions allowed most papers to present strong responses in relation to at least some of the issues within the sections as a whole. This resulted in an overall good level of knowledge being presented in the majority of answers when the paper is taken as a whole.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1(a)

This was a moderately popular question resulting in good to moderate passing grades overall; with few higher and lower scoring papers noted. Higher scoring papers noted both aspects of the question and included varied examples of seminal case law specific to defences. Lower but passing papers identified both elements of the question but tended to provide detail on only one of the two topics examined. Critical evaluation was nominal, but few good points were raised in higher scoring papers. Very few papers failed the question.

(b)

This aspect of the question tended to produce quite descriptive responses with the majority of answers citing the relevant legal issues and defences but failing to provide critical evaluation thereon. However, the question nonetheless produced overall moderate to good passing grades, with few fails. This was due to the laws cited being well identified and explained, if not critically evaluated to allow for a higher grade.

Question 2

This was a popular question, largely due to the area of law being examined. Answers tended to produce moderate to good passing grades, with few fails or higher scoring passes. There were many descriptive responses that cited relevant statute and case law but failed to provide critical analysis thereon; at times with no efforts made to comment upon the information cited. The question specifically required consideration of 'serious' allegations and this aspect of the question was sufficiently addressed in only the few higher scoring papers noted.

Question 3

This was not a particularly popular question but was attempted by some candidates.

Answers tended to produce moderate to low passing grades, with few fails. The majority of papers cited relevant case law but at times presented a slightly broad overview of the area examined rather than specifically considering the wording of the question. Nonetheless, the case law identified overall reflected an appropriate level of knowledge. However, while the laws cited were relevant and credited, critical assessment thereof in relation to the wording of the question, and assessment of the stringency of the requirements for a claim, tended to be lacking in all but very few responses. Overall, the few candidates that attempted this question passed with a low to moderate grade and cited good laws.

Question 4

This was a moderately popular question that produced good to moderate passing grades overall. The majority of responses cited the relevant case law tests and also produced various examples of their application. Higher scoring papers also detailed the 'gig' economy element of the question with citation of recent rulings surrounding the area. Most papers produced few concluding critical comments demonstrating an aspect of the evaluation element of the question. While these points needed to be more consistently evident, they were noted in the majority of papers and comments were generally well reasoned.

Section B

Question 1

This was a moderately popular question resulting in moderate to good passing grades. The majority of responses addressed both aspects of the question, with citation of statutory provisions on consultation tending to be better explained and applied than selection. Most papers referred to relevant case law, but selection cases could have been more readily found. The application of law per the question posed was found in most papers, but few responses identified all relevant points. A few lower scoring or failing answers cited relevant laws only, with nominal, or no evidence of, application to the question.

Question 2(a)

This was not a very popular question but was attempted by some candidates. The majority of answers identified relevant statutory provisions, with some application. However, further question-specific details needed to be considered in a few papers. The very few failing answers did not sufficiently recognise the issues examined.

(b)

Most candidates identified harassment, with statute, case law and some application. Only higher scoring papers addressed direct discrimination to an equally high standard. Few failing papers did not identify the correct type of discrimination examined or failed to address direct discrimination.

Question 3

This was a moderately popular question that resulted in good answers overall. Very few papers failed the question due to not identifying the legal issues examined. The vast majority of candidates recognised all the breaches of law and applied these to the question in a brief but overall reasoned manner. Implied duties were identified in most papers, but only high scoring papers addressed these with seminal case law application specific to the question. Few lower scoring papers did not identify the 'statement' issues, but these were very few and tended to still pass the question due to the good consideration of all other aspects examined.

Question 4(a)

This was a popular question resulting in good answers overall. This part of the question resulted in good answers with detailed consideration of case law, and higher scoring papers, of which there were many, also providing reasoned application per the question.

(b)

The majority of responses identified the relevant law governing the issues examined. Higher scoring papers also applied this law with reasoning to the question. Very few failing responses did not address the question or failed to identify the area of law examined.

(c)

A relatively straight forward question resulting in good answers. The majority of papers identified the relevant laws and applied these with reason. Very few failing papers identified only one aspect of the question, leaving the other unanswered.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 UNIT 4 – EMPLOYMENT LAW

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	Responses should include: • Define indirect discrimination under s19 EA 2010 • Identify the protected characteristics of religion and age • Identify that an employer can defend against a claim of indirect discrimination by demonstrating that the measure in question is a 'proportionate means of achieving a legitimate aim'. • Relevant case law examples should be critically evaluated, including but not limited to the following: • Religion • Williams-Drabble v Pathway Care Solutions Ltd and Another (2005), a change in working rota that discriminated against an employee on the grounds of religion was not justified as a proportionate means of achieving a legitimate aim. The employer had previously been able to work around the employee's requirements. • Governing Body of Aberdare Girls' High School (on the application of Watkins-Singh) (2008), prohibition on those of the Sikh religion wearing the kara at school was held to be indirect discrimination and not justified.	18

	• However, in Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust (2010) removal of a crucifix was a proportionate means of achieving the legitimate aim as the item was seen as a breach of the health and safety rules of the workplace. • Age • Homer v Chief Constable of West Yorkshire Police (2012), the educational requirement of a degree indirectly discriminated against older applicants and was not a proportionate means of achieving the legitimate aim of finding the best individual for the position. • Woodcock v Cumbria Primary Care Trust [2012] considerations of 'costs alone' to the employer cannot solely justify discriminatory treatment. However, a "cost-plus" approach can be capable of justifying age discrimination. • Heskett v Secretary of State for Justice CA 11 Nov 2020 an employer may cite reduction in staffing costs as legitimate aim, however, the measure must be a proportionate means of achieving that aim. The employer must show they could not have addressed the financial restraints in a different way that did not indirectly discriminate against a protected group/characteristic. • Critical evaluation of the case law cited should be evident throughout the response. • Critical evaluation/ commentary should address the specifics of the question in relation to evaluating whether the cases cited allow an employer to use the 'proportionate means' defence to indirectly discriminate on the basis of religion and age without due consequence. • A balanced approach should be taken in citing case law that demonstrates where the defence to a claim of indirect discrimination has been successful and where it has failed. The factors underpinning the differences within the outcomes should also be noted and critically evaluated. • Responses could include: • The onus is on the employer to show that the requirement was objectively justified, such justification can be on the grounds of business or economic need, Bilka-Kaufhaus GmbH v Weber von Hartz (1986).	

	• Certain cases criticised for failure to adequately consider Article 9 (2) ECHR freedom of religion. • The claimant must show that they have personally been put at a disadvantage, not just the group to which they may belong.	
1(b)	**Responses should include:** • Equality Act 2010 prohibits discrimination on the grounds of disability, s6 • Identify the requirement on employers to protect disabled employees. s39(5) EA 2010 duty to make reasonable adjustments and provision of adjustments, and aids provided, without any cost to the employee s20 (7). • An employer can defend against failure to make adjustments by claiming they were not 'reasonable' . • Cordell v Foreign and Commonwealth Office (2011) noted several factors considered in this respect, including the degree the employee would benefit from the adjustment and budgetary considerations. • Critical evaluation/ commentary • Responses could include • All adjustments must be reasonable. Reasonableness is judicially determined on case by case basis. • This may allow smaller employers to avoid making adjustments on the basis of financial limitations. Any other relevant case law	7
		Question 1 Total:25 marks

Question Number	Suggested Points for Responses	Marks (Max)
2	**Responses should include:** • Misconduct is a ground for potentially fair dismissal under s98 Employment Rights Act 1996 • Where an employee is dismissed for misconduct, the employer must demonstrate that the dismissal was reasonable and proper procedure followed with regards to appropriate investigation into the alleged misconduct. • Explain the requirements of the ACAS disciplinary code, including the good practice requirement to invite the employee to attend a meeting where the alleged misconduct can be further investigated. • The employer should ask the employee questions to facilitate investigation into the alleged misconduct and give the employee an opportunity to explain or defend their actions. • Dismissal due to misconduct must be reasonable and fair in the circumstances. Including that the employer genuinely believed the employee was guilty of the offence, whether they had reasonable grounds for that belief and whether the employer	25

	carried out as much investigation into the matter as was reasonable, BHS Ltd v Burchell (1978). • If investigation into the alleged misconduct is not proper, it is unlikely the employer had reasonable grounds for the dismissal. • Identify that recent case law reinforces the importance of procedural fairness, Molloy v Liverpool Community Health Trust (2016) even a 'minor' procedural defect could result in a finding of unfair dismissal. • The employer must act reasonably in the circumstances and consideration will be given to the resources of the employer, as well as the seriousness of the allegation, Iceland Frozen Foods v Jones (1982) and HSBC Bank v Madden (2001). • When a serious and potentially career changing allegation of misconduct is made, only an appropriately in depth, independent and thorough investigation will be reasonable. • Dronsfield v University of Reading (2019); Hargreaves v Manchester Grammar (2018), dismissal for an alleged physical assault on a student was held to require a higher standard of investigation given the nature of the allegation against the claimant. • Where employer fails to follow proper procedure and codes, any award obtained against it for unfair dismissal may be increased by up to 25%, Polkey v AE Dayton Services Limited (1988). • However, where proper procedure would not have made any difference to the outcome nor the decision to dismiss, the award can be reduced to an amount the tribunal considers just and equitable appropriate, up to nil. • Critical analysis of the law cited should be evident throughout the response. • Critical analysis / commentary should address the specifics of the question in analysing each of the elements of the question; proper investigation, serious allegations, remedies. • The factors underpinning the differences within the outcomes of the laws cited should also be noted and critically analysed. • **Responses could include:** • Explain the qualifying criteria for a claim of potentially unfair dismissal under s94 ERA 1996 • Evans v London Borough of Brent (2020) unfair dismissal due to lack of procedural fairness despite there being no chance of	

	compensation, in interests of justice to still find the procedure unfair • An employer should also have a policy on dismissal procedure that reflects legal standards. This would reinforce a fair process. • Any relevant case law	
		Question 2 Total:25 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
3	**Responses should include:** • Define constructive dismissal and explain that, where a constructive dismissal occurs, an employee can bring a claim for wrongful dismissal. • Identify the remedies available for a claim of wrongful dismissal/constructive dismissal • An employee who has been constructively dismissed can bring a claim for wrongful dismissal in the employment tribunal within three months of the breach. • The employee may also bring a claim for breach of contract to the civil courts within six years of breach. The damages amount will reflect the value of the employees contract. • There is no duration of employment requirement to access these remedies. • The remedies are broad as cover both tribunal and court jurisdiction and span over six years. • Explain the requirements to bring a successful claim of wrongful dismissal following a constructive dismissal. • Identify that a constructive dismissal takes place when an employee can demonstrate that the employer has made it impossible for them to continue in their job, effectively forcing them to resign from their job. • Explain that constructive dismissal requires that the employer commits a fundamental breach of the employment contract. Identify that the circumstances must be sufficiently serious to give rise to a constructive dismissal. • The breach of a fundamental term of contract by the employer must be considered sufficiently serious to constitute a constructive dismissal, Western Excavating Limited v Sharp (1979). • The breach may be of an express or implied term. • Constructive dismissal often courts where there is a breach of the implied duty of trust and confidence, which includes actions	25

	and words of the employer, a broad interpretation, Five Elms Medical Practice v Hayes (2012), Ogilvie v Neyrfor-Weir Ltd (2003) • An objective test is used to determine if the trust and confidence have been broken and the motives of the employer are not relevant to this test. Breach of this duty can include reputational damage to the employee, hindering future employment, Malik v BCCI (1997). • Although the test is objective, the circumstances of the employer will be taken into consideration, including where the employee resigned due to a non payment of salary. This was a fundamental breach of contract, however, the claim for constructive dismissal failed as the employee was aware of the mitigating and financial circumstances of the employer and the funds were not wilfully withheld, Adams v Charles Zub Associates Ltd (1978). • An employee may resign over one 'serious' incident, or several incidents. • For several incidents, the employee must identify the 'final incident' that led to their resignation, this final incident must be a breach of contract and one of the reasons for the resignation, not an 'innocuous' event, Kaur v Leeds Teaching Hospitals NHS Trust (2018). • The employee must resign reasonably promptly or may be considered to have affirmed the contract and the right to claim constructive dismissal will be lost, Brown v Neon Management (2018). This applies to both single event and cumulative claims. • Critical assessment of the case law cited should be evident throughout the response. • Critical assessment/ commentary should address the specifics of the question in relation to assessing the extent of the remedies available, and assessing the ability of employees to access these remedies/ the variation in judicial outcomes per claims of wrongful dismissal. • A balanced approach should be taken in citing case law that demonstrates where the claim for wrongful dismissal has been successful and where it has failed. The factors underpinning the differences within the outcomes should also be noted and critically analysed. • Responses could include: • Identify that, unlike constructive unfair dismissal, wrongful dismissal claims do not require a particular length of service.	

	• Examples of serious breaches of employment contract by the employer, including bullying, and unreasonable changes to working patterns. • Any relevant case law.	
		Question 3 Total:25 marks
Question Number	**Suggested Points for Responses**	**Marks (Max)**
4	**Responses should include:** • Under s203 (1) ERA, an employee is an individual who works under a contract of service and an independent contractor is someone who works under a contract for services, s203 (2). • Workers are defined under s 203(3) as individuals who perform services for another party whose status is not that of a client or customer. • The courts also have fact-based tests to determine employment status. • The multiple/economic reality test, Ready Mixed Concrete Ltd v Minister of Pensions (1968), considers the degree of control, mutuality of obligation, personal service, investment in tools and equipment, length of service and method of payment and taxation. • However, 'economic realities' must be balanced against other factors, even where the individual pays their own tax and national insurance they may still be an employee if other factors reinforce this status, Pimlico Plumbers Ltd v Smith (2018). • The ability to delegate duties generally suggests the individual is not an employee, MacFarlane and Another v Glasgow City Council (2001). However, delegation, as with all factors, will be considered in the light of the individual's full working circumstances. • The tests appear to be appropriately applied to modern ways of working, as reflected in the 'gig economy'. • When dealing with agency workers and zero hours contracts, despite contracts commonly referring to them as workers, the same tests will apply to determine employment status as for any other individual, James v London Borough of Greenwich (2008) agency workers; Pulse Healthcare Ltd v Carewatch Care Services Ltd and Others (2012), zero hours contractors held to be employees based on the reality of their working lives. • Recent judicial rulings demonstrate Economic Reality/Multiple tests still effectively used. Uber BV and others (Appellants) v Aslam and others (Respondents), the evaluation of realities in determining drivers as 'workers' and entitled to statutory rights	25

	of minimum wages and holidays. Elements considered included control on terms of working, control of earning limits, and termination of the working relationship. • Critical evaluation of the law cited should be evident throughout the response. • Critical evaluation/commentary should address the specifics of the question in evaluating the tests and their applicability to the gig economy. The factors underpinning the differences within the outcomes of the laws cited should also be noted and critically evaluated. • The test is several decades old but is flexible enough to arguable still remain relevant. None of the single factors are exclusively decisive and all factors are balanced. Case law application of the tests results in varied outcomes that appear to consider the facts of each case. • Any reasoned evaluation/ conclusion. Responses could include • The employment contract label will only be a deciding point where other factors are of equal weight, Young & Woods Ltd v West (1980). • Where there is disparity between express contractual provisions and the reality of an individual's working life, the latter should take precedence, Consistent Group Ltd v Kalwak (2007). • No single aspect will be decisive and the courts will consider many variables that make up the individual's working life in determining their status. • Any relevant law	
		Question 4 Total:25 marks

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1	• Selection • Identify that the proper selection requirement on the employer to consider a pool of employees. Selection for the redundancy pool must be reasonable in the circumstances, Capita Hartshead Ltd v Byard. • The employer must use a fair and objective way of selecting persons for redundancy and demonstrate the following: the basis of the selection process, Cox v Wildt Mellor Bromley Ltd (1978), how it was applied in practice, Protective Services (Contracts) Ltd v Livingstone (1992).	25

	• Williams v Compair Maxam (1982) reference should be made to measurable facts that can be objectively checked, including disciplinary record. An employees attendance record may also be considered in selection for redundancy, so long as absences not related to disability or maternity, EA 2010. • The selection procedure followed by Aardvark Finds Ltd appears fair. Credit any reasoned conclusion. • Consultation • Identify that the requirement to consult arises where the employer intends to dismiss 20 or more employees within a 90 day period at a single establishment ss188-194 Trade Union and Labour Relations (Consolidation) Act 1992. • Explain the time periods for consultation-s188 TULR(C)A 1992, Dewhirst Group v GMB (2003), Securicor and Omega Express Ltd v GMB (2004). • Where there is a recognised trade union, the employer must consult that union, where there is no such union the employer must consult the appointed or elected employee representatives S188-194 Trade Union and Labour Relations (Consolidation) Act 1992.Those being consulted must have a reasonable opportunity to understand the subject matter of the consultation, express their views and the other party must 'genuinely' consider their opinions, British Coal Corporation and Secretary of State for Trade and Industry, ex pate Price and Others (1994). • Aardvark Finds Ltd has failed to meet these consultation requirements: • There was no collective consultation with a trade union representative nor employee representative. • The meetings with each employee were a maximum of 10 minutes and without opportunity to attend with a representative as the meetings were 'private'. Although the reasons for redundancy were given, as required, the meetings fell short of the requirements and were not a 'genuine' attempt to limit redundancy effects. • The redundancies took place two weeks after the consultation, in breach of the requirement that where there are 20 to 99 redundancies, the consultation must start 30 days before any dismissals take place, at a minimum. • Aardvark Finds Ltd have failed to follow proper consultation procedure.	

	• Where there is failure to follow proper redundancy procedure, the dismissals will be treated as an unfair dismissal. • Remedies • Identify the remedies for unfair dismissal are under ERA s.112 and Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) s.157(1) an order of reinstatement, an order of reengagement and an order for compensation for a basic award and a compensatory award. • The basic award is the same as that of a redundancy payment. • If the redundancy was unfair, there will be an additional right to compensation under s123 ERA. • If a tribunal finds that an employer acted in breach of the s188 TULRCA duty to consult, they must make a protective award Hardy v Tourism South East (2005). • The protective award will be made in addition to any claims for unfair dismissal compensation or redundancy pay. The length of the award is at the discretion of the tribunal and subject to a limit of 90 days. • Responses could include • A proper selection procedure must be followed in any redundancy, except where the job no longer exists, ERA 1996. As the customer service department still exists, and all persons in the department perform the same job, proper selection must be shown. • Collective consultations must cover ways to avoid redundancies or limit the effect for employees. • The employee has a duty to mitigate their losses and the compensatory award can be reduced to nil if the tribunal deems equitable, University of Sunderland v Drossou (2017). • An employer may claim exemption from the consultation provisions on the ground its own consultation scheme is at least as favourable, s198 TULRCA. Aardvark Finds Ltd will be not to succeed in this defence on the facts. • Compensation under s123 ERA. This includes loss suffered and expenses reasonably incurred, as well as any benefit lost. This payment is also subject to a maximum statutory amount of 52 weeks gross pay or a statutory amount that increases each year.	

	• The basic award is calculated as half a week's pay for each full year the employee was under 22, one week's pay for each full year they were aged 22 to 41 years, one and half week's pay for each full year the employee was aged 41 years or older. The length of service is capped at 20 years, counting backwards from the date of the redundancy, and the calculation of a week's pay is subject to the maximum statutory redundancy payment.	
		Question 1 Total:25 marks

Question Number	Suggested Points for Responses	Marks (Max)
2(a)	**Responses should include:** • Request for adoption leave • Madhuri is an employee of Image Control Ltd and has given the correct notice. She has also agreed with the adoption agency a date for the newly matched adoption and have notified her employer that she wishes to take SAL no less than 7 days after the date on which she is informed of the matching. • Madhuri has also informed her employer of the specific date of placement and the date on which she wishes her SAL to start, Paternity and Adoption Leave Regulations 2002. • Madhuri has met the requirements for adoption leave, her application is proper. • Statutory Adoption Leave (SAL) can be taken by one of the parents who adopt the child, not both. Madhuri and her wife have decided that Madhuri will be the one taking the leave. • Adoption leave and paid adoption leave • The adoptive parent is allowed 26 weeks of Ordinary Adoption Leave followed by 26 weeks of Additional Adoption Leave. • Madhuri is also entitled to the paid leave under the Paternity and Adoption Leave Regulations 2002. • She has been continuously employed by Image Control Ltd for more than 26 weeks by the week she was matched with the child and she earns over £123 a week before tax. She has also given the correct notice and sent proof of the adoption. • Statutory Adoption Pay is paid for up to 39 weeks. The weekly amount is:90% of your average weekly earnings for the first 6 weeks, then £156.66 or 90% of your average weekly earnings (whichever is lower) for the next 33 weeks Responses could include: • The right to SAL is not dependent on duration of employment. • Any relevant law	16

2(b)	**Responses should include:** • The Equality Act 2010 protects against discrimination on the basis of sexual orientation s12. • Define direct discrimination, s13 EA 2010 • Madhuri's request for leave was initially accepted, then rejected upon her manager learning of her sexual orientation. This is a form of direct discrimination on the basis of sexual orientation, as Madhuri is being treated less favourably on the grounds of her protected characteristic, than would a person not holding that characteristic. • Define harassment under s26 EA 2010 • The EA 2010 prohibits harassment on the basis of a protected characteristic, including comments likely to make the individual feel degraded or humiliated. The comments made to Madhuri by Katie on the basis of 'masculine' and also 'having a child of her own/husband' meet this definition. She has been harassed on the basis of sexual orientation. Madhuri is 'offended' by the comments. • A single incident can be harassment depending on the nature of the work environment, incident and parties dynamics, Bracebridge Engineering Ltd v Darby [1990, Insitu Cleaning Co Ltd & Anor v Heads [1994]. De Souza E Souza v Primark Stores Ltd (2018). • However, two incidents of harassment have occurred within two days since Katie learned of Madhuri's sexual orientation. • Madhuri has been discriminated against Could include; • Direct discrimination (and harassment) cannot be justified. • In addition to Katie's liability, Image Control Ltd may be vicarious liability s109 and s110 EA 2010. • Madhuri may have also been discriminated against on the basis of the protected characteristic of marriage and civil partnership, s8 EA 2010.	9
		Question 2 Total:25 marks

Question Number	Suggested Points for Responses	Marks (Max)
3	**Responses should include:** • Breach of National Minimum Wage Act 1998 • Under the NMWA 1998, all employees are entitled to be paid a minimum wage, the amount being dependent on the employees' age. This amount does not include tips nor benefits, such as a free lunch. • David is 24 years old and has worked at the salon for three years, he was therefore 21 years of age when his employment began.	25

	• When David began working at Nice Nails Ltd, he should have been paid the minimum wage for a person in the age bracket of those 21-22 years of age. This exceeded £5 per hour. • Upon turning 23, David should have been paid a higher amount within the bracket for those aged 23 and over. Again, well exceeding £5 per hour. • The National Minimum Wage Act (NMWA) 1998 states that the minimum wage for a person of 24 years of age is (currently £9.50ph/insert rate at June 23). • David has been underpaid for the duration of his employment. He can bring a claim to an ET or civil courts and he will be compensated for the underpayment, ERA 1996. • Nice Nails10 Ltd has an implied duty to exercise reasonable care in protecting the health and safety of a worker. (8 marks) • The nature of the work determines what is a reasonable standard of care in the circumstances and, as a products use in the salon can be 'toxic' in large doses , this would place a reasonable level of duty on Nice Nails10 Ltd. • The mere provision of safety equipment is insufficient, the employer also has a duty to warn the employee of the specific dangers involved in the task and instruct them to wear the protective gear at all times where using potentially hazardous materials, Pape v Cumbria County Council (1991). This is possibly applicable in the nail salon as the substances used can be 'toxic'. • It appears the company has breached its implied duty to protect the health and safety of the employee. It cannot place the burden on the individual employee. The company is aware of the potentially 'toxic' effects of the products, and it has not warned David of the risks of not wearing the mask, nor taken steps to ensure he wears the mask. • However, there is no indication that David has suffered any loss through the breach of the implied duty to protect health and safety of employees, so remedies not likely available. • Unlawful deductions (10 marks) ERA 1996 s13 provides that deductions cannot be made to an employee's wages unless the deduction is required or authorised to be made by virtue of a contractual or statutory provision, or the worker has previously signed a written agreement consenting to the deduction. • Deductions may be made to in relation to overpayment of wages, s14 ERA 1996. • The deduction of £120 for wages overpaid will be valid, s14 ERA 1996. However, the deduction of £80 for 'leaving work early on one afternoon' is not allowed. • s8 ERA 1996 every employee is entitled to an itemised statement including gross wages, net amount payable and deductions. Nice Nails 10 Ltd has breached this requirement.	

	• s23 ERA 1996 David can take Nice Nails10 Ltd to an employment tribunal within three months of the deduction and the tribunal can order repayment and compensation for financial loss suffered due to the deduction. • Where a tribunal makes a declaration under section 23 (1), it may order the employer to pay to the worker to compensate for any financial loss sustained by him which is attributable to the illegal deduction of wages. If David can show he was unable to make his car payment due to the deduction of £80, the tribunal may order Nice Nails10 Ltd to pay his £25 late penalty fee. • Responses could include • David may be able to bring a claim of underpayment or unlawful deductions to employment tribunal within three months of the breach or bring a claim for breach of contract in the civil courts within 6 years. • An implied term overrides the express term when employees health is at risk, Johnstone v Bloomsbury Health Authority (1991). If the policy of Nice Nails 10 Ltd per employee responsibility for their own welfare is deemed to be contractual term, this will not exclude liability for the implied terms. • An employer may be vicariously liable for the actions of an employee where that individual harms another employee. This allows the wronged employee to seek damages from 'deepest pockets'.	
		Question 3 Total:25 marks

Question Number	Suggested Points for Responses	Marks (Max)
4(a)	**Responses should include:** • Identify that restrictive covenants are prima facie void as restraint of trade/for public policy reasons and Carlito's Clothes will need to ensure Clause 5 is 'reasonable' if it is to be enforceable. • There must be protection of a legitimate business interest and the clause 'reasonably' achieves this, Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd (1894). • Reasonableness in terms of scope, duration and the type of work involved, Fellowes v Fisher (1976). • Identify that the court may not consider the Clause 5 reasonable as it is included in 'all' employee contracts, and such clauses should be specific to the position of the employee. Clauses must be appropriate to the level of job, Patsystems Holdings Ltd v Neilly (2012); Safetynet Security Ltd v Coppage (2012). • However, as Li-Jung is privy to private information during client meetings, the clause may fit his position.	9

	• The duration and geographical extent of the limits of Clause 5 appear too broad and unreasonable, particularly as they places a significant restraint on Li-Jung to find experience-relevant employment in his area. • The clause is also broad in referring to 'any clothing business/ any capacity' of working. • Case law examples include TSC Europe Ltd v Massey (1999), Hanover Insurance Broker v Schapiro (1994, Towry EJ Ltd v Barry Bennett and Others (2012) • Credit any reasoned conclusion. • Responses could include: • The blue pencil test may severe 'unreasonable' portions of a restrictive covenant. Unlikely useful in Clause 5 as both time and distance appear unreasonable. • Any relevant law	
4(b)	**Responses should include:** • An employee is allowed a reasonable amount of unpaid time off for emergencies involving a dependant, s 57A ERA 1996. • An employee has the right not be subjected to a detriment for taking this leave, s47C ERA 1996. The written warning is a detriment. • However, although Li-Jung's daughter is a minor/dependant, the doctor's appointment does not appear to be an emergency as it was pre-booked weeks in advance. • It does not appear that Li-Jung was entitled to take the leave as it was not an 'emergency' situation. Responses could include; • Any reasoned arguments • Any relevant law	8
4(c)	**Responses should include:** • An employee with 26 weeks continuous employment has the right to request flexible working under s80F ERA, but only one such application may be made in a 12-month period. • The request must be in writing and state the date of application, the change requested and the proposed date of effect of this change. • The application must identify any effect the change may have on the employer and how this may be dealt with, as well as confirming that it is a statutory request and providing details and of any previous requests.	8

	• Li-Jung's application meets the requirements of 26 weeks continuous employment, written notice and the change requested. However, all other requirements are lacking. • The application for flexible working is not valid. • An employer has a duty to handle all requests for flexible working in a reasonable manner and may only reject a request on grounds stated under s80G ERA 1996. • These grounds include insufficiency of work during the periods the employee proposes to work. • The reasons given by Carlito's Caramels for refusing Li-Jung's request fall under this recognised ground for refusal. Responses could include; • Any relevant law	
		Question 4 Total:25 marks