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 2019 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

A common problem amongst the weaker candidates is that they ran out of time. They spent too much time on the first question and the final answer is often rushed and incomplete. The two main concerns amongst the weaker answers are, the application of the law to the facts is very poor. In problem questions, some candidates recite the law at length before applying the law to the facts. Secondly, the weaker candidates did not use case law, some did not use any cases at all. At Level 6, candidates should use authoritative sources to support their answers. Generally, candidates did better in the essay questions than the problem questions. Essay questions tend to be more discursive and open-ended than problem questions.

Ensure that the handwriting is legible.

No centre did particularly well or badly. Some centres had only a few candidates sitting the exam, whilst a couple of centres had a large cohort of candidates. Marks are quite polarised in some centres.
CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

The majority of candidates who attempted this question confused equal pay with the gender pay gap, which are different. Very few candidates discussed the gender pay audit under section 78 of the Equality Act 2010. The question specifically asks for shared parental leave only, candidates should have focused their time on this rather than discussing other types of leave such as maternity or paternity leave at length. In general, most candidates did not score well for this question.

Question 2

Many answers were descriptive at the beginning when candidates discussed the three definitions of redundancy under section 139 Employment Rights Act 1996. Stronger answers displayed critical evaluation of the law. Most candidates scored well for the law on redundancy. Weaker candidates did not use much or little case law.

Question 3(a)

Very few candidates attempted this question. Those who did scored poorly because they did not answer the question. Many discussed what is a transfer of an undertaking, service provision change, the Spijkers case and other irrelevant aspects of a business transfer. Candidates need to read the question very carefully and answer the question that has been set.

Question 3(b)

This was tackled better than part (a) and most candidates were able to identify and discuss protection from both unfair and constructive dismissals.

Question 4(a)

A popular question which was well answered by most candidates. Most candidates were able to describe and analyse the law well for both agency and part-time workers. Good use of cases by the majority of candidates.

Question 4(b)

Most candidates provided satisfactory answers on the definition and protection given to zero-hours contract workers. Weaker candidates discussed protection given to workers in general. Some good answers on the recommendations given under the Taylor Review.

Section B

Question 1

A very popular question which was generally well-tackled by the candidates, especially the unfair dismissal part. The weaker candidates recited the law on unfair dismissal but did not really apply the law to the facts. For example,
they did not discuss which are the potential fair reasons to dismiss Rachael. Nor did the weaker candidates analyse whether Goodwode College’s action to dismiss Rachael would fall within the band of reasonable response test.

With Wayne, most candidates were able to discuss the law on wrongful dismissal. Again, the weaker candidates did not apply the law to the facts. For example, candidates discussed the statutory notice period under the Employment Rights Act 1996 but did not say how much notice Wayne is entitled to.

**Question 2(a)**

A popular question where most candidates were able to identify the law on restrictive covenants and implied terms. However, the application of the law was not brilliant in some instances. Weaker candidates did not consider whether Chi-Sin has breached the covenants. With the implied terms, some answers were rather generic, and it is important that candidates are able to include only relevant implied terms.

**Question 2(b)**

Not many candidates were able to discuss Vinny’s constructive unfair dismissal claim in detail. Most candidates however, displayed good knowledge about the implied duty of care in providing a reference.

**Question 3**

The ability to include what is relevant is crucial. Some candidates listed a whole range of discriminatory claims when the facts only suggest direct discrimination and harassment. Many candidates mentioned indirect discrimination when there is no provision, criterion or practice. Some candidates confused the law on direct discrimination with indirect discrimination. Application of the law to the facts is weak in some instances. For example, not all candidates discussed what detriment Charlie has suffered; the specific remarks that were made to Charlie and the potential Vento band of compensation his claim would fall under.

**Question 4(a)**

A very popular question where candidates clearly know the law on employment status and were able to quote relevant cases. This is one area where candidates know their case law well. A number of candidates however, provided incorrect court decision on the Pimlico Plumbers case.

**Question 4(b)**

Generally well-answered by most candidates, who identified that it is about a potential breach of the Working Time Regulations 1998.

**Question 4(c)**

Many candidates thought this is a question on unlawful deduction of wages when it is about whether holiday pay includes commission.
The gender pay gap is the percentage difference between average hourly earnings for men and women. Equal pay is paying men and women the same for 'like work'; 'work rated as equivalent' and 'work of equal value'. In April 2017, men earned 18.4% more than women. Where an employer has been held to have breached the provisions of the EA 2010, it will be required to undertake a pay audit under the Equality Act 2010 (Equal Pay Audits Regulations 2014). Under the Equality Act 2010 (EA 2010), a tribunal can order an employer found to be in breach of equal pay law to undertake an equal pay audit in certain circumstances. The EA 2010 encourages employers to investigate and improve their gender pay gap voluntarily. Section 78 of the EA 2010 allows the government to require large employers (with more than 250 employees) to measure and publish information on their gender pay gap.

2018 is the first year that a gender pay gap audit was carried out. Early indications are that almost eight in 10 companies and public-sector bodies pay men more than women it was revealed. This is due to socio-economic factors such as women are more likely to have major roles of childcare and domestic work. Women often work in sectors where wages are, on average, lower than in jobs that are dominated by men. This phenomenon, known as occupational segregation, impacts upon the gender pay gap because in some industries such as the airline or finance professions, there are fewer women than men in managerial positions. Stereotypical female work such as the 5 ‘Cs’ of cleaning, catering, clerical (admin), cashiering (retail) and childcare, is associated with low pay. The concentration of women in these jobs has led them to be low-skilled, low-paid and undervalued. Other reasons for a gender pay gap include a divided labour market where women are more likely to be atypical workers and discrimination towards women all contribute to the gender pay gap.

Shared parental leave provisions are found in the Shared Parental Leave Regulations 2014. These regulations are designed to strike a more equitable division between the sexes for family and care responsibilities. Shared parental leave is a form of ‘leave transfer’ from the mother to the father/partner and replaces additional paternity leave. Shared Parental Leave is designed to give parents more flexibility in how to share the care of their child in the first year following birth or adoption. Parents will be able to share a period of leave; can decide to be off work at the same time and/or take it in turns to have periods of leave to look after the child.

The qualification criteria are ‘highly complex’ (Smith and Woods 2015). To qualify, the mother or adopter must be entitled to some form of maternity or adoption entitlement, have given notice to curtail it and must share the main responsibility for caring for the child with the named partner. For a parent to be eligible to take Shared Parental Leave they must be an employee and they must pass the continuity of employment test. In turn, the other parent in the family must meet the employment and earnings test. One of the difficulties with additional paternity leave was that it could not be taken simultaneously.
by the mother and father of the child. Shared parental leave only works if the mother consents to the transfer of leave. Therefore, mothers remain the ‘gatekeepers of fathers’ participation in care under the shared parental leave framework (Cabrelli 2017). Smith and Woods (2015) criticise the shared parental leave for having a ‘bewildering array of new notice requirements’.

Unfortunately, the statutory framework for shared parental leave does little, if anything, to change the traditional ‘male breadwinner/female carer’ role. Paid leave such as shared parental leave is paid at a rate that most people cannot live on and its use is controlled by the mother. As such, the working culture and amount of pay has to change to encourage more men to take shared parental leave. Without such changes, the gender pay gap will remain.

**Question 2**

Section 139 Employment Rights Act (ERA) 1996 states that there are three occasions when a redundancy situation arises:

- The employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him
- Business ceases at the employee’s place of work
- Diminution of work which the employee does under the contract

Cessation of business is fairly straightforward. It was held in Gemmell v Darngavil Brickworks Ltd (1967) that a temporary cessation is within the statutory definition.

Cessation of business at the employee’s place of work is a factual matter, not a contractual one. The test to be applied is where, in fact, did the employee work: Bass Leisure Ltd v Thomas (1994). A mobility clause will rarely be implied. Where there is a clear term requiring mobility on the part of the employee and an employee’s refusal to move results in his dismissal, the statutory reason will be disobedience to orders, i.e. misconduct and not because his employer has ceased to carry on business at the place where he is employed, so that he cannot claim redundancy Rowbotham v Arthur Lee & Sons Ltd (1974).

Finally, redundancy can arise where there is a diminution of work which the employee does under the contract of which he is employed. The redundancy can arise because the work has been reorganised or because of the introduction of labour-saving devices or a change in the work pattern which requires the same number of employees but a different kind of skill. In Safeway Stores Plc v Burrell (1997), it was held that the true test for the employee’s work is whether there was a diminution or cessation in the employer’s requirement for employees to carry out work of a particular kind, and not to focus on the work of the individual employee. The House of Lords in Murray v Foyle Meats Ltd (1999) resolved the issue by stating that the key word is ‘attributable’. Therefore, if a dismissal of an employee was ‘attributable’ to a diminution of the employer’s need for employees, then it is irrelevant to consider either the contractual obligations or the functions which the employee performed. The focus of Murray is on the causation rather than on the phrase ‘work of a particular kind’. Bennett (2002) praises the decision in Murray v Foyle Meats Limited (1999), stating that the judgement ‘reflects the ordinary meaning of the words’ in the statute. He also asserts that the law now achieves the purpose of greater mobility in employment. Other commentators are less convinced. Elias, Napier and Wallington (1981) argue
that older employees receive the highest statutory redundancy payments. Yet, they are the least likely, as a group, to be prepared to move and look for new jobs.

Junior employees can be made redundant by ‘bumping’. The concept of ‘bumping’ or transferred redundancies means that if a senior employee is made redundant but is retained in another post due to seniority, the junior employee who is displaced will become redundant: Elliott Turbomachinery v Bates (1981). Thus, a transferred redundancy is a redundancy under the ERA. However, employees affected are protected by unfair dismissal rules. A transferred redundancy can give rise to questions as to whether the dismissal was "by reason of redundancy" for the purposes of entitlement to statutory redundancy pay and for the purposes of the unfair dismissal rules. Two basic principles are clear:

First, it can be considered unfair if an employer does not give consideration to alternative employment within a company for a redundant employee even in the absence of a vacancy. Whether this is so or not is a question of fact for the Employment Tribunal in each particular case. Thomas & Betts Manufacturing Co Ltd v Harding CA (1980).

Second, if the employee is to be treated in law as dismissed "by reason of redundancy" then prima facie the dismissal is fair. The employee will be entitled to statutory redundancy pay but will not generally be entitled to claim unfair dismissal (with the potentially greater compensation benefits which might follow) unless some unfair procedure was adopted and/or there was unfair selection for redundancy. On the other hand, if the employee is treated as dismissed for some reason other than redundancy, then although there is no entitlement to statutory redundancy pay there may be a greater chance of succeeding in a claim that the dismissal was unfair and winning greater compensation than even maximum statutory redundancy pay. Although a redundancy situation may be grounds for dismissal, in respect of which the employee may be able to obtain a redundancy payment, it does not follow that such a dismissal will automatically be fair, or that the employer acts reasonably in treating that reason as a sufficient ground for dismissal.

Overall, the definition of ‘work of a particular kind’, one of the three redundancy scenarios under section 139 ERA 1996, has received mixed reactions. If an employer dismisses employees and replaces them with less well-paid employees, this will not amount to a redundancy situation. Not all re-organisations will amount to redundancies and thus redundancy protection is not available in all circumstances. If an employee is offered a suitable alternative job by the employer, which he unreasonably refuses, he may lose his entitlement to a redundancy payment (section 141 ERA 1996). The two-stage test in Murray v Foyle Meats (1999) focuses on causation. This means that if there is no reduction in the number of employees required to work of a particular kind, there is no redundancy. If for example, an employer dismisses employees and replaces them with less well-paid employees, this will not amount to a redundancy situation.

**Question 3(a)**

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006 Regulations), a transferee inherits those employees employed by a transferor in the “organised grouping” which is the subject of the transfer. They will be transferred on the existing terms and conditions,
provided that they do not object (regulation (4(2)). A transferred employee does not have a right to insist that (s)he be given the benefit of any superior terms and conditions enjoyed by the transferee’s existing staff. Further, a transferee inherits the legal responsibilities for any employees dismissed by reason of the transfer or for a reason connected with the transfer, where no economic, technical or organisational (ETO) reason exists. A transferee therefore inherits all the employees employed immediately before the transfer, together with all the employment contracts of the transferred employees. The transferee cannot pick and choose which employees to take on. The only exceptions to this are where the employees are ‘temporarily’ assigned to the ‘organised grouping’ and so remain with the transferor, or the employee has objected.

The transferee also inherits all the accrued rights and liabilities connected with the contract of the transferred employee (except for criminal liabilities under regulation 4(6)) and some benefits under an occupational pension scheme. All liability for tortious claims such as personal injury claims will also pass to the transferee (Bernardone v Pall Mall Services Group and Others (2000)). The transferee will also inherit all the statutory rights and liabilities which are connected with the individual employment contract.

Regulations 11 and 12 contain provisions requiring the transferor to notify the transferee in writing of any ‘liability’ information regarding an employee who is ‘assigned to the organised grouping of employees or resources that is the subject of a relevant transfer’. If the transferor fails to provide this information, the transferee may complain to an employment tribunal. It can award the transferee compensation of not less than £500 per employee. This is some relief to transferees, given the range of rights and liabilities they inherit under the TUPE 2006 Regulations.

An employer must consult the representatives of the employees about any action which will affect the employees. Under regulation 13(6), the consultation must be undertaken with a view to seek agreement of the employee representatives to the intended measures. Following the transfer of an undertaking, a restrictive covenant should be read as being enforceable by the transferee, but only in respect of customers of the transferor who fall within the protection. In relation to collective agreements, any collective agreements made with a trade union by the transferor are deemed to have been made by the transferee (regulation 5). A transferee is deemed to recognise the trade union to the same extent as did the transferor (regulation 6). In effect, the transferee steps into the shoes of the transferor. Finally, under regulation 15(9), the transferor and the transferee are jointly and severally liable in respect of compensation payable as a result of a failure to consult.

3(b)

Under the 2006 Regulations, employees affected by a transfer have the right to be consulted formally before, during and after the transfer by both the transferor and transferee organisations (regulation 13). The two most important legal rights given to employees under 2006 Regulations are protection from unfair dismissal and constructive dismissal. First under regulation 7(1), a dismissal as a result of a transfer is automatically unfair unless an employer can show that the dismissal is for an ETO reason entailing a change in the workforce (regulation 7(2)). If the reason is considered as an ETO reason, then it is a fair reason under some other substantial reason,
although an employer will have to satisfy the requirements of reasonableness under section 98(4) Employment Rights Act 1996. In Wheeler v Patel (1987), it was held that a dismissal as a condition of the sale does not fall within regulation 7(2). In Meikle v McPhail (1983), it was held that a genuine redundancy caused by a transfer does fall within regulation 7(2).

The second protection for an employee is constructive dismissal, found under regulation 4(9). An employee can claim constructive dismissal if the transfer results in a substantial change in his/her working conditions to his/her material detriment. In Abellio London and CentreWest London Buses v Musse (2012), the transfer of buses led to a change in the starting location for a particular bus route. The change meant the drivers travelling an extra hour or two to get to the new location. The EAT upheld that the change was not covered by the mobility clauses in their contracts. The EAT held that the change in working conditions was substantial and to the detriment of the claimants. The claimants’ resignations were in response to the substantial changes and were thus entitled to claim constructive dismissal.

**Question 4(a)**

The Agency Worker Regulations 2010 (AWR 2010) confer on agency workers a number of rights – some of which apply from the first day a worker is engaged and some after the worker has been with the same hirer in the same or a substantively similar role for 12 weeks. From the first day at work, agency workers are entitled to shared facilities and services provided by the employer. They are protected from discrimination; unlawful deduction of wages; not to be dismissed for whistleblowing. They are entitled to the national minimum wage; statutory sick pay, statutory maternity pay, statutory adoption pay and statutory paternity pay if they meet the qualifying conditions; paid holidays; to be accompanied to disciplinary and grievance hearings; unpaid parental leave provided they meet the necessary conditions and the right to ask for flexible working when you return from parental leave if you meet the necessary conditions.

After the 12-week qualifying period, agency workers will be entitled to equal treatment in relation to pay (to extend to allowances where appropriate); overtime and or shift allowances; bonuses which are directly attributable to the quality and quantity of work done and rest breaks. As far as entitlements are concerned, a worker denied an entitlement or payment for statutory paid leave may complain to an Employment Tribunal (Reg 30). The complaint must normally be made within three months less one day of the act or omission complained of (six months in respect of the armed forces), but this period may be extended if the tribunal consider it just and equitable. Where a complaint is upheld the Tribunal can make a declaration and may make an award of compensation ‘such as the Tribunal considers just and equitable in all the circumstances’, having regard to the employer’s default in refusing to permit the exercise of the worker’s entitlement, and any loss sustained by the worker as a consequence of that default (Reg 30).

The AWR 2010 provide some employment protection to agency workers since those who have worked for 12 weeks have the right to equal treatment in basic working and employment conditions with employees of the end-user. However, the AWR 2010 does not affect the employment status of temporary workers. The law relating to the employment status of agency workers is still in a confused state. The cases of Dacas v Brook Street Bureau (UK) Limited (2004) and James v London Borough of Greenwich (2008) show that workers
can find themselves not being employed by either the agency or the end-user, which leaves the workers rather vulnerable. The Court of Appeal in James v London Borough of Greenwich (2008) stated that a contract between an agency worker and an end-user will only be implied in exceptional circumstances such as where the employment relationship is a sham.

Further, employers can use the Swedish derogation to avoid paying agency workers the same basic pay and conditions as comparable employees after 12 weeks. For the Swedish derogation to apply, the temporary work agency has to offer an agency worker a permanent contract of employment and pay the worker between assignments. It has to be made clear to the worker that entering into the contract means giving up the entitlement to equal pay. The agency worker has a permanent contract of employment at a fixed rate with the agency. He will receive this fixed rate irrespective of the rate being paid to employees of the company to which she is supplied who are doing the same work as he is. It can be argued that there is a potential benefit to the worker as he will be paid even when not placed, although his rate of pay may be less than that of those he is working alongside when he is placed. The AWR 2010 are thus useful to a certain extent but they do not provide for the employment status of agency workers nor do they give agency workers redundancy pay rights.

Under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, part-timers should be given equal opportunity as full-time workers, unless an employer can justify the less favourable treatment on objective grounds. A part-time worker who is treated less favourably than a full-time worker can bring a claim regardless of whether gender. The Regulations apply to ‘workers’ which is a broader concept than ‘employees’. Unlike discrimination, the claimant must use an actual comparator for a claim under the Regulations. In Matthews v Kent and Medway Towns Fire Authority (2006), the House of Lords stated that one should compare the work done by part-timers and full-timers. Just because full-timers carried out some extra tasks does not prevent the jobs being the same or broadly similar.

The regulations state that less favourable treatment will only be justified on objective grounds if it can be shown that the less favourable treatment:
- is to achieve a legitimate objective, and
- is necessary to achieve that objective, and
- is an appropriate way to achieve the objective

While in the majority of situations, part-time workers who are women would already have protection under the Equality Act 2010 (‘EA’), the Part-Time Workers Regulations provide a quick remedy for part-time workers, including men, suffering less favourable treatment which cannot be objectively justified. In some cases, however, the worker may wish to rely on the EA as it is likely that any financial compensation awarded under that legislation will be higher. A claim under the EA would be one for sex discrimination. Remedies available to a successful claimant include unlimited damages; compensation for injury to feelings; declaration of employee’s rights (section 124 EA) or a recommendation that the employer takes action to alleviate the effect of discrimination.

The Sports Direct scandal exposes the vulnerability of agency workers due to poor working practices of the organisation. The AWR provides protection to a degree but the corporate culture of an organisation needs to change to improve its working practices. The Swedish derogation is one example of how
the law can be circumvented. The Part-Time Workers Regulations protect part-time workers from less favourable treatment although the requirement of an actual comparator can be difficult in some cases. The case of *Carl v University of Sheffield* (2009) is an example where the Employment Appeals Tribunal said that a hypothetical comparator is not allowed in relation to a claim of less favourable treatment in a part-time work context.

4(b)

Workers on zero hours contracts have very little employment protection. Zero hours contracts are casual contracts with no guarantee of work to the worker. Zero hours contracts are paid according to the number of hours they work. Some zero hours workers are employed under a contract of employment and so have employee status, at least while they are working. Others have been held to be workers enjoying the protections which that status brings (*Uber v Aslam and Others* (2017); *Pimlico Plumbers and Another v Smith* (2017); *Lange and Others v Addison Lee Limited* (2016). Employment protection given to workers on zero hours contracts has increased over recent years with the ban of exclusivity clauses in their employment contracts. Section 153 of the Small Business, Enterprise and Employment Act 2015 provides that any provision in a zero hours contract which prohibits a worker from working elsewhere, whether with or without the employer’s consent, is unenforceable. However, a clear way for employers to circumvent this protection is to provide a small amount of guaranteed hours to workers. The current government has not given any indication as to when the anti-avoidance regulations may be finalised and brought into force.

SECTION B

Question 1

Rachael may bring a claim for unfair dismissal. She satisfies the criterion that she has been employed for a continuous period of more than two years before the effective date of termination (s108 Employment Rights Act 1996). She is clearly an employee of the college and under s95 (1) ERA 1996 has been dismissed by the employer. Provided she brings her claim within three months less one day, she will be able to bring a claim for unfair dismissal. Here, she has till 30 January 2019 to bring a claim.

Once it is established that she is capable of bringing a claim for unfair dismissal the next stage is to see whether or not the employer has a potentially fair reason for the dismissal (s98 ERA 1996). In the present case, the potentially fair reason can be conduct or some other substantial reason. The Supreme Court held in *Reilly v Sandwell Metropolitan Borough Council* (2018), which also concerned a head teacher, that the appellant’s friendship with a man convicted of making indecent images of children and her non-disclosure of it, not only amounted to a breach of duty, but also merited her dismissal. There is no need for the employer to prove an offence has been committed beyond reasonable doubt. The test is set out in *British Home Stores Ltd v Burchell* (1978). As long as Goodwode College genuinely believes that Rachael is guilty of misconduct, the reason is fair.

Having established that the employer has a potentially fair reason for dismissing Rachael, the next stage is to consider whether the employer has
acted within the band of reasonable responses. Beyond procedural fairness the tribunal must not substitute its own decision for that of the employers: see Iceland Frozen Foods Ltd v Jones (1983). Although Iceland’s ‘range of reasonable responses’ test came in for criticism just around the turn of the millennium, it was strongly reaffirmed by the Court of Appeal in HSBC v Madden (2000). It is necessary to consider the precise circumstances. Rachael failed to disclose the relationship, even after the conviction, and demonstrated a complete lack of insight into the seriousness of the situation and its implications during the disciplinary proceedings. It appears that Goodwode College’s action to dismiss Rachael would fall within the band of reasonable response test (Reilly v Sandwell Metropolitan Borough Council (2018)). On the facts of this scenario, Goodwode College held a disciplinary hearing followed by an appeals panel. There is nothing to suggest that there has been any procedural unfairness. Therefore, it is unlikely that Rachael’s claim for unfair dismissal will succeed.

Wayne can bring a claim for wrongful dismissal. Wrongful dismissal is based on common law. Essentially, it involves looking at whether the employer has breached the employee’s employment contract. Section 86 ERA 1996 gives him eight weeks’ notice as he has worked there for eight years. We are not informed from the scenario that he enjoys a more generous notice period under his employment contract. Wayne is thus entitled to at least eight weeks’ notice. There is a pay in lieu of notice provision in Wayne’s contract. This allows GC to pay him instead of serving him notice before terminating the contract. GC, by giving him only four weeks’ notice pay instead of eight weeks, has wrongfully repudiated the employment contract. There is no suggestion that Wayne is alleged to have been guilty of misconduct which would justify summary dismissal.

**Question 2(a)**

As an employee, Chi-Sin owes express and implied duties to his employer, Fleurison Limited. Express terms are used in an employment contract to deal with wages, salaries, hours of work, holidays, sick pay, etc. Courts and tribunals will interpret the meaning of the terms in a manner consistent with industrial realism. Clauses 13.2 and 13.3 are express terms regarding Chi-Sin’s duty to work in the best interest of Fleurison Limited. Chi-Sin has set up his own accountancy consultancy business. It does not appear that he has obtained the written consent of Fleurison Limited. Since he has worked in his spare time and weekends, he does not appear to have breached clause 13.2.

Implied duties are terms implied into an employment contract because they are so obvious and ‘necessary in the business sense to give efficacy to the contract’ Reigate v Union Manufacturing Co. Ltd (1998). They are usually subject to any express terms to the contrary. The implied duty of fidelity applies here. As an employee, Chi-Sin owes a duty of fidelity to his employer, Fleurison Limited. The fundamental rule is that the employee must be honest in carrying out his duties. Courts are vigilant to protect an employer whose employee acts part-time in competition with him. ‘Moonlighting’ is the taking of additional employment outside normal working hours. This may be grounds for dismissal if this has an adverse effect on the employer’s business. In Gray v C & P Pembroke Ltd (1972), the claimant agreed not to engage in any other business without the written consent of the employer. Contrary to this agreement, he took a part-time job with a rival company and this was held to be a breach of faith for which he could be fairly dismissed. However, in Nova Plastics Ltd v Froggatt (1982), the claimant was employed as an odd-job man.
He was dismissed when it was discovered that he was working for a rival firm. The dismissal was held to be unfair. This is because as an odd-job man, it is unlikely that he would contribute seriously to the competition from the rival firm.

Applying the law to the facts, Chi-Sin set up his own consultancy business and worked on it during evenings and weekends. Clause 13.2 of Chi-Sin’s contract only restricts what he can do during normal office hours. His consultancy business takes place outside normal office hours and is not caught in clause 13.2 of Chi-Sin’s contract. Chi-Sin has not breached clause 13.2. He is likely however, to have breached the implied term of good faith and fidelity. This is because as mentioned above, his consultancy business is likely to have an adverse impact on Fleurison Limited’s business. More specifically, advising clients who might have otherwise instructed Fleurison Limited and the fact that Chi-Sin took advantage of business opportunities which he became aware from his time at Fleurison Limited are likely to harm Fleurison Limited’s position.

Clause 13.3 is a post-termination restrictive covenant. In considering the validity of a restrictive covenant in a contract of employment, one must consider the way in which the clause is laid out. In this case, each clause is separate and individual. The courts will apply the blue pencil test if required. This test enables the courts to sever a part of the clause that is too wide and leave the remainder of the clause intact and enforceable.

Prima facie, a restrictive covenant is void for public policy reasons (Phillips & Scott, Employment Law 2014). In order for a restrictive covenant to be enforceable, Fleurison Limited will need to show two factors: first, that there is a legitimate business interest to protect. Secondly, that the scope and duration of the restrictive covenant is reasonable. If the drafted clauses do not meet the criteria, they will be unenforceable and Chi-Sin will be able to ignore them.

In deciding the reasonableness of a covenant, the court will consider the period of time the covenant is to be effective for and secondly the geographical area it will cover. It is not a hard and fast rule in relation to what will amount to a valid restraint; each case needs to be considered on its own facts. A good comparison is shown by the cases of Fitch v Dewes (1921) and Fellows v Fisher (1976). A restriction of 12 months in Thomas v Farr (2007) was held to be reasonable.

The scope of the restraint will be based on such features as what the enterprise does, the position of the employee in the business, the role of the employee and the transferability of the skills the employee has. These and other factors will inform whether or not the restriction is reasonable. Applying the law to the facts of this case, Chi-Sin was a Senior Accountant and has potential to harm the business viability of Fleurison Limited by engaging in a rival business. Clause 13.3 is a non-competition clause, limited to six months and a radius of ten miles. This clause does not seem unreasonable in light of the above cases. It appears that Chi-Sin has breached clause 13.3. Fleurison Limited can enforce the restrictive covenant. It can seek for damages if they have suffered pecuniary losses or an injunction where damages are not an adequate remedy.
2(b)

Vinny can bring a claim for constructive unfair dismissal. Applying the ratio of TSB Bank Plc v Harris (2000), the EAT held that the employer should have made Vinny aware of the complaints before the reference had been given, so that he has a chance to address the damaging information which was on his file. The reference supplied was unfair and misleading, and not prepared with due skill and care. The Court of Appeal reinforced the EAT’s approach in Cox v Sun Alliance Life Limited (2001). It said that the duty of care owed by an employer with regard to the provision of a reference is not only to take reasonable care to provide an accurate one, but also to take reasonable care to provide a fair one.

Section 95(1)(c) Employment Rights Act 2010 (EA 2010) provides that an employee will have been dismissed for the purposes of the statutory unfair dismissal regime if there is constructive dismissal. A constructive dismissal takes place when an employee treats the conduct of the employer as being so serious that it confers an entitlement to walk away from the employment contract. As such, the actions of the employee resemble an express resignation of his post or a resignation by conduct such as walking away from the job. The case of Western Excavating Limited v Sharp (1979), the Court of Appeal held that a fundamental breach of an express term or a common law implied term of the employment contract by the employer would be considered sufficiently serious to constitute a constructive dismissal. Therefore, a repudiatory breach of an express or implied term is required to establish a constructive dismissal. However, there is no requirement for Vinny to show that the repudiatory breach was the principal reason of him leaving the job (Weathersfield Limited v Sargent (1999)).

Vinny cannot delay too long before resigning (Cook v MSHK Limited (2009)). Otherwise, he will have waived his right to claim constructive dismissal. Vinny needs to lodge a grievance and pursue an appeal under the employer’s procedures before bringing a claim of constructive dismissal. If he fails to do this, any compensation awarded may be reduced by up to 25%.

Question 3

Charlie can bring claims of harassment and direct discrimination on grounds of gender reassignment (De Souza E Souza v Primark (2017)).

Harassment can be sub-divided into three types under s26 Equality Act 2010 (EA 2010). Section 26(1) EA 2010 deals with general harassment which must however be in relation to a protected characteristic; s26(2) deals with sexual harassment and s26(3) deals with less favourable treatment because the claimant has rejected conduct that is unwanted and of a sexual nature or harassment related to gender reassignment which had the purpose or effect of creating an intimidating, hostile environment for the complainant. Under section 7, a person has the protected characteristic of gender reassignment if he or she has undergone a process or part of a process for the person of reassigning the person’s sex by changing physiological or other attributes of sex. It is not necessary for this to be a medical process.

In this case, it would be a section 26(3) harassment claim as Charlie is transgender. The comments from Charlie’s colleagues like “being in a men’s rugby changing room after the match” when standing next to her and that “she would make a very good bass singer in the local mens’ choir”, are likely
to breach section 26(3) EA 2010 (De Souza E Souza v Primark (2017)). Under section 212 EA 2010, conduct which amounts to harassment cannot also be direct discrimination under s13. Therefore, these acts do not constitute direct discrimination.

A single incident of harassment by an employee can be actionable. This can be seen in the case of Insitu Cleaning Co Ltd v Heads (1995) where the comment ‘Hiya big tits’ from a manager to a middle-aged woman was sufficient to constitute sexual harassment.

There is no defence for an employer to claim that he was not the direct cause of the harassment. In Jones v Tower Boot Co (1997) the claimant was seriously racially harassed while working for the employer. The employer argued that he was not responsible since the offending acts were committed outside the workplace, albeit by a fellow employee. The Court of Appeal held that the words "in the course of employment" in the Race Relations Act should be interpreted according to everyday language, and not restrictively by reference to the principles laid down by case law for establishing an employer's liability for the torts committed by an employee during the course of his or her employment.

Employers are entitled to a defence of taking all reasonable steps to prevent employees from acting in a discriminatory manner (Balgobin and Francis v London Borough of Tower Hamlets (1987)). However, merely giving a warning to the harasser about his behaviour will not be sufficient if the behaviour continues. The employer must take further disciplinary action (Enterprise Glass Co v Miles (1990)).

Under s13 of the EA 2010, it is direct discrimination for someone to treat the claimant less favourably than he or she treats or would treat another person because of a protected characteristic. The less favourable treatment here is the failure of Muwins of investigating and dealing with the complaints properly. The fact that Muwins told Charlie that she should calm down and that she was only drawing attention to herself when she completed is likely to be direct discrimination (De Souza E Souza v Primark (2017)).

The potential remedies for a successful claim in disability discrimination include a declaration of employee’s rights (section 124 EA), a recommendation that the employer takes action to alleviate the effect of discrimination, or compensation. Compensation for discrimination does not have a financial limit. Moreover, it can include an element of non-economic loss. This means that in discrimination claims, a claimant can seek to recover compensation for injury to feelings and personal injury (for example psychiatric injury) caused by the discrimination. Claimants can also seek to recover aggravated damages for the way in which the respondent has acted for example if they have acted in a high handed, malicious, insulting or oppressive manner towards the claimant. This is on top of any award for loss of earnings, interest, future earnings and other economic losses.

The courts have attempted to rein in the amounts of compensation claimants were being awarded for discrimination. In Vento v Chief Constable of West Yorkshire Police (2003), the Court of Appeal set out guidelines for how much compensation should be awarded in respect of injury to feelings. The court categorised illegal discrimination into three bands - lower, middle and top and set out what it thought the award should be in each case. A more recent case
has now reviewed these guideline amounts and increased them Simmons v Castle (2012).

The bands and updated guideline amounts are as follows:
Lower band (for the least serious cases, e.g. a one-off or isolated incident of discrimination) - up to £8,400

Middle band (which is used for serious cases that do not merit an award in the highest band) - £8,401-£25,200

Top band (for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment) - £25,201-£42,000. (The guidelines suggest that only in the most exceptional case should an award of compensation for injury to feelings exceed £42,000). In this instance, it appears that GC has not committed any previous discriminatory acts towards Charlie, but the discriminatory acts appear to be rather serious, so the upper end of the middle band is likely.

**Question 4(a)**

Employment status is important as it affects the amount of protection derrick enjoys. In O’Kelly v Trusthouse Forte (1983) and Massey v Crown Life Insurance (1978), the court stated that the ‘label’ provided to Derek is not an overriding consideration in deciding whether or not he is an employee. The mere fact that the contracting parties agreed to the status of ‘sub-contracted employee’ is not a decisive factor.

Courts have over the years developed several tests to determine the status of whether someone is an employee or worker. The original test used by the courts to determine if the relationship was one of employer-employee was the ‘control test’. As employees became more skilled however, it became apparent that the control test, as a single test to determine whether the individual was an employee, was inadequate. In the 1960’s, the courts adopted a multiple test to determine whether the employment status of an individual. In Ready Mixed Concrete (South East) Limited v MPNI (1968), McKenna J laid down this test. One must ask three questions:

1. Whether the employee agrees to provide his skill in consideration of a wage;
2. Secondly, whether there is an element of control exercisable by the employer;
3. Finally, whether there are provisions in the contract that are inconsistent with it being a contract of employment.

When using the multiple test, the question asked is, looking at all the factors, some of which may point to self-employment status and others to a finding of employment, does the evidence overall point to the person being a worker? In Derek’s case, the employment contract provided that electricians had the use of a van provided by PIL (and marked with the PIL logo), for which a monthly hire charge was payable. Derek was also required to carry a PIL identity card and wear overalls issued by PIL. PIL also provided him with a mobile phone. These factors point towards the indication that Derek is a worker.
However, the manual provided that electricians worked on a self-employed basis. There is no mutuality of obligation either since PIL had no obligation to provide Derek with work on any particular day, and if there was no work for him, he was not paid. While working for PIL, Derek could reject any particular job, provided he had adequate reasons. These factors point to a self-employed status. However, the employer has some control over him. Derek had to wear a company uniform and carry a company staff card. Derek was not an employee for a number of reasons including the fact that he personally bore a substantial financial risk. However, whilst he lacked employee status he would probably be a worker on the authority of *Pimlico Plumbers Ltd v Smith* (2018). This case highlights a business model under which plumbers are intended to appear to clients of the business as working for the business. At the same time however, the business itself seeks to maintain that, as between itself and its plumbers, there is a legal relationship of customer and independent contractor rather than employer and employee or worker.

4(b)

Assuming that Derek is held to be a worker, he is entitled to bring a claim for a potential breach of the Working Time Regulations 1998 if he does work over 48 hours for the next three months. Under the Working Time Regulations 1998, Derek cannot be obliged to work more than an average of 48 hours per week in a 17-week period. The exception is if he has signed an ‘opt-out’ agreement with PIL. From the facts, there is nothing to suggest this has taken place. Further, he said that he has never worked more than 48 hours a week. This seems to indicate that PIL has breached the Working Time Regulations 1998. Derek can bring a complaint to the Employment Tribunal within three months less one day of the act complained of. The Employment Tribunal can order a declaration and if it considers it appropriate in the circumstances, award compensation for any financial loss sustained. If Derek is held to be an independent contractor, then he is unable to bring any statutory claims.

4(c)

By virtue of the Working Time Directive (93/104) which is enshrined in the Working Time Regulations 1998, Henrietta is entitled to 5.6 weeks’ leave. The European Court of Justice held in *Lock v British Gas Trading Ltd* (2014) that an employee should receive ‘normal pay’ during her UK statutory annual leave. This means that it is not limited to basic salary but includes compensation for allowances and commission which the employee would have received had she been working during the period of leave. Henrietta can therefore ask PIL for a further amount of holiday pay representing the commission that she would have received.