CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

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 January 2021 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

In relation to Section A, stronger performing papers identified the relevant area of law examined and cited evidence of case law/statutory provisions to support their knowledge. This was then followed with considered and consistent efforts to note the requirements of the command verb within the question and ensure to properly address this element, in addition to citing relevant legal provisions. Weaker papers tended to identify case law and statute but failed to adequately address the command verbs within the respective questions, resulting in answers that, while containing some relevant detail, were descriptive. These description based papers resulted in low mark passes and, when coupled with a lack of identification of fundamental points of law, resulted in a fail.

In relation to Section B, stronger performing papers identified that there were several legal issues contained within the questions posed and identified all/ the vast majority of these issues. With respect to subsection questions, high grade papers scored well in all elements of the question and presented a specific and detailed level of knowledge specific to the issues presented within the scenario, along with citation of relevant law to reinforce understanding and accurate application. Weaker papers tended to focus only on the most obvious legal issues within a scenario and failed to identify the finer points of

the assessment. Furthermore, failing papers would identify the broad area of law examined but fail to acknowledge the precise legal issues within the scenario. Such papers present broad and over arching explanation of legal provisions that were not sufficient to demonstrate adequate knowledge of the legal issues examined but rather more of a general overview of the area of law.

The errors noted above could be lessened with greater attention being paid to the exam paper command verbs. Furthermore, thorough revision of the areas of law that form the unit specification would allow for a more precise application of law as there would be a broader knowledge base to utilise. At Level 6, it is unlikely that only the fundamental points of law specific to an area will be examined and there needs to be a higher level of expert specific knowledge gained through more detailed and extensive research and revision specific to the areas within the unit specification.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was quite a popular question and the majority of candidates who selected this question performed well. The statutory definition was overall well understood and explained, and reference was also made to case law. Stronger papers utilised a variety of cases, whereas weaker papers tended to note just a few examples. The papers that failed this question tended to describe statutory provisions without giving sufficient case law examples. Overall, the majority of candidates cited sufficient and relevant law, however, the 'critical analysis' aspect of the question required more attention. Only stronger performing papers addressed this element of the question. This however allowed for proper distinction be made between stronger and weaker papers.

Question 2

This majority of candidates who selected this question performed well. However, there was a tendency to be descriptive in noting the requirements of a proper investigation, without evaluation of the importance of the investigation. Both case law and ACAS provisions were appropriately identified and cited by the majority of candidates, and there was an overall good level of detail within most responses. This level of legal citation allowed for most responses to perform well however, again, the critical evaluation aspect was evident to an in depth extent only in the stronger performing papers. The majority of passing candidates, however, attempted some brief evaluation within the concluding passages, which was credited.

Question 3(a)

The majority of candidates recognised relevant selection criteria, stronger papers also noted relevant case law and highlighted the need to avoid discriminatory approaches in selection criteria, thereby somewhat addressing the 'assessment' element of the question. However, while the salient points were identified by the majority of the responses, a few papers presented too broad an overview of redundancy issues. This included unnecessarily

explaining what a redundancy is, and also deviation into consultation, rather than focusing only upon the quite narrow and specific confines of selection criteria only.

(b)

The question required only 'explanation' of measures and laws and these were generally well identified. The majority of candidates appropriately cited the unfair dismissal awards and relevant statutory provisions; however, only stronger papers also noted the potential for redundancy specific awards and associated statute.

Question 4

This was quite a popular question that produced some strong responses. The vast majority of candidates cited the seminal case law tests of employment status, with stronger papers also noting more recent developments in terms of issues surrounding defining agency workers and the 'gig' economy, along with citation of both case law and statutory provisions. Papers that failed this question tended to explain the differences between workers, the self-employed and employees in terms of benefits and obligations, rather than addressing the actual specifics of the question which focused on the tests used to distinguish status. Overall, the citation of law was good, but again, the weaker papers tended to be quite descriptive and did not sufficiently address the 'analyse' aspect of the question. This did however allow for stronger candidates to excel and demonstrate their topical and specific knowledge.

Section B

Question 1

This question examined several legal issues and there was some disparity in the ability to address these topics. The flexible working aspect of the question was very well addressed with the vast majority of candidates noting the relevant legal requirements and also making appropriate application of the law. The parental leave aspect examined a new piece of statute and the majority of candidates recognised this law and cited it appropriately; although some papers deviated from the focal point of assessment and also addressed broader leave options not specific to the bereavement points examined. Finally, the brief but important discrimination aspect of the question was identified by only few stronger papers. Nonetheless, the question resulted in overall good pass marks due to the flexible working elements being quite strong and specific to the scenario.

Question 2(a)

This was a very straight forward question and required only identification and explanation of one statutory provision, as specific to the scenario. The vast majority of candidates who addressed this question noted this provision, explained it in detail and applied it briefly, but accurately, to the scenario.

(b)

The responses to this question tended to identify the relevant statutory protection afforded to transferred employees and the preservation of rights, with stronger papers also mentioning the harmonisation arguments.

(c)

This was the most challenging element of the question, but answers were on the whole accurate, if lacking some of the finer details of application. Both the rights and remedies were generally addressed in a relevant manner along with appropriate citation of law. Overall, Q2 was not a particularly popular question; however, candidates that attempted the question were quite well versed on the area of law examined in relation to all three subsections.

Question 3

This was a moderately popular question and candidates that responded to this question tended to produce answers that were detailed but at times lacked sufficient identification and application of the specific legal issues examined. There were several points of discrimination found within the scenario presented and few candidates noted all relevant points; with the exception of very few higher scoring responses. Some failing papers did not address the potential remedies element of the question. While the majority of papers recognised discrimination statute and described types of discrimination, there was a tendency to lack specific application of these points to the question within failing papers. Passing papers identified some of the relevant provisions, however, very few candidates noted all points examined and accurately applied these to the question. Discrimination tends to be quite a popular area of law however this question required a very specific approach, and generalised answers, as well as a lack of reference to remedies, resulted in some quite low marks for this question. I do not believe this was a reflection on the question but rather the fact that many candidates enjoy the area of discrimination law and choose to tackle the question due to the area examined, even if they were unsure of the specifics of application.

Question 4(a)

The majority of candidates who selected this question identified the relevant type of common law dismissal, along with citation of basic supporting law with application. Stronger papers also noted the relevance of timelines and cited case law for and against a finding of dismissal. Papers that failed this question tended to give responses that did not identify the relevant type of dismissal specific to the scenario presented and rather presented some general, and at times inaccurate, legal principles that did not suggest the issues examined had been adequately identified or addressed.

4(b)

This question produced overall strong responses with the vast majority of candidates noting the requirements for validity, along with supporting seminal case law references. Arguments as to the validity of the clause were overall balanced and credit was given for any reasoned conclusion.

(c)

This straightforward, relatively low mark question produced good answers that identified the relevant law and made proper application. Few higher scoring responses were very detailed and raised some critical points when applying the law. Overall, Q4 was quite a popular question with parts b and c resulting in overall high grades.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 4 – EMPLOYMENT LAW

SECTION A

Question 1

The Equality Act 2010 protects against several forms of discrimination, including harassment. Harassment is defined under s26 as occurring where a person engages in unwanted conduct related to a protected characteristic or of a sexual nature which has the purpose or effect of violating another's dignity or creating a hostile, degrading, humiliating or offensive environment for another.

The Equality Act 2010 s26 (4) considers the 'reasonableness' of the claimants response. This requires the tribunal to take into account (a) the perception of the claimant, (b) the other circumstances of the case, and (c) whether it is reasonable for the conduct to have that effect. This balancing act will require the courts to consider both the nature of the parties' relationship, as well as the work environment.

Indeed, judicial interpretation of 'harassment' is varied and appears highly dependent upon the facts of the case. One area that illustrates this pragmatic approach is whether a single act of harassment is sufficient to create a hostile environment and thereby meet the s26 statutory definition.

In the case of Insitu Cleaning Co Ltd v Heads (1995), it was held that a single act of verbal harassment of a sexual nature can be discriminatory harassment. However, the court stressed that the characteristics of the parties involved will play a part in determining the ruling. In particular, where a senior member of staff makes a comment to a more junior member, this is more likely to be discriminatory due to the power imbalance implicit in that relationship.

The importance of considering the dynamics of the parties, as well as the nature of the work environment, was again stressed in Evans v Xactly (2018). In this case the judicial reasoning focused upon the fact that a potentially discriminatory comment may not be harassment where the work environment was one where such comments were commonplace and acceptable 'banter'. Where the complainant is a participant in such banter and does not complain at being the subject of such comments, they will not be able to meet the statutory definition of harassment as it is unlikely they experienced the environment as hostile at the time of the incident nor felt their dignity had been violated. The EAT confirmed this outcome and stated that such claims are 'highly fact-sensitive and context specific' and a different outcome would have resulted in a different work environment.

A similar issue arose in Minto v Wernick Event Hire Ltd (2009), where an employee was subject to daily remarks of a sexual nature. In this case, the 'banter' defence was not accepted as the tribunal found that the facts of the case suggested this was not an equal exchange and the complainant was not a willing participant in these communications. Furthermore, the complainant

was not on an equal footing with the more senior member of staff making the remarks to her. This case reinforces the flexible judicial approach in considering not just the words spoken but the environment in which they are spoken and how the recipient interprets the exchanges.

With regard to claims of racial harassment, a recent case again highlights the importance of being mindful of the precise words used and by whom and to whom they are said. In Basi v Snows Business Forms Ltd (2009), it was held that, although the environment was one where banter occurred , a comment made to an employee of Indian origin describing him as a "cheeky monkey" fell outside the usual level of acceptable banter and was racial harassment. This comment was made during a game of golf where business was being discussed, this reinforces the willingness to find harassment even when occurring outside the strict work environment but within a work-related discussion.

The motives of the person making the alleged harassing statements will also not be a decisive point in determining whether harassment has taken place. In Harper v Housing 21 (2012), the tribunal upheld a complaint of racial harassment, amongst other claims, despite the fact that the it was claimed the comments were made in jest and no offence or malice intended. This demonstrates the willingness of judges to consider the recipient's interpretation of the events and whether they reasonably felt their dignity was violated and the environment had become hostile for them, as per the s26 definition of harassment. The intentions of the statement maker are not a focal point of consideration; not least because this defence could clearly be abused. Similarly, 'jokes' as to the perceived sexual orientation of an individual are also not acceptable and were held to be harassment, particularly when these are made in both written and verbal form, Austin v Samuel Grant Ltd (2012).

Overall, these examples dealing with different protected characteristics do show a degree of consistency. In particular, remarks made by a manager or other senior person will be treated more seriously. The context and general atmosphere of the workplace is taken into consideration but will not justify comments which cannot fall within the definition of banter.

Finally, the courts are willing to find an employer vicariously liable for harassment committed by an employee where they have failed to take measures to address or prevent such discrimination, Jones v Tower Boot (1997). The courts appear to take this matter quite seriously and have confirmed that a merely giving a formal warning to the harasser will not suffice and, if the behaviour continues, further disciplinary action should be taken, Enterprise Glass v Miles (1990).

Ultimately, it would appear the courts interpret s26 harassment in a broad and flexible way that focuses upon the facts of each case and the characteristics of the parties involved. While this is seen as a pragmatic approach, it may also arguably give the courts too much discretion and result in inconsistent approaches as to what is considered acceptable behaviour within the workplace.

Question 2

Dismissal for misconduct can have a significant impact on an employee's welfare; both financially and in terms of professional reputation. Therefore,

an employer must ensure that the misconduct complained of has been properly investigated and adjudicated on prior to dismissing the employee.

Misconduct is a ground for potentially fair dismissal under s98 Employment Rights Act 1996 (ERA), however, the employer must demonstrate that the dismissal was reasonable. An important aspect of reasonableness is showing that proper procedure has been followed, including appropriate investigation into the alleged misconduct. This will not only protect the rights of the employee but also help guard against the employer being found to have unfairly dismissed the employee.

When an employee has been accused of misconduct, it is good practice for the employer to invite that employee to a meeting. At this meeting, the disciplinary procedure can be used as a method of investigating the alleged misconduct. The ACAS disciplinary code states that the disciplinary process should establish facts of the case, inform the employee of the problem and allow the employee to be accompanied. During this process, the employer can ask the employee questions to facilitate investigation into the alleged misconduct and give the employee an opportunity to explain or defend their actions.

Dismissal due to misconduct must be reasonable and fair in the circumstances. One aspect of this test of reasonableness occurs when the tribunal considers whether the employer genuinely believed the employee was guilty of the offence, whether they had reasonable grounds for that belief and whether the employer carried out as much investigation into the matter as was reasonable, BHS Ltd v Burchell (1978). A failure to show 'reasonable' investigation would likely result in the first two questions being answered in the negative as it would be difficult to argue the employer 'genuinely and reasonably' believed the employee was guilty of the offence if there was no proper investigation carried out to justify and substantiate that belief.

Furthermore, the tribunal will consider if the employer's actions fell within the band of reasonable responses: Iceland Frozen Foods v Jones (1982) and HSBC Bank v Madden (2001). The employer must act reasonably in the circumstances and consideration will be given to the resources of the employer, as well as the seriousness of the allegation.

When a serious and potentially career changing allegation of misconduct is made, it is clear that only an appropriately in depth, independent and thorough investigation will be reasonable. This point was reinforced in Hargreaves v Manchester Grammar (2018), where dismissal for an alleged physical assault on a student was held to require a higher standard of investigation given the nature of the allegation against the claimant.

However, it is important to note that those investigating alleged misconduct should seek information and facts only, not draw conclusions. In Dronsfield v University of Reading (2019), investigation was carried out into alleged misconduct and the investigation report included a value judgement as to the strength of the case against the employee. This comment was removed from the report and it was suggested this removal rendered the dismissal unfair. However, the employment tribunal confirmed that changes to an investigator's report will not necessarily render a dismissal unfair so long as the information excluded referred to evaluative judgements on the merits of the case and did not exclude any facts of the case. It is not the job of the investigators/investigation to reach any conclusions but to thoroughly

investigate the facts and allow conclusions to be made by the disciplinary panel only.

The importance of following proper procedure, including appropriate investigation, is further reinforced by the financial award available for unfair dismissal. Where an employer is found to have failed to follow proper procedure and codes, any award obtained against their company for unfair dismissal may be increased by up to 25%, Polkey v AE Dayton Services Limited (1988). However, this is applied with reference to the reality of each case and, where proper procedure would not have made any difference to the outcome nor the decision to dismiss, the award can be reduced to an amount the tribunal considers just and equitable appropriate, up to nil.

On the above, it would appear essential that proper investigation is conducted into any allegations of employee misconduct, particularly those of a serious nature. However, on balance, where proper investigation would not have changed the outcome, the courts will take this into account when making an award made to the employee.

Question 3(a)

When considering which employees from within the relevant pool are to be made redundant, it is necessary to use criteria which can be seen to be objective and fair. Ideally the employer should identify an explicit set of criteria in advance and make this known.

Acceptable selection criteria include the employee's standard of work, skills, qualifications or experience and disciplinary record. These are factors that can be objectively measured and observed and are therefore a fairer basis for selection, rather than ones that require a subjective value being placed upon the employee. For example, in Williams v Compair Maxam (1982) employees who, 'in the opinion of the managers would be able to keep the company viable', were not selected for redundancy. This was deemed to be an unfair basis for selection for redundancy as the justification called for subjective determinations on which employees were considered more valuable than others, without reference to measurable facts, such as skills, experience etc.

An employee's attendance record may also be considered in selection for redundancy. However, the employer must ensure not to consider any absence related to disability or maternity as the employee is protected from discrimination on these bases.

The selection criteria must be non-discriminatory. Although employees may be selected on their length of service, this cannot be the only basis for selection as it may result in age discrimination. Furthermore, the 'last in, first out' (LIFO) basis is only acceptable if it can be objectively justified and seniority is only one factor among many considered in selection for redundancy, Hobson v Park Brothers (1973). The LIFO approach may also be potentially indirectly discriminatory against women as they are more likely to work part time and therefore have less service, Clarke v Eley (1982).

Ultimately, the employer must show that the basis for selection for redundancy is clear, objectively measurable and indiscriminatory. Indeed, in Cox v Wildt Mellor Bromley Ltd (1978), it was confirmed that the employer must show how they came to the decision to make the employee redundant, the factors they considered and how their decision was applied in practice.

3(b)

Where an employer has made an employee redundant and failed to follow proper procedure, the redundancy will be treated as an unfair dismissal. The remedies for unfair dismissal are under ERA s.112 and Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) s.157(1) and include an order of reinstatement, an order of reengagement and an order for compensation. Compensation is by far the most commonly preferred remedy. It consist of a basic award and a compensatory award. The calculation of the basic award is the same as that of a redundancy payment. It is half a week's pay for each full year the employee was under 22, one week's pay for each full year they were aged 22 to 41 years, one and half week's pay for each full year the employee was aged 41 years or older. The length of service is capped at 20 years, counting backwards from the date of the redundancy, and the calculation of a week's pay is subject to the maximum statutory redundancy payment.

If the redundancy was unfair, there will be an additional right to compensation under s123 ERA. This includes loss suffered and expenses reasonably incurred, as well as any benefit lost. This payment is also subject to a maximum statutory amount of 52 weeks gross pay or a statutory amount that increases each year. However, the employee has a duty to mitigate their losses and the compensatory award can be reduced to nil if the tribunal deems equitable, University of Sunderland v Drossou (2017).

Furthermore, if a tribunal finds that an employer acted in breach of the s188 TULRCA duty to consult, they must make a protective award. The protective award will be made in addition to any claims for unfair dismissal compensation or redundancy pay. The length of the award is at the discretion of the tribunal and subject to a limit of 90 days. However, entitlement to the award may cease if the employee unreasonably refuses an offer of alternative employment, ss190 and 191 TULRCA. Furthermore, an employer may claim exemption from the consultation provisions on the ground its own consultation scheme is at least as favourable, s198 TULRCA.

There may also be penalties under the Equality Act 2010 if the redundancy procedure is discriminatory.

Question 4

Under s203 (1) ERA, an employee is an individual who works under a contract of service and an independent contractor is someone who works under a contract for services, s203 (2). Workers are defined under s 203(3) as individuals who perform services for another party whose status is not that of a client or customer. However, while these statutory definitions provide some explanation, they are not particularly precise. Therefore, the courts have developed more specific and fact-based tests to determine into which of the categories an individual's working life may fall.

When determining whether someone is an employee, worker or self-employed, it is crucial to note that no single aspect will be decisive and the courts will consider many variables that make up the individual's working life in determining their status. As such, the court utilises tests of function, rather than merely title, in considering employment status. Firstly, 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 test considers many aspects that comprise the relationship between the individual and the 'employer', including the degree of control, mutuality of obligation, personal service, investment in tools and equipment and length of service. The method of payment and taxation are also examined and those who pay their own tax and national insurance are often thought to be self-employed. However, such 'economic realities' must, again, be balanced against other factors. In Pimlico Plumbers Ltd v Smith (2018), an individual was held to be a worker, rather than self-employed, despite paying his own tax and national insurance and there being no mutuality of obligation in the relationship with his employer. However, the individual did wear a uniform, there was an obligation to follow certain instructions and his contract referred to annual leave and dismissal, he was also allowed to delegate to other company operatives.

This issue of delegation is another point to consider as personal service is a factor the courts consider in determining employment status. The ability to delegate your duties generally suggests the individual is not an employee, MacFarlane and Another v Glasgow City Council (2001). However, delegation, as with all factors, will be considered in the light of the individual's full working circumstances.

The employment contract may also examined to help assist in determining status, however, a contractual label will only be a deciding point where other factors are of equal weight, Young & Woods Ltd v West (1980). This reflects the courts recognition that an employer may seek to label a person working as an employee to be self employed as a means of avoiding liability for the many legal obligations owed to an employee by their employer. Therefore, the tests protect the employee by not giving too much weight to such contractual stipulations and thereby guard against 'sham' contracts. Indeed, in Consistent Group Ltd v Kalwak (2007) the EAT held that where there is disparity between express contractual provisions and the reality of an individual's working life, the latter should take precedence where the contractual provisions do not accurately reflect the 'actual nature' of the working relationship.

This is particularly beneficial to agency workers and those working under zero hours contracts, as both these groups are often considered to be workers under their written agreements. However, the court reinforces that when dealing with agency workers and zero hours contracts, the same tests will apply to determine employment status as for any other individual.

Therefore, agency workers and those on zero hours contracts will be employees so long as the tests of function demonstrate an employment relationship. In James v London Borough of Greenwich (2008), it was held that the decision on whether an agency worker is employed by an end-user must be decided in accordance with 'common law principles of implied contract'. Furthermore, in Pulse Healthcare Ltd v Carewatch Care Services Ltd and Others (2012), zero hours contractors were defined as not being 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 the claimants had been working fixed hours on a regular basis for a number of years, provided personal service and wore uniforms. In particular, the mutuality of obligation and control elements reinforced a finding of employee status in this case.

Overall, the tests to determine employment status appear to recognise the need to protect individuals from being denied the rights associated with employee and worker status. The courts look at many variables, and none in isolation, to ensure the fairest assessment of the reality of the individual's working life is considered in deciding their legal status.

SECTION B

Question 1

An employee with 26 weeks continuous employment has the right to request flexible working under s80F ERA, but only one such application may be made in a 12-month period. The request must be in writing and state the date of application, the change requested and the proposed date of effect of this change. Furthermore, the application must identify any effect the change may have on the employer and how this may be dealt with, as well as confirming that it is a statutory request and providing details and of any previous requests.

Lynette has been an employee of Millers Ltd for three years so has the required duration of employment and has not made an application in the preceding 12 months, as she has never made one before. Lynette's request is via email so is in writing, however, it does not stipulate that it is a request for flexible working. Lynette has specified the change requested and explained when she would like the change to take effect, however, she has not addressed the effect this may have on the employer nor how this may be overcome. As it stands, the application does not meet statutory requirements.

Employers have a duty to handle all requests for flexible working in a reasonable manner and may only reject a request on grounds stated under s80G ERA 1996. These grounds include the burden of additional costs, detrimental effect on ability to meet customer demand, inability to reorganise the work among existing staff, inability to recruit additional staff, detrimental impact on quality or performance, insufficiency of work during the periods the employee proposes to work and planned structural changes. Tamisha has stated that the business is quiet in the mornings, which falls under the insufficiency of work ground. Furthermore, she can justify her refusal on the grounds of the inability to recruit additional staff to cover afternoons due to the burden of additional costs. Tamisha has legal grounds to reject Lynette's application for flexible working.

Under new provisions made by the Parental Bereavement (Leave and Pay) Act 2018, parents who lose a child under 18 years of age or suffer a stillbirth at or after 24 weeks are entitled to take leave pursuant to regulations made under s 80EA inserted into ERA by the 2018 act. As Noel's partner has suffered a stillbirth one week prior to her due date (s 80EE ERA), Noel is entitled to at least two weeks leave under this statute. Furthermore, Noel is entitled to take the leave without notice. The rights under this statute are 'day one' rights so Noel does not need to have any requisite duration of employment as there is no qualifying criteria to take this leave unpaid. However, paid leave requires 26 weeks continuous employment (s 171ZZ6 Social Security Contributions and Benefits Act 1992, as inserted by the 2018 Act), as Noel has been with the company for eight months, he will qualify for this. By refusing his leave, Tamisha has breached Noel's rights under this statute. Furthermore, Tamisha has also directly discriminated against Noel on the grounds of sex, which is a

protected characteristic under the Equality Act 2010 s4, as it appears that she would have acceded to the request had he been female. This may also potentially raise a claim of indirect discrimination if the leave is only made available to males. Furthermore, suggesting that bereavement leave should only be available to women could also be seen as harassment under s26 as the suggestion that his loss is not great due to his gender, is likely to cause Noel to feel offended and violated.

Question 2(a)

Eating Ltd has taken over the provision of a service from Lean Treats Ltd; the service provision being the providing of catering services within a certain geographical area. For a change in service provision to fall under Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006), the activities carried on after the change in service provision must remain "fundamentally or essentially the same" as those carried on before it (Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013, Spijkers Case (1986), Cheesman v Brewer Contracts (2001). The service provision, the providing of catering services to office workers, remains essentially the same and therefore meets this definition.

(b)

Under TUPE 2006 Reg 4, the contractual rights, obligations and liabilities of transferred employees are transferred from the transferor to the transferee and no changes may be made to the contracts of the transferred employees. The only exception to this rule is where variations to contract are made for an economic, technical or organisational (ETO) reason necessitating changes in the workforce. However, harmonisation of contractual terms, in particular as to pay, of the transferred employees would not be considered an ETO reason. The definition of an ETO reason expressly excludes variations to transferred employee's contracts based solely on the transfer, the lowering of wages by 5% is an attempt at harmonisation resulting solely from the transfer and is prohibited under TUPE 2006.

2(c)

Under Reg 11 TUPE 2006, the transferor has to notify the transferee of any employee liability information relating to each transferred employee; including disclosure of any disciplinary procedures taken against the employee. This information must be in writing or made available to the transferee in a readily accessible form. Notification must be given no less than 28 days before the relevant transfer, or as soon as reasonably practicable. Therefore, Eating Ltd had a right to know about Jack's disciplinary record prior to his transfer from Lean Treats Ltd. By not providing this information, Lean Treats Ltd have failed in their obligation under TUPE Reg 11.

As there has been a breach of Reg 11 TUPE 2006, Eating Ltd can make a complaint to an employment tribunal that Lean Treats Ltd failed to comply (Reg 12). They must bring their complaint before the end of the period of three months beginning with the date of the relevant transfer or within such further period as the tribunal considers reasonable in the case. As Jack has been working at Eating Ltd for just three weeks, his transfer took place less than a month ago. Therefore, Eating Ltd still has two months to bring this claim to the tribunal.

If the tribunal finds in favour of Eating Ltd, they can make a declaration to that effect and award compensation from Lean Treats Ltd in an amount the tribunal costs considers just and equitable in the circumstances, normally not less than £500. The court will consider any loss sustained by the transferee as a result of the matter complained of and any terms of the contract under which the transferor may be liable to pay the transferee a sum in respect of failing to supply employee liability information. The contract between Eating Ltd and Lean Treats Ltd does not appear to contain any such clauses and Eating Ltd has not, as yet, suffered any specific financial loss due to the breach. The tribunal will award an amount deemed equitable in light of these facts.

Question 3

Mohammad

The Equality Act 2010 (EA) recognises nine protected characteristics and treating a person less favourably on the basis of their holding any of these characteristics will be considered discrimination. These protected characteristics include religion and sex.

Mohammad has been directly discriminated against on the grounds of religion, s10 EA; there is also a potential for indirect discrimination if the exclusion extends to all persons of a particular religion. The fact that Mohammad is not of any religious belief is not of relevance as the statute recognises discrimination by perception. This type of discrimination occurs where an individual is treated less favourably due to another perceiving them to hold a protected characteristic they do not actually hold, English v Thomas Sanderson (2009). In this case, Mohammad is being treated less favourably, by being excluded from the company meeting where future prospects were being discussed, and this is on the basis of Katya perceiving him to be of a certain religious faith when he does not actually follow any religion.

Perception discrimination is recognised in relation to all protected characteristics, including religion, and extends to both direct discrimination as well as claims of harassment. An individual may feel degraded or offended by the use of certain language in relation to a religion, even if they do not hold the religion, Noble v Sidhil Ltd & Anor (2016). Therefore, Mohammad may also bring a claim for s 26 EA harassment as the words used by Katya are likely to cause offence and create a hostile environment for him, leading him to avoid communal staff areas and miss his lunch break.

Demi

The EA also recognises associative discrimination. This type of discrimination occurs an individual is treated less favourably due to their association with a person holding a protected characteristic. Mohammad holds a protected characteristic and Demi has been treated less favourably due to her association with Mohammad, Coleman v Attridge Law (2008). As stated above, an individual can feel harassed by comments aimed at a protected characteristic even if they do not hold the protected characteristic. Therefore, Demi may also bring a claim for harassment as Katya's actions, as based upon Mohammad's perceived religion, made her feel 'very uncomfortable', s26 EA.

Finally, Demi may be able to make a claim for victimisation under s27 EA as she has been subjected to a detriment due to supporting a person who has been the victim of discrimination. The detriment in question is her no longer being considered for a promotion for which she was due to interview. The reason behind Demi's exclusion for promotion is her telling Katya that she found her actions towards Mohammad unfair and discomforting and this has evidently led to the decision not to allow her to interview for the promotion.

Remedies

Both Mohammad and Demi may bring a claim for discrimination against Katya, s110 EA or they may prefer to bring a claim against Pretty Dresses Ltd through vicarious liability. For a claim of vicarious liability to succeed, it will need to be proven that the company did nothing to stop or prevent the discrimination s109 EA. This appears to be the case as Katya discriminated against Mohamad and the proceeded to also discriminate against Demi. This suggests her behaviour was not being monitored nor was any policy in place to prevent such actions.

If an employment tribunal finds that discrimination has occurred, they may make an order declaring the rights of the parties or make a recommendation that the respondent take a particular action designed to remove or reduce the effects of the discrimination, s 124 (2) (a) EA. The tribunal may also order compensation be paid under s124 (2) (b) EA, including financial loss which will be assessed as an amount to put the employee in the position he would be in had the discrimination not occurred. This is a broad remit and includes career loss and 'stigma' loss for pursuing a claim against an employer, Chagger v Abbey National (2009). The tribunal may also make an award for injury to feelings and this amount has no upper limit. In Vento v Chief Constable of West Yorkshire Police (2003), three payment bands were established to reflect the seriousness of the discrimination: the more serious the discrimination, the higher the compensation. Band 1 applies where there has been a lengthy campaign of discriminatory harassment, Band 2 is appropriate for serious cases which do not merit an award in the highest band, and Band 3 will apply for less serious cases of discrimination, for example an isolated act. As Katya has recently joined the company, there does not appear to be any sustained discrimination, therefore, the compensation for both Mohammad and Demi will likely fall in Band 2 or Band 3.

Question 4(a)

Constructive dismissal occurs where an employee resigns due to the employer making it very difficult for them to continue in their role. This type of dismissal requires that the employers commit a fundamental breach of the contract between employer and employee. Where a constructive dismissal occurs, an employee can bring a claim for wrongful dismissal; unlike constructive unfair dismissal, this type of claim does not require a particular length of service.

The actions of Hatty may constitute such a breach of contract leading to the constructive dismissal of Peter. Hatty, a manager, has targeted and 'humiliated' Peter in front of other members of staff, in particular, less senior staff. These are recognised grounds for constructive dismissal, Western Excavating Ltd v Sharp (1978).

An employee may resign over one 'serious' incident, as Peter has done; it is clear Peter considers the event to be serious and it has remained on his mind

for three months and he felt other employees had lost professional respect for him.

However, in claims of constructive dismissal, the employee must resign promptly following the matter complained of. In Peter's case, there has been a three - month lapse between the incident with Hatty and his resignation. This may affect his claim as he could be seen to have affirmed his contract within that time, Brown v Neon Management (2018). Therefore, while Peter has grounds to bring a successful claim for wrongful dismissal, the delay of three months may defeat his case.

4(b)

Clause 4.4 is a restrictive covenant and therefore *prima facie* void as a restraint of trade. However, a restrictive covenant may be enforceable if it is appropriate to the level of the job involved, protects legitimate interests of the business and is no wider than necessary to protect those interests, Fellows v Fisher (1976), Patsystems Holdings Ltd v Neilly (2012). Applying this to Clause 4.4, it appears to be a reasonable restriction in terms of geographical scope of just 5 miles and has a duration of just 6 months. Although Peter has been employed with Sums Ltd for just 18 months, he did hold a senior position within the company as a senior account executive, so he is likely to be privy to sensitive information and contacts. These factors suggest the restriction on his conduct after leaving the company in Clause 4.4 is likely to be valid.

(c)

Sums Ltd has no general legal obligation to provide Peter with a reference. However, they cannot refuse to supply a reference on the basis of any discriminatory reasons. Furthermore, when an employer provides a reference, they create a duty of care between themselves and the employee with respect to the content of that reference, Spring v Guardian Assurance (1995). The duty requires that due care is taken when providing the reference and the employer must not give any misleading statements that may damage an employee, Harris v Trustee Savings Bank (2000). Therefore, although Sums Ltd has no obligation to provide Peter with a reference, if they do so, they will not be able to suggest he resigned due to an inability to handle the workload as this would be a false and misleading statement.