

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### LEVEL 6 - UNIT 4 – EMPLOYMENT LAW

JUNE 2022

#### 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 2022 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

Failing candidate papers tended to either not recognise the area of law examined or provided very brief responses lacking sufficient detail to demonstrate level 6 knowledge of the law. Section A questions were overall well addressed in terms of identification of relevant statutory provisions and case law specific to each of the areas examined. However, the command verbs required further consideration. The majority of responses provided little critical analysis/ evaluation as required, with most citing just a few basic and brief concluding points. There were several exceptions to this approach however, where some very good critical discussion was found, along with awareness of topical issues pertinent to the areas examined, which is great. Nonetheless, the slightly descriptive approach of several Section A answers resulted in a slightly lower grades than found in January 2022, where the critical discussion in papers was improved from previous sessions. The pass rate however is near identical to the January 2022.

Section B questions tended to have several legal issues that required identification and application. The vast majority of answers recognised the most fundamental issues examined, with some citation of supporting law. This allowed for an overall moderate to good marks to be achieved. Few exceptional papers identified all legal issues and applied these in a detailed and specific manner with supporting statute and case law, as appropriate.

The paper performed well overall, and the pass rate is on par with previous sessions. The pass rate and grades are within the boundaries expected of a larger cohort. The overall grading reflects an appropriate variation in pass, merit, and distinction papers; demonstrating that the paper allows for stronger candidates to apply their skills, and weaker candidates to pass the exam should they make level-appropriate efforts. As always, certain areas of law and types of question were slightly more popular than others, however, all questions in both sections were attempted, with expected variations in grading.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

#### Question 1

This was a relatively popular question that resulted in overall moderate to high passing grades. The law relevant to restrictive covenants was recognised in the vast majority of scripts, with stronger papers also noting garden leave clauses and implied duties/terms. Case law was overall well identified and applied in the majority of answers, however, most laws cited were in relation to restrictive covenant discussions only. However, while the explanation of relevant laws was overall very good, the level of critical analysis of the laws cited was overall moderate to poor. Only higher scoring papers were able to provide adequate critical commentary upon the good laws cited, with the majority of these points being related to restrictive covenants only. Most papers provided only a few closing statements of brief, critical detail.

#### Question 2

This was not a popular question. The few candidates who answered this question tended to achieve poor to moderate grades. This was largely due to the lack of detail within the answers. There was recognition of a few pieces of relevant seminal case law, however, further common law examples could have been evident. Critical evaluation of the laws cited was nominal in nearly all papers that attempted this question. Most answers passed on explanation of law, few failed due to a lack of relevant detail.

#### Question 3

This was a popular question, as 'substantive and procedural fairness' generally always proves popular. Most papers passed this question with moderate to high grades. The overall recognition of relevant statute and case law were very good. There was also a level of critical analysis evident in most responses. While these points could have been more in depth, consistent and detailed, they did provide a critical slant to most of the answers provided.

#### Question 4(a)

This was a moderately popular question. Most answers well identified statutory paternity leave provisions, with higher scoring papers also noting statutory shared leave options. Most papers scored a moderate passing grade, with few papers gaining high grades due to an overall strong level of critical assessment of the statutory provisions identified.



**(b)**

Most answers identified relevant provisions of statute. The critical assessment could have been more detailed, but the question was not particularly critical.

## **Section B**

### **Question 1(a)**

This was a moderately popular question. Most answers passed with a moderate grade due to recognising either supporting law or applying correct conclusions. Only stronger scoring papers were able to reach logical conclusions with evidence of how these were reached through application of relevant statute and case law. The question-specific details were applied in a broad manner, with only few high scoring papers applying all relevant points examined.

**(b)**

The answers to this question were overall moderate, with few very good responses. Most candidates recognised broadly relevant points and legal issues, but only higher scoring answers identified the specific points of potential discrimination examined, along with supporting law.

**(c)**

A relatively straight forward question that resulted in poor to moderate grades. This was largely due to the vast majority of candidates recognising unfair dismissal remedies, but inadequately applying discrimination remedies. Few very good answers noted both remedies with application and supporting statute detail.

### **Question 2**

This was a very popular question that produced good results overall. The issues related to indirect discrimination/religious discrimination were well identified and addressed in most answers. Most papers also recognised legitimate aims defences, as well as relevant case law. The issues relevant to age discrimination were broadly identified in most responses, with only higher scoring papers also noting the need to apply all the details within the question per 'capability'. Equal pay issues were identified in the vast majority of answers with higher scoring papers applying these points to the question details. However, a few papers cited discussions on sex discrimination, without reference to equal pay.

### **Question 3**

This was a moderately popular question. Most answers recognised most, but not all, of the breaches examined. Furthermore, very few papers identified the remedies relevant to each specific breach, with supporting application. The exception was found in the issues of harassment, where the vast majority of responses identified relevant law, with application. This allowed for most papers to pass the question with a low to moderate passing grade. Very few higher scoring papers identified all the legal issues examined with the statutory remedies applicable.

#### Question 4(a)

This was not a very popular question but was attempted by some candidates. Part (a) resulted in high marks as a straightforward, low mark question.

#### (b)

The majority of answers identified the fundamental breaches of TUPE examined, along with some basic remedies. However, few high scoring papers identified all breaches, with supporting law and question-specific application.

### SUGGESTED POINTS FOR RESPONSE

#### LEVEL 6 - UNIT 4 – EMPLOYMENT LAW

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>Responses should include:</p> <ul style="list-style-type: none"><li>• Identify that restrictive covenants may be included in contracts of employment to protect an employer’s business interests.</li><li>• Identify that restrictive covenants are prima facie void as restraint of trade/for public policy reasons.</li><li>• Explain that the employer will need to ensure that any restrictive covenants in contracts of employment are no wider than necessary to protect a legitimate business interest. If the clause is too wide, it will not be enforceable against the employee/will not protect the employer.</li><li>• Cite relevant case law on the enforceability of restrictive covenants, including but not limited to, <u>Systems Reliability Holdings v Smith</u> (1990). <u>Emersub v Wheatley</u> (1998) <u>Safetynet Security v Copenhagen</u> (2013); <u>Towry Ltd v Barry Bennett</u> (2012)</li><li>• Explain that, where there is no restrictive covenant in an employment contract, an employer can rely on implied contractual terms to protect certain business interests. Highly confidential information, including trade secrets, are protected by the implied term of fidelity, <u>Faccenda Chicken Limited v Fowler</u> (1986).</li><li>• Explain that implied terms only protect the employer in certain circumstances, depending on the nature of the employment and the employee’s awareness of the confidentiality of the information.</li></ul>	25



	<ul style="list-style-type: none"> <li>• <u>Hivac Ltd v Park Royal Scientific Instruments Ltd (1946)</u>, <u>Roger Bullivant Ltd v Ellis (1987)</u>.</li> <li>• Identify that employers may also include garden leave clauses in the contract to protect their interests during the employees notice period. Such clauses must also be reasonable.</li> <li>• All points mentioned must be critically analysed, per the question posed.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Explain that such restrictive covenants may be classed as non dealing, non solicitation, non poaching and non competition.</li> <li>• The blue pencil test may be used in certain circumstances to allow an employer to retain some protection if the restrictive covenant is deemed too wide on certain points.</li> <li>• Garden leave clauses are becoming more popular due to specialist nature of work meaning more employees have access to trade secrets, contacts, and information.</li> <li>• The employer may also seek an injunction preventing an employee from using confidential company information for their own benefit.</li> <li>• Any further relevant case law examples of restrictive covenants, implied terms, or garden leave clauses.</li> </ul>	
<b>Question 1 Total:25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
2	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identify that a constructive dismissal takes place when an employee feels the employer has made it impossible for them to continue in their job, effectively forcing them to resign from their job.</li> <li>• Define a constructive dismissal and explain that, where a constructive dismissal occurs, an employee can bring a claim for wrongful dismissal.</li> <li>• 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.</li> </ul>	25

	<ul style="list-style-type: none"> <li>• The breach of a fundamental term of contract by the employer must be considered sufficiently serious to constitute a constructive dismissal, <u>Western Excavating Limited v Sharp</u> (1979).</li> <li>• Constructive dismissal often occurs where there is a breach of the implied duty of trust and confidence, which includes actions and words of the employer, a broad interpretation, <u>Five Elms Medical Practice v Hayes</u> (2012), <u>Ogilvie v Neyrfor-Weir Ltd</u> (2003)</li> <li>• An objective test is used to determine if the trust and confidence has been broken and the motives of the employer are not relevant to this test, <u>Malik v BCCI</u> (1997).</li> <li>• The breach may be of an express or implied term.</li> <li>• 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, <u>Brown v Neon Management</u> (2018).</li> <li>• Employee protection also found in the damages available for wrongful dismissal</li> <li>• Critical evaluation of the law must be evident, per the question posed.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• An employee may resign over one ‘serious’ incident, or several incidents.</li> <li>• Identify that, unlike constructive unfair dismissal, wrongful dismissal claims do not require a particular length of service.</li> <li>• An employee who has been constructively dismissed can bring a claim for wrongful dismissal in the employment tribunal within 3 months of the breach.</li> <li>• The employee may also bring a claim for breach of contract to the civil courts within 6 years of breach. The damages amount will reflect the value of the employees contract.</li> <li>• Compare maximum damages in tribunal and at civil court.</li> <li>• Examples of serious breaches of employment contract by the employer, including bullying, and unreasonable changes to working patterns.</li> <li>• Any relevant case law.</li> </ul>	
	<b>Question 2 Total: 25 marks</b>	

Question Number	Suggested Points for Responses	Marks (Max)
3	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identify the s98 ERA 1996 potentially fair reasons for dismissal: capability; conduct; redundancy; statutory illegality; and some other substantial reason.</li> <li>• Cite and analyse any case law examples of any of these reasons, including but not limited to: stealing in <u>Sainsburys Supermarkets Ltd v Hitt</u> (2003), attendance record in <u>Co-operative Society Ltd v Tipton</u> (1986); misuse of staff discount <u>BHS v Burchell</u> (1978); some other substantial reason <u>Reilly v Sandwell Metropolitan Borough Council</u> (2018); <u>capability, Sutton &amp; Gates (Luton) Limited v Boxall</u> (1978).</li> <li>• In addition to there being a fair reason for dismissal, the employees' dismissal must fall within a band of reasonable responses of an employer; <u>Iceland Frozen Foods v Jones</u> (1982) and <u>HSBC Bank v Madden</u> (2001).</li> <li>• Reasonableness: the employer must act reasonably in the circumstances, consideration will be given to the resources of the employer, and the seriousness of the allegation.</li> <li>• Reasonable investigation into the offence is needed to suggest reasonable belief of employee guilt, <u>BHS Ltd v Burchell</u> (1978).</li> <li>• Explain that the ACAS Code of Practice should be followed to evidence procedural fairness in dismissal. Explain the requirements of proper procedure under ACAS, including investigations, meetings, and appeal opportunity.</li> <li>• Where an employer is found to have failed to follow proper procedure and codes, any award for unfair dismissal may be increased by up to 25%, <u>Polkey v AE Dayton Services Limited</u> (1988).</li> <li>• The award can also be reduced to an amount the tribunal considers just and equitable, up to nil.</li> </ul>	25

	<ul style="list-style-type: none"> <li>• Critical analysis of the law must be evident, per the question posed.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Explain that under S94 ERA 1996 an employee has the right not to be unfairly dismissed by the employer, however, there are certain ‘potentially fair’ reasons for dismissal.</li> <li>• Explain the requirements of potentially unfair dismissal, must be an employee (s94(1), have been dismissed (s94 (2)) and have two years continuous service with the employer and bring a claim within 3 months.</li> <li>• The level of investigation into allegations of misconduct must reflect the seriousness of the allegation, <u>Hargreaves v Manchester Grammar</u> (2018). Those investigating alleged misconduct should seek information and facts only, not draw conclusions, <u>Dronsfield v University of Reading</u> (2019) Any relevant case law</li> </ul>	
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**Question 3 Total: 25 marks**

Question Number	Suggested Points for Responses	Marks (Max)
<b>4(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Ss80A-E ERA 1996, Paternity and Adoption Leave Regulations 2002, to be eligible for ordinary paternity leave (OPL), the employee must:</li> <li>• have 26 continuous weeks service with the same employer by the end of the 15<sup>th</sup> weeks before the child is due to be born</li> <li>• have a relationship with the new-born and the mother and expect to be parenting the new-born child.</li> <li>• at least 15 weeks before the EWC, inform their employer of the baby’s due date, when they want their leave to start, and how much leave they want to take.</li> <li>• The employee will be paid for ordinary paternity leave if they meet the qualifying criteria and earn at least the lower limit for national insurance.</li> <li>• Ordinary paternity leave entitles the individual to be paid the lower statutory rate per week and 90% of their average weekly earnings during the paternity leave, Statutory Paternity Pay, Social Security Contributions and Benefits Act 1992.</li> <li>• The ‘qualifying criteria’ means that those on a very low income will not be covered under the legislation.</li> </ul>	<b>14</b>





	<ul style="list-style-type: none"> <li>• Ss80A-E ERA 1996, Paternity and Adoption Leave Regulations 2002 employee who has taken paternity leave has the right to return to the same job and are protected from detriment for exercising this right to leave.</li> <li>• Employment Act 2002 s1 and s80A Paternity and Adoption Leave Regulations, while on statutory paternity, an employee is entitled to all contractual benefits, other than wages, and is entitled to return to their job at end of paternity leave; ss73-76 Equality Act 2010; and has a right not be subjected to a detriment, ERA 1996; Paternity and Adoption Leave Regulations 2002.</li> <li>• Shared Parental Leave Regulations 2014; dismissal of a male employee will be automatically unfair dismissal if dismissed because he took or sought to take paternity leave (or is selected for redundancy for that reason).</li> <li>• Remedy for refusal to make statutory paternity payment, s27 ERA 1996.</li> <li>• Critical assessment of the statute must be evident, per the question posed.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Explain that paternity leave legislation attempts to redress ‘gender imbalances’ in parental leave. However, this aim has yet to be achieved as significant imbalances remain.</li> <li>• The statutory rights identified extend to employees only, not to workers. Supporting a suggestion of the ‘inadequacy’ of the rights.</li> <li>• ‘Paternity leave’ applies to married and cohabiting couples, heterosexual and same sex couples.</li> <li>• The employee can choose to take either one or two weeks leave taken consecutively within 56 days of the birth.</li> </ul>	
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Question Number	Suggested Points for Responses	Marks (Max)
<b>4(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• The ERA 1996 gives the right to request flexible working to carers of adults and parents of children under 16 (or disabled children of under 18).</li> <li>• Therefore, fathers and male care givers, have a right to request flexible working, if they meet certain criteria. This is a right to request, not a right to work flexibly.</li> <li>• Explain the qualifying criteria: s80F ERA 1996 the employee must have worked for a minimum 26 weeks before making the request, the request must be in writing and must specify that it is an application for flexible working, the change applied for and date on which it should become effective, what effect, if any the employee thinks the change would have on the employer and how they think such effect might be dealt with.</li> <li>• Only one such request may be made every 12 months.</li> <li>• S80G ERA 1996 the employer has a duty to deal with the application in a reasonable manner and to notify the employee of their decision within three months from the date of application.</li> <li>• The employer may only refuse the application for prescribed statutory reasons: additional costs, detrimental effect on meeting customer demand or quality of product, inability to reorganise existing staff or recruit additional staff, detrimental impact on quality or performance, insufficient work during periods employee proposes to work and planned structural change.</li> <li>• If an employer rejects a request for unprescribed reasons, the employee may refer the request to ACAS, raise a grievance, claim constructive dismissal, or take a complaint to an ET within 3 months.</li> <li>• Critical assessment of the statute must be evident, per the question posed.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• S80F ERA 1996, request the right to work flexibly, including change of hours and times of work and or place of work.</li> <li>• Requests cannot be refused on discriminatory grounds</li> <li>• The employee has a right of appeal.</li> </ul>	<b>11</b>

**Question 4 Total: 25 marks**



## SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identify that a redundancy situation has occurred under s139 Employment Rights Act 1996, business ceases at the employee’s place of work, i.e. Josephine’s department; <u>Safeway Stores Plc v Burrell (1997)</u>, <u>Murray v Foyle Meats Limited (1999)</u>.</li> <li>• BibiBoo has followed proper procedure in considering suitable alternative employment for Josephine.</li> <li>• If Josephine unreasonably refuses this offer, she may lose his entitlement to a redundancy payment s 141 ERA 1996.</li> <li>• The offer of alternative work must be objectively suitable, and the tribunal will determine whether the offer was reasonable and Josephine unreasonable in declining the role.</li> <li>• The tribunal will consider the status of the job as a factor in whether the offer was ‘suitable’, <u>Taylor v Kent County Council (1969)</u>. The fact that Josephine will no longer be a ‘senior shop floor manager’ may be reasonable ground to reject the offer.</li> <li>• Josephine does not appear to have a mobility clause in her employment contract.</li> <li>• This will also support a suggestion she was entitled to reject the alternative offer of work as her contract does not require her to work at another location.</li> <li>• However, BibiBoo can argue this is only one day a month. Furthermore, payment is an important contractual term, and this has remained the same.</li> <li>• Both factors may be used by BibiBoo to suggest rejection unreasonable. However, this is unlikely to outweigh the other factors.</li> <li>• Overall, appears Josephine had reasonable grounds to decline the offer.</li> <li>• Any reasonable conclusion credited.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Any relevant case law</li> </ul>	9

Question Number	Suggested Points for Responses	Marks (Max)
1(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Selection of employees for redundancy has to be objective and reasonable s98 ERA 1996.</li> <li>• An employee’s attendance record may also be considered in selection for redundancy. However, absence due to disability is not a fair reason for selection and will be discriminatory, EA 2010 s6.</li> <li>• Therefore, Paul may have been unfairly selected for redundancy as ‘most’ of his leave was due to MS, a recognised disability.</li> <li>• However, the ‘most’ point could be used by BibiBoo as a potential, but unlikely successful, defence.</li> <li>• Length of service may be considered a reason for selection, but not in isolation, as this may result in age discrimination, <u>Hobson v Park Brothers</u> (1973), EA 2010 s4.</li> <li>• Therefore, Asha appears to have been unfairly selected on the basis of being the longest serving employee and the nearest ‘retirement age’.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Acceptable selection criteria include the employee’s standard of work, skills, qualifications or experience and disciplinary record, <u>Williams v Compair Maxam</u> (1982) <u>Farthing v Midland House Stores</u> (1974).</li> <li>• s98(4) ERA 1996 the size and resources of the employer will be relevant, however, selection must always be objective, transparent and non-discriminatory, <u>Cox v Wildt Mellor Bromley Ltd</u> (1978).</li> <li>• An unfair selection would potentially lead to an unfair dismissal.</li> </ul>	8

Question Number	Suggested Points for Responses	Marks (Max)
1(c)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Where an employer has made an employee redundant and failed to follow proper procedure, the redundancy will be treated as an unfair dismissal.</li> <li>• Remedies for unfair dismissal are under ERA s.112 and Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) s.157(1)</li> <li>• Remedies include reinstatement, reengagement and compensation.</li> <li>• Basic award: calculation of the basic award is the same as that of a redundancy payment. It is 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.</li> <li>• The length of service is capped at 20 years, and calculation of a week's pay is subject to the maximum statutory redundancy payment.</li> <li>• Compensatory award: if the redundancy was unfair, there will be an additional right to compensation under s123 ERA. Subject to a maximum statutory amount of 52 weeks gross pay or a statutory amount that increases each year.</li> <li>• Asha and Paul may also have a claim under the Equality Act 2010 as their selection/ redundancy appears discriminatory. Asha, age discrimination s4 EA 2010 and Paul disability discrimination, s6 EA 2010.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Compensatory award includes loss suffered and expenses reasonably incurred, as well as any benefit lost.</li> <li>• Employee has a duty to mitigate their losses, <u>University of Sunderland v Drossou</u> (2017).</li> </ul>	8
<b>Question 1 Total:25 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
2	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• <b>Baljit</b></li> <li>• Religion is a protected characteristic under the Equality Act 2010</li> <li>• Baljit may have been subjected to s19 indirect discrimination as the requirement to remove head coverings is a provision that is discriminatory in relation to his religion, a protected characteristic. This requirement applies to all employees but puts person of Baljit’s religion at a disadvantage when compared with a person not of that religion, who does not wear a turban.</li> <li>• ABC Learning may try to defend the requirement is a proportionate means of achieving a legitimate aim (accessing CCTV images).</li> <li>• Case law interpretation of indirect discrimination on the basis of religion and legitimate aims is varied, <u>Williams-Drabble v Pathway Care Solutions Ltd and Another</u> (2005), <u>Governing Body of Aberdare Girls’ High School</u> (2008), <u>Chaplin v Royal Devon &amp; Exeter Hospital NHS Foundation Trust</u> (2010)</li> <li>• It appears ABC does not have proportionate and legitimate aims in needing to access CCTV images. However, as they have stated this is for the safety of visitors and employees, this may, potentially, if unsuccessfully, be argued as a legitimate aim.</li> <li>• <b>Desmond</b></li> <li>• If ABC Learning compels Desmond to retire on the grounds of his age, this will be direct discrimination s13 on the grounds of age, EA 2010 s5.</li> <li>• However, ABC Learning may use the defence of an employer justified retirement age.</li> <li>• An employer justified retirement age will be enforceable if it is justified as a proportionate means of achieving a legitimate aim.</li> <li>• ABC Learning must be able to show the link between the ability of Desmond to carry out his role and the specified retirement age, failure to do so could render their policy discriminatory, <u>Prigge and others v Deutsche Lufthansa AG</u> (2011).</li> </ul>	25

	<ul style="list-style-type: none"> <li>• ABC Learning applies the EJRA without consideration of the individual employee’s ability or performance. The policy therefore appears to discriminate against Desmond on the grounds of his age.</li> <li>• <b>Rita</b></li> <li>• Sex is a protected characteristic under s4 EA 2010.</li> <li>• Every contract of employment contracts contains an implied sex equality clause, s66 EA 2010.</li> <li>• To bring a claim against ABC Learning, Rita will need a ‘real comparator’. Rita will need to prove she is doing like work or work rated as equivalent or of equal value with her comparator (S65 EA 2010). Desmond appears to meet the ‘comparator’ criteria as he is employed by the same employer, at the same time and in the same role.</li> <li>• ABC Learning may raise the defence that the difference in pay is not based on gender but on a material factor s69 EA 2010.</li> <li>• A material factor includes length of service, <i>Cadman v Health and Safety Executive (2007)</i>. However, 3 months is unlikely to be a sufficient duration to justify the difference in payment between Rita and Desmond.</li> <li>• Credit any reasonable conclusion.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• ABC Learning may also claim that the EJRA is legitimate as it will avoid the need to dismiss older workers with a manual role, such as Desmond, on the grounds of incapacity or underperformance, <i>Seldon v Clarkson Wright and Jakes (2012)</i>, <i>Prof J Pitcher v University of Oxford (2019)</i>. This may be a defence as the role is ‘manual’, per being a security guard.</li> <li>• The burden of proof will be on ABC Learning to show the EJRA is a proportionate means of achieving a legitimate aim.</li> <li>• ABC Learning will carry the burden to prove there is a material factor, not related to sex, that justifies the difference in pay between Desmond and Rita.</li> </ul>	
	<b>Question 2 Total:25 marks</b>	

Question Number	Suggested Points for Responses	Marks (Max)
3	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Breach of the Agency Worker Regulations 2010</li> <li>• Huda is an agency worker and has rights under the AWR 2010.</li> <li>• AWR 2010- day one right to be entitled to access to shared facilities, including canteen. Huda does not need to wait 12 weeks to access this right.</li> <li>• Remedy: Huda can bring a complaint to an employment tribunal, the tribunal can make a declaration, recommendation or compensation. It is unlikely any compensation would be high in Huda's case.</li> <li>• Breach of ERA 1996 s13 unlawful deduction of earnings</li> <li>• Pastries UL Ltd has made an unlawful deduction to Huda's wages, s13 ERA 1996. Payment for damaging employer property, (cakes) is not one of the recognised lawful deductions, such as tax and NI contributions and authorised or statutory deductions.</li> <li>• Remedy- Huda can bring a complaint to the employment tribunal within three months of deduction. The ET can order repayment and/or compensation for loss sustained, as it deems just in the circumstances. Likely Huda will receive repayment of amount deducted only.</li> <li>• Breach of National Minimum Wage Act 1998</li> <li>• Under the NMWA 1998, all employees are entitled to be paid a minimum wage, the amount being dependent on the employees age.</li> <li>• This is a day one right under the AWR 2010.</li> <li>• Ken and Latifah are 20 years old and fall into the payment bracket of those aged 18-20 years of age. Huda is 27 years of age and falls into the bracket for those aged 23 and over.</li> <li>• It is stated that Huda is paid the same amount as Ken and Latifah, both of whom are on minimum wage. Huda is therefore being underpaid.</li> <li>• Remedy- Huda can make a claim to an ET and she will be compensated for the underpayment, ERA 1996.</li> <li>• Breach of Equality Act 2010- harassment</li> </ul>	25



- Huda is protected from discrimination under the EA 2010, this is a day one right applicable to all employees, workers and contractors.
- s26 harassment occurs where a person engages in unwanted conduct of a sexual nature, that degrades the employee or creates for them a hostile working environment.
- The comments made by Derek to Huda appear to be of a sexual nature and they have made her feel 'uneasy' and 'humiliated'. Suggesting the environment has become hostile.
- Although Derek has made just one comment to Huda, a single act of verbal harassment can be discrimination, particularly as Derek is a more senior member of staff than Huda, Insitu Cleaning Co Ltd v Heads (1995).
- Remedy- Huda can complain to an ET that can make a declaration or order damages, including injury to feelings.
- Explain the Vento bands for compensation, Vento v Chief Constable of West Yorkshire Police (2003), compensation for injury to feelings.
- Huda's damages will likely be the lower band. Credit any reasoned conclusion.

Responses could include:

- Explanation of the rights triggered after the 12-week qualifying period, to distinguish from day one rights.
- Explanation of the relevant amounts payable in each wage brackets under the NMWA 1998 (at time of the exam).
- Identify that, in relation to harassment, the 'banter' defence unlikely to apply as no evidence Huda was willingly involved in such exchanges, Evans v Xactly (2018).
- The Equality Act 2010 s26 (4) considers the 'reasonableness' of the claimants response. This requires the tribunal to take into account (a) the perception of the claimant, (b) the other circumstances of the case, and (c) whether it is reasonable for the conduct to have that effect.
- Huda may be able to seek remedy under S109 and s110 EA 2010 vicarious liability of the employer if they have failed to take measures to address or prevent such discrimination, Enterprise Glass v Miles (1990).

	<ul style="list-style-type: none"> <li>Explanation of the current Vento band amounts. Lower band (for the least serious cases, e.g. a one-off or isolated incident of discrimination) - Middle band (which is used for serious cases that do not merit an award in the highest band) - Top band (for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment)</li> </ul>	
<b>Question 3 Total: 25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
<b>4(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>Identify that there has been a service provision change, recognised under 3(1)(b) Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).</li> <li>A service activity by employer A, Beany Drinks, has been stopped and taken over by employer B, Open44 Ltd.</li> <li>There was a group of employees, Pedro and Leon, whose main job it was to carry out those activities for employer A. The services offered by Beany Drinks, as taken over by Open44, are fundamentally the same, as required under Regulation 5.</li> </ul> <p>Response could include:</p> <ul style="list-style-type: none"> <li>Service provision change, <u>Spijkers Gebroeders v Benedik bbatoir CV and Alfred Benedik en Zonen BV, ECJ (1986) ECR 1119 (Spijkers case)</u> and <u>Cheesman v Brewer Contracts EAT (2001) IRLR 144</u>.</li> <li>Case law including but not limited to, <u>Argyll Coasting Services Ltd v Stirling and Others (2012)</u> guidelines on the definition of an ‘organised grouping of employees’.</li> <li>Regulation 3 (1) types of service provision change, including client to contractor- first generation outsourcing, contractor to contractor- second generation outsourcing and contractor to client-insourcing.</li> </ul>	<b>6</b>

Question Number	Suggested Points for Responses	Marks (Max)
<b>4(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• TUPE Regulation 4 (2), a transfer does not terminate the contracts of employment of the employees working in the grouping which is to be transferred. The contracts are transferred to the transferee (rights, duties, liability), Reg 4 (2). Any variations in terms of employment will be void.</li> <li>• Under TUPE Reg 4 (4) (5) variations to contract may be permissible if the sole or principal reason for the variation is economic, technical or organisational (ETO) reasons entailing changes in the workforce</li> <li>• Pedro- while ‘economic’ reasons may be an ETO reason, the company knew about moving to the more costly premises prior to the transfer. Therefore, the transfer is likely the reason for the dismissal, rather than the ETO reason. As there is no ETO reason, the dismissal is automatically unfair, Reg 7 (1) (2)</li> <li>• Leon- harmonisation of transferred employee’s contractual terms would not be considered an ETO reason. Open44 Ltd did not have a right to change Leon’s working hours to match existing employees.</li> <li>• Leon’s refusal to accept these new terms did not warrant a potentially fair reason for dismissal, s98 ERA 1996. Leon has been automatically unfairly dismissed.</li> <li>• There is no duration of employment requirement for automatically unfair dismissal, so the remedies below are available to both Pedro and Leon; even though the latter worked for the transferor for just 1 year.</li> <li>• Identify the remedies for unfair dismissal, ss112 and 113 ERA reinstatement, reengagement and financial compensation under s118 ERA</li> <li>• Basic award calculation, subject to statutory maximum payments.</li> <li>• Compensatory award, subject to statutory maximums.</li> </ul> <p>Response could include:</p> <ul style="list-style-type: none"> <li>• ETO reasons- economic is likely to refer to ‘profitability’, technical to refer to the ‘equipment or processes’ and organisational to consider the ‘management structure’ of the entity</li> </ul>	<b>19</b>

	<ul style="list-style-type: none"> <li>Examples of ETO reasons, <u>Osborne and others v Capita Business Services Ltd and others (2016)</u> changes in the job functions of the workforce; change to the structure of the workforce by reducing the numbers or changing the functions that individuals perform, <u>Berriman v Delabole Slate Ltd (1985)</u>.</li> </ul>	
	<b>Question 4 Total: 25 marks</b>	

