CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 4 – EMPLOYMENT LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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 overall performed well. However, a number of responses were quite broad in addressing points not explicitly examined, most notably, remedies. This appears to be a consistent issue across sessions. This suggests a need to read the questions more carefully and consider only points examined.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was a popular question. The majority of responses noted relevant statutory provisions, as well as some case law, as required. Candidates who answered this question tended to achieve an overall good pass grade. However, there was quite a lot of 'description 'of, albeit relevant, law, rather than 'critical assessment' of the law, as required within the question. Although most responses scored well by noting appropriate law and a few sentences of

basic analysis, there was a consistent lack of thorough critical assessment of the law appropriate to a level 6 paper.

Question 2

(a)

This question was of average popularity. A few responses noted very broad statutory provisions governing redundancy and failed to address the specific 'consultancy' issues, as per the question. There was unnecessary in-depth explanation of the statutory definition of redundancy, nonetheless, the majority of answers noted broad consultation requirements, as credited. However, there was a consistent lack of 'analysis' of the role of consultancy, as required within the question.

(b)

As this question required 'explanation' of law, rather than analysis, answers tended to be more specific to the question. The majority of responses identified relevant provisions.

Question 3

This question was of average popularity. Answers tended to note relevant provisions within TUPE 2006, as well as some supporting case law. However, most responses included unnecessary and broad explanations of the nature of TUPE that are not specific to employee protection. At best, there were a few sentences of 'critical evaluation' within some scripts. However, this element of the question was overall not sufficiently addressed. Overall, most responses identified relevant law and achieved a decent pass grade, however, higher grades were rare due to the lack of critical evaluation, as required by the question.

Question 4

This was a popular question. The vast majority of responses noted appropriate statutory provisions along with relevant case law. The nature of these laws was overall well explained and the relationship between the provisions was acknowledged. However, again, there is a lack of 'analysis', as per the question. A few sentences of analysis are found within most scripts, however, these points tend to be brief and lacking depth appropriate to Level 6. Nonetheless, the question scored well due to good recognition and explanation of many relevant legal points, including statute, case law and ACAS regulations.

SECTION B

Question 1

This was a very popular question that resulted in overall strong responses. The 'employment status' tests were very well identified and applied to the question along with consistent citation of appropriate case law. The 'harassment' elements were also overall well addressed with recognition of the relevant statutory provisions and application specific to the question. Vicarious liability was also recognised in some of the stronger responses.

Question 2

(a)

This question was of average popularity. Responses tended to recognise relevant obligations. However, the question refers explicitly to 'contractual' obligations and, at times, too broad an overview of more general obligations was noted. The relevant breaches of obligations were overall appropriately noted and applied to the question. However, there was often a lack of citation of relevant case law to support knowledge of the contractual obligations that had been breached within the question scenario.

(b)

A straightforward question that performed well. However, a few papers did not adequately note the provisions governing unlawful deductions. The minimum wage element was well addressed, as expected.

Question 3

This was a popular question. The majority of responses performed well in terms of identifying and addressing the points relevant to constructive dismissal. These issues were generally appropriately applied to the question, along with citation of supporting case law. The 'emergency leave' aspect of the question was also identified and well addressed in the vast majority of responses, with supporting statute applied. However, a few scripts failed to adequately address this element and provided too broad an overview of constructive dismissal. The remedies element of the question was overall well addressed with explanation of the various contractual and statutory remedies available in the scenario, as credited.

Question 4

This was not a popular question and candidates that answered this question tended to perform poorly when compared to other questions/responses within the paper.

(a) Most responses noted general provisions governing adoption along with some reference to application for leave. However, many answers provided a broad overview of the area of adoption leave, including amounts of leave etc, rather than a specific application of points relevant to the question i.e. the making of a proper application only.

(b) This was a very simple question; however, many responses noted a broad overview of the area of flexible working, rather than specifically addressing the narrow confines of the question. Several candidates placed emphasis on the employers' duty to respond to an application, rather than sufficient focus on the requirements on the employee to make a proper application, as per the question/ scenario.

(c) There was overall appropriate identification of the relevant statutory provisions and the protected characteristic. There was recognition of either direct discrimination or harassment, with few papers noting that both types of discrimination had occurred. Often, there was unnecessary and broad explanation of potential remedies, despite this not being examined.

SECTION A

Question 1

The Equality Act 2010 protects against many forms of discrimination, including indirect discrimination. Indirect discrimination occurs where A discriminates against B if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. The practice will be discriminatory if A applies it to persons with whom B does not share the characteristic, it puts persons with whom B shares the characteristic at a particular disadvantage when compared to persons not holding the characteristics and puts B at that disadvantage, s19. This provision applies to all protected characteristics except pregnancy and maternity.

However, when accused of indirect discrimination, an employer can raise the defence of the measures in question being a 'proportionate means of achieving a legitimate aim'. If this defence is successfully argued, the actions will not be considered discrimination under the Equality Act 2010. The potentially discriminatory effect will be outweighed by the legitimate aim being reasonable in the circumstances.

It is for the courts to determine what is a 'legitimate aim' and whether 'proportionate means' have been taken to achieve that goal. This judicial determination is made on a case by case basis with reference to the particular characteristics of the disputing parties, their actions and their intentions. Case law has also provided guidance on the definition of a 'provision, criterion or practice' and this definition will extend to include formal practices, informal practices and contractual rules. The onus is on the employer to show that the requirement was objectively justified, such justification can be on the grounds of business or economic need, Bilka-Kaufhaus GmbH v Weber von Hartz (1986).

However, the case law in relation to the different protected characteristics needs to be considered separately. In particular, several claims of indirect discrimination on the grounds of the protected characteristic of religion have been litigated with varying outcomes.

In Williams-Drabble v Pathway Care Solutions Ltd and Another (2005), the employment tribunal found that a change to work rota indirectly discriminated against an employee on the grounds of her religious practices. The change to working hours could not be justified as a proportionate means of achieving a legitimate aim as the employer had previously been able to work around the employee's requirements. This suggest the tribunal took quite a practical, fact- based approach in considering why the change could not be justified as proportionate or legitimate.

There has been variation in the judicial approach taken with regard to the wearing of religious items. In Governing Body of Aberdare Girls' High School (on the application of Watkins-Singh) (2008), the prohibition on those of the Sikh religion wearing the kara at school was held to be indirect discrimination. This can be compared with Chaplin v Royal Devon & Exeter Hospital NHS

Foundation Trust (2010) where it was held that the employer was acting reasonably in moving a nurse to a desk job because she refused to remove her crucifix. However, one key difference is that the wearing of the crucifix was in breach of the health and safety rules of the workplace. This case has been criticised for failure to adequately consider Article 9 (2) ECHR freedom of religion, although the case remains good law. Overall, there appears to be a balance struck within the cases above, as the courts are willing to consider the 'proportionate means' defence critically, but not at the expense of other important considerations, such as health and safety, particularly within a hospital.

Indirect discrimination on the grounds of sex is another common claim. It has been held that a provision, criterion or practice can be indirect discrimination where it is detrimental to a larger proportion of women than men, British Airways plc v Starmer (2005). This includes a range of cases including McFarlane and Another v EasyJet Airline Company Ltd (2016), where the refusal to limit shifts to eight hours was found to be indirect discrimination against female cabin workers as they were not able to breastfeed and there was no proportionate means of achieving a legitimate aim.

The requirement to have a degree level qualification was also held to be indirect discrimination on the grounds of age, Homer v Chief Constable of West Yorkshire Police (2012). In this case, the educational requirement was not a proportionate means of achieving the legitimate aim of finding the best individual for the promotion, as it effectively excluded older employees approaching retirement age from obtaining the degree within the three years required. This case balanced the needs of the employer to find the best candidates for promotion, with the need to observe the protected characteristic of age.

However, Woodcock v Cumbria Primary Care Trust [2012] confirmed that considerations of 'costs alone' to the employer cannot solely justify discriminatory treatment. However, a "cost-plus" approach, meaning the costs plus something else, can be capable of justifying age discrimination.

On the above, it would appear the defence of a 'proportionate means of achieving a legitimate aim' is judicially interpreted in a balanced and highly case specific manner. When looking at these claims, it is important to note that the claimant must show that they have personally been put at a disadvantage, not just the group to which they may belong.

Question 2(a)

Redundancy under ERA 196 s139 can occur due to closure of the business, of the workplace or a change in the requirements of the business. Prior to carrying out a redundancy, the employer must undertake proper consultation. The requirement to consult arises where the employer intends to dismiss 20 or more employees within a 90 day period. Consultation must be carried out to liaise with representatives in an attempt to avoid dismissals, reduce the number of dismissal and mitigate the consequences of any dismissals.

S188-194 Trade Union and Labour Relations (Consolidation) Act 1992 requires the employer to consult the authorised representatives of recognised independent trade unions or other elected representatives about redundancy. The definition of redundancy for the purposes of these provisions is wider than that for redundancy payment and is 'dismissal for a reason not related to the

individual concerned or a number of reasons all of which are not so related' s195 TULR(C) A 1992. Where there is a recognised trade union, the employer must consult that union, where there is no such union the employer must consult the appointed or elected employee representatives.

Those being consulted must have a reasonable opportunity to understand the subject matter of the consultation, express their views and the other party must 'genuinely' consider their opinions , British Coal Corporation and Secretary of State for Trade and Industry, ex pate Price and Others (1994). The 'genuine attempt' emphasis is there to ensure that the consultation is not merely paying 'lip service' to a decision already made, it is an opportunity for true consultation with a view to minimising the disruption caused by the redundancies.

Furthermore, consultation is required even where the employer company is in administration, however, a lack of consultation will be acceptable in special circumstances' such as a 'sudden' insolvency of a business, rather than an anticipated insolvency, Clarks of Hove Ltd v Bakers Union (1979).

It is clear that consultation is an essential aspect of any correctly conducted redundancy. The consultation must involve the proper representatives and must involve a genuine effort to consider the impact of the redundancy on employees and minimise any negative effects. The importance of consultation is further emphasised as, where an employer breaches the duty to consult under s188, a tribunal may make a protective award.

2(b)

S138 Employment Rights Act (ERA) 1996 provides that there will not be a dismissal where, before the existing contract of employment comes to an end the employee is offered re-engagement or alternative work by the employer, to commence no later than four weeks after the termination of the original contract. Reengagement occurs where the employee is offered a renewal of their contract on the same terms, in particular as to the capacity in which employed and the place of employment, see Briggs v ICI (1968). Where such an offer is made, the employee loses their right to redundancy pay as there is no redundancy, s141 (1) ERA 1996.

Where the employer offers, within the same timeframe, a new contract, the terms of which, in particular as to capacity or location, vary from the original one, a different regime applies. There is a trial period of four weeks, or longer if the new contract involves retraining. If either the employer or the employee terminates the new contract within this trial period employment is deemed to end with the termination of the original contract and for the reasons for which the contract was terminated: s 138 (4) ERA. However, if the employee has unreasonably terminated a new contract on different terms which was suitable for him within the trial period, he will not be entitled to a redundancy payment: s 141 (4) ERA. The burden of proof is on the employer to show that such refusal was unreasonable.

A tribunal will consider all the circumstances in considering whether an employee has unreasonably refused an offer of work. The employee must be given sufficient time to consider the offer and the employment must be substantially equivalent; not only in the terms and conditions of the contract, but also the status of the employee, Taylor v Kent County Council (1969).

Question 3

The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006 were introduced to facilitate the transfer of business services from one entity to another. TUPE protects employees by providing that the employee's contract of employment is automatically transferred from the transferor employer to the transferee employer. However, this protection is only available where the transfer is recognised under TUPE.

TUPE currently recognises two categories of transfer. Firstly, the 'traditional or standard' method under Reg 3 (1) (a) that applies to the transfer of an undertaking, business or part of a business situated immediately before the transfer in the UK to another person where there is a transfer of an economic entity which retains its identity. Reg 3 (2) defines an economic entity as an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary, Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV (1986) (Spijkers case). In addition to the traditional transfer above, TUPE 2006 also recognises service provision changes, this is known as the 'extended transfer definition'. Service provision changes fall under Reg 3 (1) (b) which states that there is a transfer for the purposes of TUPE if service activity by employer A is stopped and the service provision is taken over by employer B and there must be a group of employees whose main job it was to carry out those activities for employer A. Reg 5 added that the service must be fundamentally the same before and after the transfer.

The protection of employees under TUPE 2006 begins prior to the transfer as the employer has a duty to inform and consult employee representatives, Reg 13. The employer must inform the recognised trade union representative or elected representative of the relevant transfer and reasons therefore, the legal, economic and social implications of the transfer for affected employees and any measures the transferor or transferee envisages needing to put into place in relation to affected employees, including no measures. 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.

Reg 4 states that a transfer does not terminate nor alter the contract of employment of the employees working in the grouping being transferred and these employees' contracts are transferred to the new employer. Reg 4 protects the employee by including the transfer of all contractual rights and liabilities under or in connection with the employment relationship, any statutory employment claims triggered by the transferor's employment, any severance or redundancy schemes, bonuses, commission and liability for personal injury. In addition to transferring all rights under the contract of employment, TUPE also extends protection to employees by stating that, where the transfer is the sole reason for variation of a term within a transferred employee's contract, this variation will be void, Reg 4 (4).

The only exception to the restrictions of amending the contracts of transferred employees are found where the business can prove an Economic, Technical or Organisational (ETO) reason for the variation. An example of an ETO reason would include a change to the structure of the workforce by reducing the numbers or changing the functions that individuals perform. ETO reasons tend to be interpreted quite narrowly, for example, in Wheeler v Patel (1987) where it was held that an economic reason must relate to the conduct of the

business. Therefore, dismissal of an employee by the transferor as a means of facilitating the transfer was not an ETO reason. The court stated that to allow it to be would 'defeat the purpose of TUPE' by allowing employers to justify dismissing employees as necessary for the transfer.

Furthermore, harmonisation of transferred employee's contractual terms would not be considered an ETO reason. Therefore, the definition of an ETO reason expressly excludes variations to transferred employee's contracts based solely on the transfer. This is to protect the transferred employees as any changes to their contract on the basis of the transfer will be considered void.

However, 'changes in the workforce' can include a change in the place employees are employed to work. Therefore, redundancy can be considered an ETO reason Reg 4 (5). However, any dismissals by the transferor must relate to the workforce prior to the transfer to be considered an ETO reason. The ETO justification would not apply to situations where the transferor anticipates redundancies after the transfer and carries out those dismissals before the transfer, Hynd v Armstrong and Others (2007).

Under Reg 7 (1) where, either before or after the transfer, an employee of the transferor or transferee is dismissed, the employee is automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer; this includes redundancy of an employee before the specific transferee has been identified but the idea of the transfer was in the mind of the employer at the time of the dismissal, Spaceright Europe Ltd v Bailiavoine (2011). This case suggests a very broad and pragmatic interpretation of the law to protect the employee. Additionally, under Reg 4 (9), if the employer makes a substantial change to the working conditions of the employee to his material detriment, the employee may treat the contract as being terminated by the employer. The employee may then claim constructive unfair dismissal, Tapere v South London and Maudsley NHS Trust (2009).

However, there are certain limits to claims transferred employees may make. Under Reg 10(3), an employee whose contract of employment is transferred under TUPE 2006 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.

TUPE appears to offer considerable protection to transferred employees as it ensures that their contracts of employment, and all associated benefits, remain intact before, during and after the transfer. Furthermore, any attempt to vary these contractual terms and conditions, or to dismiss the employee by reason of the transfer, may result in a claim of unfair dismissal or constructive dismissal against the employer. The transferred employees' rights are also protected by the narrow interpretation of ETO reasons allowing for variation to a transferred employee's contract. However, there are certain limits to recovery of pension rights.

Question 4

Firstly, substantive fairness must be established by asking whether it was reasonable to dismiss the employee in the circumstances. The Employment Rights Act 1996 states that any dismissal that interferes with an employees' statutory rights will be considered an automatically unfair dismissal.

Additionally, s98 (2) cites potentially fair reasons for dismissal, including conduct, capability/performance, redundancy, statutory illegality or some other substantial reason. The 'range of reasonable responses' test will be utilised and the tribunal must be satisfied that the actions taken by the employer fall within the range of those expected of a reasonable employer, Iceland Frozen Foods v Jones (1982).

However, the determination of 'reasonableness' involves a judgment call on the part of the tribunal in assessing what a reasonable employer could properly do in the circumstances. Nonetheless, the Court of Appeal has affirmed the 'range of reasonable responses' test and the tribunal must consider whether the employee's dismissal is reasonable by considering the actions of the employer and whether they were what was expected of a reasonable employer in the circumstances; the tribunal must not consider what it would have done in the circumstances, The Post Office v Foley (2001); HSBC Bank plc v Madden (2001); Manchester Airport plc v McCall (2008). Reasonableness will be considered in the light of the knowledge the employer had or should have had. Ignorance of key information that may be a mitigating factor does not render the dismissal unfair so long as the information could not have reasonably been obtained through an appropriate disciplinary procedure, Orr v Milton Keynes Council (2011).

In addition to substantive fairness, the employer must also demonstrate that they acted with procedural fairness. The employer must evidence reasonable grounds for the basis upon which they have dismissed the employee. These 'reasonable grounds' can be demonstrated by showing proper investigation into the employee's conduct or circumstances that led to the dismissal. The case of British Home Stores v Burchell (1978) confirmed that the employer must have an honest belief, and reasonable grounds for that belief, that the employee was guilty of the actions that led to the dismissal. The employer must have carried out as much investigation into the matter as was 'reasonable in all the circumstances of the case'. When conducting this investigation, the employer must not have a biased view in seeking only information that confirms their suspicions and must also look for evidence that supports the employee's' position, Salford Royal NHS Foundation Trust v Roldan (2010). However, although the employer is required to show that a reasonable procedure was followed, including investigation in cases of alleged misconduct, this procedure is also subject to a range of reasonable responses test. Therefore, failure to show a full investigation would not amount to unreasonable action on the employer's part if it can be shown that a reasonable employer would have acted in the same way in those circumstances, Sainsburys Supermarkets Ltd v Hitt (2003).

In determining whether an employer has adopted a reasonable procedure, consideration will be given to whether the employer followed the ACAS Code of Practice on Disciplinary and Grievance procedure. The Code states that an employer should write to the employee setting out the alleged offence and inviting them to a disciplinary meeting, allow the employee opportunity to speak and to be accompanied at that meeting and allow the employee time to prepare for the meeting. In this meeting, the employer should establish facts of the case, inform the employee of the problem, decide on the appropriate action and provide the employee with an opportunity to appeal. S207 A Trade Union and Labour Relations (Consolidation) Act 1992 provides that an ET may increase or decrease an award made to an employee depending on whether the employer has followed the Code. Furthermore, Polkey v AE Dayton Services Ltd (1988) also provides that where a tribunal

finds the correct procedure would have made no difference to the outcome, the dismissal will still be considered unfair, however, the award can be significantly reduced; to nil, if appropriate.

SECTION B

Question 1

Kalinda may be classed as either an independent contractor, a worker or an employee. Under s203 (1) Employment Rights Act 1996, an employee is an individual who works under a contract of service and an independent contractor is someone who works under a contract for services, s203 (2). Workers are defined under s 203(3) as individuals who perform services for another party whose status is not that of a client or customer. Although those working under zero hours contracts, such as Kalinda, are commonly referred to as 'workers', this does not prevent a finding of employee status so long as the tests of function demonstrate an employment relationship.

In determining Kalinda's status, the court will use certain tests of function. The multiple/economic reality test, Ready Mixed Concrete Ltd v Minister of Pensions (1968) is the most frequently used test looking at several factors in determining employment status. This acknowledges that no singular aspect will determine employment status and, rather, the reality of the individuals working life is considered. The test considers many variables including the degree of control, mutuality of obligation, personal service, investment in tools and equipment, length of service and method payment and taxation. Although Kalinda's contract states she is self-employed, such contractual 'labels' will be just one of the factors considered in determining employment status. A contractual label will only be a deciding factor where other factors are of equal weight, Young & Woods Ltd v West (1980).

Personal service is an important element to consider in determining employment status, the ability to delegate your duties strongly suggests the individual is not an employee, MacFarlane and Another v Glasgow City Council (2001). However, delegation, as with all factors, will be considered in the light of the individual's full working circumstances. In Pimlico Plumbers Ltd v Smith (2018), an individual was held to be a worker, rather than self-employed, despite there being no mutuality of obligation to offer nor accept work and paying his own tax and national insurance. To balance these points, the individual in this case wore a uniform, followed certain instructions and his contract referred to annual leave and dismissal, he was allowed to delegate but only to other company operatives. In Kalinda's case, she is unable to delegate her duties, except to an approved co-worker, Robert. This suggests that she is an employee. She is required to wear the same outfit as all other employees, although this is the individual's 'own clothing', it is a very specific type of clothing and Kalinda's required workplace attire is the same as all employees. This suggests she is an employee.

Where an individual is on a zero hours contract, such as Kalinda, the test of employment status relies largely on the mutuality of obligation aspect of the test for employment status. In Pulse Healthcare Ltd v Carewatch Care Services Ltd and Others (2012), zero hours contractors were not defined as employees of the company but were nonetheless held to be employees based on the reality of their working lives. This was due to the fact that claimants had been working fixed hours on a regular basis for a number of years, provided personal service and wore uniforms. As Kalinda has worked the same

shifts at Eats Well for four years and has been sent her timetable weekly, she works a fixed number of hours, the same hours and there also appears to be mutuality of obligation as she is sent the timetable and there is no opportunity to challenge or amend this schedule. This latter point also suggests control, further reinforcing a suggestion of Kalinda's employee status. It would appear Kalinda is an employee.

With regard to Sarah's comments to Kalinda, the Equality Act 2010 s26 defines harassment as including unwanted conduct of a sexual nature which has the effect of creating a hostile or degrading or intimidating environment. Sarah's comments to Kalinda meet this definition as she feels very humiliated and embarrassed by the remarks. Insitu Cleaning Co Ltd v Heads (1995) confirmed that one offensive comment of a sexual nature is sufficient to create a hostile intimidating environment, particularly when that comments comes from a more senior member of staff. In Driskel v Peninsula Business Services (2000), the suggestion that a woman should 'show plenty of cleavage' in a promotion interview was a discriminatory comment and undermined her dignity. In relation to Sarah's comments to Kalinda, it is of no relevance that Sarah, Kalinda and Emma are all female. Sarah cannot defend her actions by claiming it is 'girls' talk. Furthermore, the comment by Sarah suggesting Kalinda should 'loosen up, we're all girls here' suggests s4 direct discrimination as Sarah is suggesting she would not have spoken to a male colleague in such a way. The company owner, Emma, is aware of the comments made by Sarah, has taken no action and seemingly endorsed the behaviour by 'laughing along'. This may allow for a claim of vicarious liability for the actions of the employee under s109, Jones v Tower Boot Ltd (1997).

Question 2(a)

Exceedo Ltd may have breached their implied duty to exercise reasonable care in protecting the health and safety of a worker. The nature of the work determines what is a reasonable standard of care in the circumstances and, as a factory is a higher risk environment, this would place a higher duty on Exceedo Ltd to ensure protective measures are undertaken in relation to its employees. This implied duty includes provision of a safe operating system with sufficient precautions, warnings and protective materials and equipment. The latter carries particular importance as it has been held that the mere provision of safety equipment is insufficient, the employer also has a duty to warn the employee of the specific dangers involved in the task and instruct them to wear the protective gear at all times, Pape v Cumbria County Council (1991). This ruling likely relates only to industries involving the use of potentially hazardous materials where the consequences of an incident would be very serious, such as in Gita's case. Farooq is aware that Gita does not wear her protective eyewear and that she has a very legitimate reasons for not doing so; the equipment will not fit over the glasses that she needs to see. They have not offered her alternative protective gear nor have they required her to wear such equipment while working. This suggests the company has breached their implied duty of protecting the health and safety of the worker, especially in the factory environment in which Gita works.

Furthermore, an employer has an implied obligation to provide a safe working environment, including the use of competent staff, Hawkins v Ross Castings Ltd [1970]. This duty requires the employer to ensure all staff are properly qualified and trained, particularly in a high-risk factory environment. Exceedo Ltd have failed in this obligation to Gita by not providing Stella with any

training and by not properly confirming that Stella has the required experience, as essential for the role she is performing.

2(b)

The National Minimum Wage Act (NMWA) 1998 states that the minimum wage for a person of 32 years of age is £8.21 per hour. This amount does not include benefits in kind, such as the free meals, or travel expenses. Therefore, Joe has not been paid the minimum wage he is entitled to for the duration of his employment. As his rights have been breached, Joe can bring a claim for breach of contract in the ET within three months or in the civil courts within six years.

With regard to the deduction of his wages, the ERA 1996 s13 provides that deductions cannot be made to an employee's wages unless the deduction is required or authorised to be made by virtue of a contractual or statutory provision, or the worker has previously signed a written agreement consenting to the deduction. Deductions may also be made to 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 exceptional circumstances apply to Joe's situation. Therefore, it appears his rights have been breached and he may bring a claim against the company to employment tribunal within three months, s23 ERA 1996.

Question 3

May-ling may be able to bring a claim for wrongful dismissal against Home Pottery Ltd as her resignation could be seen as a constructive dismissal. Constructive dismissal occurs where an employee resigns due to the behaviour of the employer which makes it impossible for them to continue in their role. A sufficiently serious single incident may be sufficient to give rise to a claim for wrongful dismissal, however, in May-ling's case there is more than one incident.

Felicia has spoken to May-ling in an offensive manner by calling her 'stupid and dramatic' after she received a distressing phone call regarding her daughter's involvement in an accident. She then tried to prevent May-ling exercising her right to unpaid time off for an emergency involving her dependent daughter pursuant to s 57A ERA 1996. Furthermore, upon May-ling's return from work, Felicia accused her of lying about her daughter's accident and has used mildly profane language to her when doing so. Felicia's actions can be seen as a breach of the employment contract's implied duty of trust and confidence.

Additionally, Felicia has issued May-ling with a written warning for taking time off in an emergency, despite this being her statutory right. Under s57A ERA 1996, an employee is allowed to take a reasonable amount of unpaid time off for emergencies involving dependants. May-ling's 15-year-old child would be considered a dependant as she is a minor and being told that her child has been involved in an accident and taken to the hospital would constitute an emergency. May-ling has the hospital report to prove emergency circumstances arose involving her dependant; the fact that her daughter did not suffer serious injury is irrelevant. May-ling had a legal right to take the unpaid leave, as well as a right not to be subjected to a detriment for taking this leave under s 47C ERA. The verbal warning can be seen as a detriment as it was issued despite her legal right to take the leave, Royal Bank of

Scotland plc v Harrison (2009). The depressive bout may be recoverable under this statutory right but not under the common law claim.

These incidents may cumulatively have given rise to May-ling's resignation as she could no longer continue in her role, leading to a potential claim for wrongful dismissal, Western Excavating Ltd v Sharp (1978). However, May-ling must resign soon after the incident to be able to prove constructive dismissal, she has resigned the day after the exchange so meets this requirement.

If May-ling were successful in a claim of wrongful dismissal, she would be entitled to compensation that would reflect the test for damages for a breach of contract and would put her in the position she would have been in but for the breach of contract, Hadley v Baxendale (1854). May-ling states that her notice period is two weeks, so this is the maximum amount payable to her. Furthermore, there would be no recovery for injury to feelings or psychiatric injury associated with the dismissal, Johnson v Unisys Ltd (2001). Therefore, the depressive bout triggered by the dismissal would not be an allowable head of damages. However, an ET does have the power to award compensation for financial damages flowing from the breach of the implied terms of trust and confidence.

May-ling has a duty to mitigate her losses by taking active, but reasonable, steps to seek alternative employment, Yetton v Eastwoods Froy (1967). Any losses she could have avoided by seeking such employment will be deducted from any award she receives. May-ling's taking of a one-week holiday abroad to 'forget about all things work-related', despite having no remaining holiday leave entitlement, suggests she was not seeking alternative employment for the one week after resigning. Therefore, a proportionate deduction may be made to any award May-ling receives.

May-ling may also bring a claim for unfair constructive dismissal as she appears to meet the requirements for a claim of unfair dismissal under s98 ERA 1996. For this type of claim, May -ling must show that there a repudiation of the contract and that the dismissal was also unfair. If she is successful in this claim, she will be entitled to the same remedies as for a claim of unfair dismissal; reinstatement, re-engagement and basic or compensatory award. A basic award of compensation, based on her length of service, would be most suitable to May-ling. May-ling may also have a potential claim under s104 ERA 1996 for asserting a statutory right.

Question 4(a)

Adoptive parents are entitled to leave under the Paternity and Adoption Leave Regulations 2002. These regulations reflect the rights given in maternity leave and allow the adoptive parent 26 weeks of Ordinary Adoption Leave followed by 26 weeks of Additional Adoption Leave. Statutory Adoption Leave (SAL) can be taken by one of the parents who adopt the child, not both. As Heather is the sole adopter, this will not be an issue. To qualify for the leave, Heather must have agreed with the adoption agency a date for the newly matched adoption and have notified her employer that she wishes to take SAL no less than 7 days after the date on which she is informed of the matching, unless that is not reasonably practicable. Heather has been matched with a child for adoption, however, she did not inform her employer as soon as she heard of the placement but waited until she had returned from holiday. Therefore, she arguably informed the employer as soon as reasonably practicable, when she

returned to the country. Heather must also inform her employer of the specific date of placement and the date on which she wishes her SAL to start. As it stands, Heather has not made a proper application for adoption leave as these latter two criteria have not been met.

4(b)

Heather has the 26 weeks continuous employment required to request flexible working under s80F ERA 1996. She has put her request in writing including the change requested, effective date and she has confirmed it is a statutory request. However, she has not mentioned the date of application nor the effect on the employer and how this might be dealt with, she has also failed to include details of any previous request as she can only make one every 12 months. Furthermore, her 'effective date' of change may be not be sufficiently specific as she has not yet been granted adoption leave, therefore, she does not know the precise date she would be returning to work.

(c)

The Equality Act 2010 has nine protected characteristics, including being transgender. An individual does not need to be under medical supervision or have undergone any particular treatment to consider themselves transgender. Therefore, Heather meets this definition and her status as a transgender female is protected under the statute, meaning any less favourable treatment on the grounds of her being transgender will be discrimination. Paul has suggested that he will have to keep in mind her 'unusual life choices' in considering her request for adoption leave and for flexible working. This is evidently a reference to her being transgender and is a form of direct discrimination under s4 of the statute. Paul is treating Heather less favourably on the grounds of her protected characteristic, than he would a person not holding that characteristic. Heather being transgender should not be a consideration in responding to her application for adoption leave or flexible working. Furthermore, s26 of the Equality Act 2010 prohibits harassment on the basis of a protected characteristic, including comments likely to make the individual feel degraded or humiliated. Paul asking Heather how far along she is in the transition process and whether she has undergone any 'genital removing surgery' would likely meet this definition as his questions are a form of highly personal, intimate and degrading communication.