

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 – UNIT 4 – EMPLOYMENT LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2022 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

The pass rate is a slight increase on previous years. This is, in part, due to an overall stronger level of identification of relevant laws, as well as fewer purely descriptive responses.

Failing papers were those that either did not identify the correct area of law examined, or failed to demonstrate sufficient detail within their responses, as minimally expected at Level 6.

In relation to Section A, all of the questions, when attempted, produced answers which reflected an overall strong level of awareness of relevant case law, statute and ACAS Codes, as they applied to the particular question. However, when citing these laws, quite a few scripts took slightly too broad an approach. For example, several answers to a question on implied duties also included reference to express duties, and answers to a question on the redundancy selection process, also contained explanation of the consultation procedure. While no marks were deducted for the inclusion of these wider points, they did not specifically address the questions examined, so no marks could be allocated for these broader points. Overall, the vast majority of candidates passed the exam by demonstrating a level of knowledge of relevant laws. However, the application of said law was at times too descriptive. This was largely due to the command verbs not being adequately considered when answering the questions. Most candidates included a few critical concluding comments, and these were credited as demonstrating awareness of the need to be critical. However, only higher scoring papers showed detailed critical evaluation/analysis/ assessment of

the material cited, as examined. Nonetheless, overall, there was a slight improvement than in previous sessions with respect to both citation of relevant law, as well as critical discussion. In particular, while critical aspects could have been more detailed or in depth in most papers, the vast majority of answers did contain some effort to include a critical slant, albeit at times just a few concluding sentences. This nonetheless represented an improvement on prior sessions where many responses were purely descriptive.

In relation to Section B, passing scripts consistently identified the legal issues raised within the scenarios presented. The majority of scripts also cited relevant statute and case law to reinforce their knowledge. The application of law was overall specific to the legal issues raised. However, each of the questions posed contained several points to address. Passing papers tended to identify the fundamental issues and dealt with these by citing relevant statute/case law and reaching overall logical conclusions. Stronger scripts however identified all of the legal issues raised and applied each of these, in detail, to reach balanced and legally supported outcomes. Therefore, the distinction between higher and lower scoring papers was generally found in the level of critical detail, research and application of law.

Overall, the cohort performed very well with not only an increase in passes, but also a generally higher standard of work, in relation to both explanation and application of the law cited.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

This was not a particularly popular question with relatively few candidates attempting to answer. Those that did answer this question tended to pass the question by citing relevant law with reference to age discrimination under the EA 2010. The specific EJRA points were also overall identified but could have been expanded upon. Citation of case law was also generally evident in relation to few seminal cases. The critical assessment aspect of the question however tended to be, at best, nominally addressed. Nonetheless, recognition of relevant statute and case law allowed for most candidates to pass the question.

Question 2

This was an extremely popular question with the majority of sitting candidates providing detailed and strong responses. The popularity of the question was likely due to the subject matter, as well as the broad nature of material that could be considered. Answers tended to cite a good range of relevant statute, case law and also made reference to ACAS Codes. However, while critical analysis of the laws cited was overall evident, this analysis was in depth and critical only within higher scoring papers, of which there were several. The candidates who did not score well on this question tended to provide answers that were not sufficiently specific to the question, or very brief and lacking adequate detail.

Question 3

This was a moderately popular question with the majority of candidates providing good answers with respect to recognition of the duties examined. Citation of supporting case law was overall impressive with respect to the majority of answers. Critical evaluation of the law was not sufficiently found in most papers to support the otherwise good points of law cited. However, there were a few stand out answers containing topical and interesting points of critical commentary.

Question 4 (a)

A moderately popular question. Candidates tended to respond to the 'nature' aspect of the question with relevant, if descriptive, explanation of supporting statute. The 'purpose' element of the question however was only addressed within higher scoring papers.

(b)

The majority of answers cited some relevant statutory provisions. However, there was also reference to broader rights not explicitly examined. The critical assessment aspect of the question was overall attempted by the majority of candidates in the form of a few concluding comments. Very few higher scoring papers provided some interesting points of critical assessment.

SECTION B

Question 1(a)

A moderately popular question. Candidates tended to recognise the relevant areas of law examined but also provided detailed explanation of general surrounding areas of law. Reference to such broader redundancy considerations often detracted from the focal point of the question. Nonetheless, the vast majority of candidates recognised that fair selection process had not been followed. There was also good identification of age discrimination and rights of part time workers. Disability and sex discrimination were noted only in higher scoring papers.

(b)

Most candidates passed this question with recognition and application of statutory unfair dismissal remedies. Only stronger candidates also recognised the potential discrimination legislation remedies.

Question 2

This was a very popular question that produced good results overall. The vast majority of candidates scored very well on this question by identifying the various types of discrimination examined. The identification of supporting statute was also overall specific to the many legal issues raised within the question. In addition to identification of legal issues, the majority of candidates applied the law cited to the specifics of the question in a critical manner. The higher scoring papers also provided supporting case law, further critical detail and noted the various potential liabilities of each party.

Question 3(a)

A moderately popular question. This 5-mark question scored well with the vast majority of candidates recognising the service provision change examined.

(b)

Most candidates recognised the rights of transferred employees and also noted the potential constructive dismissal claims. This allowed for the majority of candidates to pass the question. Stronger answers also explored ETO reasons, as they applied to the question, as well as finer details, such as harmonisation. Overall, the question was more popular than anticipated and produced better results (the subject matter is not generally favoured).

Question 4

A moderately popular question which produced overall good answers. There were many statutory breaches examined and the majority of candidates recognised each breach and cited supporting statute. The application of law was generally well reasoned, and the legal issues raised were identified and addressed. Stronger candidates tended to provide more detailed responses, but identification of legal issues was overall consistently evident, with few exceptions. However, the remedies aspect of the question, while noted, was thoroughly considered only in higher scoring papers.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 – UNIT 4 – EMPLOYMENT LAW

SECTION A

Question Number	Suggested Points for Responses	Max Marks
1	<p>Responses should include:</p> <ul style="list-style-type: none">• Define direct discrimination under the Equality Act 2010• Explain that there is no defence to direct discrimination in relation to any of the EA 2010 protected characteristics, with the exception of age discrimination, s4• Explain indirect discrimination under the EA 2010• Identify the 'proportionate means of achieving a legitimate aim' defence as applicable only to indirect discrimination, with the exception of age discrimination, where it can be a defence to direct discrimination• Identify that compulsory retirement ages are no longer allowed, making the 'proportionate means' defence more relevant• Define the concept of an 'employer justified retirement age'	25

	<ul style="list-style-type: none"> • Explain that direct age discrimination can be justified if the employer can demonstrate that the treatment of the employee was a proportionate means of achieving a legitimate aim, s13 EA. • Identify various examples of legitimate aims, including but not limited to, physical and mental demands of the post; there must not be an assumption of decline in ability, safety, promotion of diversity in terms of age and race, ‘intergenerational fairness’. Succession planning and intergenerational equity have been considered legitimate aims. • The aim of avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, and related disputes on these type of matters, have also been held to be legitimate aims, <u>Seldon v Clarkson Wright and Jakes (2012)</u>, <u>Prof J Pitcher v University of Oxford (2019)</u>. • Identify that, even where a legitimate aim is identified, the means must still be proportionate and the employer will need to show that there are no reasonable alternative ways to achieve their aim and that the benefits of this aim significantly outweigh the discriminatory effect. • The employer must be able to show the link between the measure and the specified retirement age, failure to do so could render their policy discriminatory, <u>Prigge and others v Deutsche Lufthansa AG (2011)</u>. • Critical assessment of the judicial reasoning within the case laws cited should be consistently evident • The critical assessment should consider the statement within the question (the EJRA allowing for ‘arbitrary removal of older employees’). <p>Responses could include:</p> <ul style="list-style-type: none"> • ACAS advises that an employer can set an EJRA if there is proportionately on the basis of business and societal needs. • Staff contracts should clearly state any compulsory retirement age and its reasoning. The age should be regularly reviewed to ensure proportionately and need remains. <p>Consider the reasons underpinning the need to protect against age discrimination in relation to older workers</p>	
Question 1 Total:		25 marks
2	<p>Responses should include:</p> <ul style="list-style-type: none"> • Explain the potentially fair reasons for dismissal, s98 ERA 1996, and how, in addition to any of these reasons, there must evidence of fairness in all the circumstances of the dismissal • Explain the importance that the employer acts within a ‘band of reasonableness ‘s98(4). The size and resources of the employer 	25

considered in reasonable responses test, British Telecommunications plc v Daniels (2012).

- Fairness can include where the employer genuinely believed the employee was guilty of the misconduct and had reasonable grounds for that belief, appropriate review of circumstances, warnings, seriousness of the allegation upon which the dismissal is based and corresponding level of investigation, , BHS Ltd v Burchell (1978); Sainsbury Supermarkets Ltd v Hitt (2003), Hargreaves v Manchester Grammar (2018).
- Define substantive fairness and the employers need to act within a 'range of reasonable responses'. Cite case law examples of the interpretation of this criteria, including but not limited to HSBS v Madden (2000),
- Explain the relationship between procedural fairness in dismissal and the requirement to follow the ACAS Disciplinary and Grievance Code
- Discuss how failure to follow the ACAS Code can result in a finding of a lack of 'fairness' and an unfair dismissal.
- Procedural fairness is relevant to determine reasonableness, however, procedural defects will not necessarily render the dismissal unfair (London Central Bus Company Ltd v Manning (2013)).
- Identify that recent case law reinforces the importance of procedural fairness:
- Molloy v Liverpool Community Health Trust (2016) even a 'minor' procedural defect could result in a finding of unfair dismissal. Evans v London Borough of Brent (2020) unfair dismissal due to lack of procedural fairness despite there being no chance of compensation, in interests of justice to still find the procedure unfair

Responses could include:

- Explain the qualifying criteria for a claim of potentially unfair dismissal under s94 ERA 1996
- Distinguish between procedural and substantive fairness and explain the relevance of both standards in determining a finding of unfair dismissal.
- An employer should also have a policy on dismissal procedure that reflects legal standards. This would reinforce a fair process.

	<ul style="list-style-type: none"> • The tribunal must consider whether the employers actions were reasonable and therefore 'fair' in all the circumstances, not whether they would have 'done things differently'. • Tribunal can consider substantive and procedural unfairness separately or interrelated in determining fairness. 	
Question 2 Total:		25 marks
3	<p>Responses should include:</p> <ul style="list-style-type: none"> • Define an implied term as distinct from an express term • Explain the purpose of implying terms into every employment contract as a means of regulating the employee-employer relationship • Identify the initial 'business efficacy' purpose underlying implied terms • Explain how this purpose has developed to reflect the power imbalance in the employer-employee dynamic and the need for implied terms to protect the employee • Evaluate whether case law reasoning has developed to acknowledge implied terms covering many aspects of employee welfare, including but not limited to: <ul style="list-style-type: none"> • Identify longer standing duties, such as the duty to pay wages, remain even when there is no duty to provide work, <u>Way v Latilla (1937)</u>. • No duty to provide work unless exceptions apply; damage to reputation or publicity, reduction of an employee's actual or potential earnings or their ability to have a reasonable opportunity to maintain skills. • No duty to provide a reference but a duty to show due care if one provided, <u>Spring v Guardian Assurance plc (1994)</u> <u>Harris v Trustee Savings Bank plc (2000)</u>, and a reference cannot be withheld on discriminatory basis • The implied term of mutual trust and confidence has been extended to include harassing, abusive, derogatory or humiliating language or practices, <u>Ogilvie v Nyrfor-Weir Ltd (2003)</u> • An objective standard is taken by the courts in determining breach of the duty of mutual trust, <u>Malik v BCCI (1997)</u> . • There is a common law implied duty to provide a safe plant, a safe system of work and safe colleagues, <u>Wilson & Clyde Coal Co Ltd v English (1937)</u>. • Identify that this duty has developed to include an employer's implied duty to exercise reasonable care in protecting the health and safety of the worker. Including a safe operating system with sufficient precautions, warnings and protective materials and equipment. 	25

	<ul style="list-style-type: none"> • The employer also has a duty to warn the employee of the specific dangers involved in the task and instruct them to wear the protective gear at all times, <u>Pape v Cumbria County Council (1991)</u>. • The employer has an Implied duty of the provision of proper information so employee aware of their rights, in relation to benefits and pensions, disciplinary rules and consequences of breach of rules , <u>Sally v Southern Health and Social Services Board (1991)</u>; <u>Crossley v Faithful and Gould Holdings Ltd (2004)</u>. • Case law governing employee health appears to have developed to protect a broader definition of 'health'. An implied term overrides the express term when employees health is at risk, <u>Johnstone v Bloomsbury Health Authority (1991)</u>. • The employees physical and, more recently, mental health, must be protected against work related stress and psychiatric injury and employers will be liable for work-induced mental illness, if foreseeable, <u>Northumberland CC (1995)</u>; <u>Barber v Somerset County Council (2004)</u>. <u>Sutherland v Hatton (2002)</u> • Critical evaluation of the cases cited should be consistently evident and in line with the statement in the question. Any reasoned evaluation of the law will be credited. <p>Responses could include:</p> <ul style="list-style-type: none"> • Identify that an employer may be vicariously liable for the actions of an employee where that individual harms another employee. This allows the wronged employee to seek damages from 'deepest pockets'. <ul style="list-style-type: none"> • Walker v Northumberland County Council (1995) an employer could be liable in contract and/or tort for work-related stress. • Common law implied duties governing employee health and safety are reinforced in statute. • Common law duty in relation to health and safety at work has increased in significance as an action for breach of statutory duty in relation to regulations under s47 HSWA not available for events after September 2013. 	
Question 3 Total:		25 marks
4(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Explain that the relevant statutory provisions apply equally to married and cohabiting couples, heterosexual and same sex couples. • Identify the Paternity Leave provisions ss 80A-E of the ERA 1996 and the Paternity and Adoption Leave Regulations 2002 (as amended), provide guidance on eligibility for paternity leave. • Explain the requirements for paternity leave entitlement: employee, 26 continuous weeks service with the same employer by the end of the 15th week before the child is expected to be born or adopted, and have a relationship with the new born or 	8

	<p>newly adopted child and the mother or the adoptive parent; and expect to be parenting the new-born child or child placed for adoption. At 15 weeks, the employee must inform their employer of the due date and when they want their leave to start.</p> <ul style="list-style-type: none"> • Explain the entitlement to paid ordinary paternity leave – meet qualifying criteria and earn at least the lower limit for national insurance. • Ordinary paternity leave entitles the individual to be paid the lower statutory rate per week and 90% of their average weekly earnings during the paternity leave, Statutory Paternity Pay, Social Security Contributions and Benefits Act 1992. • The employee can choose to take either one- or two-weeks leave taken consecutively and within 56 days of the birth or adoption. • Credit any reasoned explanation of purpose of the legislation, including but not limited to: legislation governing paternity leave attempts to redress apparent ‘gender imbalances’ in parental leave. • However, ‘qualifying criteria’, especially NI contributions, may prohibit individuals on a very low income from accessing the rights. <p>Responses could include:</p> <ul style="list-style-type: none"> • Employee who has taken paternity leave has the right to return to the same job and are protected from detriment for exercising this right to leave. 	
4(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Explain the aim of shared parental leave in redressing gender imbalances in paternal leave, with a specific focus on the rights given in the first year of having or adopting a child. • Identify the relevant statute of the Shared Parental Leave Regulations (2014) and explain the qualifying criteria for shared parental leave under this legislation • The child’s mother or adoptive parent must be eligible for maternity leave, pay or allowance or adoption leave or pay. • The employee seeking shared parental leave, either the mother or partner, must meet the ‘continuity of employment test’: worked for the employer continuously for at least 26 weeks by the end of the 15th week before the due date, still be employed by the employer while they take shared parental leave, give the employer eight weeks’ notice of intention to take the leave and provide a declaration that their partner meets the employment and income requirements which allow the employee to receive shared parental leave. 	17

	<ul style="list-style-type: none"> • Critical assessment of protection given to mothers, including but not limited to: • Leave only given in the first year after birth or adoption • Notice requirements have been criticised as being overly complex • The opportunity to share leave is available only to those who already have a steady income and meet certain tests connected to their employment. • This may result in lack of accessibility to those with a non-traditional working pattern and partners on a low income. • The statute does not recognise parents who do not have a partner, they are unable to share leave with anyone other than a recognised 'partner'. • A mother must take a minimum of two weeks maternity leave following birth – four if she works in a factory - whether the remainder of her leave is shared or not. • This suggests that the legislation, while facilitating shared parental responsibilities, nonetheless recognises the need for leave immediately following the birth of a child and the need to avoid placing pressure on females to share leave after giving birth. • Maternity leave should not be compared with shared parental leave in terms of payment or discrimination, <i>Ali v Capita Customer Management Ltd (2019)</i>; <i>Hextall v Chief Constable of Leicestershire Police (2019)</i> EWCA Civ 900 <i>Hextall v Chief Constable of Leicestershire Police</i>. • However, this 'disparity' in payment may deter some males or partners from taking shared parental leave, defeating the purpose of the legislation. • Responses could include: • Any reasoned critical assessment • Any further case law examples 	
Question 4 Total: 25 marks		

SECTION B

Question Number	Suggested Points for Responses	Max Marks
1(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Explain that there has been a redundancy situation under Section 139 Employment Rights Act (ERA) 1996, therefore a fair selection process is required. • The selection process should include an employer requesting volunteers for redundancy. • Selection for the redundancy pool must be reasonable in the circumstances, <i>Capita Hartshead Ltd v Byard (2012)</i> 	17

- The employer must use a fair and objective way of selecting persons for redundancy and demonstrate the following: the basis of the selection process, Cox v Wildt Mellor Bromley Ltd (1978) and how it was applied in practice, Protective Services (Contracts) Ltd v Livingstone (1992).
- Edward:
- An employee's attendance record may be considered in selection for redundancy. However, the employer must not consider any absence related to disability.
- The selection procedure must be non-discriminatory, Whiffen v Milham Ford Girls School (2001). Severe asthma can be classed as a disability if affects day to day living, s6 Equality Act 2010. Credit any reasoned conclusion on this point.
- The employers opinion/value judgement as to the viability of employees, including assimilation with other employees, is not an objectively measurable selection criteria, (Williams v Compair Maxam (1982))
- The Equality Act 2010 s4 age is a protected characteristic and should not be a consideration in the redundancy selection procedure.
- Seniority may be considered but should not be the only reason for selection for redundancy, Hobson v Park Brothers 1973, Farthing v Midland House Stores (1974).
- Betty does not appear to have followed proper procedure when selecting Edward for redundancy.
- Latisha:
- Selection on 'last in first out' basis is fair, although not in isolation, Anderson v Pringle of Scotland Ltd (1998).
- Length of service may be one criteria for selection for redundancy but cannot be the only basis for selection as it may result in age discrimination.
- 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).

	<ul style="list-style-type: none"> Betty does not appear to have followed a proper procedure when selecting Latisha for redundancy. <p>Responses could include:</p> <ul style="list-style-type: none"> The employer must show that the basis for selection for redundancy is clear, objectively measurable and indiscriminatory. 	
1(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> Failure to follow proper procedure results in a redundancy being treated as an unfair dismissal. Remedies under ERA s.112 and Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) s.157(1) Reinstatement, an order of reengagement and an order for compensation of a basic award and a compensatory award. 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. The employee has a duty to mitigate their losses, <u>University of Sunderland v Drossou (2017)</u>. There may also be penalties under the Equality Act 2010 if the redundancy procedure is discriminatory; age (Edward) and sex (Latisha) are the protected characteristics upon which discrimination may have occurred. <p>Responses could include:</p> <ul style="list-style-type: none"> Explain how the basic award will be calculated: 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. Compensatory award to cover actual loss is only, Langley v Burlo (2006). 	8
Question 1 Total:		25 marks
2	<p>Responses should include:</p> <ul style="list-style-type: none"> Karthik: Identify that the Equality Act 2010 prohibits discrimination on the basis of disability, s15. Protection from discrimination is a 	25

day one right, Karthik is protected despite having 'just recently joined the company'.

- Explain that s6 EA 2010 defines disability as a physical or mental impairment having a substantial and long term adverse effect on an individual's ability to carry out their normal day-to-day activities.
- Substantial means more than minor by reference to what the individual could do with or without the impairment, Paterson v Metropolitan Police Commissioner (2007).
- Long term impairment means at least 12 months, or likely to last the rest of the person's life.
- Explain that Karthik's depressive bout appears to meet the definition of a disability: he takes medication and had attended counselling for several years, suggesting the condition is long term and affects his day to day life.
- Once the employer is aware of the employees disability, legal obligations apply, EA 2010, Baldeo v Churches Housing Association (2019). Melinda is aware of Karthik's condition.
- EA 2010 ss39(5) and 20 an employer is required to make reasonable adjustments for disabled employees once they are aware of the disability and a request for adjustment has been made. The employee should not be expected to contribute to the costs of any adjustment.
- Identify that the courts take a wide definition of reasonable adjustment, Chief Constable of South Yorkshire Police v Jelic (2010). Furthermore, the degree the employee would benefit from the adjustment is balanced against budgetary considerations, Cordell v Foreign and Commonwealth Office (2011).
- Explain that the cost restrictions raised by Melinda are unlikely 'reasonable' refusal in the circumstances. Furthermore, the duration of Karthik's employment and his unwillingness to contribute to costs are not relevant considerations in determining a reasonable adjustment.
- Heather:
- Equality Act 2010 (disability) Regulations 2010 excludes certain conditions from being considered a disability under the law. Drug and alcohol addiction are excluded.
- However, if the addiction causes severe impairment, these symptoms may be recognised as a disability.
- It does not appear Heather's 'headache' meets this definition.
- Any reasoned conclusion credited.

	<ul style="list-style-type: none"> • Identify s27 EA 2010 victimisation as a form of discrimination arising where an individual is treated less favourably due to supporting an individual who has been discriminated against. • It appears Heather has been victimised by having her long term shift changed after speaking in support of Karthik, who has been discriminated against. • Explain the s26 definition of harassment as including unwanted conduct based on gender reassignment that has the purpose or effect of creating a degrading or humiliating environment for the complainant. It appears this definition has been met as Melinda’s comments relates to Heather being a ‘sexually confused man’ which clearly relates to her gender reassignment and has made her feel ‘humiliated’ and avoid the staffroom. • The fact that no prior incidents of harassment have occurred will not defeat a claim. A single incident can be harassment depending on the nature of the work environment, incident and parties dynamics, <u>Bracebridge Engineering Ltd v Darby [1990, Dos Santos v Preview Services Limited ET/2700170/10 , Insitu Cleaning Co Ltd & Anor v Heads [1994].</u> • It appears the comment is very degrading and made in front of other colleagues, so likely to be considered harassment under s26 EA 2010, <u>de Souza E Souza v Primark Stores Ltd (2018).</u> <p>Responses could include:</p> <ul style="list-style-type: none"> • Heather may also raise a claim of associative discrimination, EA 2010. • Relevant case law, including <u>Perratt v City of Cardiff Council (2016)</u> • There is no defence for failure to make reasonable adjustment. • Vases Ltd may be vicariously liable for the discrimination, s109 and s110 EA 2010. • Identify that the courts will take a wide definition of normal day to day activities in determining a disability, <u>Banaszczyk v Booker (2016).</u> 	
Question 2 Total:		25 marks
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identify TUPE 2006 categories of transfer: ‘traditional or standard’ method under Reg 3 (1) and Reg 3 (2) and the ‘extended transfer definition’ recognising service provision changes, Reg 3 (1) (b). 	5

	<ul style="list-style-type: none"> • Explain that there is a service provision change as Orbit Ltd have taken over the provision of services from TedBears Ltd and the services are fundamentally the same before and after transfer i.e. 'identical services', Reg 5. • Reg 3 (3) an 'organised grouping of employees' is a group of employees which has been specifically organised to carry out activities for the client. Explain that two employees have been transferred and will be considered a grouping for the purpose of protection under TUPE 2006. <p>Responses could include:</p> <ul style="list-style-type: none"> • Any relevant case law • Case law example of a service provision change, <u>Argyll Coasting Services Ltd v Stirling and Others (2012)</u> 	
3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Explain that under TUPE 2006 Regulation 4(2), a transferee shall acquire 'all the rights, powers, duties and liabilities' under or in connection with the contract'. Xavier and Jatifah's contractual rights and liabilities have been transferred from Ted Bears Ltd to Orbit Ltd • Explain that the transferred employees employment contract is protected from variation by the transferee. If the sole reason for the variation is the transfer, any such change will be void, Regulation 4(4) and (5). • Identify the exception to this rule exists where variation to contractual terms may be allowed for economic, technical or organisational (ETO) reasons entailing changes in the workforce that is related to the conduct of the business, Wheeler v Patel (1987). • Identify that that no ETO reasons are evident in the scenario as there is no loss of profits, only a maintenance of profits, and no change in working practice, location etc. Harmonisation of contract terms is also not a recognised ETO reason. • Identify that the reduction in working hours and reduction in wages is a repudiation of the contract that brings a substantial and detrimental change. • An employee can claim constructive dismissal if the transfer results in a substantial change in his/her working conditions to his/her material detriment, <u>Abellio London and CentreWest London Buses v Musse (2012)</u>. • This allows both Jatifah and Xavier to treat the contract as terminated by Orbit Ltd and claim constructive unfair dismissal, 	20

	<p>Reg 4 (9), <u>Tapere v South London and Maudsley NHS Trust (2009)</u>.</p> <ul style="list-style-type: none"> • The breach of contract leading to the resignation must be 'serious'. The reduction in working hours and, more so, wages, is arguably serious. • Both Jatifah and Xavier had been employed by Orbit Ltd for 4 years, so exceed the 2 year employment duration requirements to access statutory remedies. s98 ERA 1996 remedies of reinstatement, re-engagement and compensation of a basic and a compensatory award. <p>Responses could include:</p> <ul style="list-style-type: none"> • TUPE 2006 does not explicitly define an economic, technical or organisational (ETO) reason but the Department of Business, Innovation and Skills suggest economic is likely to refer to 'profitability', technical to refer to the 'equipment or processes' and organisational to consider the 'management structure' of the entity. • ETO reasons are generally broadly interpreted but none are evident. • Reg 10(3), an employee whose contract of employment is transferred under TUPE 2006 is not entitled to bring a claim against the transferor for breach of contract or constructive unfair dismissal arising out of a loss or reduction in his rights under an occupational pension scheme in consequence of the transfer. • This exception does not apply. • Jatifah and Xavier have a duty to mitigate their losses. 	
Question 3 Total:		25 marks
4	<ul style="list-style-type: none"> • An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws (13) • Discussion around the above with detailed arguments, for and against being evidenced (5) • Relevant alternatives/options available (2) • A reasoned conclusion which is supported with evidence, offering the suggested best option available (4) • Response is appropriately structured (1) <p>Responses should include:</p> <ul style="list-style-type: none"> • Identify that there has been a breach of the National Minimum Wage Act 1998 as Callum has been paid the same wage 	25

throughout his duration of employment despite changing age bracket.

- Callum should have been paid the minimum wage applicable when was 17 years of age, this would have risen when he was 21 and then again when he was 25 years of age.
- Identify the relevance of the Working Time Regulations 1998
- Explain that the time period for night working is determined by a relevant agreement but, if not specified, it will be taken to be between 11pm and 6am, Reg 2.
- For purposes of night work, night time is a period of at least 7 hours duration including the period between midnight and 5am.
- Normal working hours for a night worker shall not exceed 8 hours for each 24 hour period, Reg 6. Normal hours are calculated by reference to a 17-week period, as with the 48 hour week.
- Where night workers are involved with heavy physical or mental strain, there is a limit of 8 hours actual working time in any 24 hour period.
- Explain that Callum is a night worker as his shifts are from 12am to 9am, Reg 2.
- He works 9 hour shifts which is in breach of the WTR maximum of 8 hour shifts as his work involves 'very heavy' physical strain of loading and unloading delivery vans.
- Identify that young workers are prohibited from night working under Reg 6a. This means that there was a breach of the WTR for the time Callum was 17 years of age and working the night shift. However, any claim is likely statute barred by time lapse.
- Deduction of wages:
- Explain that, under the ERA 1996 s13, deductions cannot be made to an employee's wages unless the deduction is required or authorised to be made by virtue of a contractual or statutory provision, or the worker has previously signed a written agreement consenting to the deduction.
- Deductions may also be made to in relation to overpayment of wages and expenses, disciplinary proceedings held by virtue of statutory provision, industrial action or court order, s 14 ERA 1996.
- None of these exceptions apply to Callum and it appears his rights have been breached by the company deducting his wages for the item damaged during the training session.
- s8 ERA 1996 every employee is entitled to an itemised statement including gross wages, net amount payable and deductions. There has been a breach of this statute as Never

	<p>Late Ltd has not issued Callum with the statement, as requested.</p> <ul style="list-style-type: none"> • Identify the relevance of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations (2002). • Pedro is a fixed term worker as he is on a 12 month contract with Never Late Ltd. • Reg 3 states that fixed term workers have a right not be treated less favourably regarding terms of contract or any detriment. This includes access to benefits such as training courses and canteen discounts • If Pedro believes he treated less favourably, he can request Never Late Ltd provide him with a statement giving the particulars of the reasons for the less favourable treatment, which they must provide within 21 days, Reg 4. • Pedro can bring a complaint to the ET within three months of incident, or later if ET considers fair. The ET may order a declaration, compensation of recommendation, Reg 7. • However, Never Late Ltd can raise a defence of objective justification, Reg 4 . • The refusal of the training course may be objectively justified due to the expense involved. The denial of the 5% canteen discount is unlikely to be objectively justified due to its low value. • Credit any reasoned conclusion. <p>Responses could include:</p> <ul style="list-style-type: none"> • Employer must keep records to show they are meeting WTR obligations , kept for two years on file. • Failure to provide a statement of particulars of reasons for difference in treatment allows an ET to draw just inferences at future ET hearing. • Any relevant case law 	
Question 4 Total:		25 marks