

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
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 June 2021 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

A total of 57 candidates sat the June 2021 paper and the pass rate is on par with previous years and generally as expected.

In relation to Section A, all questions posed were, when attempted, answered with relevant explanation of legal principles, and citation of supporting case law and/or statute, as appropriate. However, while explanation and citation of law were overall fine, the command verb application was not sufficiently evident in the majority of answers. This resulted in responses that were relevant and achieved a pass mark due to identification of legal principles and supporting laws but failed to achieve high grade passes due to a lack of critical analysis, critical evaluation and critical assessment, as required. This was particularly the case where the answer required critical application of statute, where responses were quite descriptive, with few notable exceptions. Several candidates, at best, added on a few sentences of superficial critical elements in the concluding passages, rather than involving the command verb when forming the answer. It would be beneficial if the command verbs became more of a focal point of exam revision. This would allow candidates to realise that the analysis/evaluation/ assessment elements of a question are essential, and not merely supporting points per the application of relevant law. Descriptive answers may allow for an overall pass mark, if containing sufficient relevant explanation and law, however, when aiming for a merit or distinction, the command verbs must be considered as crucial aspects of the question. Candidates should be encouraged to build confidence in attempting critical aspects of questions, such comments do not necessarily have to be expert

analysis, assessment/ evaluation, but there does need to be evidence that effort was made to address the command verbs within the questions.

In relation to Section B, both citation and application of law were overall well evidenced in the majority of papers. Application of law is likely facilitated by the sub section questions allowing for candidates to recoup marks lost in any weaker sections. Many candidates selected to answer more than two questions from this section of the paper and there were no general deficiencies within approaches taken in this section.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

A moderately popular question. Overall, candidates who selected this question tended to be able to cite a sufficiently varied amount of relevant case law, resulting in overall good passing grades. The use of case law, however, was at times slightly descriptive, with the exception of few higher scoring papers. The critical analysis aspect of the question was generally addressed with few basic critical comments throughout, per the general interpretation of the laws cited. However, the critical analysis element of the question could have been more of a focal point in the majority of responses. Most candidates respectably passed this question due to the overall consistent recognition of relevant laws and some good explanatory application.

Question 2

A question that overall, fewer candidates selected to answer when compared with other Section A questions.

(a)

A few answers were very broad and failed to sufficiently address the relevant area of law examined. However, the majority of responses cited a few relevant pieces of case law, but gave little, to no, critical assessment of the laws cited.

(b)

A few candidates who answered part (a) of the question did not address part (b). The majority of answers contained a few broadly relevant explanations of gender pay gap issues and some brief detail on reporting. However, most answers gave slightly too broad an overview of the area examined and the 'nature and purpose' aspect of the question was not sufficiently addressed in nearly all of the responses.

As mentioned, few candidates selected this question and those who did tended to not perform well for the reasons noted above.

Question 3

A moderately popular question. A few candidates cited broad and descriptive explanations of redundancy statute in general. These answers did not sufficiently address the specific consultation and selection processes examined and therefore failed the question. The candidates who passed the question did so by recognising relevant statutory sections relating to areas examined, and a few higher scoring papers also cited relevant case law. Again, the command verb needed to be more of a focal point of answers within the majority of responses, with few notable exceptions. Answers were good in detail and some critical explanation, but critical evaluation could have been more evident overall.

Question 4

A moderately popular question. A few candidates failed the question due to citing broad and overarching descriptions TUPE regulations, and failing to address the specific sections relevant to the question. The majority of candidates did identify relevant sections governing employee protection, with few also reinforcing knowledge with case law citation. However, most responses contained nominal evidence of critical assessment of the law. A few candidates included brief concluding comments in an attempt to provide some assessment of the law, but these tended to be just a few sentences of comments lacking critical depth. Candidates who passed this question tended to do so with a basic passing grade, with few notable exceptions.

SECTION B

Question 1

A popular question. The majority of candidates performed well on this question by citing laws relevant to both implied duties and constructive dismissal elements of the question. The application of law tended to recognise the majority, although usually not all, of the breaches of duty examined, with reasoned conclusions. A few responses contained slightly broad discussion of dismissal and breaches but did also refer to the relevant common law principles examined. There was at times unnecessary discussion of remedies and statutory provisions, which were not examined. No marks were deducted for this but perhaps time wasted. A few papers scored very well by identifying all breaches of common law with consistent supporting precedent and thorough application.

Question 2 A popular question with overall moderate results.

(a)

The harassment element of the question was overall well addressed with recognition of supporting statute. Some higher scoring papers also applied case law. The antenatal leave rights were overall accurately identified in most responses but could have been considered in slightly more detail in certain instances. The remedies aspect of the question was not always sufficiently

addressed, with most papers noting remedies for just one of the breaches. A few noteworthy papers noted all relevant remedies with application.

(b)

The maternity leave element of the question was overall sufficiently addressed. A few papers gave slightly broad explanation of relevant statute, higher scoring papers identified the need to consider specific OML and AML rights, as applied. The breast-feeding aspect of the question led to many candidates citing flexible working applications; which are not necessary to enforce specific breast feeding rights. Nonetheless, these answers did also overall cite relevant discrimination points, as credited. The question tended to produce moderate passing grades overall.

Question 3

A moderately popular question. The majority of candidates identified relevant agency worker rights with supporting statute. However, the specifics of the question could have, overall, been more directly addressed. Many responses, while generally accurate, needed to more closely consider the details of the question when reaching, albeit relevant, conclusions. Remedies could also have been more consistently addressed. Overall, candidates who selected this question recognised supporting statute and made somewhat general but reasoned application of law per the question. The improper deductions aspect of the question was at times only briefly considered, but with overall relevant and accurate application and law.

Question 4 A popular question with overall high scoring answers.

(a)

Overall, very good answers to this low mark question, as expected. Relevant law cited and appropriate defences applied to reach logical conclusions. Most candidates scored high on this question, with very few exceptions failing due to not recognising the area of law examined.

(b)

The majority of candidates appropriately answered this low mark question, with identification of relevant statutory rights and some application of law.

(c)

The majority of responses recognised the relevant type of dismissal per the scenario examined. Supporting statute was also generally recognised and applied, with remedies noted. The relevance of protected disclosures was noted in most papers, as credited. However, only higher scoring papers discussed the full extent of the specific issues raised in the question, per the manner and consequences of such protected disclosures.

**SUGGESTED POINTS FOR RESPONSES
LEVEL 6 – UNIT 4 - EMPLOYMENT LAW**

The purpose of this document is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The Suggested Points for Responses 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. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Section A

Question Number	Suggested points for responses	Max Marks
Q1	<p>Critically analyse An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Define restrictive covenants as prima facie void as a restraint on trade. Identify clauses as enforceable if 'reasonable'. • Critically analyse case law examples of enforceability of any type of restrictive covenant, including, but not limited to, the below. • Protection of a legitimate business interest and the clause 'reasonably' achieves this, <u>Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd (1894)</u> • Reasonableness in terms of scope, duration and the type of work involved, <u>Fellowes v Fisher (1976)</u>. • The amount of work available is relevant in determining 'restraint of trade', <u>Fitch v Dewes (1921)</u>. • Clauses must be appropriate to the level of job, <u>Patsystems Holdings Ltd v Neilly (2012)</u>. • Discuss critical examples, including where a 12-month non-competition clause was held valid in contract of a managing director, <u>Thomas v Farr plc (2007)</u>. 	25

	<ul style="list-style-type: none"> • A broad non solicitation clause was enforceable against a ‘high profile’ employee, <u>Safetynet Security Ltd v Coppage</u> (2012). • Explanation that non poaching covenants are generally not enforced. These must be narrowly drafted and in reference to specialist employees, <u>TSC Europe Ltd v Massey</u> (1999), <u>Hanover Insurance Broker v Schapiro</u> (1994). • Explanation that non dealing clauses are more likely enforceable than non – solicitation clauses in protecting employers legitimate interests, <u>Towry EJ Ltd v Barry Bennett and Others</u> (2012). • Worldwide restrictions only enforceable if involve a large international company, <u>Office Angels Limited v Rayner – Thomas and Another</u> (1991). • The blue pencil test may sever ‘unreasonable’ portions of a restrictive covenant, <u>Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd</u> (1894), <u>Beckett Investment Management Group Ltd v Hall</u> (2007). • Critical analysis of the law cited must be evident throughout the response. <p>Responses could include:</p> <ul style="list-style-type: none"> • Recognition of the implied term of confidentiality in post termination restrictive covenants • Enforceability of garden leave clauses, as relevant to restrictive covenants, <u>Credit Suisse Asset Management Ltd v Armstrong and Others</u> (1996). • Any further relevant case law. 	
Total		25 marks

Question Number	Suggested points for responses	Max Marks
Q2(a)	<p>Critically assess</p> <p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • s66(1) Equality Act 2010 every employment contract is deemed to include an equality clause. • Identify the need for a comparator, s79 and like work s65. • Define the s69 EA 2010 defence of a material factor • Case law examples of interpretation of s69 material factor defence including, but not limited to the below • location, <u>NAAFI v Varley (1976)</u> • economic necessity, <u>Rainey v Greater Glasgow HB (1987)</u> <u>Grundy v British Airways plc (2007)</u>, <u>Strathclyde Regional Council v Wallace and Others (1998)</u> • bonuses, <u>Abdulla and Others v Birmingham City Council (2010)</u> • Length of service, experience and qualifications could be materials factors, but not ‘extrinsic’ matters, such as the male employees prior wage, <u>Fletcher v Clay Cross Ltd (1979)</u>. • ‘Red circling’ of rates of pay to prevent a dispute will not be considered a material factor, <u>Snoxell v Vauxhall motors (1977)</u>. • Any historical practices that result in sex based differences in treatment are discriminatory and not a material defence. • Critical assessment of the case law cited. <p>Responses could include:</p> <ul style="list-style-type: none"> • S69 focuses on equal pay, not fair pay. Differences in pay, not based on sex, do not have to be objectively justified. • S 69(3) the long-term objective of reducing inequality between men's and women's terms of work is always to be regarded as a legitimate aim. • If the material factor indirectly discriminates against the worker because of sex, the employer may justify it on the basis that it is a proportionate means of achieving a legitimate aim s69 (1) (b) 	15

Question Number	Suggested points for responses	Max Marks
Q2(b)	<p>Explain</p> <p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Gender pay gap reporting obligation on employers with more than 250 employees. • Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. • Gender Pay Report must be submitted online at the Government's gender pay reporting website. • The report must also remain available on the organisation's website for a minimum of three years. • Employers must publish the mean and median hourly pay gap and bonus gap between men and women. • The report will include six comparative figures including mean and median hourly pay gap and mean and median bonus gender pay gap. • There is a requirement that companies report on the proportion of men and women in each of four pay bands (quartiles), based on the employer's overall pay range. This will show how the gender pay gap differs across the organisation, at different levels of seniority. • New data based upon the 'snapshot date' of 5 April must be published each year • There is expectation that having to provide this data would lead companies to become aware of gender imbalances within their organisation. They would then be on alert to modify their approach. • The utility of having data showing the position in various sectors and the direction of travel in terms of equality. 	10

	<ul style="list-style-type: none"> • However, there is no obligation on companies to explain gender pay gaps nor their steps to address these; although they may choose to do so. <p>Responses could include:</p> <ul style="list-style-type: none"> • The regulations have a broad definition of ‘employees’ to include self-employed workers and independent contractors, if engaged directly by the employers. • Partners and LLPs excluded from the definition. • Part-time employees, contractors, employees on maternity leave, non-binary employees and internationally mobile employees can all be subject to special rules. 	
Total		25 marks
Question Number	Suggested points for responses	Max Marks
Q3	<p>Critically evaluate</p> <p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Responses should include:</p> <p>Consultation</p> <ul style="list-style-type: none"> • Explain the requirement to consult, ss188-194 Trade Union and Labour Relations (Consolidation) Act 1992. • Explain the time periods for consultation- s188 TULR(C)A 1992, <u>Dewhirst Group v GMB (2003)</u>, <u>Securicor and Omega Express Ltd v GMB (2004)</u>. • Must be a ‘genuine attempt’ to consult, <u>British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price and Others (1994)</u>. • If the employer breaches the duty to consult s188, a tribunal may make a protective award, <u>Hardy v Tourism South East (2005)</u>. • Critically evaluate the effectiveness of the measures cited. <p>Proper selection</p> <ul style="list-style-type: none"> • Requirement on the employer to consider a pool of employees. 	25

	<ul style="list-style-type: none"> • Selection for the redundancy pool must be reasonable in the circumstances, <u>Capita Hartshead Ltd v Byard</u>. • Employer must use a fair and objective way of selecting persons for redundancy and demonstrate the following: <ul style="list-style-type: none"> • the basis of the selection process, <u>Cox v Wildt Mellor Bromley Ltd (1978)</u>, • how it was applied in practice, <u>Protective Services (Contracts) Ltd v Livingstone (1992)</u> • how it can be objectively checked, <u>Williams v Compair Maxam (1982)</u>. • Selection on 'last in first out' basis is fair, although not in isolation, <u>Anderson v Pringle of Scotland Ltd (1998)</u>. • Seniority as a justification for selection for redundancy, <u>Hobson v Park Brothers 1973</u>, <u>Farthing v Midland House Stores (1974)</u>. • The Equality Act 2010- age should not be a consideration in the redundancy selection procedure. • The selection procedure must be non-discriminatory, <u>Whiffen v Milham Ford Girls School (2001)</u>, • Critically evaluate the effectiveness of the measures cited. <p>Responses could include:</p> <ul style="list-style-type: none"> • Further examples of relevant case law and statutory provisions. • Identify the broad definition of redundancy in relation to consultation: 'dismissal for a reason not related to the individual concerned or a number of reasons all of which are not so related' s195 TULR(C) A 1992. • Consultation required even where the employer company is in administration/anticipated insolvency, but not in a 'sudden' insolvency of a business, <u>Clarks of Hove Ltd v Bakers Union (1979)</u>. • A proper selection procedure must be followed in any redundancy, except where the job no longer exists, ERA 1996. 	
Total	25 marks	

Question Number	Suggested points for responses	Max Marks
Q4	<p>Critically assess</p> <p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> • Explain the purpose of The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006. • A transferred employee’s contract of employment is automatically transferred to the transferee employer. • Reg 4, includes all contractual rights and liabilities, and any statutory employment claims. • Where the transfer is the sole reason for variation of a term within a transferred employee’s contract, this variation will be void, Reg 4 (4). • Exception- where the business can prove an Economic, Technical or Organisational (ETO) reason for the variation. • ETO reasons narrowly interpreted to protect against variations to employees contracts in a transfer, <u>Wheeler v Patel</u> (1987). • Harmonisation of transferred employee’s contractual terms would not be considered an ETO reason. • Reg 7 (1) the employee is automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer, <u>Manchester College v Hazel</u> (2012). • Reg 4 (9), if the employer makes a substantial change to the working conditions of the employee to his material detriment, the employee may treat the contract as being terminated by the employer and claim constructive unfair dismissal, <u>Tapere v South London and Maudsley NHS Trust</u> (2009). • Critical assessment of TUPE (2006) employee protection should accompany all points raised. 	25

	<p>Responses could include</p> <ul style="list-style-type: none"> • Any other relevant case law examples • Any other relevant TUPE 2006 provisions. • Reg 10(3), an employee 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. • Reg 8-9 effect of TUPE on insolvent/bankrupt transferor. 	
Total		25 marks

Section B

Question Number	Suggested points for responses	Max Marks
Q1	<p>Advise</p> <p>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> <p>Responses should include:</p> <ul style="list-style-type: none"> • Define implied duties. • No general implied duty on the employer to provide work, <i>Collier v Sunday Referee Publishing Co (1940)</i>. None of the exceptions to this rule apply to Kiara. • There is no breach of the implied duty to provide work by asking Kiara not to come in to work on days she is not needed. • Implied duty to provide wages if employee is ready and able to work, <i>Way v Latilla (1937)</i>. This duty has been breached by not paying Kiara for the days she is not needed at work, as per her contract. • Employers implied duty to provide a safe operating system with sufficient precautions, protective materials and equipment. • The nature of the work determines what is reasonable in the circumstances. • Kiara works in a role that carries risk (driving a delivery vehicle). 	25

	<ul style="list-style-type: none"> • The employer must instruct the wearing of protective gear, <u>Pape v Cumbria County Council</u> (1991). • Gia/Yummy Sandwiches provides Kiara with the 'shoe grips' but does not enforce the wearing of the protective equipment. This is a breach of the implied duty to provide a safe working environment. • Implied duty to provide competent staff/ co-workers, <u>Hudson v Ridge Manufacturing</u> 1957. • If employers knows or foresees acts done by an employee may cause physical or psychiatric harm to a fellow employee, they may be in breach of duty if they fail to prevent that harm. • Gia/Yummy Sandwiches is aware of Mitchell's 'inappropriate and aggressive behaviour' as they have issued hm a final warning. By placing Mitchell in the delivery van, they have arguably subjected Kiara to a risk of harm that could have been avoided. Breach of duty. • Implied duty of mutual trust and confidence. This can be breached by the employers use of highly offensive language when publicly reprimanding an employee, <u>Ogilvie v Neyrfor-Weir Ltd</u> (2003). • The language must irrevocably damage the working relationship. • This duty is potentially breached by Gia shouting at Kiara and calling her offensive names in front of co-workers. • The breach of implied duty of trust and confidence may lead to a constructive dismissal. • Define constructive dismissal • Explain the circumstances that can lead to constructive dismissal; including humiliating employees <u>Western Excavating Ltd v Sharp</u> (1978) and using abusive language. • Objective test to determine if trust and confidence seriously damaged by the actions of Gia/employer, <u>Malik v BCCI</u> (1997), <u>Tullet Prebon plc v BGC Brokers LP</u> [2010]. 	
--	---	--

	<ul style="list-style-type: none"> • It appears Gia’s actions may have damaged the relationship as Kiara has been shouted at and put in a potentially dangerous situation. • There can be one incident or a cumulation of incidents. • Kiara may cite both the ‘lack of concern for her safety and welfare’ , as well as the manner in which she is spoken to, as justification for her resignation. • Kiara has resigned promptly, as required, <u>Brown v Neon Management</u> (2018). • It appears Kiara has been constructively dismissed. • Credit any well- reasoned conclusion. <p>Responses could include:</p> <ul style="list-style-type: none"> • The Implied duty to provide adequate supervision has possibly been breached. This includes reducing stress on an employee where the employer is aware of a potential risk of psychiatric injury through increased stress, <u>Barber v Somerset County Council</u> (2004). • Kiara has been subjected to stress through the actions of both Mitchell and Gia. Employer is aware of Mitchell’s aggressive tendencies. • Kiara has two years length of service so can claim constructive unfair dismissal or constructive dismissal 	
Total		25 marks
Question Number	Suggested points for responses	Max Marks
Q2(a)	<p>Advise 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> <p>Responses should include:</p>	15

Paul

- Define s26 Equality Act harassment
- Courts look to the perception of the statement recipient and whether their response is 'reasonable', rather than considering the intention of the maker of the statement-maker, s26(a).
- Comments made in front of customers, make Paul feel undermined and embarrassed.
- 'Relaxed and informal working environment' unlikely justification for the comments, particularly as he is an unwilling participant in this 'banter', Evans v Xactly Corporation Limited (2018)
- Likely Paul has been harassed.
- Potential vicarious liability of BBP for not addressing the harassment, ss109 and 110 Equality Act 2010.
- Remedies – Paul can make a complaint to the employment tribunal within three months.
- Remedies of Interest, recommendations, declarations, aggravated and exemplary damage, as the court deems appropriate, ss48 and 49 ERA 1996. Including injury to feelings, Brown Hill v Gateway 1991
- s55 Employment Rights Act 1996, Paul has a right to unpaid time off to accompany his partner to 2 antenatal appointment; this is her first such appointment.
- Paul's employer has unreasonably refused this leave as there is no required 'duration of employment' for unpaid leave. However, Paul does not qualify for paid leave.
- Paul can bring a complaint to an employment tribunal within three months.
- Remedy for unreasonable refusal to attend an antenatal appointment is compensation of twice the hourly rate for the period when the employee would have been entitled to be absent, had the employer granted the time off.

Question Number	Suggested points for responses	Max Marks
Q2(b)	<p>Advise</p> <p>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> <p>Responses should include:</p> <p>Asha</p> <ul style="list-style-type: none"> • Maternity and Parental Leave Regulations 1999 (MPLR). • Asha has taken additional maternity leave (AML), which is a period of 26 weeks off work immediately after the ordinary maternity leave (OML). • Following AML, Asha is entitled to return to the work in which she was employed, or if this is not reasonably practicable for the employer, to an alternative and appropriate job on the same terms and conditions as her previous job, Regs 18 and 18A MPLR 1999. • Asha's rights have been breached as the role she has been offered is different and on less favourable terms. • Asha has notified BBP in writing that she is breastfeeding. • BBP must carry out a workplace risk assessment and make reasonable adjustments to accommodate her. • If it is not possible, BBP must offer her suitable alternative work or suspend her on full pay. • Asha's rights have been breached as BBP have not met any of these obligations. They also responded to her request 'the same day', suggesting no alternatives were reasonably considered. <p>Responses could include:</p> <ul style="list-style-type: none"> • Relevant case law • <u>MacFarlane & Ambacher v Easyjet Airline Ltd 2016</u>, refusal to limit shifts/adjust rotas to accommodate breastfeeding may also be indirect sex discrimination. 	10
Total		25 Marks

Question Number	Suggested points for responses	Max Marks
Q3	<p>Advise</p> <p>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> <p>Responses should include:</p> <ul style="list-style-type: none"> • Reg 3 Agency Worker Regulations (AWR) 2010, an agency worker is an individual supplied by a temporary work agency to work temporarily and for and under the supervision of a hirer. This includes part time workers, such as Lebron. • Lebron is an agency worker. • AWR Regs 5 and Reg 7 (2), once an agency worker has completed a 12-week qualifying period, they will be entitled to the same basic working conditions as if they were hired by the company they work. • 'Pay' includes overtime. • Lebron was entitled to the same wages, annual leave and overtime payment for 6 of the 18 weeks he worked at Numbers Ltd. • His rights have been breached by not being paid the same as company employees after 12 weeks. • Responsibility for ensuring the agency worker is equally treated initially lies with the agency AWR, Reg 14. • Lebron can make a written request to the agency for a written statement Reg 16(1) within 28 days. • If agency fails to provide this, the agency worker can apply to the hirer who within 28 days, should provide information on the rights of a comparable worker and the reason for the treatment of the agency worker. • Lebron may bring a claim for breach of rights against the hirer or the agency. • Lebron must bring the complaint to the ET within three months of alleged breach, although can be heard out of time if ET believes just and equitable. 	25

	<ul style="list-style-type: none"> • ET can make a declaration of rights, order compensation or recommend the respondent take a specified action . • ERA 1996 and NMW Act 1998, deductions cannot be made to an employee's wages unless the deduction is authorised by contract, statute or by the employee in writing. None of the allowed exceptions to this rule apply to Lebron, s14 ERA 1996. • Lebron can apply to recover the 'overtime payment' deductions made to his wages, s23 ERA 1996. • Lebron may need to reimburse the employer for the overtime payment claimed for 12 of the 18 weeks; this does not change his right to recover the deduction from his wages. <p>Responses could include:</p> <ul style="list-style-type: none"> • Tribunal can make an additional award if the assignment appears structured to avoid the provisions of the AWR 2010. 	
Total		25 marks
Question Number	Suggested points for responses	Max Marks
Q4(a)(i)	<p>Advise</p> <p>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> <p>Responses should include:</p> <p>Jalisa</p> <ul style="list-style-type: none"> • Identify the relevance of the Equality Act 2010, protected characteristic of sex. • Explain s19 EA 2010 indirect discrimination • Identify that the 'weightlifting' requirement may be a PCP that women find harder to meet. • Identify that the employer has the defence of the test being a proportionate means of achieving the legitimate aim defence of preventing further injury to employees. 	7

	<ul style="list-style-type: none"> • Even where an aim is legitimate, it may be indirect discrimination if the test is 'unnecessarily stringent', <u>Carter v Chief Constable of Gloucestershire and Others</u> 2017. • Credit any reasoned conclusion. <p>Responses could include:</p> <ul style="list-style-type: none"> • Any relevant case law • <u>Homer v Chief Constable of West Yorkshire Police</u> [2012] – to be proportionate, a measure has to be both an appropriate means of achieving the legitimate aim and (reasonably) necessary in order to do so in. 	
Question Number	Suggested points for responses	Max Marks
4(a)(ii)	<p>Advise 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> <p>Carter</p> <ul style="list-style-type: none"> • The Paternity and Adoption Leave Regulations (2002) allow the adoptive parent 26 weeks of Ordinary Adoption Leave, followed by 26 weeks of Additional Adoption Leave. • Statutory Adoption Leave (SAL) can be taken by one of the parents who adopt the child, not both. Carter is the sole adopter. • Carter has agreed with the adoption agency a date for the adoption, 1st March. • He has notified his employer that he wishes to take SAL on the same day he learns of the matching, thereby meeting the 7-day limit. • Carter has also confirmed the specific date of placement and the date on which he wishes his SAL to start. • Carter has made a proper application and he qualifies for the SAL. • The company does not have grounds to refuse his application for adoption leave for the reasons given. 	6

	<p>Responses could include:</p> <ul style="list-style-type: none"> • Relevant case law 	
Question Number	Suggested points for responses	Max Marks
Q4(b)	<p>Advise 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> <p>Responses should include:</p> <ul style="list-style-type: none"> • Identify the potential claim is one of Employment Rights Act 1996 automatically unfair dismissal. • This claim does not have a length of service requirement, so Indira is eligible despite working for the company for just 3 weeks. • ERA 1996 automatically unfair reasons for dismissal include whistle blowing s103A. • Indira has made a health and safety disclosure and has made it to the relevant person in an appropriate manner. • Indira has tried to sort the matter internally by informing her manager of this issue, as required. • Indira made a qualifying disclosure to the appropriate person/in the correct manner, s43B ERA 1996. • Indira has been dismissed due to making this protected disclosure, Protected disclosures Act 2014, Public Interest Disclosure Act 1998. • It is likely Indira has been automatically unfairly dismissed. • Remedies under s112 and 113 ERA 1996 are reinstatement, reengagement and financial compensation. • Compensation for protected disclosure/H&S dismissal is not subject to the statutory cap as with other form of unfair dismissal. • Award reduced by 25 % if disclosure appears motivated by malice. 	12

	<ul style="list-style-type: none"> • Any award Indira receives may be reduced if her disclosure is seen as motivated by malice due to her feeling she was not given due 'respect and attention'. <p>Responses could include:</p> <ul style="list-style-type: none"> • Financial compensation most appropriate to Indira due to breakdown of working relations • Automatically unfair dismissal S100(1)(e) employee reasonably believed to be serious and imminent danger, took or proposed to take appropriate steps to protect themselves or others. • Relevant case law 	
Total		25 marks