

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 6 UNIT 4 – EMPLOYMENT LAW

### 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 January 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

The paper as a whole performed well. 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. This is on par with the last session. There were few borderline fails.

Section A questions were overall well addressed. Passing papers identified the areas of law examined with some recognition of supporting law with application. However, several questions within this section examined two topics and candidates tended to be stronger on one of the two subjects only; this is explained in more detail in the question specific aspect of the report. There was overall good explanation of relevant laws governing the areas examined. There was also some effort to provide critical elements to the answers given, as per the questions posed. While these points tended to be quite brief, they were slightly more evident than in previous sessions, suggesting prior feedback has been noted. While the pass rate remains consistent, the grades are slightly higher than in some previous sessions, due in part to greater use of law and some effort to provide critical application.

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. However, several low scoring or failing papers did not give due consideration to all aspects examined; even where there were just two areas of law examined, several papers

focused on just one. This appeared to be a lack of knowledge issue, rather than time management or lack of understanding of the question as the areas were often very briefly identified, but not adequately addressed. Higher scoring papers identified all legal issues and provided question-specific application, with good use of supporting statute and case law.

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. 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 moderately popular question resulting in low to moderate passing grades overall; with few higher scoring papers noted. The statute cited within the question was well identified and explained within the majority of responses. This information was duly credited. However, the question specifically requires knowledge and critical evaluation of 'case law' surrounding the area examined. Only higher scoring papers referred to an adequate amount of such cases. Passing papers managed to identify a few cases, with good application per the statutory provisions also cited. Some basic critical evaluation of law was attempted in most papers, with the statute noted being used to illustrate critical points in higher scoring papers.

#### Question 2(a)

This was a moderately popular question. A few papers failed this question by providing inadequate detail or giving a broad overview of family protection in general, without reference to the specifics of the question. The majority of passing papers identified the relevant statute and provided detailed explanation thereof, which was duly credited. However, the 'low income' aspect of the question, while noted in relation to the explanation of statute, was only critically assessed within few higher scoring papers.

#### 2(b)

The same comments as made in 2a apply to 2b. However, the responses to this question tended to contain even less critical assessment and were overall quite descriptive, if relevant in relation to statute cited.

## **2(c)**

Few candidates did not recognise the relevant statutory provisions so failed this section. The majority of responses noted the relevant law, with some also assessing the protection given, which was credited.

### **Question 3**

This was a moderately popular question. The majority of papers passed the question by recognising relevant TUPE provisions, with sections, and some application to the question. However, the majority of responses focused upon the 'after' aspect of the question, with only higher scoring papers also noting in detail the 'before' transfer protection in the form of consultation. Passing papers tended to refer to statute only, higher scoring papers also noted supporting case law. Some basic but relevant point of 'critical analysis' were evident in most papers.

### **Question 4**

This was also a moderately popular question. The overall quality of responses tended to vary. There were two areas of law examined and, while restrictive covenants were overall well addressed with detailed explanation and case law, implied terms tended to be less a focus of many responses. Failing papers did not address both aspects of the question. Low scoring but passing papers identified both aspects and focused upon one. These answers nonetheless were able to score a passing/respectable grade if the material cited, even if brief, was supported with law and applied to the question. Few papers scored very well by addressing both elements with law. Critical assessment of the law was evident in relation to restrictive covenants in many papers, with few higher scoring papers also provided few critical points in relation to implied terms.

## **Section B**

### **Question 1**

This was a very popular question resulting in overall good grades. The vast majority of papers recognised issues of disability discrimination, reasonable adjustments and gender reassignment discrimination, with supporting statute law. Stronger papers also cited case law and identified the issue of the company policy on discrimination. However, while most papers passed the question, some marks were lower than others due to certain responses failing to identify the specific type of discrimination present in relation to gender reassignment; although broadly relevant points were noted with statute even within these lower scoring, passing papers. There was an overall good level of critical application of law to the question, particularly in relation to the issues of disability discrimination examined.

### **Question 2**

This was a moderately popular question resulting in varying grades. There were several legal issues examined within the question and these issues were recognised and addressed to differing extents. Failing papers provided very brief and unsupported answers, broadly identifying only one or two of the relevant issues; usually unlawful deductions. The majority of responses passed the question by identifying the most legal issues, citing relevant law and providing some brief but logical application

to the question. A few higher scoring papers recognised all potential breaches, and provided supporting case law, statute, and critical application specific to the question.

### **Question 3(a)**

This was a popular question resulting in moderate to lower grades overall (largely due to part b). Part (a) was generally well addressed with identification of relevant legal issues and good application to the question, with statute and case law in higher scoring papers. A few failing papers did not adequately identify nor address the relevant area of law examined.

### **3(b)**

This part of the question examined two areas of law. The majority of papers identified both areas of law but addressed only one of these areas in detail; with the other area being given brief but relevant consideration. Most papers addressed harassment in detail and provided a brief note of constructive dismissal, however, other papers reversed this focus. A few marginally failing answers identified and addressed only one of the two areas, albeit addressing this single area in a strong manner, entirely overlooking the other area of law examined. This appeared to be due to a lack of knowledge, rather than a time management issue.

### **Question 4(a)**

A moderately popular question resulting in moderate to low passing grades. Part (a) was overall well addressed in the majority of papers with identification of protected disclosures and relevant statutory protection. Brief note of lawful orders issues was found in most papers, but few papers failed to address this issue. Higher scoring papers gave a good level of question-specific application of law to specific protected disclosure issues examined.

### **4(b)**

This question resulted in overall lower grades. Most papers recognised the issue of potential unfair dismissal, however, the specific basis of the potential dismissal and associated statutory provision examined, needed to be more of a focal point of lower scoring or failing answers.

### **4(c)**

The majority of papers recognised the issue of conduct and provided some relevant law. Higher scoring papers also applied these points in a critical manner to the specifics of the question.

**SUGGESTED POINTS FOR RESPONSE**

JANUARY 2023

**LEVEL 6 UNIT 4 – EMPLOYMENT LAW**

Question Number	Suggested Points for Responses	Marks (Max)
1	<p><b>Critically evaluate</b></p> <p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Case Laws and Statutory provisions</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• Relevant new developments</li> <li>• A reasoned conclusion which is supported with evidence</li> <li>• Response is appropriately structured</li> </ul> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The Equality Act 2010 protected characteristic of sex</li> <li>• s66(1) Equality Act 2010 every employment contract is deemed to include a sex equality clause.</li> <li>• Identify the need for a comparator, s79</li> <li>• The comparator must be or have been employed by As employer or an associate of As employer and work at the same establishment as A or a different establishment where common terms apply at both establishments</li> <li>• The judicial interpretation of ‘establishment ‘ and ‘common terms’ is broad, <u>City of Edinburgh Council v Wilkinson and Others (2010)</u>.</li> <li>• However, the same employer can have separate departments that determine pay and conditions, <u>Robertson and Others v Department for the Environment, Food and Rural Affairs (2005)</u>, <u>City of Edinburgh v Wilkinson and Others (2010)</u>.</li> <li>• The work must be ‘like work’, rated as equivalent or of equal value to the comparator in the same employment, s65. Case law</li> </ul>	25

	<p>examples including but not limited to <u>Capper Pass v Lawton, Eaton v Nuttall Ltd</u> (1977).</p> <ul style="list-style-type: none"> <li>• <u>Asda Stores Ltd v Brierley and others</u> [2021] UKSC, 10 equal pay comparators.</li> <li>• Critical evaluation of the law cited</li> <li>• Define the s69 EA 2010 defence of a material factor, the employer carries the burden of proof</li> <li>• Case law examples of interpretation of s69 material factor defence including, but not limited to location, <u>NAAFI v Varley</u> (1976)</li> <li>• economic necessity, <u>Rainey v Greater Glasgow HB</u> (1987) <u>Grundy v British Airways plc</u> (2007), <u>Strathclyde Regional Council v Wallace and Others</u> (1998), <u>Abdulla and Others v Birmingham City Council</u> (2010), day and night workers, <u>Kerr v Lister Limited</u> (1977),</li> <li>• Length of service, experience and qualifications could be material factors, but not 'extrinsic' matters, such as the male employees prior wage, <u>Fletcher v Clay Cross Ltd</u> (1979).</li> <li>• If the material factor indirectly discriminates against the worker because of sex, the employer may justify it on the basis that it is a proportionate means of achieving a legitimate aim s69 (1) (b) and the difference in treatment is objectively justified and not related to sex.</li> <li>• Direct discrimination cannot be justified.</li> <li>• Critical evaluation of the law cited.</li> </ul> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>• Pay has a broad meaning and includes travel concessions, sick pay and pensions</li> <li>• Any historical practices that result in sex based differences in treatment are discriminatory and not a material defence.</li> <li>• S69 focuses on equal pay, not fair pay.</li> <li>• Part-time employees cannot use full-time employees as comparators, <u>Lynn v Rokeby School Board of Governors</u> (2001).</li> <li>• 'Red circling' of rates of pay to prevent a dispute will not be considered a material factor, <u>Snoxell v Vauxhall motors</u> (1977). Red circling must not be related to the sex of the person concerned <u>Methven v Cow Industrial Polymers Limited</u> (1980).</li> </ul>	
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	<ul style="list-style-type: none"> <li>Any relevant law.</li> </ul>	
	<b>Question 1 total:25 marks</b>	
<b>2(a)</b>	<p><b>Critically assess</b></p> <p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>Correct identification of relevant Case Laws and Statutory provisions</li> <li>Discussion around the above with detailed arguments, for and against being evidenced</li> <li>A reasoned conclusion which is supported with evidence</li> </ul> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>Identify the Shared Parental Leave Regulations (2014) and explain the qualifying criteria for shared parental leave under this legislation</li> <li>The child’s mother or adoptive parent must be eligible for maternity leave, pay or allowance or adoption leave or pay.</li> <li>The employee seeking shared parental leave, either the mother or partner, must meet the ‘continuity of employment test’: worked for the employer continuously for at least 26 weeks by the end of the 15th week before the due date, still be employed by the employer while they take shared parental leave, give the employer eight weeks’ notice of intention to take the leave and provide a declaration that their partner meets the employment and income requirements which allow the employee to receive shared parental leave.</li> <li>Critical assessment of protection given, including but not limited to: <ul style="list-style-type: none"> <li>Leave only given in the first year after birth or adoption</li> <li>The opportunity to share leave is available only to those who already have a steady income and meet certain tests connected to their employment.</li> <li>This may result in lack of accessibility to those on a low income.</li> <li>The statute does not recognise parents who do not have a partner, who are also often on a lower, single source, income. These parents are unable to share leave as they do not have a recognised ‘partner’.</li> </ul> </li> <li>Law makers seek to extend shared leave without diminishing maternity leave. However, shared parental leave can only be taken if the employee or their partner end their maternity or</li> </ul>	<b>12</b>

	<p>adoption leave or payments early. The remaining leave will then be available as shared parental leave.</p> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>• A mother must take a minimum of two weeks maternity leave following birth – four if she works in a factory - whether the remainder of her leave is shared or not.</li> <li>• Maternity leave should not be compared with shared parental leave in terms of payment or discrimination, <u>Ali v Capita Customer Management Ltd (2019)</u>; <u>Hextall v Chief Constable of Leicestershire Police (2019)</u> EWCA Civ 900 Hextall v Chief Constable of Leicestershire Police.</li> </ul> <p>However, this ‘disparity’ in payment may deter some males or partners from taking shared parental leave, defeating the purpose of the legislation.</p>	
<p><b>2(b)</b></p>	<p><b>Critically assess</b></p> <p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Case Laws and Statutory provisions</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> </ul> <p>A reasoned conclusion which is supported with evidence</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identify the Paternity Leave provisions ss 80A-E of the ERA 1996 and the Paternity and Adoption Leave Regulations 2002 (as amended), provide guidance on eligibility for paternity leave.</li> <li>• Explain the requirements for paternity leave entitlement: employee, 26 continuous weeks service with the same employer by the end of the 15th week before the child is expected to be born or adopted, and have a relationship with the new born or newly adopted child and the mother or the adoptive parent; and expect to be parenting the new-born child or child placed for adoption. At 15 weeks, the employee must inform their employer of the due date and when they want their leave to start.</li> </ul>	<p><b>8</b></p>



	<ul style="list-style-type: none"> <li>• Explain the entitlement to paid ordinary paternity leave – meet 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>• However, ‘qualifying criteria’, especially NI contributions, may prohibit individuals on a very low income from accessing the rights.</li> <li>• The statutory rights identified extend to employees only, not to workers. Workers are often on lower income. Supporting a suggestion of the ‘inadequacy’ of the rights.</li> <li>• Responses could include:</li> <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>• Remedy for refusal to make statutory paternity payment, s27 ERA 1996.</li> </ul>	
2(c)	<p><b>Critically assess</b></p> <p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Case Laws and Statutory provisions</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> </ul> <p>A reasoned conclusion which is supported with evidence</p> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The Parental Bereavement (Leave and Pay) Act 2018</li> <li>• Parents who lose a child under 18 years of age or suffer a stillbirth at or after 24 weeks are entitled to at least two weeks leave</li> <li>• There is no notice period for the leave and no death certificate is required as evidence.</li> <li>• The rights are ‘day one’ rights with no requisite duration of employment nor qualifying criteria to take this leave unpaid</li> </ul>	5

	<ul style="list-style-type: none"> <li>• However, the leave will not be paid unless certain requirements met.</li> <li>• Paid bereavement leave requires 26 weeks continuous employment (s 171ZZ6 Social Security Contributions and Benefits Act 1992, as inserted by the 2018 Act). These requirements do not appear as onerous as those for shared leave and paternity leave. Nonetheless, paid leave is not given to those lacking long term employment.</li> </ul> <p>Responses could include Any other relevant law or commentary</p>	
<b>Question 2 total:25 marks</b>		
<b>3</b>	<p><b>Critically analyse</b></p> <p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Statute and Case Laws</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• Relevant new developments</li> <li>• A reasoned conclusion which is supported with evidence</li> <li>• Response is appropriately structured</li> </ul> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006 Regulations) recognises a transfer of an undertaking or service provision change.</li> <li>• <b>Protection before the transfer via consultation</b></li> <li>• In this transfer, affected employees have a right to be formally consulted before during and after the transfer. There is a duty to inform and consult employee representatives, Reg 13.</li> <li>• The employer must consult with a representative of the employees, with the aim of seeking the agreement of the employee representatives to the changes proposed, Reg 13 (6).</li> <li>• The meeting must be with sufficient notice and adequate information given as to affect the legal, economical and social implication the transfer would have on employees.</li> <li>• The transferee must recognise the trade union in the same extent as the transferor, Reg 6.</li> <li>• Both the transferor and the transferer may be liable for breach of TUPE 2006 and may be jointly and severally liable jointly and severally liable for compensation payable for failure to consult, Reg 14.</li> </ul>	<b>25</b>

- Reg 14 allows the employer to raise the ‘special circumstances defence’ when it cannot consult as required, how this defence is narrowly interpreted and the onus is on the employer to make arrangements as reasonably practicable.
- **Protection after the transfer** – preservation of contractual rights and protection from unfair dismissal
- Employees are transferred on existing contractual terms and conditions, Reg (4(2)).
- The transferor cannot choose which employees to accept, all employee contracts within the subject of the transfer will be transferred.
- The transferee will also inherit all the statutory rights and liabilities which are connected with the individual employment contract.
- Regulation 4 a transfer does not terminate the contracts of employment of the employees working in the grouping which is to be transferred.
- These contracts are treated as if they had been entered into by the new employer as Reg 4 (2) (3) transfers the transferor’s rights, powers, duties and liabilities under the contract.
- Regulation 4(9). An employee can claim constructive dismissal if the transfer results in a substantial change in his/her working conditions to his/her material detriment. In *Abellio London and CentreWest London Buses v Musse* (2012),
- Reg 7 (1) TUPE 2006 where, either before or after the transfer, an employee of the transferee/transferor is dismissed, the employee is automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer
- However, if there is an ETO reason entailing a change in the workforce, then it is a potentially fair reason under some other substantial reason, ERA 1998 s98. The requirements of reasonableness will apply under section 98(4) Employment Rights Act 1996, *Wheeler v Patel* (1987), *Meikle v McPhail* (1983).
- Harmonisation of transferred employee’s contractual terms would not be considered an ETO reason.
- Critical analysis must be evident throughout the response.
- **Responses could include**

	<ul style="list-style-type: none"> <li>• A transferee inherits the legal responsibilities for any employees except for criminal liabilities under regulation 4(6)) and some benefits under an occupational pension scheme.</li> <li>• TUPE 2006 does not explicitly define an economic, technical or organisational (ETO) reason. The Department of Business, Innovation and Skills states 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> <li>• Remedies available in an unfair dismissal claim of reinstatement, re-engagement and compensation, which comprises a basic and a compensatory award.s98 ERA 1998</li> <li>• A protective award of up to 13 weeks' pay may be made where there is failure to consult under TUPE 2006. Reg 10(3), an employee is not entitled to bring a claim against the transferor for breach of contract or constructive unfair dismissal arising out of a loss or reduction in his rights under an occupational pension scheme in consequence of the transfer.</li> <li>• Redundancy can be considered an ETO reason Reg 4 (5) but would not apply to situations where the transferor anticipates redundancies after the transfer and carries out those dismissals before the transfer, <i>Hynd v Armstrong and Others</i> (2007).</li> </ul>	
<b>Question 3 total: 25 marks</b>		
<b>4</b>	<ul style="list-style-type: none"> <li>• <b>Critically assess</b></li> <li>• An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</li> <li>• Marks should be distributed in the following areas:</li> <li>• Correct identification of relevant Case Laws and Statutory provisions</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• Relevant new developments</li> <li>• A reasoned conclusion which is supported with evidence</li> <li>• <b>Responses should include:</b></li> <li>• Restrictive covenants may be included in contracts of employment to protect an employers business interests.</li> <li>• Restrictive covenants are prima facie void as restraint of trade/for public policy reasons.</li> </ul>	<b>25</b>

- Restrictive covenants tend to be narrowly interpreted by the courts.
- Employers will need to show there is a legitimate interest to protect, and the clause is no wider than necessary to protect the employer's business interest, is reasonable in terms of time, area and nature of information protected.
- 'Reasonableness' of clauses are judged by the courts on a case by case basis with disparate results.
- Case law examples of enforceability have included non-competition covenants in Fitch v Dewes (1921), non-solicitation covenants in Safetynet Security v Copenhagen (2013); non-poaching covenants Hanover Insurance v Schapiro (1994); non-dealing covenants, Towry Ltd v Barry Bennett (2012), Systems Reliability Holdings v Smith (1990). Emersub v Wheatley (1998), Egon Zehnder v Tillman (2017)).
- Identify recent judicial interpretation on restrictive covenants, post faith obligations and post termination restrictions, Richard Baker Harrison Ltd v Brooks and others – [2021] All ER (D) 94
- Each clause will be considered in isolation and courts can sever a part of the clause that is too wide, the remainder of the clause will be enforceable, 'the blue pencil test'.
- Courts may be less willing to enforce restrictive covenants as employers are also protected by implied duties.
- Where there is no restrictive covenant in an employment contract, an employer can rely on implied contractual terms of good faith and fidelity to protect certain business interests.
- However, this is dependent on the nature of the information (trade secrets), the level of employment and the employee's awareness of the confidentiality of the information, Faccenda Chicken Limited v Fowler (1986), Hivac Ltd v Park Royal Scientific Instruments Ltd (1946), Roger Bullivant Ltd v Ellis (1987)
- It is arguably unlikely implied terms offer greater protection to an employer.
- Both restrictive covenants and implied duties will only protect an employer where they are reasonable, per the specific and individual employment relationship. Credit any other points.
- All points mentioned must be critically assessed, per the question posed.

	<ul style="list-style-type: none"> <li>• <b>Responses could include:</b></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> </ul> <p>Any other relevant law or commentary</p>	
<b>Question 4 total: 25 marks</b>		

## SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
<b>1</b>	<p><b>Advise</b></p> <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Facts and Laws</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• Relevant alternatives/options available</li> <li>• A reasoned conclusion which is supported with evidence, offering the suggested best option available</li> <li>• Response is appropriately structured</li> </ul> <ul style="list-style-type: none"> <li>• Andrea</li> <li>• Identify the EA 2010 protected characteristic of gender reassignment, s7</li> <li>• S7 defines gender reassignment as the undergoing of a process for the purpose of reassigning gender by altering physiological or other attributes of sex.</li> <li>• The facts that Andrea has been with the company for just less than a week does not interfere with rights under the EA 2010.</li> <li>• Explain the s4 EA 2010 definition of direct discrimination as occurring when a person is treated less favourably on the basis of a protected characteristic.</li> <li>• Identify that Andrea has been treated less favourably than a person without the characteristic of gender reassignment as she is being denied access to female facilities and being requested to change in a shed outside the premises.</li> <li>• Identify that Andrea can bring a claim for direct discrimination on grounds of gender reassignment (<u>De Souza E Souza v Primark (2017)</u>).</li> <li>• Leisure Life Ltd is also aware that another employee, Egbert, is acting in a discriminatory way against Andrea on the grounds of gender reassignment.</li> </ul>	<b>25</b>

- The employer has taken no steps to address the discrimination, despite the anti-discrimination policy.
- The mere existence of company policies against discrimination is insufficient, they must also be enforced by the employer, Martin v Parkam Foods Ltd (2006).
- The policy has not been enforced by Leisure Life Ltd so cannot be used in its defence.
- Kavita
- Identify that the Equality Act 2010 prohibits discrimination on the basis of disability, s15.
- Explain that s6 EA 2010 defines disability as a physical or mental impairment having a substantial and long term adverse effect on an individual's ability to carry out their normal day-to-day activities.
- Substantial means more than minor by reference to what the individual could do with or without the impairment, Paterson v Metropolitan Police Commissioner (2007).
- Long term impairment means at least 12 months, or likely to last the rest of the person's life.
- Kavita's bone condition appears to meet this definition in respect of the severe pain, limited mobility as well as her undergoing physiotherapy and taking multiple prescription medications.
- Although the condition has just recently been diagnosed it is unlikely to get better and may worsen, making it potentially a 'life long' problem.
- EA 2010 ss39(5) and 20 an employer is required to make reasonable adjustments for disabled employees once they are aware of the disability and a request for adjustment has been made.
- Leisure Life Ltd is aware of Kavita's disability, therefore legal obligations apply, EA 2010, Baldeo v Churches Housing Association (2019).
- The courts take a wide definition of reasonable adjustment, Chief Constable of South Yorkshire Police v Jelic (2010). Furthermore, the degree the employee would benefit from the adjustment is balanced against budgetary considerations, Cordell v Foreign and Commonwealth Office (2011).
- Leisure Life Ltd is a small company, lacking financial resources. They also have no capacity or need for a desk job role. It is unlikely the adjustments will be considered reasonable as a job would need to be created for Kavita, and the company lacks the necessary resources.

	<ul style="list-style-type: none"> <li>• Credit any reasoned conclusion.</li> <li>• Responses may include</li> <li>• Andrea would not need to ‘prove her complaint’ against Leisure Life Ltd.</li> <li>• The employer carries the burden.</li> <li>• Factors taken into account in deciding what steps are reasonable under this legislation are financial costs and disruption, financial resources of employer, type and size of employer</li> <li>• Any relevant case law</li> </ul>	
	<b>Question 1 total:25 marks</b>	
<b>2</b>	<p><b>Advise</b></p> <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Facts and Laws</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• Relevant alternatives/options available</li> <li>• A reasoned conclusion which is supported with evidence, offering the suggested best option available</li> <li>• Response is appropriately structured</li> </ul> <p><b>Responses should include:</b></p> <p>Vishu is an employee of Beautify Ltd. Duties are implied into the contract of employment.</p> <ul style="list-style-type: none"> <li>• <b>Beautify Ltd</b></li> <li>• The employer has a duty to pay wages even when there is no work for the employee, <u>Way v Latilla (1937)</u>, <u>Beveridge v KLM UK Ltd (2000)</u>.</li> <li>• Beautify Ltd will pay/has paid Vishu’s wages for the month of November 22, so there is no breach of this duty to pay wages.</li> <li>• The employer does not have a duty to provide work, except in certain circumstances.</li> <li>• The duty to provide work can occur where the employee needs to have reasonable opportunity to maintain their skills.</li> <li>• Vishu is keen to maintain and develop his language skills through his job, and the skills are necessary for his vocation.</li> <li>• Beautify Ltd may have breached this right, particularly as they are denying him the right to hone his skills for the entire month of December, <u>Langston v Auew (1974)</u>.</li> </ul>	<b>25</b>



- An employer cannot compel an employee to work over 48 hours per week. However, an employee may choose to work in excess of these hours by opting out of the 48-hour working week, Working Times Regulations 1998.
  - Vishu has 'happily agreed' to work 50 hours a week, therefore, Beautify Ltd has not breached his right.
  - In relation to the deal with Maria, Beautify Ltd has a right to ask Vishu to account for the profit they lost/he made, however they cannot deduct this amount from his wages.
  - Deduction of wages may only be made in relation to overpayment of wages and expenses, disciplinary proceedings held by virtue of statutory provision, industrial action or court order, s 14 ERA 1996. None of these exceptions apply to Vishu/Beautify Ltd.
  - Beautify Ltd has breached this right.
  - Credit any reasoned conclusions as to potential breaches.
- **Vishu**
- An employee has an implied duty to obey reasonable orders.
  - Reasonableness is judged upon the nature and scope of employment, O'Brien v Associated Fire Alarms (1969)
- Failure to obey a lawful order that is an essential part of the job will be a breach of this duty, Pepper v Webb (1969).
  - If the order to meet Xander in person is lawful and within the scope of employment, Vishu may have breached this term.
  - Furthermore, although Vishu's contract does not expressly require him to meet clients, this term could be implied into the contract if it proven to be a custom within the art dealership industry/trade.
  - The practice must be very well recognised and in the minds of both parties when entering the contract, Hutton v Warren (1836).
  - Beautify Ltd states that the custom meets these requirements. If this is proven, Vishu will have breached this term by refusing to meet Xander in person.
- An employee has an implied duty of good faith, loyalty and fidelity, including the duty not to compete with the client and to account for secret profit, Roger Bullivant Ltd v Ellis (1987). Neary and Neary v Dean of Westminster (1999), Hivac Ltd v Park Royal Scientific Instruments Ltd (1946), Tesco Stores Ltd v Pook (2004)
- Vishu got the opportunity with Maria through his employment with the company and while discussing a deal for the company. Vishu has made a profit and has not declared this to the company.
  - Vishu has breached the duties above. He will be required to account for the £500 profit.
  - Credit any reasoned conclusions as to potential breaches.

	<p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Distinguish express and implied terms within a contract of employment</li> <li>• Vishu can change his mind and work 48 hours.</li> <li>• If an employer has a duty to provide work, they can also withhold work by inclusion of a garden leave clause, employee will still be bound by implied duties of good faith and fidelity, trust and confidence.</li> <li>• Failure to obey a lawful order that is an essential part of the job may also be a breach of contract justifying summary dismissal.</li> <li>• Any relevant case law</li> </ul>	
<b>Question 2 Total:25 marks</b>		
<p><b>3(a)</b></p>	<p><b>Advise</b></p> <p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Facts and Laws</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• A reasoned conclusion which is supported with evidence, offering the suggested best option available</li> </ul> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The Northton branch of Clean Green has been closed due to low profits. This is a redundancy situation under Section 139 Employment Rights Act (ERA) 1996. Joely has seemingly been made redundant as business has ceased at her place of work.</li> <li>• Joely is an employee, s135 era 1996, and has been employed at Clean Green for 3 years, meaning she could be entitled to paid redundancy as she exceeds the two year duration of employment requirement, s155 EAR 1996.</li> <li>• However, Joely may not have been dismissed by reason of redundancy if she is found to have unreasonably refused an offer of alternative employment, s139 ERA 1996.</li> <li>• Joely has arguably been offered objectively suitable alternative employment. If she unreasonably refuses this offer, she will lose her entitlement to redundancy pay, ss138-142 ERA 1996.</li> <li>• Many factors will be taken into account by the tribunal in deciding whether Joely's refusal is reasonable. These include the level of the alternative role, distance and pay scales, and any</li> </ul>	<p><b>9</b></p>

	<p>mobility clauses within her contract, <u>Taylor v Kent County Council</u> (1969) <u>Fisher v Hoopoe Finance Ltd</u> (2005).</p> <ul style="list-style-type: none"> <li>• The terms of Joely’s employment will remain fundamentally the same, the only change is a 3 mile distance between the Northton branch and Eastville branch of Clean Green.</li> <li>• This is likely to be considered a reasonable offer of alternative employment, particularly as Joely has a mobility clause in her contract. The clause does not define a ‘reasonable distance’, however, 3 miles may be considered reasonable.</li> <li>• Therefore, Joely may have lost her right to redundancy pay by unreasonably refusing the offer of alternative employment and breaching the mobility clause.</li> <li>• Credit any reasoned conclusion.</li> </ul> <p>• <b>Responses could include:</b></p> <p>If Joely is found to have unreasonably refused alternative employment and breached the mobility clause, this will result in her being dismissal on the grounds of some other substantial reason’, rather than redundancy, s98 ERA 1998.</p>	
<p><b>3(b)</b></p>	<p><b>Advise</b></p> <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Facts and Laws</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• Relevant alternatives/options available</li> <li>• A reasoned conclusion which is supported with evidence, offering the suggested best option available</li> </ul> <ul style="list-style-type: none"> <li>• Terms are implied into every contract of employment, including the implied term of mutual trust and confidence.</li> <li>• This term has been extended to include harassing, abusive, derogatory or humiliating language or practices, <u>Ogilvie v Neyrfor-Weir Ltd</u> (2003).</li> <li>• An objective standard is taken by the courts in determining breach of the duty of mutual trust, <u>Malik v BCCI</u> (1997).</li> <li>• When this fundamental term is breached by the employer, the employee may resign and claim constructive dismissal, <u>Western Excavating Limited v Sharp</u> (1979).</li> <li>• The breach of the employment contract by the employer must be considered sufficiently serious to constitute a constructive dismissal.</li> </ul>	<p><b>16</b></p>

	<ul style="list-style-type: none"> <li>• Peter must show there has been a repudiatory breach of the implied term of trust and confidence, that led to him resigning. Ying’s behaviour appears to meet this definition.</li> <li>• Peter has also resigned promptly, as required <u>Cook v MSHK Limited (2009)</u>.</li> <li>• An employer’s implied duty to exercise reasonable care extends to protecting the health and safety of the worker, including mental health.</li> <li>• The employees physical and mental health, must be protected against work related stress and psychiatric injury and employers will be liable for work-induced mental illness, if foreseeable, <u>Walker v Northumberland CC (1995)</u>; <u>Barber v Somerset County Council (2004)</u>; <u>Sutherland v Hatton (2002)</u></li> <li>• An employer could be liable in contract and/or tort for work-related stress, <u>Walker v Northumberland County Council (1995)</u></li> <li>• Peter’s stress-induced panic attacks, and continued anxiety, were caused by the incident with Ying. Clean Green may be liable for this, but only if the injury is foreseeable. Explain the s26 definition of harassment as including unwanted conduct of a sexual nature that has the purpose or effect of creating a degrading or humiliating environment for the complainant.</li> <li>• A single incident can be harassment depending on the nature of the work environment, incident and parties dynamics.</li> <li>• Ying is Peter’s manager so there is a power imbalance. The comments made to Peter are hostile, of a sexual nature, and appear to have had a very negative effect on Peter; causing the panic attack and ‘tears’. The fact that Ying has a crush on Peter, further suggests the inappropriate nature of his conduct, reinforcing harassment.</li> <li>• Ying’s comments to Peter were made in front of customers and colleagues. It appears the comment is very degrading and is likely to be considered harassment under s26 EA 2010, <u>Bracebridge Engineering Ltd v Darby [1990]</u>, <u>Dos Santos v Preview Services Limited ET/2700170/10</u>, <u>Insitu Cleaning Co Ltd &amp; Anor v Heads [1994]</u>, <u>De Souza E Souza v Primark Stores Ltd (2018)</u>.</li> <li>• Responses could include: <ul style="list-style-type: none"> <li>• Clean Green may be vicariously liable for the actions of Ying, s109, s110 EA 2010.</li> <li>• Common law implied duties governing employee health and safety are reinforced in statute</li> </ul> </li> <li>• Peter cannot claim constructive unfair dismissal as he does not meet the two-year employment duration requirement, Employment Rights Act 1998.</li> </ul>	
	<b>Question 3 total:25 marks</b>	



<p><b>4(a)</b></p>	<p><b>Advise</b></p> <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Facts and Laws</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• A reasoned conclusion which is supported with evidence, offering the suggested best option available</li> </ul> <p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Kimmy</li> <li>• S103A ERA 1996 automatic unfair dismissal for termination due to whistleblowing and the raising of health and safety concerns.</li> <li>• Automatic unfair dismissal does not require a two year duration of employment, unlike potential unfair dismissal s98 ERA 1996</li> <li>• Kimmy must have reasonably believed the disclosure was in the public interest, <u>Beatt v Croydon NHS Trust (2017)</u>.</li> <li>• Kimmy was not under any duty to disclose in good faith, although this may affect any award if the disclosure is made in bad faith, Public Interest Disclosure Act 1998. The social media post may suggest bad faith.</li> <li>• Employees are under an implied duty to obey lawful orders and the breach of the term may justify summary dismissal.</li> <li>• However, the order to dispose of the waste in a hazardous manner is not lawful, so there is no breach of contract on the part of Kimmy, <u>Morrish v Henlys Ltd (1973)</u>.</li> <li>• Furthermore, it does not appear that disobeying a lawful order was the reason Kimmy was dismissed as she was terminated only upon Niche Offices Ltd learning of her report in the company to the local council.</li> <li>• Kimmy has been automatically unfairly dismissed for whistleblowing.</li> </ul> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>• Kimmy has a duty to mitigate her loss</li> <li>• Any relevant case law</li> </ul>	<p><b>9</b></p>
<p><b>4(b)</b></p>	<p><b>Advise</b></p> <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Facts and Laws</li> </ul>	<p><b>10</b></p>

	<ul style="list-style-type: none"> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• A reasoned conclusion which is supported with evidence, offering the suggested best option available</li> </ul> <p>Responses should include Oliver</p> <ul style="list-style-type: none"> <li>• S98 ERA 1996 dismissal for a potential fair reason, including capability</li> <li>• Ill health can include capability, but the employer must consider the nature and length of illness, possibility of return to work and length of service. Consultation should be undertaken with the employee, and doctors opinion may also be considered, <u>Eclipse Blinds v Wright</u> (1992).</li> <li>• There should be a fair review of the employees attendance record and reasons for absence, warnings must also be given to the employee, <u>International Sports Ltd v Thompson</u> (1980).</li> <li>• Oliver is a long term employee with no prior disciplinary warnings and an excellent attendance record.</li> <li>• His illness has caused absences for just the past three months of his four years of employment, and the nature of the illness (headaches) does not suggest he could never return to work.</li> <li>• There has been no warning given to Oliver, nor any consultation.</li> <li>• Niche Offices Ltd has breached Oliver’s rights as there is no fair review or consideration of his illness.</li> <li>• If Oliver is dismissed on the basis of his illness/ sick leave, this will likely be unfair dismissal.</li> <li>• Even if the dismissal was found to be fair under the grounds of capability s98 ERA 1996, Niche Offices Ltd would still need to demonstrate fair procedure and substantive and procedural fairness.</li> <li>• Responses could include</li> <li>• Oliver meets the eligibility requirements under s94 ERA 1996 to not be unfairly dismissed.</li> <li>• ACAS Code should have been followed in the dismissal.</li> </ul>	
4(c)	<p><b>Advise</b></p> <p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> <li>• Correct identification of relevant Facts and Laws</li> <li>• Discussion around the above with detailed arguments, for and against being evidenced</li> <li>• A reasoned conclusion which is supported with evidence, offering the suggested best option available</li> </ul>	6

	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• S98 ERA 1996 dismissal on the grounds of conduct can include criminal conduct that takes place outside of the workplace, <u>X v Y(2004)</u>.</li> <li>• The tribunal will consider whether the offence involves a serious breach of trust and/or deliberate injury to others, <u>Maris v Rotherham Corporation</u> (1974).</li> <li>• The employer should investigate the matter and give the employee opportunity to explain.</li> <li>• Zoe has not been given opportunity to explain and the role of security guard may not be one of where the incident represents a 'breach of trust'.</li> <li>• However, Zoe has deliberately and seriously injured another person.</li> <li>• Credit any reasoned conclusion as to whether Zoe's dismissal was fair.</li> </ul> <p><b>Responses could include:</b></p> <ul style="list-style-type: none"> <li>• Substantive and procedural fairness should be shown, even for gross misconduct dismissal.</li> <li>• Zoe may be suspended, rather than dismissed, pending the outcome of criminal proceedings</li> <li>• Relevant case law</li> </ul>	
	<b>Question 4 total:25 marks</b>	