LEVEL 6 - UNIT 4 – EMPLOYMENT LAW

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

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 January 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

Candidates appeared to understand what the questions were assessing across the paper, although at times ancillary information was unnecessarily presented, this was not due to a misunderstanding of the questions but rather an attempt to cover all bases even if not explicitly examined. Overall, low scoring papers reflected a lack of relevant knowledge and not a misunderstanding of questions.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question1

This was a popular question and candidates who tackled this question tended to do well. The majority of responses noted the relevant statutory provisions and provided some comment thereon. This approach allowed for a pass mark; however, a broader approach was needed to justify a higher grade. Candidates who also referred to relevant case law and applied this legal reasoning to demonstrate application of the statute scored well. However, very few candidates provided sufficiently in depth 'critical assessment' of the law cited, as per the question.

Question 2

Very few candidates attempted this question; this was not surprising as this area of law is not universally popular. Candidates who did attempt this question tended to score a pass grade at best. The responses to Part (a) were fine in relation to 'explaining the definition', however, the essential accompanying case law was largely lacking. Part (b) responses also tended to present explanation of the definitions, rather than 'critical analysis', as per the question. It is suggested that case law governing this area is better considered, this would allow for a more critical aspect to answers.

Question 3

This was a moderately popular question. Responses, however, were not particularly strong. Again, the 'explanation' element of the question resulted in some good information being presented with the relevant statutory provisions being overall clearly referenced. However, the question requires analysis of a 'fairer' distribution of parental responsibility and this was not readily seen in most papers. The majority of papers provided some commentary as to the goals of legislation and the problems with the existing dynamics. However, given the highly topical and broad nature of the question, more in depth and critical analysis of the law was needed overall to justify the award of higher grades.

Question 4

This was a moderately popular question and several candidates who attempted this question performed very well. The majority of answers recognised various case law examples, as required, and provided a balanced overview of the law governing the area. A few papers also included the 'critical analysis' element of the question and provided some consideration of the effectiveness of employee protection, as per the question. However, again, this latter skill could have been more readily demonstrated as several papers cited a good deal of excellent case law, as credited, but failed to adequately analyse the material cited.

SECTION B

Question 1

This was a popular question. In relation to parts (a) and (b), the majority of candidates recognised the examined areas of law and applied relevant material. There was some overlap between the material presented in part (a) and part (b), however, relevant information was credited regardless of where it appeared. However, the majority of candidates who answered this question scored a pass/high pass grade. Higher grades were often lacking due to very few candidates recognising that, potentially, a protected disclosure had been made within the scenario. Part (c) was a clear and straight forward question that saw the majority of candidates gaining the majority of marks available.

Question 2

Candidates tended to do well in relation to part (a), recognising harassment had occurred, as well as victimisation. A few papers also recognised that direct discrimination had occurred and issues of vicarious liability were also broadly noted. Overall, the majority of papers did well with this question, however, as there were several issues to identify and address, few candidates managed to consider all these points, with most failing to note direct discrimination had occurred. Responses to part (b) generally recognised constructive dismissal had occurred and the reasons therefore, however, few candidates recognised the potential for both constructive dismissal and unfair constructive dismissal claims and the different remedies available. In particular, very few candidates noted the common law remedies available for breach of contract.

Question 3

This was not a popular question and was attempted by few candidates. The responses to this question tended to score quite low marks due to failing to address the specific points examined. With one or two notable exceptions, the few responses presented were very broad and noted general points in relation to redundancy, rather than focusing upon the selection procedure, as the question explicitly states. At this level of education, it is essential that candidates are able to provide full and learned answers to questions that focus on a particular aspect of a topic, rather than presenting all the information they have on a subject in the hope something will prove relevant. Overall, the aspects of the question that touched upon discrimination and remedies for unfair dismissal were adequately/well addressed, however, the essential elements of redundancy selection procedure were not properly considered.

Question 4

This was quite a popular question and the majority of candidates who attempted this question tended to score quite well. In relation to 'Nina', the majority of responses broadly recognised issues of indirect discrimination and potential defences thereto. However, the explanation and application of the law relevant to the restrictive covenant provided the best responses, with the majority of candidates applying correct and critical examination of the clause. In relation to 'Zack', relevant law was overall consistently cited and both issues of minimum wages and deduction of wages were overall adequately/well addressed, with few high scoring candidates recognising the extent of recovery for these issues. A few answers, however, appeared to be

incomplete or provided 'hurried' responses, suggesting that time management was perhaps an issue as this was the last question attempted.

LEVEL 6 - UNIT 4 – EMPLOYMENT LAW

SUGGESTED ANSWERS

SECTION A

Question 1

The first point upon which to critically assess the effectiveness of the Equality Act 2010 in protecting disabled employees is to consider how this legislation defines disability. If the definition is too broad, it may be subject to abuse and genuine claimants may suffer. If it is too narrow, those suffering with more obscure of less 'obvious' disabilities will fail to be protected by the law. So, a careful balance needs to be struck in defining what will constitute a disability under the law.

Section 6 defines disability as a physical or mental impairment having a substantial and long-term adverse effect on the individual's ability to carry out normal day to day activities. Certain illnesses are automatically recognised as a disability under s6, such as cancer and MS. With these conditions, the legislation recognises that the illness itself is evidence of interference with everyday life activities; regardless of severity of symptoms. This speaks to the effectiveness of the Equality Act 2010 as those diagnosed with potentially life-threatening illnesses do not carry the further burden of having to prove they have a disability under the law.

Furthermore, symptoms that affect day to day activities will be considered a disability even though they do not have a precise 'label'. The law will consider the reality of a person living with the condition when assessing disability. In this respect, a topical point to consider is that of obesity. While obesity itself is not classed as a disability, the statute does recognise that, if the obesity results in restricted physical or mental ability, then this restriction may fall under the definition of a disability, Kaltoft v Municipality of Billund (2013). This again suggests that the Equality Act 2010 offers protection for a wide variety of conditions, so long as impairment to everyday life can be proven.

However, despite its seemingly broad protection, the Equality Act 2010 (disability) Regulations 2010 excludes certain conditions from being considered a disability under the law. These include socially unacceptable tendencies such as pyromania and voyeurism. These exclusions endeavour to protect the integrity of the legislation and prevent deviant and socially harmful behaviour being protected under the law. Drug and alcohol addiction are also excluded; however, if the addiction causes severe impairment, these symptoms may be recognised as a disability.

The definition of disability under the Equality Act 2010 s6 also requires that the disability is not a transient feature of a person's life and normal day to day activities must be substantially affected in the long term. Long term means lasting 12 months at least, or the rest of that person's life', and substantial is classed as more than minor and assessed in relation to what the individual could do without the impairment, rather than being compared

against the average person, Paterson v Metropolitan Police Commissioner (2007).

However, realistically, the law recognises that there are some conditions that impair a person's working life but not their personal life, and vice versa. Therefore, judicial reasoning is increasingly recognising a wide definition of normal day to day activities could include manual work jobs, so that an individual unable to carry out such tasks due to a physical limitation can be classed as disabled, Banaszczyk v Booker (2016).

In addition to attempting to define disability in an appropriately balanced and flexible manner, the Equality Act 2010 also puts certain responsibilities on employers in an effort to protect disabled employees. s39(5) EA 2010 states that employers have a duty to make reasonable adjustments for disabled persons in the workplace. s20 further states that where a practice, criterion or physical feature of A puts a disabled person at a substantial disadvantage compared to a non-disabled person, A must take reasonable steps to avoid that disadvantage. These provisions are effective in protecting a disabled person against an employer who does not wish to accommodate their needs. For example, the legislation requires the employer to provide auxiliary aids if a disabled person would be, but for the provision of the aid, at a substantial disadvantage in comparison with non-disabled persons. These aids must be provided without any cost to the employee s20 (7). The judicial definition of a 'reasonable adjustment' appears to have a wide definition, including a job swap, Chief Constable of South Yorkshire Police v Jelic (2010).

However, all adjustments must be reasonable. Cordell v Foreign and Commonwealth Office (2011) noted several factors considered in this respect, including the degree the employee would benefit from the adjustment and budgetary considerations. This may allow smaller employers to avoid making adjustments on the basis of financial limitations.

In addition to providing a reasonable definition of disability and placing certain responsibilities on employers, the Equality Act 2010 also protects disabled persons from any discrimination on the basis of their disability. Discrimination will occur where an individual is treated less favourably than a person not having a disability and there is no proportionate and legitimate reason for the difference in treatment, s15. Furthermore, if the individual is harassed upon the basis of his disability, this will also constitute discrimination. Section 26 harassment includes conduct which has the effect of creating a hostile or degrading intimidating environment for persons holding a protected characteristic, such as disability. Therefore, any 'mocking' or personal or derogatory comments on the basis of disability will be strictly prohibited. S27 victimisation may also occur if the individual is treated less favourably for making a complaint of disability discrimination.

Additionally, associative discrimination is also prohibited under the Equality Act 2010, meaning a person cannot be treated less favourably due to their association with a disabled person, Coleman v Attridge (2008) IRLR 722. Perceptive discrimination is also recognised under the statute, prohibiting less favourable treatment on the grounds of being perceived as having a disability, Chief Constable of Norfolk v Coffey (2019) EWCA Civ 1061.

Finally, when a disabled employee wishes to bring a claim for discrimination under the Equality Act 2010, the claimant must establish facts from which it could be concluded that, in the absence of adequate explanation, the

respondent committed an act of discrimination. The respondent will be liable for this discrimination unless he can establish he did not commit that act of discrimination, s136 Equality Act 2010. As such, the disabled employee is supported as the burden of proof shifts to the employer to prove they did not commit a discriminatory act.

It would appear the Equality Act 2010 has some effective characteristics, including its wide and pragmatic definition of disability that increasingly recognises various conditions as limiting day to day activities. However, the statute is still in relative infancy and the ultimate test of its effectiveness arguably remains to be seen.

Question 2(a)

TUPE 2006 was introduced to facilitate the transfer of business services from one entity to another. The definition of a transfer under the regulations has recently been extended to include several types of activity, so as to protect the widest scope of persons.

TUPE 2006 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 e.g. sale of a business as a going concern.

Regulation 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. This standard definition was interpreted in the Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV (1986) (Spijkers case) where the court stated that, when considering the definition under TUPE, it is important to consider the type of undertaking or business, whether the assets tangible or intangible are transferred, whether the employees are taken over, whether customers are transferred and the degree of similarity between activities carried on before and after the transfer. The court clarified that, when considering whether a transfer is covered by TUPE 2006, all of the above points are to be considered with no single aspect being decisive in isolation. In Fairhurst Ward Abbotts Limited v Botes Building Limited and others (2004) it was held that TUPE also applies where the part of the business transferred was not a discrete economic entity.

Furthermore, in Cheeseman v Brewer Contracts (2001) the EAT further clarified the definition of a traditional transfer by stating that attention should be paid to the way the work is organised, rather than on whether there is an activity or service. This was in recognition of the fact that there may be an activity or service which is not an economic entity.

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 Regulation 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. Regulation 5 added that the service must be fundamentally the same before and after the transfer. Regulation 3 (1) covers

many different types of service provision change, including client to contractor- first generation outsourcing, contractor to contractor- second generation outsourcing and contractor to client-insourcing. Further example of case law interpretation of service provision changes can be seen in Argyll Coasting Servces Ltd v Stirling and Others (2012) where the EAT provided some guidelines on the definition of an 'organised grouping of employees', stating that there must be a group of employees which has been specifically organised to carry out activities for the client; the principal purpose of this group does not have to be the sole purpose. The court further stated that the needs and intentions of the client would also be considered. Therefore, even where one employee worked all of his time on this client but others also dealt with the client, as well as dealing with others, there was no transfer as there was no overall grouping of employees working for the client, Seawell v Ceva (2012) However, a single employee could constitute an organised grouping for TUPE where he or she has been instructed by the employer to carry out all the activities necessary to provide services for the client, Rynda (UK) Limited v Rhijnsburger (2015).

2(b)

TUPE 2006 does not explicitly define an economic, technical or organisational (ETO) reason. However, the Department of Business, Innovation and Skills provides some guidance by stating that 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.

ETO reasons include a change to the structure of the workforce by reducing the numbers or changing the functions that individuals perform. For example, in Osborne and others v Capita Business Services Ltd and others (2016) seven employees were dismissed as the employer had split their job functions and redistributed those functions across several different sites. This was considered to be an ETO reason as it entailed changes in the job functions of the workforce.

However, 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. Furthermore, termination of employment on the basis of the transfer will give rise to a claim for unfair dismissal.

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).

On the above, it would appear judicial application of ETO reasons endeavour to strike a balance; too strict an interpretation of an ETO reason might hamper business, whereas too broad a definition would result in employees being denied essential protection in a transfer. Ultimately, although potential ETO reasons are quite broad, they appear to be interpreted narrowly by the courts.

An example of this seemingly narrow interpretation to protect the interests of transferred employees can be seen 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. Again, this suggests the court is interpreting TUPE and defining ETO reasons in recognition of the need to protect the rights of employees in a transfer.

Ultimately, ETO reasons exist in acknowledgement of certain situations where certain changes will prove necessary. However, when practically interpreting and applying these ETO reasons, the courts take a conservative approach acknowledging that, while business endeavour must not be fettered or dampened, it is no less essential to protect the rights of employees within a transfer.

Question 3

Legislation regulating both paternity leave and shared parental leave has attempted to redress apparent 'gender imbalances' in parental leave. It is important to note that all such measures apply equally to married and cohabiting couples, heterosexual and same sex couples.

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. Firstly, to be eligible for paternity leave, the employee must have 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. The employee can choose to take either one- or two-weeks leave taken consecutively and within 56 days of the birth or adoption.

The employee will be paid for ordinary paternity leave if they meet the qualifying criteria and earn at least the lower limit for national insurance. 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. The legislation further protects the employee who has taken paternity leave as they have the right to return to the same job and are protected from detriment for exercising this right to leave. However, despite these positive measures, the payment of national insurance 'qualifying criteria' mentioned above means that those on a very low income, and therefore perhaps most in need of assistance, will not be covered under the legislation.

In addition to paternity leave, more recent legislation has recognised the benefits of shared parental leave as a means of bringing fairer distribution of parental responsibilities within the first year of having or adopting a child. The Shared Parental Leave Regulations 2014 allow parents to share leave and pay following the birth or adoption of a child so long as they meet certain eligibility requirements. To qualify for shared parental leave, the child's mother or adoptive parent must be eligible for maternity leave, pay or allowance or adoption leave or pay. Furthermore, the employee seeking shared parental

leave, either the mother or partner, must meet the 'continuity of employment test' in having 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. An employer can refuse shared parental leave if the employee does not qualify.

Although these measures are commendable in their aims, they apply only to the first year after birth or adoption as SPL must be taken between the child's birth and first birthday or within one year of adoption. Furthermore, the opportunity to share leave is available only to those who already have a steady income and meet certain tests connected to their employment. As such, the regulations may, again, not assist some of the most vulnerable groups, for example, those with a non -traditional working pattern and partners on a low income. Furthermore, those who find themselves without the support of a partner are unable to share leave with anyone other than a recognised 'partner'.

Shared parental leave can only be taken if the employee or their partner end their maternity or adoption leave or payments early. The remaining leave will then be available as shared parental leave. However, 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. This suggests that the legislation, while facilitating shared parental responsibilities, nonetheless recognises the need for leave immediately following the birth of a child and the need to avoid placing pressure on females to share leave after giving birth.

Indeed, the law must strike a balance between extending shared parental leave, without interfering with maternity leave. It is further reinforced that maternity leave should not be compared with shared parental leave and there should be no expectation that rates of pay should be the same Ali v Capita Customer Management Ltd (2019); Hextall v Chief Constable of Leicestershire Police (2019) EWCA Civ 900 Hextall v Chief Constable of Leicestershire Police. Therefore, a male cannot claim sex discrimination for rates of shared parental leave not being on par with maternity leave payments; this would arguably defeat the very purpose of the legislation which is there to ease and enhance the position of females and mothers. However, it has been suggested that this 'disparity' in payment may deter some males or partners from taking shared parental leave.

Ultimately, paternity leave and shared parental leave have offered alternatives methods and opportunities of distributing responsibilities between partners, which is certainly a positive step. However, there appears to be much room for improvement in the applicability and workability of these measures.

Question 4

The relationship between employer and employee can have a tremendous impact on the wellbeing of both parties. Therefore, the law does not rely purely on written contractual clauses nor statutory rules in regulating the employment relationship. Additionally, certain common law duties are implied into every contract of employment. These duties are seen as necessary for

the benefit and protection of both employer and employee, as well as the workability of the employment relationship. As such, case law interpreting the implied duties governing the employment relationship must strike a balance in recognising and observing the rights of all parties and being mindful of the innate power imbalances that exist within the employer-employee dynamic.
When focusing on the implied duties of an employer, case law interpretation of these duties varies considerably. Firstly, the employer has the duty to facilitate proper performance of the employment contract; this includes the provision of proper information. This protects the employee as he/she is aware of any rights they may have in relation to benefits and pensions and can therefore enforce these rights if breached. Furthermore, the duty to provide proper information also extends to making the employee aware of the disciplinary rules within the workplace. This ensures the employee is aware of what is, and is not, acceptable within their particular workplace so they can better avoid any potential disputes, Scally v Southern Health and Social Services Board (1991); Crossley v Faithful and Gould Holdings Ltd (2004).

Interestingly, although the employment relationship revolves around work, there is no general duty on the employer to provide work. The only exceptions to this rule would be where failure to provide work can lead to damage to reputation or publicity or leads to reduction of an employee's actual or potential earnings or their ability to have a reasonable opportunity to maintain skills. However, although there is no duty to provide work, this does not mean that the duty to pay wages is affected. There is indeed a general duty to provide wages as long as the employee is ready and able to work, Way v Latilla (1937).

Another crucial aspect of employee protection is health and safety. Although the health and safety of a workplace is now largely governed by statute, implied duties nonetheless still have a role in this area and the employer has an implied duty to exercise reasonable care in protecting the health and safety of the worker. The nature of the work determines what is reasonable in the circumstances and a safe operating system with sufficient precautions, warnings and protective materials and equipment is implied. 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). Although this case suggests an almost paternalistic role in the employer protecting the employee, it must be noted that the ruling likely relates only to industries involving the use of potentially hazardous materials where the consequences of an incident would be very serious.

In addition to providing warnings, the employer must also provide adequate supervision. This particular implied duty has a pragmatic and broad interpretation and includes reducing stress on an employee where the employer is aware of a potential risk of psychiatric injury through increased stress; this then creates a duty to ensure further injury is not suffered, Barber v Somerset County Council (2004). This suggest the implied duties of an employer are evolving to recognise various types of injury, including psychiatric harm to the employee.

A similarly broad interpretation of an employers implied duty was found in Ogilvie v Neyrfor-Weir Ltd (2003). In this case, the implied duty of mutual trust and confidence was found to have been breached by the employers use of highly offensive language when publicly reprimanding an employee when

in the boardroom. The court recognised the considerable negative impact of these words on the employee and that the relationship between the employer and employee, and thereby the working relationship, was irrevocably damaged.

In Malik v BCCI (1997) it was established that an objective test, taking account of all the circumstances, will be used in considering whether the conduct of the employer is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer. The motives of the employer are not relevant to this objective test. The broad nature of this implied liability can be seen in the finding that an employer may be liable for damages to an employee stigmatised by association with the employers' improper methods of conducting business, even though he had only learned of the misdeeds after the termination.

Finally, when an employee leaves their employment, the employer has no general duty to supply a reference. However, they cannot refuse to provide one on any discriminatory basis, such as sex, race, disability and religion. Furthermore, if the employer decides to provide a reference, they create a duty of care and the employee can claim damages if he/she incurs a loss as a result of a negligent misstatement within their reference. To avoid such a claim, any employer providing a reference must give full details and no misleading impression resulting in damage to the employee, Spring v Guardian Assurance plc and Others (1994), Harris v Trustee Savings Bank plc (2000). Therefore, should an employer take on the responsibility of providing a reference to an employee, they must acknowledge the impact a derogatory statement could have.

Ultimately, the implied duties of an employer appear to protect the interests of an employee as a wide and flexible interpretation of these duties extends to cover many crucial aspects of the employee's wellbeing; from their physical and mental health, to the provision of proper information and references.

SECTION B

Question 1(a)

Jamie is an employee with more than two years continuous service and is not in any excluded category. Therefore, you must ensure that the reason for dismissing Jamie is valid, if not, he is eligible to bring claim for unfair dismissal against his employer, as long as he brings a claim within three months, s94 ERA 1996.

Jamie has been dismissed for misconduct. Conduct is a potentially valid reason for dismissal under s98 Employment Rights Act 1996 and would extend to the making of a derogatory statement to a customer. However, case law examples of conduct being considered a fair reason for dismissal suggest the conduct must be quite serious, for example, stealing in Sainsburys Supermarkets Ltd v Hitt (2003), or an 'appalling' attendance record in Co-operative Society Ltd v Tipton (1986).

Conduct has been further considered in British Home Stores Ltd v Burchell (1978) where it was held that the tribunal will consider whether the employer genuinely believed the employee was guilty, had reasonable grounds for that belief and carried out reasonable investigation into the matter. Furthermore, in addition to there being a fair reason for dismissal, S98 ERA 1998 also requires that the employer only takes actions that a reasonable employer would take. If the employees' dismissal fell within a band of reasonable responses it is likely fair, if not, it is likely unfair, Iceland Frozen Foods Ltd v Jones (1982), HSBC Bank plc v Madden (2000).

Furthermore, certain reasons are considered automatically unfair reasons for dismissal, including dismissal for making a protected disclosure/whistle blowing. Jamie may argue that his statement to the customer falls under the category as he is making a disclosure relating to food safety within the restaurant. However, he did not make the disclosure to his employer or a prescribed person, nor did he believe the disclosure is in the public interest, as required when making such a disclosure under the Public Interest Disclosure Act 1998. Furthermore, even if Jamie's statement was considered to be whistleblowing, it was apparently motivated by resentment, rather than the public interest. Therefore, any damages Jamie might receive for unfair dismissal would be reduced by 25%.

You appear to have grounds for genuinely believing Jamie is guilty of the misconduct in his making the derogatory statement to the customer. However, you must nonetheless present evidence that there has been a proper investigation into this matter, in particular as the issue concerns the safety of food products. Your actions may be seen as that of a reasonable employer, particularly as Jamie has potentially breached the implied duty of trust and confidence between employer and employee. However, the fact that you did not follow certain procedures in the dismissal will count against you. Indeed, irrespective of whether or not your reasons for dismissing Jamie prove valid, there are certain procedures that should be followed in dismissing any employee and these do not appear to have been adhered to in your dismissal of Jamie, and the dismissal may therefore be procedurally unfair.

1(b)

Even if Jamie's conduct is accepted by a tribunal as a fair reason for dismissal, the dismissal itself must also be reasonable with regard to procedural fairness. As the dismissal relates to conduct, it is important to adopt the provisions of the ACAS Code of Practice on Disciplinary and Grievance procedure. The ACAS Code of Practice provides detailed guidelines as to the proper disciplinary procedure that should be followed before dismissing an employee. The ACAS Code of Practice should ideally be followed during any disciplinary action, as reinforced in s13 Employment Relations Act 1999. The ACAS disciplinary code states the process should: write to the employee setting out the alleged offence and inviting them to a disciplinary meeting, allow the employee 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. It is good practice to maintain written notes during the disciplinary procedure. Failure to follow the ACAS Code can be taken into account by employment tribunals in deciding whether employers have acted properly in connection with an unfair dismissal claim.

None of the measures above appear to have been followed in your dismissal of Jamie, therefore, any award obtained against your company for unfair dismissal may be increased by up to 25% due to your failure to follow the code, Polkey v AE Dayton Services Limited (1988).

1(c)

The Equality Act 2010 protects against discrimination on the basis of sex. Jamie is suggesting he has been directly discriminated against under s13 as he has been treated less favourably than his female colleague, Susan, on the basis of the protected characteristic of sex, s11. However, the difference in treatment of Jamie and Susan is based upon the conduct of both individuals, rather than on their respective genders. Susan's conduct is appropriate as she followed the correct procedure in privately contacting her employer and alerting them to her concerns. Jamie made a public derogatory statement about the restaurant to a customer when in a fit of anger. Therefore, Jamie is highly unlikely to be able to bring a successful claim of sex discrimination against your restaurant as there has been no less favourably treatment on the grounds of sex.

Question 2(a)

The Equality Act 2010 recognises various forms of discrimination, including harassment. Section26 defines harassment as occurring when a person engages in unwanted conduct in relation to a protected characteristic or in unwanted conduct of a sexual nature which has the purpose or effect of violating another's dignity or creating an intimidating hostile degrading humiliating or offensive environment for another person. Applying this to your case, it is clear that the comments made by Jolene are a form of sexual harassment under the legislation as they have made you feel distressed and unable to enter the staffroom.

Furthermore, Edward's response to your complaint could be a form of discrimination. S4 Equality Act 2010 recognises direct discrimination as occurring when a person is treated less favourably on the basis of a protected characteristic. Sex is a protected characteristic and Edward appears to have treated you less favourably than he would a female making such a compliant. This is evidenced by his statement that you are more likely to have made the jokes due to being male and such actions are 'typical male behaviour'. As such, Edward may have directly discriminated against you. Additionally, the comments made by Edward could also be harassment as they meet the definition of making you feel humiliated and accused of being a liar in such highly sensitive matters.

With regard to Edward moving your working location, s27 Equality Act 2010 recognises victimisation as a form of discrimination occurring where a person is treated less favourably for doing a protected act, including bringing proceedings against an employer. Therefore, if Edward moved you to the new location because you made a complaint about the treatment you had received, this would be a form of victimisation.

Lastly, the fact that your manager, Edward, appears to have largely disregarded your complaint is also of relevance as it exposes Scores Ltd to a claim of vicarious liability under s109 Equality Act 2010. The company may defend itself by stating they did all they reasonably could to prevent or address the discrimination. However, this is unlikely to be a successful defence

in your case as Edward's reaction to your complaint was entirely dismissive and inappropriate, Jones v Tower Boot Co Ltd (1997) Chief Constable of the Lincolnshire Police v Stubbs and Others (1999).

2(b)

With regard to your resignation, this could be seen as a constructive dismissal that occurs where an employee resigns because the employer has made it very difficult for them to continue working. The employer's actions must amount to a fundamental breach of the contract of employment, Western Excavating Ltd v Sharp (1978). In such cases, an employee's resignation will be treated as a constructive dismissal and the employee can claim for wrongful dismissal. The resignation can result from one serious incident or a cumulation of less serious incidents.

Examples of constructive dismissal include both humiliating staff, victimising staff and making a significant change in the employee's job location at short notice. Although all of these apply to your situation, the latter example is the specific reason for which you state you resigned and would be considered a possible basis for a wrongful dismissal claim. Furthermore, the change to your contract will likely amount to a repudiation as there is nothing to in your contract that allows for such a variation, Singh v British Steel Corporation (1974). Nonetheless, you may also be able to bring a claim for the harassment suffered, particularly if you can show this contributed to your resignation.

However, the employee must resign soon after the incident to be able to prove constructive dismissal, Tanner v Kean (1979); Morrow v Safeway Stores (2002) and Sovereign House Security Services Ltd v Savage (1989). Although you initially, accepted the new working location, you did resign within a two-week period and before the move to the new location took place.

If you were to be successful in a claim for wrongful dismissal, you would likely be awarded damages. The amount of compensation would reflect the test for damages for a breach of contract and would be an amount to put you in the position you would be in but for the breach of contract. This would include recovery for losses which arise in the natural course from the breach and any loss reasonably foreseeable from the breach, Hadley v Baxendale (1954). However, there would be no recovery for injury to feelings from the dismissal and you do have a duty to mitigate your losses, for example by seeking and accepting suitable alternative employment as soon as possible.

Furthermore, you may also be able to bring a claim for unfair constructive dismissal as you seem to meet the requirements for a claim of unfair dismissal under s98 ERA 1996. For this type of claim, you must show that not only was there a repudiation of the contract, the dismissal was also unfair. If you are successful in this claim, you will be entitled to the same remedies as for a claim of unfair dismissal; reinstatement, re-engagement and basic or compensatory award. A financial award would appear most suited to your circumstances.

Question 3

The Employment Rights Act 1996 requires that a proper selection procedure is followed in any redundancy. The only instance in which Anna could make Keith redundant without having to prove a fair selection process would be where the job he is performing no longer exists, for example closure of the

department in which he worked. However, there is clearly still a need for Keith's role as there are two remaining client experience managers within the company.

Before selecting an employee for dismissal on the grounds of redundancy, Anna must consider a pool of employees from which the selection will be made. Selection for the redundancy pool must be reasonable in the circumstances. For example, in Capita Hartshead Ltd v Byard (2012), the redundancy was unfair as the employer limited the size of the pool to one individual and this was not held to be reasonable in the circumstances. Anna does not appear to have met this 'reasonable pool of employees' requirement in relation to Keith's redundancy.

Furthermore, Anna has a duty to use a fair and objective way of selecting persons for redundancy. It is essential Anna shows the basis of the selection process and how it was applied in practice: Cox v Wildt Mellor Bromley Ltd (1978). The criteria used for redundancy selection should be capable of being objectively checked against matters such as attendance record, efficiency, staff appraisal, qualifications and experience, and any disciplinary action taken against the employee, Williams v Compair Maxam (1982). None of these matters reinforce Keith's selection for redundancy as it is stated that he has an 'impeccable record', suggesting there has been no disciplinary action against him nor any problems with the quality of his work. Another example of a fair reason for redundancy selection, although not in isolation, is 'last in first out'. Keith is one of the longest serving members of staff, therefore, his length of service is meant to be considered favourably when assessing redundancy selection. In Farthing v Midland House Stores (1974), it was held that seniority should be considered in redundancy, if it is not, the redundancy may be considered an unfair dismissal.

Anna may be able to use Keith's seniority as a justification for redundancy if the company decides to keep a less senior manager as they are more suitable to future tasks, so long as this is not the only reason for selection for redundancy, Hobson v Park Brothers 1973. However, there is nothing to suggest this is the reason for Keith's selection for redundancy. On the point of seniority, Anna has explicitly noted Keith's age in his 'getting on in years'. The Equality Act 2010 recognises age as a protected characteristic, so selection for redundancy on the basis of age will be considered unfair dismissal. Keith's seniority may be mentioned; however, his age should not be a consideration in the redundancy selection procedure.

Ultimately, the selection process used by Anna does not appear to meet the statutory guidelines. If it is established Anna did not follow a fair selection process, Keith can bring a claim of unfair dismissal against Best Nursery Ltd. He must bring this claim within three months of termination of employment. If it is proved the selection process was not fair, Keith can claim a basic award under s162 ERA 1996, as well as possibly a compensatory award under s123 ERA 1996. As Keith is 52 years of age, he falls into the band of 41 years to retirement age, so his basic award will be one and a half weeks pay for every complete year of service with the maximum number of years pay allowed at 20 years. However, pursuant to s122 ERA, the amount of the basic award will be reduced by any redundancy payment made by the employer or ordered by the tribunal. Keith may also claim a compensatory award to cover losses, including any reasonable expenses and any loss of benefits. However, it must be noted that compensatory damages for unfair dismissal are intended to cover actual loss only, Langley v Burlo (2006). The maximum award for

compensatory damages is 52 weeks of the employee's gross salary or £86,444, whichever is lower.

Furthermore, if Anna is found to have made Keith **redundant on the basis of his age, he** may **be entitled to** remedies for discrimination under the equality act 2010**, including a declaration, a recommendation and compensation with no upper limit.**

Question 4

Nina.

The Equality Act 2010 includes religion as one of its nine protected characteristics. Therefore, any less favourable treatment on the basis of religion may be considered discrimination under the legislation; in your case, indirect discrimination.

Section 19 indirect discrimination occurs where A discriminates against B if A applies to B a provision, criterion or practice which is discriminatory to relation to a relevant protected characteristic of Bs. The practice will be discriminatory if applies to persons with whom B does not share the characteristic, it puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared to person not holding the characteristics, it puts or would put B at that disadvantage and it is not a proportionate means of achieving a legitimate aim.

Therefore, the requirement to wear the new uniform could be a criterion that puts you at a particular disadvantage due to your religion forbidding the wearing of such clothing. However, the company could defend itself by stating that the uniform is to a proportionate means of meeting the legitimate aim of creating a more identifiable brand and making staff more recognisable to customers, Governing Body of Aberdare High School (2008), Chaplin v Royal Devon & Exeter Hospital NHS Foundation Trust (2010). If discrimination has occurred, an employment tribunal may make an order, declaration or recommendation that the respondent take a particular action to remove or reduce the effects of the discrimination, s 124 (2) (a). Compensation may also be awarded under Vento v Chief Constable of West Yorkshire Police (2003), where three payment bands were established to reflect the seriousness of the discrimination; the more serious the discrimination, the higher the compensation.

With regard to the clause in your contract that forbids you from working for a competitor. Such clauses are known as restrictive covenants and these are prima facie void as a restraint of trade. However, such a clause may be enforceable if it protects legitimate interests and is no wider than necessary to protect the employer's business interest. Furthermore, the clause must be reasonable in terms of scope and duration, Fellows v Fisher (1976). It is also important that the restrictive covenant is appropriate for the level of job involved, Patsystems Holdings Ltd v Neilly (2012). The National Hairdressing Federation in a submission in 2016 to a government call for evidence on whether any such restrictive covenant should be enforceable, indicated that the current position was that a radius clause of half a mile and a time limit of six months were generally regarded as the maximum reasonable restriction for hairdressers. Similar considerations would apply to Nina, as a hairdresser and a make-up stylist are very similar professions.

Applying this to your situation, it is clear that a restriction of 100 miles exceeds reasonable geographical limits and three years is also excessive. Furthermore, as you have been with the company for just six months and are a junior member of staff, it is unlikely you would have been privy to sensitive company information or contacts, making a restriction on your future employment unnecessary to protect business interests. Furthermore, it is also unlikely the blue pencil test could be utilised to severe any unreasonable aspect of the restriction as the entire clause is unreasonable. Therefore, you are not likely to be bound by the restrictive covenant as it appears void on the grounds above.

Zack.

The first issue to consider is your rate of pay. You have been employed by Beauty Solutions Ltd for six years since you were 20 years of age, you are therefore now 26 years of age and entitled to a different rate of pay, irrespective of the fact that your role within the company has not changed throughout the duration of your employment.

The National Minimum Wage Act 1998 has varying brackets based on age. When you joined Beauty Solutions, you would have been placed in the bracket for persons 18-20 years of age. As you are now over 25 years of age, you would be placed in the highest bracket for minimum wage; two brackets above your current wage. This is currently £8.21 per hour. You may be able to bring a claim of underpayment or unlawful deductions to employment tribunal within three months of the breach or bring a claim for breach of contract in the civil courts within 6 years. The latter is clearly your best option, particularly as the Deduction from Wages (Limitation) Regulations 2014 states that a tribunal can only consider unlawful deductions from wages which were paid within two years prior to the date of the claim.

With regard to the deductions made to your wages due to your lateness, such behaviour is prohibited. Under the ERA 1996 and NMW Act 1998, 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 your situation and rather the deduction has been made due to your lateness, which is not a recognised exception to the rule that deductions cannot be made to employee's wages. Therefore, you may bring a claim against the company under s23 ERA 1996. You can take your claim to an employment tribunal within three months of the deduction and the tribunal can order repayment and, if relevant and appropriate, compensation for financial loss suffered due to the deduction. In your circumstances, not only would you receive a repayment, you would also likely be compensated for the £50 loss incurred through having insufficient funds in your bank account due to the illegal deduction from your wages, ERA 1996 s24 (2). Where a tribunal makes a declaration under section 23 (1), it may order the employer to pay to the worker (in addition to any amount ordered to be paid under that subsection) such amount as the tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.