LEVEL 6 - UNIT 4 – EMPLOYMENT LAW
SUGGESTED ANSWERS – JUNE 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 June 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

Section 27 of the Equality Act 2010 (EA) defines 'victimisation'. For a claimant to succeed, he/she needs to prove that: he or she committed one of the protected acts mentioned in section 27 EA; he or she was treated less favourably and the less favourable treatment was because the claimant did the protected act. The final causal link has proved to be difficult to establish. As such, victimisation is not about unfavourable treatment due to a protected characteristic. Rather, it is where an employer subjects an employee to a detriment as a result of the latter performing a protected act. In the United States, victimisation is known as 'retaliation' which perhaps conveys a more precise and accurate meaning.

The EA removed the requirement of a comparator, so the basis of a victimisation claim is whether the claimant has suffered a 'detriment' because the employer knows or believes that the employee did the protected act. The word 'detriment' has been held that it should be given a broad meaning (Deer v University of Oxford (2015)). A claimant can therefore bring an associative victimisation claim (Thompson v London Central Bus Company (2016)) and a post-employment victimisation claim (Jessemey v Rowstock Ltd (2014)). In an associative victimisation claim, it is not necessary for the claimant to establish a particularly close relationship with the person who performed the protected act. The claimant only needs to show factual causation, i.e. that the detriment was suffered as a result of the protected acts. It is the causal link that has proved difficult to establish.

With the protected acts, sections 27(a) and (b), which relate respectively to bringing proceedings and giving evidence in proceedings, are straightforward. Section 27 (c) is very wide and has included secret recording of conversations to provide evidence of race discrimination in Aziz v Trinity Taxis (1988). As such, one can argue that victimisation in relation to these subsections is not more difficult to establish than other types of discrimination. In contrast, section 27(d)

is very narrow because it has been interpreted to mean that the alleged act needs to have breached the EA. It is not enough that the informant believes that it has done so. This is demonstrated in the case of Waters v Commissioner of Police of the Metropolis (1997). The Court of Appeal in this case held that since the sexual assault took place outside work, the employer could not be liable under section 109 of the EA since the assault did not take place in the course of the officer's employment. Therefore, the employer did not breach EA, so there was no protected act and the employer cannot be held liable for the alleged victimisation. The House of Lords in 2000 upheld the Court of Appeal's interpretation whilst allowing Waters' appeal that her employer had been negligent. However, this case reveals the narrow scope of section (d) in comparison to section (c). A later decision by the Court of Appeal, Rank Nemo (DMS) Limited v Coutinho (2009) may have alleviated the situation. In this case, the claimant won his unfair dismissal and race discrimination claims and was awarded damages. However, he never received the damages and so he brought a victimisation claim for non-payment. Non-payment was related to the fact that the claimant as brought tribunal proceedings. The Court of Appeal held that non-payment can constitute an act of victimisation since the EA does not provide a remedy where non-payment takes place.

The causal link has proved to be more difficult to establish. In Nagarajan v London Regional Transport (1999), a claimant was interviewed for a job with London Regional Transport against which he had brought several race discrimination claims. The House of Lords held that if the protected act was an important factor leading to the less favourable treatment, then a victimisation claim existed even if the protected act was only one reason for the treatment and not the main reason. This approach seems to converge with the 'but for' test in direct discrimination (James v Eastleigh BC (1990)) and removed the requirement of motive. The question is therefore 'but for' the protected act, would the claimant have been subjected to the detriment?

Yet, the House of Lords in the case of Chief Constable of West Yorkshire v Khan (2001) did not use the 'but for' test. In this case, Khan complained to the employment tribunal alleging that he had been the victim of race discrimination. In his view, this is because his promotion was not supported. Before the claim was heard, Khan applied for promotion to another police force. This police force asked Khan's current employer for a reference. The latter's chief constable refused to provide a reference because he was worried that it would prejudice his own case before the impending tribunal hearing. Khan's victimisation claim was rejected. The refusal to provide a reference was not because the claimant had brought proceedings in the employment tribunal. Rather, it was because the chief constable wanted to preserve his legal position in relation to the proceedings. Therefore, if an employer took appropriate, honest and reasonable action by refusing to provide an employee with a reference in order to defend its interests in the context of pending discrimination proceedings brought by that employee, it was held that the employer had not subjected the employee to a detriment (Chief Constable of West Yorkshire Police v Khan (2001)).

The House of Lords in St Helens Metropolitan BC v Derbyshire (2007) focused on the word 'detriment'. The Court also said that when considering the element of 'detriment', it is about whether a reasonable worker would or might take the view that the treatment was in all the circumstances detrimental. In this case, the employer sent letters to a number of female employees warning them that if they continued to pursue an equal pay claim and succeeded, there would be redundancies. It was held that the redundancy warning was an attempt to bring undue pressure to settle or abandon the claim. This amounted to victimisation. Further, the letters were also sent to workers who have settled their own claims.

The letters therefore amounted to a detriment because the women in question brought equal pay claims.

To conclude, there are some parts of section 27 EA which are relatively easy to establish. The removal of the requirement of a comparator certainly helps claimants of victimisation. The most difficult part for a claimant to prove is the causal link, that the detriment suffered by the claimant was the result of protected acts.

Question 2

The TUPE Regulations 2006 ('2006 Regulations') were brought into force to implement the Acquired Rights Directive (Directive 2001/23/EC). 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 mentions 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 mentions 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, and either or both may be satisfied on the facts of a particular case. 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 TUPE 2006, 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). Transferors have obligations to give specific information to transferees about the employees who are transferring (regulation 11). The two most important legal rights given to employees under the TUPE regulations 2006 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 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 TUPE 2006 seems 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 (Amendment) Regulations 2013 do not seem to assist. Under these Regulations, 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
- they 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 (Amendment) Regulations 2013 seem to be more friendly towards employers, thus providing a balance between employers and employees' interests. To conclude, TUPE 2006 and the TUPE (Amendment) Regulations 2013 do protect employees' interests and rights to some extent.

Question 3

It is very important that an employer goes through a fair procedure when dismissing an employee. Even if an employer has a substantively fair reason to dismiss an employee in the sense that it has satisfied the 'band of reasonable responses' test in Post Office v Foley (2000), an employer may be found to be in breach of section 98(4) Employment Rights Act 1996 (ERA). This will be the case where the procedure adopted by the employer was irregular and failed to meet the standards imposed by the law. In fact, statistics show that most successful unfair dismissal cases are due to a lack of procedural fairness on the employer's part rather than a lack of substantive fairness. Procedural fairness can be justified due to the fact that it provides an opportunity for employees concerned to engage, participate and some form of ownership of the pre-dismissal process.

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, not on whether the employee is actually guilty of the misconduct in question. 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 can be argued that section 98(4) ERA is in favour of employers. Section 98(4) ERA states that a tribunal or court must take into account the size and administrative resources of the employer in deciding whether the dismissal of the employee is reasonable. It is unrealistic for small employers to fully comply with the requirements of natural justice. The case of Slater v Leicestershire Health Authority (1989) held that a failure to follow the rules of natural justice does not of itself form an independent ground for a decision to be attacked. Further, in Ayanlowo v IRC (1975), it was held that an employee has no absolute entitlement to an oral hearing to make representations where he/she is afforded the right to make written representations. These cases echo the principle established in section 98(4) ERA.

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 band 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 band of reasonable responses test.

The combination of the 'band of reasonable responses' test and the importance of procedural fairness means that an employer simply has to satisfy the tribunal or court that its investigation, fact-finding process, consultation, disciplinary hearing and/or appeal hearing fell within the band of reasonable responses. The subordination of substantive justice to procedural justice suggests that the judiciary is reluctant to interfere with employers' managerial prerogative. As such, it can be seen that the procedural fairness in unfair dismissal is in favour of employers. Some academics such as Anderman and Cabrelli call for reforms,

including a suggestion that the 'band of reasonable responses' test should be construed more restrictively. However, it is unlikely that the government will be more hostile to unfair dismissal laws. Such an approach would deter employers from hiring and thus increase the unemployment rate.

Question 4(a)

An employee is entitled to paid time off work for antenatal care under sections 55-57 Employment Rights Act 1996 (ERA). If she has made an appointment for antenatal care, she has the right not to be unreasonably refused time off work during her working hours to enable her to keep the appointment. She is entitled to be paid for her absence at the appropriate hourly rate. If an employee is refused time off work or if she is not paid for this time off, she can make a complaint to an employment tribunal within three months less one day of the date of the antenatal appointment in question, or within such further time as the employment tribunal considers to be reasonable. If the employment tribunal upholds her complaint, it will make a declaration to that effect and also award her the amount of remuneration to which she is entitled (section 57 ERA).

An employer who dismisses a pregnant employee, or one who is on maternity leave, but will potentially face claims for section 18 Equality Act 2010 (EA) pregnancy discrimination and automatic unfair dismissal section 99 Employment Rights Act 1996 (ERA). Dealing first with pregnancy discrimination, section 18 EA makes it unlawful during the protected period (defined in section 18(6) EA) to treat a woman unfavourably on the ground of her pregnancy, or on the ground that she is exercising or seeking to exercise a statutory right to maternity leave. No comparator is required and no justification defence is available. Pregnancy or maternity leave must be a substantial reason for the treatment (O'Neill v Governors of St Thomas More (1996)). Once the protected period has ended, a comparator will be needed. Remedies for a successful pregnancy discrimination claim include:

- Declaration of employee's rights (section 124 EA)
- Recommendation that employer takes action to alleviate effect of discrimination
- 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.

Compensation will be limited according to the principles in Vento v Chief Constable of West Yorkshire Police (2003), as updated by (Simmons v Castle (2012).

In addition, an employee is protected under section 99 of the ERA. Section 99(a) ERA states that a woman who is dismissed can claim automatic unfair dismissal if the reason or the principal reason is connected with her pregnancy (Regulation 20(3)(a) Maternity and Parental Leave Regulations 1999, (the Regulations)). The tribunal does not have to decide whether the dismissal was reasonable in accordance with section 98(4) ERA if it is an automatic unfair dismissal. An employee will not be protected under regulation 20(3)(a) Regulations from a child-related dismissal that occurs after the end of her maternity leave.

Potential remedies for an automatic unfair dismissal are 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. 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 £479. There is a formula for working out the total based on age, length of continuous employment (20 years maximum), and the week's pay. 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 the lower of £78,962 (as at 6 April 2016) or one year's gross salary.

4(b)

Under The Maternity and Parental Leave etc. Regulations 1999 (as amended in 2008) ('the Regulations'), employees are 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, the employee and employer can agree to have up to 10 'keep in touch' days. The employee has the right to return to her original job or suitable alternative after taking ordinary maternity leave. Following additional maternity leave, the employee 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 2016 is £139.58 per week. Women on maternity leave are protected by a maternity equality clause under sections 73 and 74 Equality Act 2010. Any pay increase she receives or would have received had she not been on maternity leave must be taken into account in the calculation of her maternity-related pay.

If an employee fulfils the above criteria and the employer refuses maternity leave or pay, the former 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.

Employees are also protected under section 18 Equality Act 2010 from discrimination on grounds of maternity. Section 18 makes it unlawful during the protected period to treat a woman unfavourably on the ground that she is exercising or seeking to exercise a statutory right to maternity leave. No comparator is needed and no justification defence is available.

SECTION B

Question 1

EASL should be aware that Dominic, Florin and Gianna may bring a number of employment law claims. Starting with Dominic, he can bring a claim under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('the Regulations'). Under the Regulations, part-timers should be given equal opportunity to full-time workers on a range of issues such as training and (pro rata) sick pay. This is an additional stand-alone right for part-time workers. The Regulations make it unlawful for part-time workers to be treated less favourably than full-time workers. 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 definition than 'employees'. A number of statutory employment protections apply not solely to employees but to a wider class of 'worker' (which includes employees). Unlike discrimination, the claimant must use an actual comparator for a claim under the Regulations, but the comparator may come from any part of EASL's operation.

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.

Applying the law to the facts, Dominic can bring a claim under the Regulations because as a part-time sales assistant, he did not have the opportunity to attend a relevant course and did not receive (pro rata) enhanced sick pay. As both were restricted to full-time sales assistants only, Dominic will have to be specific and use an actual comparator from EASL.

The Regulations provide that a part-time worker may present a complaint to an employment tribunal if s/he thinks that the employer has treated her/him less favourably than a comparable full-time worker on the grounds that s/he is a part-time worker and that the less favourable treatment is not justified on objective grounds. Any claim must be made within three months less one day of the alleged infringement. If the Tribunal finds in favour of the worker it can make a declaration as to the rights of the employee and the employer and/or order the employer to pay compensation and/or recommend the employer take action to remedy the less favourable treatment. In the case of pensions the Tribunal only has the power to order compensation/remedial action going back up to two years.

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
- is necessary to achieve that objective, and
- is an appropriate way to achieve the objective

Unless EASL can justify the less favourable treatment of Dominic, he is likely to succeed in a claim brought under the Regulations.

Florin is an agency worker. The Agency Worker Regulations 2010 (AWR) 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 attribute to the quality of work done and rest breaks. There are employment issues under the Working Time Regulations 1998 and the Minimum Wage Act 1998, specifically issues concerning the amount of time Florin works at EASL, the amount he is paid and the lack of holiday provided. Taking first the issue of the amount of time he has worked over the past 15 weeks. Clearly Florin is a worker as required by the AWR (Redrow Homes (Yorkshire) Ltd v Wright and Others (2004)) and as such he should be working a 48 hour week (Reg. 4.1). The normal period over which the average is 48 hours is calculated at 17 weeks (Reg. 4.3).

Florin has at present worked only 15 weeks and EASL is therefore not yet in breach of the AWR. It could be assumed however that he is likely to work the same hours over the next two weeks. If that is the case, then there will be a breach of the AWR. Under Reg. 5 it is possible for the worker to opt out of the AWR. Provided Florin has agreed in writing to opt out of the 48 hour restriction then he would be able to work as many hours as he wished.

The second issue is Florin's holiday entitlement. This too is regulated by the Working Time Regulations 1998. All workers are entitled to 5.6 weeks annual leave per leave year (Reg. 13). Under Reg. 15A, he will be entitled to holiday once it has been accrued. Leave will accrue at the rate of 1/12th of the full entitlement per calendar month. On that basis he will be entitled to a proportion of his leave on the basis that he has worked at EASL for the last 15 weeks.

Under the National Minimum Wage Act 1998. Florin will fall in the 'adult' category as he is 27 years old. Currently, he is entitled to £7.20 (this figure will change every year). As he is being paid the rate of £5.30 per hour, there is a breach. Where an individual is not paid the minimum wage then a claim for underpayment can be made to an Employment Tribunal or to court. Such an underpayment will mean that Florin is entitled to be compensated for the period of time he has been underpaid.

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 2002 Regulations') protect employees on fixed-term contracts.

Gianna could not apply for the permanent positions of Senior Buyers. Under the 2002 Regulations, a fixed-term worker who is treated less favourably than a permanent worker can bring a claim regardless of whether he or she is a man/woman. Unlike discrimination, the claimant must use an actual comparator for a claim under the 2002 Regulations. Applying the law to the facts, Gianna can bring a claim because as a fixed-term junior buyer, she did not have the opportunity to apply for the full-time posts. This opportunity was restricted to permanent staff only. She will have to use actual comparators from EASL.

Finally, Gianna would only become a permanent employee upon any renewal/extension once she has worked there for four years. She has only worked there for two years, so does not yet have the length of service for this claim under the 2002 Regulations.

Question 2(a)

Employment status is important as it affects the amount of protection she enjoys. Only employees can bring redundancy and unfair dismissal claims. In O'Kelly v Trusthouse Forte (1983) and Massey v Crown Life Insurance (1978), the court stated that the 'label' provided to Hannah 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 self-employed 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. Lord Denning developed the 'organisation integration test' in the case of Stevenson, Jordan and Harrison Limited v Macdonald and Evans (1952) 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 an employee? This multiple test was applied by Cooke J in Market Investigations v Minister of Social Security (1969).

Hannah has an agreement with Go Faster Taxis Limited (GFTL) which has the following terms: she is self-employed; she would pay weekly rent payments to GFTL in return for work; she would notify GFTL if she was unable to work; she understood that there was an "open shift" system whereby she could work such hours as she wished. Applying the multiple test, it appears that she is self-employed due to a lack of mutual obligations. In Knight v Fairway & Kenwood Car Service Ltd (2012), there was no obligation on the employee to work at all. Knight could work or not as he wished with no adverse consequences provided that he paid rent to his employer. He also had to give his employer appropriate notification when he could not work. It was clear from looking at the agreement that Knight had not been employed under a contract of employment, despite the fact that there had been some mutual terms. There was no obligation on Knight to do any work at all. Accordingly, this means that Hannah is likely to be self-employed and unable to bring a redundancy claim.

(b)

Igor can bring an equal pay claim. Under section 64 of the Equal Pay Act 1970, an equality clause will be implied into an employment contract. This means that employees of one sex are entitled not to be treated less favourably than their comparators of the opposite sex in the same employment. Although equal pay

claims are mostly brought by women, men are also protected. Section 65 of the Equality Act 2010 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. Igor is a male telephone operator. His work can be argued to be similar to the work of his colleague, Jackie. Essentially, the main duties as telephone operators, whether male or female, are similar. Igor only needs to show that his work is the same or broadly similar to female telephone operators' duties and that the differences between these sectors are not of practical importance (section 65 Equality Act 2010).

Actual comparators are required in equal pay claims so Igor needs to compare his work with a female telephone operator, i.e. Jackie. GFTL can argue that the difference in pay between male and female telephone operators 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 Equality Act). A possible defence here is different responsibilities (Capper Pass v Allan (1980)); location (NAAFI v Varley (1976)) as Jackie is responsible for corporate clients whilst Igor deals with individual clients. Unless Jackie's role involves very different responsibilities such as corporate client entertainment, it is difficult to see how this defence will succeed.

Igor can argue that his work is rated equivalent or of equal value but these claims are harder to prove as a job evaluation study is required from an expert. If he is successful in his equal pay claims, he is entitled to remuneration going back up to six years for breach of the equality clause.

Question 3(a)

Nia can bring a wrongful dismissal claim. Wrongful dismissal is based on common law. Essentially, it involves looking at whether the employer has breached the employee's employment contract. There is no express term regarding Nia's notice period in his contract. Section 86 ERA 1996 gives her four weeks' notice as she has worked there for four years.

The issue here is whether the contract could have been lawfully brought to an end by the company without notice. This can take place in two situations:

- wrongful repudiation of the contract by the employee (wrongful repudiation) which entitles the employer to accept or reject the breach.
- serious breach of contract by the employee (gross misconduct) which entitles the employer to dismiss the employee without notice (summary dismissal)

Marcus berated Nia in front of everyone in the practice. He told Nia that: "If you do not immediately rectify this error within the next hour, don't even bother coming back. A trainee could have done better." All of this took place in public. Marcus's words: "If you do not immediately rectify this error within the next hour, don't even bother coming back" might be perceived by a reasonable person as capable of giving rise to a dismissal. It seems that Marcus dismissed Nia with immediate effect and this was confirmed in an email. The contract has come to an end. Nia can bring a wrongful dismissal claim before an Employment Tribunal (since it is for less than £25,000) or a Civil Court. If Nia succeeds in her wrongful dismissal claim, contractual damages to reflect four weeks' pay would be awarded. Nevertheless, the employer is entitled to dispense with contractual notice prescribed by statute and summarily dismiss an employee who has committed a repudiatory breach of contract. In this scenario, Nia has been accused that she is incompetent and incapable of doing her job, which is, if true, gross misconduct and justification for summary dismissal.

(b)

Picton's Pet Centre has not breached any implied term by refusing to provide a reference. Employers do not have an obligation to provide references unless it is custom and practice for them to provide employees with references. However, if they provide one, there is an implied term to take reasonable care in compiling or giving a reference and in verifying the information on which it is based. If the reference turns out to be a negligent misstatement, the employer might be liable to the employee or former employee for any economic loss (Caparo Industries v Dickman (1990) and Spring v Guardian Assurance Plc (1994). There is a duty of care to provide a reference which is 'true, accurate and fair'. By 'fair', the Court means the overall impression created by the employer and being factually accurate in the individual parts.

(c)

Clause 12.1 is a non-compete clause and clause 12.2 is a non-poaching 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, Picton's Pet Centre 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 Llywellyn 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 a 5 year restraint on a 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, Llywellyn is a veterinary surgeon and has potential to harm the business viability of Picton's Pet Centre by engaging in a rival business and asking one of its staff to join him. Both clauses are limited to 12 months but there is no restriction on geography. 12 months would seem reasonable but the lack of a specific geographical restriction seems unreasonable in light of the above cases. Therefore, whilst Llywellyn may have breached both clauses, they might not be enforceable as they are too wide.

Question 4

Othello can bring claims for redundancy and unfair dismissal. 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 6 months of the dismissal due to redundancy.

There needs to be a dismissal. There is a dismissal here as the employer has terminated the contract. The onus is on the employee claimant to show that a dismissal has occurred (Morton Sundour Fabrics v Shaw (1966)). Under section 163(2) ERA 1996, 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 Employment Rights Act (ERA) 1996.

Section 139(1)(a)(i) is potentially applicable because modern technology has replaced Othello's role. There needs to be 'employer reasonableness', especially with the issues of consultation and selection. Consultation is a procedural matter, giving the relevant notices to employees, clear disclosure to employees about details of redundancy. The facts do not indicate how far Starlit Bank did undertake an appropriate consultation process.

Selection of employees for redundancy has to be objective and reasonable (section 98(4) ERA). An unfair selection would potentially lead to an unfair dismissal. Redundancy per se is a fair reason for dismissal under section 98(2) ERA. The requirements for a fair method of selecting and dismissing employees for redundancy is clearly stated in Williams v Compair Maxam Ltd (1982), EAT and Polkey v AE Dayton Services (1988). In essence it involves the identification of a pool of employees, the adoption of fair criteria for selecting employees from that pool and the fair application of those criteria. Length of service can be taken into account, which would be relevant here. In Farthing v Midland House Stores (1974), capability, mobility and adaptability were considered rather than length of service.

Applying the law to the facts, it seems that there may have been an unfair selection of Othello. He scored well in the redundancy matrix, received excellent client feedback and yet was made redundant. It is however possible that other employees in the redundancy pool scored even more highly.

The facts do not indicate whether there was any alternative employment available, but if there were other roles to be fulfilled, Starlit Bank should have offered suitable alternative employment to its employees rather than making them redundant.

Finally, assuming that Othello is successful in a redundancy claim, he is entitled to a redundancy payment under section 162 ERA. There is a formula for working out the total based on age, length of continuous employment (20 years maximum), and the week's pay. He can also appeal against the redundancy decision. The right of appeal in redundancy is regarding the selection of employees for redundancy.

Unfair dismissal

The selection criteria used by Starlit Bank may have been flawed, or may have been applied unfairly, so Othello can bring an unfair dismissal claim as there is a breach of procedure in the redundancy process. Firstly, Othello must qualify to bring a claim for unfair dismissal. He has been employed for a continuous period of more than two years (eight years) before the effective date of termination (section 108 Employment Rights Act 1996). He is clearly an employee of the company and under section 95(1) ERA 1996 has been dismissed by the employer. Provided he brings his claim within three months less one day, he will be able to bring a claim for unfair dismissal.

Once it is established that he is capable of bringing a claim for unfair dismissal the next stage is to see whether or not the employer has a potentially fair reason for the dismissal (section 98 ERA 1996). In the present case, the potentially fair reason will be redundancy. Having established that the employer has a potentially fair reason for dismissing Othello, the next stage is to consider whether the employer has acted within the band of reasonable responses. In this case it may have been unreasonable to dismiss him (Iceland Frozen Foods v Jones (1983)), if the selection was unfair. According to the principles laid down in Williams v Compair Maxam Ltd (1982), it appears that Starlit Bank failed to follow good industrial relations practice in redundancy. Although the principles are merely guidelines and consideration is given to smaller companies, on balance, the selection procedure may have been unfair due to the use of the criteria and lack of consultation.

In such circumstances it is likely that there is an unfair dismissal. As the employer failed to carry out an appropriate procedure this will mean that the Tribunal will be able to increase the amount of compensation by up to 25%. The tribunal must explain the potential remedies: 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. 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 which is £479. Any redundancy payment that Othello is paid will be offset against the basic award. In addition the compensatory award is the lower of £78,962 (as at 6 April 2016) or one year's gross salary.