LEVEL 6 - UNIT 4 – EMPLOYMENT LAW
SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 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 students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

Question 1

In this essay, it will be argued that only employment protection for zero hours contract workers has increased over recent years. Other types of atypical workers such as part-time workers and fixed-term employees and agency workers have not seen an increase in employment protection during the past few years. 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.

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 substantively similar role for 12 weeks. 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 do 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 pays 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 AWR 2010 are thus useful to a certain extent but they do not provide for the employment status for 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 he or she is a man/woman. 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 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.

Fixed-term or limited term workers have contracts for a specific period of time, i.e. with a defined beginning and a defined end (Wiltshire County Council v National Association of Teachers in Further and Higher Education and Guy (1978)). Fixed-term contracts generally cannot be terminated before their expiry date unless there is gross misconduct or mutual agreement. The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ('the Regulations') protect employees on fixed-term contracts in that they should be

treated equally when compared to permanent employees, unless there is objective justification. 'Employee' is not defined in the Regulations. It is not clear whether the narrower definition in section 230 Employment Rights Act 1996 (ERA) or the wider definition in section 83(2) EA applies. Nonetheless, the Regulations provide the following protection to fixed-term employees:

- A right for a fixed-term employee not to be treated less favourably than a comparable permanent employee on the grounds that he is a fixed-term employee, unless objectively justified.
- There is an obligation on employers to advertise permanent vacancies in such a way as is reasonably likely to come to the fixed-term employee's attention.
- A fixed-term employee has a right to receive a written statement of reasons for treatment if he believes less favourable treatment has occurred.
- Provision that a fixed-term contract will be converted to a permanent contract upon the next renewal/extension if the employee has been employed on a fixed-term contract for over four years (unless the employer can demonstrate an objective justification for continued fixed-term employment).

Question 2(a)

Under the National Minimum Wage Act 1998 all workers in the UK are entitled to a statutory national minimum wage. This applies to all sectors of the economy and all companies regardless of their size. The legislation covers all workers employed under a contract. The contract does not need to be a contract of employment and does not need to be in writing; it may be an implied contract or an oral contract. The national minimum wage increases every October. The current minimum wage an hour for adults who are 25 years old and above is £7.20 (living wage); £6.70 an hour for 21-24 year olds; £5.30 for 18-20 year olds; £3.87 an hour for 16-17 year olds and £3.30 for apprentices.

Since 1 October 2013, the government will name all employers that have been issued with a Notice of Underpayment by HMRC unless there are very exceptional cases. This notice sets out the owed wages to be paid by the employer together with the penalty for not complying with minimum wage law. Any employer who fails to pay the NMW will have to;

1. Pay the unpaid wages, plus a financial penalty of 100 per cent of the total underpayment of wages (up from 50 per cent); and
2. Face a higher maximum penalty of up to £20,000 (up from the previous maximum of £5,000).

Both the National Minimum Wage Act 1998 and the penalties against employers who breach the Act aim to protect workers. When looking at minimum wage per month, the United Kingdom is currently at the highest amount in 15 years. After a drop between 2007 and 2009, it has gradually been rising. Although this is a positive development, it is still one of the lowest minimum wages in Western Europe. There is therefore room to improve workers' protection in this area.

2(b)

The UK Working Time Regulations 1998 (WT Regulations') came into force in October 1998 and are designed to implement the provisions of the Working Time Directive (1998) as amended by the WTD 2003. Under the WTD 2003, the key provisions provide the right for workers in EU member states to have paid breaks and rest of at least 11 in any 24 hours, as well as placing an upper limit (subject to some exemptions, called "opt-outs") on the number of hours a worker may work per week. This is currently 48 hours per week, however there are opt-outs provided for in the Directives and the United Kingdom has adopted these.

The Regulations govern the maximum working week and employees' entitlements to rest breaks. There are also limits imposed on night work (Regulation 6) and providing night workers with free health assessments at regular intervals (Regulation 7). The Regulations aim to protect workers' health and safety without stifling employers' need to run a business. Yet, workers can opt out of the 48 hour week and this is particularly common amongst doctors. Employers can vary the rules in the Working Time Regulations by collective agreements so they enjoy flexibility.

Workers can enforce the Regulations relating to daily and weekly rest and in-work rest breaks and compensatory rest by presenting a complaint to an employment tribunal. Enforcement of the Regulations can be found in sections 28-32. 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).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). In addition, employees who are dismissed for reasons connected with the Working Time Regulations will have a claim for automatic unfair dismissal (Reg 32). Workers are protected against detriment or discrimination connected with the Regulations (Reg 31). If the detriment constitutes a dismissal the ceiling on compensation is the same as that for unfair dismissal.

The WTD 2003 requires employees to keep records of the hours actually worked by employees who have opted out of the 48-hour limit but national legislation only requires that records of the opt-out agreement itself are kept. The WTD 2003 only defines 'working time' and 'rest time'. Member States dealt differently with the time spent on call, which is not defined in the current directive. This led to two Court of Justice rulings seeking to clarify the issue. In the SIMAP and Jaeger cases in 2000 and 2003, the Court ruled that time spent on call by health professionals had to be counted as working time. As a result of this case law, time spent on call by health professionals has to be regarded entirely as working time, and where appropriate as overtime, if they are required to be at their place of employment, even if they are resting. Currently, doctors work more than 48 hours a week in most Member States if on-call time is considered entirely as working time.

The WTD 2003 provides a minimum guarantee of:

- a maximum average working week (including overtime) of 48 hours (Article 6)
- a minimum daily rest period of 11 consecutive hours in every 24 (Article 3)
- breaks when the working day exceeds six hours (Article 4)
- a minimum weekly rest period of 24 hours plus the 11 hours daily rest period in every seven-day period (Article 5)
- night work is restricted to an average of eight hours in any 24-hour period (Article 8)

The European Court of Justice (ECJ) recently clarified its position on mobile workers' travel time. In Federacion de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security SL and another (C-266/14), the ECJ held that mobile workers who have no fixed place of work and spend time travelling from home to the first and last customer should have this time considered as working time. The Court justified this by explaining that since the

workers are at the employer's disposal for the time of the journeys, they act under their employer's instructions and cannot use that time freely to pursue their own interests.

The Regulations try to protect workers' health and safety by imposing a maximum number of working hours. Working too many hours can lead to stress in the workplace although if workers are prevented from working overtime, the economic argument applies and can lead to financial difficulties of workers, which can be equally stressful. Full-time British workers still work some of the longest hours in Europe although overall, there has been a decline in hours worked (Taylor and Emir, Employment Law). In this respect, the Regulations have been fairly effective. With the development of modern technology and the ease of communication via email after work, it is arguable whether the Regulations managed to provide a good work-life balance. In this respect, the Regulations have not been entirely effective.

Question 3

Unfair dismissal has been praised for subjecting the managerial right to dismiss workers to scrutiny against statutory criteria. This is because the common law on wrongful dismissal is not concerned with the reason for firing workers. As long as the employer provides sufficient notice to workers, the former can lawfully terminate the employment contract. Therefore, when the concept of fairness was introduced in unfair dismissal, it was welcomed. In an unfair dismissal claim, there is a prior stage where the employer must prove that he has dismissed the employee for a reason which is capable of constituting a fair dismissal, but this rarely poses a problem since the categories of potentially fair reasons are very wide. Under section 98(2) Employment Rights Act 1996 (ERA 1996), they include capability/qualifications, conduct, redundancy, illegality and 'some other substantial reason'. More importantly, the tribunal must be satisfied that the employer acted reasonably in treating the reason as sufficient to dismiss the employee. The factors which may be relevant in a claim for unfair dismissal are very broad. Even a simple dismissal for misconduct may require a consideration of a range of factors such as the nature and degree of misconduct, the employee's previous record, the procedures adopted by the employer, the employer's treatment of previous cases and the size and requirements of the business under section 98(4) ERA 1996. However, the notion of justice seems to be ignored in unfair dismissal. This is because the legislation is concerned with the fairness of a dismissal, i.e. if the employer has acted reasonably in dismissing an employee. It is not concerned with whether the employee has suffered an injustice. In the example of an alleged misconduct of an employee, the focus of the legislation is on the reasonableness of the employer's actions. As the case of British Homes Stores v Burchell (1978) demonstrates, the employment tribunal asks firstly, if the employer honestly believed that the employee has committed the misconduct in question. Secondly, that there were reasonable grounds for that belief and finally, if the dismissal was within the band of reasonable responses which was open to the employer. It is difficult to see how ignoring the injustice inflicted upon the employee whilst focusing on employer reasonableness produces a fair result.

The doctrine laid down in Polkey v A E Dayton Services Limited (1988) is important to procedural fairness. It recognised that a dismissal may be unreasonable because the employer failed to follow a fair procedure prior to making the dismissal, even though the employer had good reasons for the dismissal such as the need to make redundancies in that case. The case makes clear that although courts will not always strictly follow the ACAS Code of Practice (the Code), it is a starting point for determining procedural justice. The

question before the tribunal is not whether the employer breached the Code, but rather whether the employer's conduct fell within the range of reasonable responses for an employer in the light of the facts known at the time of the dismissal. This test allows considerable flexibility in adjusting procedural requirements to the facts of each case. Furthermore, it allows a tribunal to take the view that, although most reasonable employers would have followed the code's procedural requirements in a particular case, the failure by this employer to do so was not so unreasonable as to fall outside the range of reasonable responses test.

In unfair dismissal, employers need only to consider evidence which is available at the time of the dismissal. In W. Devis & Sons Ltd. v. Atkins (1977), the House of Lords emphasised that the relevant question is whether the employer has acted reasonably and this must be determined in the light of the circumstances as they appeared to the employer at the time of the dismissal. Evidence discovered after a dismissal cannot be used to convert an unfair dismissal into a fair one. This again illustrates the principle that fairness of the dismissal is tested in the context of the employer's position.

Some reasons for dismissal cannot be tested for reasonableness at all. These are automatically unfair reasons such as dismissal for reasons connected with pregnancy and childbirth (section 99 ERA 1996); dismissal because of a trade union membership or activities (section 103 ERA 1996); dismissal because of whistleblowing under the Public Interest Disclosure Act 1998 (section 103A ERA 1996) and dismissal for asserting statutory rights under section 104 ERA 1996. One can argue that the legislation does not seem fair on employers because once they are deemed to have dismissed unfairly for the above reasons, there is no defence. However, policy reasons play a role in determining the automatically unfair reasons, so there may be moral issues to be considered. The automatically unfair reasons under the ERA 1996 essentially provide employers with solid defences in the form of exceptions to the general position. Therefore, if an employer dismisses an employee for reasons related to pregnancy or childbirth, the employer might have done so because it would not be practicable for her to return to a suitable and appropriate job and the employee unreasonably refuses a job of the same kind with an associate employer (Maternity and Parental Leave Regulations 2007). Honeyball submits that this puts employers in enhanced positions compared to making specific defences to a tribunal based on reasonableness.

To conclude, it has been argued that although the concept of unfair dismissal does incorporate some elements of fairness, it appears that the law is more protective of employers than employees.

Question 4

The TUPE Regulations 2006 ('2006 Regulations') were brought into force to implement the Acquired Rights Directive (Directive 2001/23/EC) (2001 Directive). The purpose of the 2001 Directive and the 2006 Regulations is to protect an employee's contractual rights through the transfer. However, this protection is only available where there is a relevant transfer of an undertaking. A tribunal needs to find out whether an undertaking exists and whether that undertaking has been transferred. The 2006 Regulations do not define an undertaking. Regulation 3 however, defines what is meant by a transfer. It states the transfer of an economic entity that retains its identity and defines an economic entity as an organised grouping of resources that has the objective of pursuing an economic activity, whether or not the activity is central or ancillary (regulation 3(2)). Section 3(3) also states that the 2006 Regulations apply to

both public and private undertakings whether operating for gain or not (regulation 3(4)(a)).

There are broadly two categories of relevant transfers: business transfers (regulation 3(1)(a)) and service provision changes (regulation 3(1)(b). The two definitions are not mutually exclusive- as long as one definition is satisfied, it does not matter if the other one is not. With a service provision change, the tribunal must first identify the relevant activities (Metropolitan Resources Ltd v Churchill Dulwich Ltd (2009)) and the activities carried out by the subsequent contractor must be fundamentally the same as those carried out by the previous contractor. The tribunal must also decide whether the employee is assigned to the organised grouping of employees transferred (Enterprise Management v Connect-Up (2011)).

Regulation 4 sets out the effect of a transfer on an employee's contract. According to regulation 4(2), a transferee shall acquire 'all the rights, powers, duties and liabilities' under or in connection with the contract'. It also states that any act or omission before the transfer is complete is treated as an act or omission of the transferee. Employees are protected from a variation of terms in his/her employment contract (regulation 4(4) and (5)). Varying contractual terms is void unless the principal reason for the change is an economic, technical or organisational (ETO) reason entailing changes in the workforce. In London University v Sackur (2006), an employer dismissed staff and offered to re-engage them on new terms after a transfer. The EAT upheld a tribunal's finding of fact that a transfer of an undertaking was the sole reason for the dismissal of the employees, even though the dismissals occurred two years after the transfer.

Under 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 v Central West London Buses (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. It also said that the dismissals were not due to an ETO reason and they were automatically unfair.

Although 2006 Regulations seem to provide a range of legal rights to employees, there is one major area where employers' interests prevail. Under regulation 4(7), an employee has the right to object to a transfer but the objection terminates his/her contract and there will be no dismissal. This means that such an employee cannot claim unfair or constructive dismissal unless there has been a change made in the level of terms and conditions after the transfer (i.e. TUPE

is not followed). Courts still have wide discretion over whether there has been a transfer of an economic entity and the TUPE Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 do not seem to assist. Under TUPE Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013, the main changes are as follows:

- they allow renegotiation of terms agreed from collective agreements one year after transfer, provided any changes are no less favourable to employees (Alemo-Herron v Parkwood Leisure Ltd (2013))
- the location of a workforce can be within the scope of an ETO reason entailing changes in the workforce, thus preventing genuine place of work redundancies from being automatically unfair
- clarify that for there to be a TUPE service provision change, the service provision must be "fundamentally or essentially the same" as before the transfer
- allowing microbusinesses to inform and consult directly with employees

The changes brought by the TUPE Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 seem to be more friendly towards employers. To conclude, 2006 Regulations and the TUPE Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013 do protect employees' interests and rights to some extent but certainly do not offer complete protection.

SECTION B

Question 1(a)

Zoe can bring a claim for discrimination arising from disability under section 15 Equality Act 2010 (EA). Under the EA, a person has a disability if they have a physical or mental impairment and the impairment has a substantial and long-term adverse effect on their ability to perform normal day-to-day activities (section 6 EA). For the purposes of the EA, these words have the following meanings:

- 'substantial' means more than minor or trivial
- 'long-term' means that the effect of the impairment has lasted or is likely to last for at least twelve months (there are special rules covering recurring or fluctuating conditions, terminal illnesses and past disabilities)
- 'normal day-to-day activities' are things that people do on a regular or daily basis such as shopping, reading, getting dressed…etc.

Partial sightedness would fall under the definition of disability under section 6 EA. Under section 15 EA, no requirement of a comparator is needed. The employer must know of the disability and no defence is available under section 15(2) EA. The employer may make out a justification argument under section 15(1)(b) EA where their treatment of the employee is a 'proportionate means of achieving a legitimate aim'. Yvonne is aware of Zoe's disability but by refusing to allow Zoe an assistance dog at work, it can be argued that Flintshire University is liable for discrimination under section 15.

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 £6,600

Middle band (which is used for serious cases that do not merit an award in the highest band) - £6,601 to £19,800

Top band (for the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment) - £19,801 to £33,000. (The guidelines suggest that only in the most exceptional case should an award of compensation for injury to feelings exceed £33,000). In this instance, it appears that Flintshire University has not committed any previous discriminatory acts towards Yvonne, so the award is likely to fall in the lower band.

1(b)

Xi-Ying can bring an equal pay claim. Under section 66 EA, an equality clause will be implied into an employment contract. This means that women are entitled not to be treated less favourably than men in the same employment. Section 65 EA deals with the definition of 'equal work'. There are three types of equal work: like work, work rated as equivalent to the comparator's work and work of equal value. Xi-Ying is arguing that her work is of equal value to a man doing another type of job. Under section 79 EA, she will need an actual comparator of the opposite sex (i.e. a man) in the same employment at the same establishment or at a different establishment in Great Britain where common terms and conditions are used. Flintshire University however, may try to argue two points. First, although the gardeners earn more money than Xi-Ying, she receives non-cash benefits such as free meals and transport. The cases of Hayward v Cammell Laird Shipbuilders (No 2) (1988) and St Helens and Knowsley NHS Trust v Brownbill (2011) show that courts and tribunals should not adopt a whole pay package approach. Rather, they should compare term by term. Therefore, the fact that Xi-Ying receives extra non-cash benefits does not prevent her cash pay being equalised to that of the gardeners. Flintshire University may also argue that the difference in pay between Xi-Ying and the gardeners is due to a material factor which is relevant and significant and which does not directly or indirectly discriminate against the worker because of her sex (section 69 EA). Possible defences include different responsibilities (Capper Pass v Allan (1980)); location (NAAFI v Varley (1976)) and economic necessity (Rainey v Greater Glasgow HB (1987)). If Xi-Ying is successful in the equal pay claim, she is entitled to the difference in remuneration going back up to six years for breach of the equality clause or a declaration of her rights. Interest on back pay is included but she cannot claim injury to feelings damages.

Question 2

The starting point for a redundancy claim is the qualification criteria:

(i) Employees with at least 2 years' continuous employment.
(ii) Who have not refused suitable alternative employment.
(iii) Have made a claim within 3 months less one day of the dismissal due to redundancy.

Walter has two years' continuous service and the issue is whether he has been dismissed for redundancy. The onus is on the employee claimant to show that a dismissal has occurred (Morton Sundour Fabrics v Shaw (1966)). Under section 163(2) Employment Rights Act 1996, (ERA) there is a statutory presumption that a dismissal is for redundancy. The employer bears the burden of proof to show that the dismissal was for some other reason under the admissible reason test of section 98 ERA.

Section 139(1)(a)(ii) ERA is potentially applicable. Section 139(1)(a)(ii) applies as Walter worked in the Sheffield factory, where there is a lack of work This means that Walter appears to have been made redundant but it is important to see if he has a mobility clause in this contract. On the facts of this scenario, there does not appear to be an express mobility clause. There also seems to be no evidence to imply such a clause, seeing that Walter has always worked in the Sheffield factory (O'Brien v Associated Fire Alarms Limited (1969). Given that such a clause does not appear to be in Walter's contract, the employer cannot argue that Walter can be dismissed instantly for refusing to move i.e he has not repudiated his own contract. In this case, Walter was told to move when such a move is not part of his contractual terms. Therefore, the employer cannot dismiss Walter and his dismissal is unlawful as a repudiatory breach has been committed by the employer. There is no mention of a contractual notice period in Walter's contract but under section 86 ERA, he is entitled to three weeks' notice and a redundancy payment and benefits.

Umako has been downgraded as part of a reorganisation. She has suffered a loss in pay and status. The new position also includes compulsory reasonable overtime. Umako has resigned. She can claim a constructive dismissal claim if the employer is in breach of the contract under section 136(1) ERA (Western Excavating (ECC) Ltd v Sharp (1978). It appears in this scenario that the employer has unilaterally changed the terms of Umako's contract by downgrading her and lowering her pay. The changes appear to be permanent. As a result of the changes, her resignation is due to a repudiatory breach on the part of the employer, entitling her to resign and claim constructive dismissal.

In order for her to claim redundancy, Umako must show that her dismissal falls under section 139 ERA. If Umako's job has changed and overall, the employer's requirements for that type of work have reduced under section 139(1)(b)(i) ERA, then there will be a redundancy even if the employer still employs the same number of people doing other work (Murphy v Epsom College (1985)). If however, Umako's job has remained the same and the reorganisation is for cost-cutting reasons, then the requirements of the employer for that particular work have not decreased and a redundancy has not happened. Umako was downgraded, she is earning £500 less per month and suffers a loss of status. The regrading was on different terms from her original contract and included a provision in relation to compulsory overtime. In this case, the compulsory overtime seems to suggest that there is no reduction of work. Therefore, there does not appear to be a redundancy. If there is a redundancy, the employer should offer Umako suitable alternative employment. The alternative work must

be objectively suitable and the employee only loses his rights if he unreasonably refuses the employer's offer. Tribunals will take into account various factors before deciding whether the work is suitable. In Taylor v Kent County Council (1969), the alternative role of a supply teacher was held not to be suitable for an ex-headmaster. Subjective factors will be taken into account. If an employee unreasonably refuses an offer of alternative work, the employee loses his right to redundancy pay (s141(2)-(4) ERA). To conclude, it seems that the requirements of the employer do not appear to have diminished and therefore no redundancy has occurred.

Question 3

Clause 17.1.1 is a non-compete clause. Clause 17.1.2 is a non-dealing clause whilst clause 17.1.3 is a non-soliciting clause. 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 sub-clause is separate and individual. The courts can 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 (Claygate v Batchelor (1602)). In order for a restrictive covenant to be enforceable, Edekar 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 Tim 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 the geographical area it will cover. There is no general rule as to what amounts to a valid restraint; each case needs to be considered on its own facts. A good example is Fellowes v Fisher (1976). In Fellowes, there was 5 year restraint on conveyancing clerk and this was held to be unreasonable. It was held that the clerk was relatively unknown in the densely populated area of Walthamstow, London.

The scope of the restraint will be based on such features as what the enterprise does, the seniority of the employee in the business, the specific 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, Tim is an Advertising Manager and has potential to harm the business viability of Edekar Limited by engaging in a rival business. This can be done via setting up a competing advertising business; soliciting or dealing with clients of Edekar Limited. Clause 17.1.1 is rather wide because it covers a range of roles which Tim can engage in. This includes 'any advertising business'; which seems too broad. Clauses 17.1.2 and 17.1.3 seem reasonable in relation to the scope. 'Any dealings on behalf of the company' under clause 17.1.2 is not unusual. All three clauses are limited to nine months but there is no restriction on geography. Nine months would seem reasonable. Advertising businesses can easily operate online, without a specific location. Therefore, the fact that there is no restriction on geography in these three clauses does not appear to be unreasonable.

It is possible to put Tom on garden leave and this is more likely to be enforceable than a simple restriction precluding the employee from joining a competitor for a period post-termination. This is because it ensures that the employee does not suffer financially during the period of garden leave (Eurobrokers Ltd v Rabey (1995)).

With Sangeeta, two implied terms of the contract should be discussed. These are both common law implied terms. An employer does not have a duty to provide work to his employees as a general rule (Collier v Sunday Referee Publishing Co (1940)). There are however, some exceptions to this rule. First, where failure to provide work can lead to a loss of reputation or publicity. Secondly, where failure to provide work leads to a reduction in the employee's actual or potential earnings. Finally, where reasonable work is required to maintain or develop skills. In this case, Sangeeta is a trainee advertising sales assistant. Without work, she is unable to develop and obtain relevant experience. Therefore, the employer has breached its implied duty of providing work to Sangeeta.

There is no implied term that an employer must provide a reference. However, if a reference is provided, it must be given with reasonable care (Spring v Guardian Assurance Plc (1994)). An employee may be able to obtain a reference if they can show that the only reason one has not been provided is due to earlier discrimination or trade union membership. In such circumstances Coote v Granada Hospitality Ltd (1999) states that the individual could apply to the Tribunal.

Question 4(a)

As Rebecca has been an employee at Cafe Allegro for two years, under The Maternity and Parental Leave etc. Regulations 1999 (as amended in 2008) ('the Regulations'), she is entitled to 26 weeks ordinary maternity leave and 26 weeks additional maternity leave under the Regulations as long as she fulfils the criteria set out in section 4 of the Regulations. The criteria are as follows:

(i) That no later than the end of the fifteenth week before her expected week of childbirth, or, if that is not reasonably practicable, as soon as is reasonably practicable, she notifies her employer of her pregnancy, the expected week of childbirth and the date on which she intends her ordinary maternity leave period to start and
(ii) If requested by her employer, to provide a certificate from a registered medical practitioner or a registered midwife confirming she is pregnant.

During maternity leave, Rebecca and Paul can agree to have up to 10 'keep in touch' days. Rebecca has the right to return to her original job or suitable alternative after taking ordinary maternity leave. In additional maternity leave, Rebecca only has the right to return to the same job if reasonably practicable.

In relation to maternity pay, statutory maternity pay (SMP) is payable for 39 weeks; for the first six weeks it is paid at 90 per cent of the average weekly earnings. The following 33 weeks will be paid at the SMP rate or 90 per cent of the average weekly earnings whichever is the lower. The SMP rate from April 2015 is £139.58 per week.

If Rebecca fulfils the above criteria and Paul refuses maternity leave or pay, she can claim under section 48 Employment Rights Act 1996 (ERA) that she has suffered a detriment in contravention of section 47C ERA. Her remedies will be a declaration and/or compensation. No period of continuous employment is required to claim under this provision.

Rebecca is not entitled to the right to work flexibly but will have the right to request flexible working. Rebecca is a qualifying parent since she has 26 weeks' service. Employers must consider any reasonable request seriously but they can refuse the request on certain grounds set out in section 80G(1)(b) ERA such as

additional costs, detrimental effect on the business, inability to recruit additional staff...etc. The right to request flexible working applies to carers of adults and parents of children under 16 (or disabled children of under 18). Rebecca will be a mother of a baby and so qualifies for the right to request flexible working. If Paul refuses the request for flexible working, Rebecca may have a claim for indirect sex discrimination (section 80H ERA).

4(b)

All employers have an implied duty of care to all their employees. This is established through the law of tort but also now with statutory protection for employees through the health and safety legislation such as the Health and Safety at Work Act 1974. There is a common law duty to provide safe plant, a safe system of work and safe colleagues (Wilsons & Clyde Coal Co Ltd v English (1937)). Every employee has a duty towards their colleagues as well as themselves. Neil can bring a claim for breach of the implied term of duty of care. Cafe Allegro owes him a duty of care. They have breached it by having loose wires in the cafe and Neil has suffered damages in the form of a knee injury and lost football match fees.

Additionally, Neil can bring a claim for unlawful deduction of earnings. The deduction for the damaged cups and saucers can only be lawful if the circumstances laid down in section 13(1) Employment Rights Act 1996 ("ERA") are complied with. These include statutory deductions such as National Insurance contributions, tax, attachment of earning orders etc. Express authorisation from the employee is possible in the form of writing or where it is permitted under the employment contract. If his employment contract permits such a deduction, then the deduction is lawful.

However, it is not enough for the employer to show only that the deduction has been authorised in the manner in which the ERA allows. It must also be shown that the deductions were justified in fact (Fairfield Ltd v Skinner (1983)). In Fairfield, the employer argued that it was justified in deducting wages for alleged damage to a van and for telephone calls without substantiating the allegations. The Employment Appeal Tribunal held that the deductions were not lawful in this case. Cafe Allegro must be able to provide evidence to support the deduction and see if Neil's contract expressly allows for the deduction. Neil can bring a complaint to the Employment Tribunal within three months less one day of the deduction. The Employment Tribunal can order repayment and if it considers it appropriate in the circumstances, award compensation for any financial loss sustained.