LEVEL 6 - UNIT 4 – EMPLOYMENT LAW
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and 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

Family friendly rights have been introduced in the UK in stages. First, there is the older group of rights relating to women's rights regarding pregnancy, birth and maternity. The Employment Protection Act 1975 incorporated the Pregnant Workers' Directive. This Directive gave women protection in relation to pregnancy, birth, maternity, provision for statutory maternity pay and protection from discrimination at the workplace due to pregnancy or maternity. The second group of rights concern paternity, parental, adoption and other family friendly rights such as the right to request flexible working and taking time off to care for dependents. These rights were introduced by the Employment Relations Act 1999 and the Employment Act 2002.

The right for a father to take paternity leave is enshrined in the Employment Act 2002 and Paternity and Adoption Leave Regulations 2002. Paternity leave is available to employees who:

- have or expect to have responsibility for the child's upbringing
- are the biological father of the child or the mother's husband or partner (including same sex relationships)
- have worked continuously for their employer for 26 weeks ending with the 15th week before the baby is due or the end of the week in which the child's adopter is notified of being matched with the child
- give the correct notice.

Employees should tell their employer as soon as possible that they wish to take paternity leave, but must do so no later than the end of the 15th week before the expected week of childbirth. Those who are eligible can choose to take either one week or two consecutive weeks' paid paternity leave. Employees may be entitled to Statutory Paternity Pay which from April 2017 is £140.98 per week or

90 per cent of their average weekly earnings, if that is less. Employers may however, pay more and this may form part of the terms and conditions of employment.

Adoption leave was introduced as part of the same legislation as paternity leave. An employee who is the adoptive parent of a child newly placed for adoption can apply for adoption leave. To qualify for adoption leave, an employee must have at least 26 weeks' continuous service by the week in which he or she is notified of being matched with a child for adoption. Adoption leave is similar to maternity leave in that an eligible employee can take up to 52 weeks adoption leave. This is made up of 26 weeks Ordinary Adoption Leave and 26 weeks Additional Adoption Leave. Where a couple adopts a child, only one of them is entitled to take adoption leave. Payments, notification procedures, contractual entitlements and keeping in touch days are similar to maternity and paternity leave. Overall, the scope of the adoption leave is as broad as maternity and paternity leave.

Since June 2014, every employee has the statutory right to request flexible working after 26 weeks' employment service under the Children and Families Act 2014. Other relevant pieces of legislation in relation to flexible working are the Employment Rights Act 1996 and the Flexible Working Regulations 2002. Requests should be in writing stating the date of the request and whether any previous application has been made and the date of that application. Other requirements include the following:

- Requests and appeals must be considered and decided upon within three months of the receipt of the request
- Employers must have a sound business reason under section 80G of the Employment Rights Act 1996 for rejecting any request
- Employees can only make one request in any 12 month period

Under sections 57A and 57B of the Employment Relations Act 1999 give employees time off to deal with an emergency involving a dependant. Employees are allowed a reasonable amount of time off to deal with the emergency, but there is no set amount of time as it depends on the situation.

The most recent introduction of family friendly rights were in 2015. This enables mothers, fathers, mothers' partners and adopters to share the mother's 50 weeks' maternity leave between them in order to look after their children. In this way, both the baby's parents (or the husband or partner of the mother) can take leave simultaneously in a one-week period or multiple periods of a week. Shared parental leave provisions are found in the Shared Parental Leave Regulations, the Statutory Shared Parental Pay (General) Regulations 2014 and the Maternity and Adoption Leave (Curtailment of Statutory Rights to Leave) Regulations 2014, the parental leave elements of the Maternity and Parental Leave Regulations 1999 and the paternity leave provisions of the Paternity and Adoption Leave Regulations 2002. These regulations are designed to strike a more equitable division between the sexes for family and care responsibilities.

Shared parental leave is a form of 'leave transfer' from the mother to the father/partner and replaces additional paternity leave. Shared Parental Leave is designed to give parents more flexibility in how to share the care of their child in the first year following birth or adoption. Parents will be able to share a period of leave; can decide to be off work at the same time and/or take it in turns to have periods of leave to look after the child. The qualification criteria are 'highly complex' (Smith and Woods 2015). To qualify, the mother or adopter must be entitled to some form of maternity or adoption entitlement, have given notice to curtail it and must share the main responsibility for caring for the child with the

named partner. For a parent to be eligible to take Shared Parental Leave they must be an employee and they must pass the continuity of employment test. In turn, the other parent in the family must meet the employment and earnings test. One of the difficulties with additional paternity leave was that it could not be taken simultaneously by the mother and father of the child. Shared parental leave only works if the mother consents to the transfer of leave. Therefore, mothers remain the 'gatekeepers of fathers' participation in care under the shared parental leave framework (Cabrelli 2017). Smith and Woods (2015) criticise the shared parental leave for having a 'bewildering array of new notice requirements'.

Whilst there is an increase in family friendly rights for fathers, the statutory framework for shared parental leave does little, if any, to change the traditional 'male breadwinner/female carer' role. Despite a father's right to request for flexible working, the culture of long working hours in male dominated professions prevent some fathers to take leave. Paid leave such as shared parental leave is paid at a rate that most people cannot live on and its use is controlled by the mother. As such, fathers still face some work-life challenges despite some improvement in employment protection.

Question 2

Parties to an employment relationship will often but not always, put the terms and conditions that govern the relationship into writing. However, there is no legal requirement for the employment contract itself to be in writing. It can be written, oral or a combination of both. Where there is no written employment contract, the law requires employers to provide a written statement of terms and conditions. Under section 1 of the Employment Rights Act 1996, express terms of an employment contract set out fundamental terms and conditions regarding pay, holidays, date of employment, place of work; job title, etc. All employees are entitled to receive a section 1 statement within two months of the employment start dates.

The parties may however not discuss, still less reduce to writing, all the terms of the contract. When the express terms of the contract do not provide an explicit answer, implied terms can fill in the gaps in employment law. Implied terms may be relevant in a variety of situations.

Implied terms at common law are terms so obvious that the parties to a contract did not see the need to state them expressly. Courts and tribunals are occasionally prepared to imply a term into the contract in cases where the parties did not expressly insert a term to meet a particular contingency. In the case of Mears v Safecar Security Limited (1982), the Court of Appeal held that the correct approach was to consider all the facts and circumstances before implying a term into the contact.

The original justification of implied terms was to give business efficacy to the contract but there is now a much wider approach, implying terms which are a necessary incident of a definable category of contractual relationship. However, it is not possible to imply terms which are too vague or unpredictable.

In the event of a conflict between express and implied terms, the case of Johnstone v Bloomsbury Health Authority (1991) shows that the employer's implied duty of care not to injure its employees' health can prevail over the employee's express contractual term of working more than 48 hours.

The employer has an implied duty to provide wages to the employee. In Beveridge v KLM UK Ltd (2000), the issue was whether an employee is contractually entitled to be paid following a period of sick leave. The Employment Appeal Tribunal held that an employee had an implied contractual right to payment of wages when presenting him or herself for work unless the contract contained an express term excluding this in specified circumstances.

The implied term of mutual trust and confidence recognises the essential human nature of the employment relationship. There must be mutual respect between employer and employee requiring that the employer directly or through management does not victimise, harass, verbally abuse or introduce unreasonably any changes to the employee's terms and conditions. In Scally v Southern Health and Social Services Board (1991), although the duty of mutual trust and confidence was not specifically mentioned, the employer was held to be in breach of the implied term for not telling employees (doctors) that they could purchase 'added years' of pensionable service.

In some areas the law has developed in such a way that issues which could be treated as governed by implied terms are dealt with as issues arising under a duty imposed on an employer in tort. So, all employers have a 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.

An employer's duty of care can extend to physical and mental health. The case of Walker v Northumberland CC (1995) shows how this duty of care needs to be adhered to where the employer is aware that the employee has been suffering from work-related stress. In Barber v Somerset County Council (2004), the House of Lords confirmed that an employer can be liable for work-induced mental illness, but only where this was reasonably foreseeable, which normally required actual knowledge, not only of the stressful working conditions, but also that the employee was suffering from stress.

There is normally 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)). In the absence of an express duty to provide a reference, the only way an employee will be able to ensure that she receives a reference is if the reason why one has not been provided is due to discrimination or trade union membership. In such circumstances Coote v Granada Hospitality Ltd (1999) states that the individual could apply to the Employment Tribunal.

Implied terms may impose obligations on employees. An employee has an implied duty to obey reasonable orders. Reasonable here relates to what an employee is being asked to do given his existing terms and conditions. If he was asked to do something totally outside of his normal scope of employment, it is more likely to be seen as being unreasonable and therefore refusal will not amount to a breach. However, failure by an employee to obey a lawful order which relates to an essential part of his/her job, will amount to a serious breach justifying instant (summary) dismissal. In Pepper v Webb (1969), the dismissal was justified as the employee refused to obey a reasonable and lawful order. By contrast, in Morrish v Henleys (1973), an employee refused to obey an illegal order so he was held to be wrongfully dismissed.

An employee must provide personal and faithful service. Good faith and fidelity are also very important to maintain a healthy work relationship. In Neary and Neary v Dean of Westminster (1999), the employees were dismissed for using their positions in the organisation to make secret profits. This conduct was held to undermine fatally the relationship of trust between the employer and employees.

An employee is expected to demonstrate a degree of care and skill that is commensurate with his/her position and training. This will cover damage to equipment as well as injury to others such as fellow workers and members of the public. Although the employer would be likely to be held vicariously liable for acts of negligence by employees, this term would allow the employer to take disciplinary action and possibly dismiss the offending employee.

Terms may also be implied by statute. If there is no express term as to the notice period, section 86 Employment Rights Act 1996 provides statutory notice period to employees. Implied terms of contract therefore play an important role in regulating a healthy and beneficial relationship between employers and employees. Express terms of employment contracts are certainly not the only source of terms.

Question 3(a)

Wrongful dismissal is a dismissal in breach of contract. The principle is set out in contract law, which means that the damages claimed are designed to put the innocent party in the position he would have been in had the contract been performed. Some contracts may specify a precise sum (or a precise means of calculating it) that must be paid to end the contract lawfully, either as an alternative to giving notice or as the only means of termination. Other contracts state a specific sum that is to be paid in compensation in the event of dismissal in breach of contract. If the employment contract is silent on the notice period, section 86 Employment Rights Act 1996 provides statutory notice periods. However, there is a maximum of 12 weeks' notice provided to employees under section 86.

(b)

Wrongfully dismissed employees are entitled to compensation for non-cash benefits as well as money remuneration. Such benefits (e.g. insurance, cars, travel, share options) are more difficult to value but in general, the proper measure is the cost to the employee of replacing the lost benefit for the relevant period. Loss of pension rights if the employee/worker was entitled to a pension are also possible. In Silvey v Pendragon Plc (2001), the Court of Appeal held that an employee who was wrongfully dismissed 12 days short of his 55th birthday was entitled to claim damages for loss of significant pension rights that would have accrued when he reached 55 years old. Under the employee's contract and/or regulation 14 of the Working Time Regulations 1998, the employee/worker will be entitled to payment in lieu of any holiday to which he was entitled but had not yet taken, subject to a maximum of unclaimed holiday pay of up to two years.

If an employer fails to follow a contractual disciplinary procedure, the employee is generally only entitled to receive compensation for the wages he would have received during the course of the disciplinary procedure (Gunton v London Borough of Richmond (2000)) plus any contractual notice. This remains the case even if the employee is able to show that the disciplinary process, if followed, would have meant that the employee was not dismissed. This is because at

common law, employers are entitled to dismiss on notice without proper cause. The only remedy in this instance is to bring an unfair dismissal claim. A majority of the Supreme Court held in Edwards v Chesterfield Royal Hospital NHS Foundation Trust (2011) that breach of contract claims for an alleged failure to follow an express disciplinary process could not proceed. This is because the claims for financial loss caused by damaged to reputation were inextricably linked to the dismissal process. Unfair dismissal was therefore held to be the appropriate claim. One problem arising from this case is that it was common ground between the parties, and accepted by a majority of the Supreme Court, that an employee may obtain an injunction to prevent or restrain a breach of a contractual disciplinary procedure. The primary remedy for breach of contract is damages. Injunctions are discretionary and the Court's suggestion for an injunction sits somewhat uncomfortably with the established rule of damages. Secondly, the Supreme Court was rather conservative and did not permit 'stigma damages' suffered by Edwards.

This is in contrast to the decision of Malik v BCCI; Mahmud v BCCI (1997). Malik was decided in circumstances where the employees claimed that they had been tainted on the job market by association with BCCI, a corrupt and fraudulent bank. However, when the cases went to trial, none of the employees was found to have suffered any 'stigma' on the job market. In Edwards, it can be argued that Edwards suffered stigma damages due to a breach of implied trust and confidence. However, the loss arose from psychiatric injury caused by suspension. If the suspension had caused subsequent "stigma" damages may have been recoverable under that head too.

An employee cannot claim damages for breach of contract in respect of a loss of opportunity to bring an unfair dismissal claim. The Court of Appeal held in Harper v Virgin Net Limited (2004) that an employee dismissed in breach of contract with less than one year's service (today the relevant period would be two years) cannot claim damages for wrongful dismissal on the basis that she lost the chance of recovering unfair dismissal compensation that she would have received if she had been given her contractual notice of termination. Furthermore, losses claimed must not be too remote. Under Hadley v Baxendale (1854), the loss must either arise naturally from the breach or as may reasonably be supposed to have been in the contemplation of both the parties at the time the contract was made. If someone is wrongfully dismissed, they may claim compensation for all financial and other benefits that would have been received had they been dismissed in compliance with the contract (i.e. had they remained employed until the end of their notice period, or until the end of the contract's fixed term).

Any wrongfully dismissed employee is under a duty to mitigate his loss and give credit for sums earned during the notice period or during the remainder of the contract's fixed term. If they fail to comply with this duty, the court will consider that their losses arise from that failure rather than the original contractual breach, and reduce the damages recoverable accordingly.

Question 4(a)

In October 2010, the Equality Act 2010 (EA 2010) consolidated over 100 pieces of legislation on anti-discrimination into one piece of legislation. Indirect discrimination is defined in section 19 of the EA 2010. It occurs when a provision, criterion or practice applies in the same way to everybody but has an effect which particularly disadvantages, for example, disabled people. Indirect discrimination may be justified if it can be shown to be a proportionate means of achieving a legitimate aim. Unlike discrimination arising from disability under section 15 EA 2010, there is no requirement in section 19 that an employer

needs to know about an employee's disability. Indirect discrimination may cause difficulties for a disabled person who has to show a group disadvantage under section 19 EA 2010. In Russell v College of North West London (2013), the EAT pointed out that to establish a claim it was necessary to show that a provision, criterion or practice caused a particular disadvantage to employees who shared the protected characteristic of the claimant. This is because section 6(3)(b) EA 2010 makes it clear that the disadvantage has to apply to people who share the same disability rather than to disabled people as a whole.

Under sections 20-22 EA 2010, an employer has a duty to make reasonable adjustments if an employee is disabled and is placed at a substantial disadvantage in comparison with non-disabled people. There is no defence available under this claim. Once a substantial disadvantage is identified when compared to a non-disabled person, the onus is on employers to show that they have made reasonable adjustments. Employers need to take proper medical advice and consult with the employee before making decisions about reasonable adjustments (Southampton City College v Randall (2006)). The duty to make reasonable adjustments continues throughout the employment on an ongoing basis. This duty arises only if employers have actual or constructive knowledge of the claimant's disability (DWP v Alan (2009).

There are a number of crucial differences between these two concepts, despite the fact that both are designed to achieve forms of substantive equality. First, the duty to make reasonable adjustments requires evidence of the disabled claimant suffering a 'substantial disadvantage', whereas in an indirect discrimination claim, the claimant need only establish a 'particular disadvantage', which is a lower hurdle to negotiate. Secondly, with indirect discrimination, the employer has a proportionality defence, whereas this is not available in the context of the duty to make reasonable adjustments. Another difference between the two claims is that the duty to make reasonable adjustments involves the application of preferential treatment for disabled employees, i.e. more favourable treatment than the non-disabled group. This can be contrasted with an indirect disability discrimination claim, which entails the achievement of an equality of results or outcome where an ostensibly neutral provision, criterion or practice is applied equally by the employer to all employees and workers. Finally, there is no need for a disabled claimant to show group disadvantage in the case of the duty to make reasonable adjustments, whereas this is an inherent part of satisfying the test of indirect disability discrimination.

(b)

'Discrimination arising from disability' is found under section 15 EA 2010. The explanatory notes of section 15 state that this section is aimed at 're-establishing an appropriate balance between enabling a disabled person to make out a case of experiencing a detriment which arises from his or her disability, and providing an opportunity for an employer or other person to defend the treatment'. Under s15 EA 2010, no requirement of a comparator is needed. The employer must know of the disability and no defence is available under s15(2) EA 2010. Although the burden is on claimants to establish causation in a section 15 claim, the threshold is low. It is sufficient to show that the unfavourable treatment has been caused by an outcome or consequence of the disability and the employer's motivation is irrelevant. However, employers may make out a justification argument under s15(1)(b) EA 2010 where their treatment of the employee is a 'proportionate means of achieving a legitimate aim'.

When the disability concerns mental illness rather than a physical one, it is sometimes difficult for employers to balance between taking potentially

discriminatory action against an employee, with protecting a legitimate need (maintaining appropriate standards and safeguarding employees).

In Burdett v Aviva Employment Services Ltd (2014), the claimant suffered from schizophrenia and had medication problems. He committed assaults at work and was dismissed. Maintaining appropriate standards of conduct in the workplace is a legitimate aim. However, the Employment Appeals Tribunal said that there should have been a critical evaluation of the justification for the action. It concluded that Aviva should have considered other means available in order to achieve its legitimate need, for example requiring Mr Burdett to work from home. This case serves as a reminder that employers should always consider whether any potentially discriminatory treatment can be objectively justified as a means to achieve a legitimate aim.

When assessing proportionality, the role of the tribunal is not the same as it is when considering reasonableness in an unfair dismissal case. The tribunal is not confined to asking whether the decision was within the range of reasonable responses that an employer might have in the circumstances. It can determine for itself whether the conduct in question was proportionate (Hardy and Hansons Plc v Lax (2005)). Although the tribunal can decide for itself whether the respondent's conduct was justified, it cannot ignore the reasons that the respondent gives for its treatment of the claimant. The tribunal must take into account the business reasons and concerns put forward by the respondent. This seems to indicate a fair balance between employers and employees.

Finally, employers should take care when providing references to disabled employees. In Pnaiser v NHS England and Coventry City Council (2016), a negative verbal reference, which resulted in a job offer being withdrawn, was considered to be discrimination arising from disability. A reference was agreed as part of the settlement agreement. However, the manager in this case volunteered information about Ms Pnaiser's sickness absence and her condition. The Tribunal concluded this could lead to a negative assumption as to Ms Pnaiser's capability. The unfavourable oral reference was given partly in consequence of the employee's sickness absence which arose from disability. This was held to be a breach of Section 15 of the EA 2010. To conclude, section 15 EA 2010 generally appears to provide a fair balance between employers and claimants.

SECTION B

Question 1(a)

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

Courts have over the years developed several tests to determine the status of whether someone is an employee or worker. The original test used by the courts to determine if the relationship was one of employer-employee was the 'control test'. As employees became more skilled however, it became apparent that the control test, as a single test to determine whether the individual was an employee, was inadequate. In the 1960s, the courts adopted a multiple test to determine whether the employment status of an individual. In Ready Mixed

Concrete (South East) Limited v MPNI (1968), McKenna J laid down this test. One must ask three questions:

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

When using the multiple test the question asked is, looking at all the factors, some of which may point to self-employment status and others to a finding of employment, does the evidence overall point to the person being a worker? In Colin's case, the employment contract provided that electricians had the use of a van provided by EEL (and marked with the EEL logo), for which a monthly hire charge was payable. Colin was also required to carry an EEL identity card and wear overalls issued by EEL. EEL also provided him with a mobile phone. These factors point towards the indication that Colin is a worker.

However, the manual provided that electricians worked on a self-employed basis. There is no mutuality of obligation either since EEL had no obligation to provide Colin with work on any particular day, and if there was no work for him, he was not paid. While working for EEL, Colin could reject any particular job, provided he had adequate reasons. These factors point to a self-employed status. However, the employer has some control over him. Colin had to wear a company uniform and carry a company staff card. Colin was not an employee for a number of reasons including the fact that he personally bore a substantial financial risk. However, whilst he lacked employee status he would probably be a worker on the authority of Pimlico Plumbers Ltd v Smith (2017). This case highlights a business model under which plumbers are intended to appear to clients of the business as working for the business. At the same time however, the business itself seeks to maintain that, as between itself and its plumbers, there is a legal relationship of customer and independent contractor rather than employer and employee or worker.

(b)

Assuming that Colin is held to be a worker, he is entitled to bring claims for unlawful deduction of earnings and a potential breach of the Working Time Regulations 1998. The deduction for the damaged items 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. EEL must be able to provide evidence to support the deduction and see if Colin's contract expressly allows for the deduction. Colin 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.

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

Question 2

Denise can bring claims for breach of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTW Regs 2000); indirect sex discrimination; unfair dismissal and redundancy payment.

- Breach of PTW Regs 2000

As a part-time worker, Denise is protected by the PTW Regs 2000 from less favourable treatment at work compared to a full-time worker (Matthews v Kent and Medway Towns Fire Authority (2006)). Denise would need to find an actual comparator who is a full-time worker (Carl v University of Sheffield (2008)). Reneging on the agreement that Denise could leave work at 5pm would amount to less favourable treatment of which her part-time status was the predominant and effective cause. Regulation 4 of the PTW Regs 2000 precludes a comparison with a working arrangement which is more than 12 months old. However, a woman who takes 12 months' maternity leave and then takes annual leave before returning to work in a newly created part-time role can still claim less favourable treatment on the basis of a comparison between her new part-time role and her previous full-time one. This is because annual leave does not count as a period of absence.

The PTW Regs 2000 provide that a part-time worker may present a complaint to an employment tribunal if she thinks that the employer has treated her less favourably than a comparable full-time worker on the grounds that she is a part-time worker and that the less favourable treatment is not justified on objective grounds. Applying the law to the facts, it seems difficult for the employer to justify the cessation of working flexibly here. Any claim must be made within three months less one day of the dismissal.

- Indirect sex discrimination

Denise can also bring an indirect sex discrimination claim. Section 19 Equality Act 2010 (EA 2010) applies here since there may be indirect discrimination against Denise in respect to sex, which is a protected characteristic (section 11 EA 2010). The unlawful act is the fact that Denise was made redundant because she did not apply for the engineer role, which involves working after 5pm. Indirect discrimination occurs where the effect of a provision, criterion or practice (PCP) imposed by an employer has an adverse impact disproportionally on one group or other. Denise would be placed at a disadvantage by the twofold PCP of having to undertake the work after 5pm and doing so at the workplace rather than at home. This disadvantage was more likely to be suffered by women, given

they as a group predominantly have a requirement to exercise childcare functions and collect children from nursery at the end of the working day. Unless Hedon Plc can prove that the PCP is a 'proportionate means of achieving a legitimate aim', then it is unlikely that they can defend the indirect sex discrimination claim. Denise has three months less one day from the dismissal to bring the claim.

- Unfair dismissal and redundancy payment

Finally, Denise can bring an unfair dismissal claim. She is an employee of approximately eight years standing. She does not fall within any excluded category. Denise is currently within the time limit of three months less one day of the dismissal. The burden of proof is on the employee to show that there is a dismissal under section 95 Employment Rights Act 1996 (ERA 1996). Here, Denise was made redundant, which as an actual dismissal. The redundancy scenario is diminution of work of a particular kind under section 139 (1)(b) ERA 1996.

The burden of proof then shifts to the employer to provide a fair reason for the dismissal under section 98(2) ERA 1996. Here, the potential fair reason is redundancy. However, the requirement for working beyond 5pm was one of the issues that caused Denise not to apply for the new role. The tribunal can take this into account when deciding whether her dismissal was fair (Fidessa Plc v Lancaster (2016)). The reason is unfair here because the employer did not take into consideration any existing agreements in place that concern flexible working arrangements when offering employees alternative roles in a redundancy situation. Failure to do so and to incorporate the same agreement and flexibility into the alternative role may amount to a PCP. If the PCP is found to be indirectly discriminatory, it may also impact on the fairness of any redundancy dismissal. This is the position even if the employee does not choose to apply for the alternative role on offer, as was the case here. In relation to the fairness of the dismissal under section 98(4) ERA 1996, the dismissal has to fall within the 'range of reasonable responses' test under Iceland Frozen Foods v Jones (1983). This is a question of fact for the tribunal, which will take into account of factors such as size and administrative sources of the employer; equity and sufficiency of the reason given by the employer.

Question 3

Regulation 3(1)(b) and 3(3) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') apply here since there is a service provision change. The services in the pensions department, customer services, human resources services, benefits and support have transferred from Kent County Council (KCC) to Zelok Limited. Regulation 4(3) transfers employment contracts of individuals who were employed by the transferor immediately prior to the transfer and assigned to the relevant grouping of employees that is transferred. Regulation 4(3) would apply to Hector since he was employed by the transferor (KCC) prior to the transfer.

Reg 7(1) TUPE states that where an employee is dismissed before or after the transfer then the employee will be automatically unfairly dismissed if the sole or principal reason for the dismissal is:

- the transfer itself or
- a reason that is not connected to an economic, technical or organisational (ETO) reason entailing changes in the workforce.

If the reason is connected to an ETO reason, then a dismissal will not be an automatically unfair dismissal (Reg 7(2)). The ETO reason must entail a 'change in the workforce'. For a change in the workforce, there has to be a change in the composition of the workforce, or possibly a substantial change in job descriptions (Berriman v Delabole Slate Ltd (1985)). Changes in the identity of the individuals who make up the workforce do not constitute changes in the workforce itself so long as the overall numbers and functions remain the same. The Court of Appeal's decision in The Manchester College v Hazel (2014) held that the dismissal of two employees who refused to take pay reductions were dismissal for ETO reasons. However, they did not entail a change in the workforce so the dismissals were unfair.

With Hector, he is protected by Reg 3(1)(b) and Reg 3(3) TUPE because the customer services work has been outsourced. He has more than two years' service, he can bring an unfair dismissal claim if he is dismissed because of the transfer unless there is an ETO reason. Hector was dismissed because KCC wanted to save costs due to technological reasons and his dismissal entailed changes in the workforce. Hector's dismissal is thus because of an ETO reason and he cannot bring an unfair dismissal claim unless there is evidence of procedural unfairness, which the facts do not suggest.

Imogen is also protected by Reg 3(1)(b) and Reg 3(3) TUPE because the pensions work has been outsourced. Imogen however, would be able to bring an automatically unfair dismissal claim. The principal reason of her dismissal was that she did not wish to move to Chelmsford and was dismissed because of that. The question is silent on whether there is a mobility clause in Imogen's contract. It appears that Imogen has always worked in Kilminster. Requiring her to work in Chelmsford, which is 70 miles away, seems unreasonable considering she does not drive and there is no practical means of commuting by public transport. Her dismissal did not entail changes in the workforce. It was unique to her. There are no significant differences between her role at KCC and in Chelmsford (Osborne v Capita Business Services Limited (2016)). Imogen's dismissal is automatically unfair under regulation 7 and she can bring a claim against the transferee, Zelok Limited. The seller is liable for pre-transfer dismissals and the buyer is liable for post-transfer dismissals.

The next stage is to consider remedy. The tribunal must explain the potential remedies available to Imogen: reinstatement (same job), re-engagement (similar job), and compensation, which comprises a basic and a compensatory award. The tribunal must look at the remedies in the order stated. Reinstatement within s.114(1), ERA is unlikely on the facts. Trust and confidence appear to have broken down between the parties. If reinstatement is not ordered, the tribunal is to consider re-engagement next. If neither remedy is awarded, the tribunal deals with compensation. The basic award is calculated on the same basis as a redundancy payment (except that years of work under 18 count), subject to a maximum week's pay is £489. There is a formula for working out the total based on age, length of continuous employment (20 years maximum), and the week's pay. The current maximum is £14,670 (as at April 2017). Tribunals will be required to decide whether employers have complied with the Code and will increase compensation by up to 25% where there is an unreasonable failure to do so (Trade Union and Labour Relations (Consolidation) Act 1992, s 207A). In addition the compensatory award is calculated under the heads laid down in Norton Tool Co Ltd v Tewson (1973). The compensatory award is designed to compensate the employee for the loss that he has suffered. Under section 123(1) Employment Rights Act 1996, the tribunal will make a compensatory award of an amount which is just and equitable in the circumstances. A tribunal must, in deciding whether to make a compensatory award, identify what loss the

employee has suffered at the date of dismissal and then decide whether the employer's action (in dismissing the employee) caused the loss. The heads of loss in a compensatory award include: immediate loss of net earnings to which the employee was entitled; future loss of net earnings to which the employee was entitled; loss of pension rights and net fringe benefits; loss of statutory rights; expenses in looking for work and removal expenses.

Question 4(a)

The principle of equal pay for equal work is contained in Article 157 TFEU. The principle was however, established in the original Treaty of Rome (Article 119) and has therefore been an integral part of the European Union from the outset. Article 157 TFEU is directly enforceable in the member states and takes precedence over domestic law. It has to be read subject to Directive 2006/54, the re-cast Equal Treatment Directive. Whilst the directive is not directly enforceable against individual employers, Article 157 TFEU must be interpreted in accordance with the directive. Therefore, the Equal Treatment Directive is applied indirectly.

Article 157 is directly effective here. It is not the case that there could only be direct effect in equal value claims where it had been established by concession or an internal job evaluation scheme, Worringham v Lloyds Bank Ltd (1981). The tribunal might have to achieve the evaluation with the assistance of expert evidence, but that did not take the exercise out of the scope of fact-finding that was necessary for Article 157 to be directly effective.

By virtue of sections 64-66 of the Equality Act 2010 (EA), a 'sex equality clause' is implied into the contract of every person (A) who is employed on 'like work'; 'work rated as equivalent' or 'work of equal value' with a person of the opposite sex (B). This means that if any aspect of A's conditions is or becomes less favourable to A than a term of a similar kind in B's contract, the term is modified so as to be as favourable. B's contract is not to be read as modified to bring it into line with the less favourable term in A's contract – s.66(2)(a). If there is no corresponding term, the contract is deemed to include one - s.66(2)(b). By virtue of section 66 EA 2010, Karen can bring an equal pay claim against Petroove Supermarkets.

She must show that the comparator is:

- employed on 'like work'
- employed on 'work rated as equivalent' under an analytical job evaluation study, or
- employed on work of 'equal value'.

Karen can use depot workers such as Lionel as her comparator. There is no need for both Karen and Lionel to be working at the same premises and they can be working across different sites under section 79 EA 2010.

'Like work' is generally a matter of degree. Work is like work if it is the same or broadly similar and such differences as there are between their work are not of practical importance in relation to the terms of their work Sorbie v Trust House Forte (1976). The case of Shields v E Coomes (Holdings) Ltd (1978) established the principle that it is the actual work done by the employee which is important.

Regarding 'work rated as equivalent', the Court of Appeal held in Redcar and Cleveland Borough Council v Bainbridge (2007) that a claim can be brought using a comparator who was rated lower than the claimant in a job evaluation scheme.

In respect of a claim for work 'of equal value', an expert's report will have to be obtained on the comparative worth of both jobs. The burden of proof is initially on the employee to show on the balance of probabilities that she is doing the same or broadly similar work with that of her comparator, or her work has been rated as equivalent to his, or that her work, albeit different, is of equal value; and that his contract contains a more favourable term. If the employee succeeds in this, equal pay will be awarded unless the employer can prove that the difference between the contracts is genuinely due to a material factor which is not the difference of sex.

'Work of equal value' means equal in terms of the demands made by reference to such factors as effort, skill and decision-making. To determine whether someone's work is of equal value to another's, the tribunal may ask for an independent expert's report. In this case, Karen would argue that her work is of equal value (Brierley v Asda Stores Limited (2016)) under section 65(1)(c) EA 2010. In Hayward v Cammell Laird Shipbuilders Ltd (No. 2) (1988), a female cook was entitled to be paid the same as male painters and joiners due to work of equal value. The tribunal will appoint an independent expert to conduct a job evaluation study. The onus is then on the employer to rebut the presumption of unequal pay by relying on section 69 EA 2010. Genuine material factors can justify pay differences. These include geographical locations (Navy v Army and Air Force Institute v Varley (1977)), red circling (Snoxwell v Vauxhall Motors (1977)) and market forces (Rainey v Greater Glasgow Health Board (1985)). From the facts of the scenario, it seems unlikely that there are any applicable defences. If Karen is successful in her equal pay claim, the tribunal may award a declaration or compensation of up to six years in back pay.

(b)

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

Here, Mateo was told off by his employer in front of his colleagues. He felt embarrassed and humiliated by the incident. He can claim that his employer breached the implied term of mutual trust and confidence by telling him off in front of his colleagues. It seems that the employer's actions were not reasonable since Mateo has been a very good employee so far. Mateo cannot delay too long before resigning (Cook v MSHK Limited (2009)). Otherwise, he will have waived his right to claim constructive dismissal. Mateo needs to lodge a grievance and pursue an appeal under the employer's procedures before bringing a claim of constructive dismissal. If he fails to do this, any compensation awarded may be reduced by up to 25%.