

OPTION 1

SUBJECT NAME : INTRODUCTORY LABOUR LAW
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EXAMINERS : MRS ME ROSTOLL
MS K LETSIRI

MODERATOR : DR E FOURIE

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GENERAL INSTRUCTIONS TO STUDENTS

- 1) Answer all questions.
 - 2) Answer all questions in the SCRIPT provided.
 - 3) Write legibly.
 - 4) Number your answers carefully.
 - 5) Leave a line open between each answer (for example, between questions 1.1 and 1.2).
 - 6) Write in full sentences where applicable. Do NOT make use of “SMS speak”.
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QUESTION 1 (UNIT 3 - BASIC CONDITIONS OF EMPLOYMENT)

Joanne works as a hostess at The Crown Oriental restaurant. She works six days a week. Her ordinary hours are from 12h00 to 22h00. She is allowed to take a 45-minute meal break at 18h00. She gets 15 consecutive days' annual leave, which she is entitled to take during February or March. At night, Joanne has to walk three kilometres back to her house as there is no public transport. Joanne is unhappy about her employment conditions. After she told her employer that she was pregnant, he remarked that she would only be entitled to two months' unpaid maternity leave.

Explain in detail to Joanne what the conditions of her employment will be with regard to the following:

1.1 Maternity leave (5)

- An employee is entitled to at least four consecutive months' unpaid maternity leave.
- An employee may commence maternity leave at
 - any time from four weeks before the expected date of birth, unless otherwise agreed, or
 - from a date which a medical practitioner or midwife certifies is necessary for the employee's health or that of the unborn child.
- An employee may not work for six weeks after the birth of her child unless a medical practitioner or midwife certifies that she is fit to do so.
- The Unemployment Insurance Act 63 of 2001
 - makes provision for the payment of maternity benefits calculated on the wage of the employee according to a graduated scale.
 - the higher an employee's wage, the smaller the percentage of the benefit that will be paid out.
- In terms of the LRA, an employer will be understood to have dismissed an employee if it refuses to allow her to resume work after she took maternity leave in terms of any law, collective agreement or her contract of employment.
- Employer will then have to prove that the dismissal was fair.
- The LRA provides that a dismissal is automatically unfair if the reason for the dismissal is the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy.
- No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.
- During the employee's pregnancy and for a period of six months after the birth
 - employer must offer her suitable alternative employment if she performs night work or
 - if her work poses a danger to her or her child's health and safety.
 - This is only required of the employer if it is practicable to do so.

Any four of the above

[5]

QUESTION 2 (UNIT 4 - EQUALITY)

The applicant was a former female employee of the respondent. She was employed on an annual fixed term contract ending in December of each year. The renewal of the contract was dependent on funding as the respondent was a non-profit organisation. She had been in the employ of the respondent since 2004. In December 2008 the applicant was dismissed.

The applicant alleged that the respondent's former national director had made repeated sexual advances towards her. She had repeatedly rejected such advances. The respondent's code of conduct required that instances of sexual harassment must be reported. Despite the applicant's knowledge of such code she elected not to report the advances. She believed she had control of the situation, and could not have anticipated the consequences thereof. Following the final instance of alleged sexual harassment which she refused the applicant testified that the former national director's behaviour towards her changed. She was advised in December of 2008 that her contract would not be renewed due to her poor performance. This was the first occasion in which her alleged poor performance had been raised. Furthermore, the alleged perpetrator of the sexual harassment had, prior to this matter being heard, left the employ of the respondent, and was unable to be traced.

Following the termination of her contract the applicant raised the occurrence of the alleged sexual harassment. The respondent did not respond to these allegations, nor did the evidence reflect that the claims were investigated.

PLEASE NOTE – when a question contains an assumption that assumption is only applicable to the particular question unless the context indicates otherwise.

- 2.1 Briefly explain what the constitutional concept of the right of equality is based on within an employment law context. (3)
- **the achievement of equality requires**
 - **certain groups or persons to be treated differently (1)**
 - **in order to ensure that they attain full equality (1)**
 - **with others who have not been disadvantaged (1)**
- 2.2 In your own words summarise the primary purposes of the Employment Equity Act 55 of 1998 in two sentences? (2)
- **to eliminate discrimination in the workplace and, on the other hand, (1)**
 - **to make provision for affirmative action measures (1)**
 - **to redress disadvantages in employment experienced by designated groups & (1)**
 - **to ensure their equitable representation in all categories and levels in the workplace. (1)**
- 2.3 There is other legislation that also supplement the Employment Equity Act 55 of 1998 in regulating equality and discrimination within the employment relationship in South Africa. Name the relevant supplementary legislation. (2)
- **Labour Relations Act 66 of 1995 (1)**
 - **The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (1)**
- 2.4 With reference to the given set of facts. Can an employer be held liable for the sexual harassment committed by one of its employees? Motivate your answer.

(4)

- The EEA makes the employer legally liable for acts of discrimination (including acts of harassment) committed by employees:
 - if the act of discrimination is committed while at work (1) (this has a broad meaning and includes work-related events outside the workplace, at conferences and on company transport); (1)
 - if the conduct is brought to the attention of the employer; and (1)
 - if the employer fails
 - to consult all the relevant parties (1) and
 - take the necessary steps (1) or
 - steps that were "reasonably practicable" in the circumstances to eliminate the harassment. (1)

Any four of the above

2.5 The obligation on employers to prevent harassment in the workplace means that employers should be proactive about putting in place steps to prevent its occurrence, and if it happens, to make sure that the issue is seriously and expeditiously dealt with. Name two minimum measures which an employer can implement to ensure compliance with this duty? (2)

- ensure that there is a **clear workplace policy** prohibiting sexual harassment; (1)
 - ensure that **grievance and disciplinary procedures** exist to effectively deal with such conduct; (1)
 - deal with complaints **timeously and sensitively**; and (1)
 - comply with the **2005 Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace**. (1)
- Any two of the above

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QUESTION 3 (UNIT 5 – DISMISSAL WITH SPECIFIC FOCUS ON CONSTRUCTIVE AND AUTOMATICALLY UNFAIR DISMISSALS)

PLEASE NOTE – when a question contains an assumption that assumption is only applicable to the particular question unless the context indicates otherwise.

3.1 In your own words explain when will a dismissal be deemed as automatically unfair in terms of South African labour legislation? (1)

- **Section 187 regulates this and states the following –**
 - In dismissing an employee, the employer acted contrary to section 5 of the LRA (which is primarily concerned with an employee's right to freedom of association); or (1/2)
 - The reason for the dismissal is a reason that falls into a list of particularly despicable reasons listed in the LRA. (1/2)

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3.2 Indicate in each of the following scenarios whether they amount to constructive dismissal? Briefly motivate your answer in each instance.

3.2.1 Mandy is suspected of theft and her employers wish to search her handbag. She refuses to let them and then resigns in anger. (2)

This would not be constructive dismissal (1) as Mandy's employer is entitled to search her bag if he suspects her of theft. Her working relationship was not rendered intolerable as a result. (1)

3.2.2 Sue's employer tries to kiss her at an office party. She resigns the following morning. (2)

This would be sexual harassment (1) and the resignation would constitute a constructive dismissal. (1)

3.3 Indicate in each of the following scenarios whether they amount to an automatically unfair dismissal. Motivate your answer in each instance.

3.3.1 Mary misses 20 days of work during her pregnancy as she is very weak and nauseous. She is dismissed as a result. (2)

Mary is dismissed for reasons related to her pregnancy and her dismissal will be automatically unfair. As she missed only 20 days of work, which is within her sick leave entitlement, her dismissal cannot be justified on this basis. (2)

Marker apply discretion

3.3.2 Sipho leaves work early to attend a union meeting, without the permission of his employer. He is dismissed. (2)

Sipho is dismissed for leaving work without the permission of his employer and not for union membership. This will not be automatically unfair. It may be unfair if it is found that his misconduct was not sufficiently serious to justify dismissal. (2)

Marker apply discretion

3.3.3 The workers at the company embark upon a strike, without following proper procedure. They are all dismissed. (2)

It is acceptable to dismiss unlawfully striking workers. Only if lawfully striking workers were dismissed would it be an automatically unfair dismissal. (2)

Marker apply discretion

3.4 Linda is employed as a clerk at Siyasebenza (Pty) Ltd. Linda is a member of the Allied Workers Union, which is the majority trade union at Siyasebenza. AWU enters into collective bargaining with the employer for purposes of negotiating salary increases for the workers and after numerous failed attempts at reaching an agreement with the employer, AWU decides to undertake strike action. Linda decides to continue working and does not join the strike, however her employer instructs her to do the work of the striking employees. She refuses to do the work as it adds a substantial amount to her work load. Linda is subsequently dismissed.

Linda approaches you for advice. Explain to her why this dismissal constitutes an automatically unfair dismissal. (4)

- **In terms of the LRA, it is an automatically unfair reason to dismiss an employee for refusing to do the work of striking employees. (1)**

- During a strike, an employer might request non-striking employees to do the work that striking employees would normally do. (1)
- However, an employer may not dismiss the non-striking employees if they refuse to do the work. (1)
- The employer is only entitled to expect non-striking employees to do the strikers' work if the work is necessary to prevent actual danger to the life, personal safety or health of other people at the workplace. (1)
- If there is no danger to people at the workplace as a result of the absence of some striking employees, the employer may not dismiss employees who refuse to do the work of striking employees. (1)

Any four of the above.

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QUESTION 4 (UNIT 6 - COLLECTIVE LABOUR LAW)

PLEASE NOTE – when a question contains an assumption that assumption is only applicable to the particular question unless the context indicates otherwise.

4.1 The employees at ABC Superstore decide to embark on strike action as their employer is failing to meet their demands.

4.1.1 Explain the procedural requirements that have to be satisfied in order for the strike to be protected. (5)

- The dispute must be referred to a bargaining council or to the CCMA.
- A certificate stating that the dispute remains unresolved must be issued or the dispute must remain unresolved for 30 days after the referral, despite the conciliation process.
- The employer (or council or employers' organisation) must have been given 48 hours' written notice before the commencement of the strike. (If the State is the employer, then seven days' notice is required.).
- A protected strike may commence after the expiry of the 48-hour notice period (or seven-day notice period where the State is the employer).

4.1.2 Assume for purposes of this question that the strike does not comply with the procedural requirements in term of the Labour Relations Act 66 of 1995. As a result, the strike is unprotected. What are the consequences of an unprotected strike? (3)

- Employees participating in unprotected strikes can be fairly dismissed. (1)
- The dismissal must be procedurally and substantively fair. (1)

- **The labour court may also grant an interdict to restrain any person from participating in an unprotected strike or lock-out. (1)**

4.2 The employees at 123 Motor Manufacturers have been in consultations with their employer over the continued retrenchment of employees. Following the retrenchment of over 25 more employees, the employees at 123 Motor Manufacturers declare a dispute which results in a protected strike. In support of this strike, the employees at ABC Tyre Manufacturers also embark on strike action. Identify this form of industrial action and list the requirements that need to be satisfied in order for it to be lawful. (4)

- **This form of industrial action is a secondary strike. (1)**
- **In order for this strike to be lawful, the following requirements must be satisfied:**
 - **The primary strike must be lawful (1)**
 - **The employer of the employees taking part in the secondary strike must have received written notice of the proposed secondary strike at least 7 days prior to its commencement (1)**

The nature and the extent of the secondary strike have to be reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer (1)

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QUESTION 5 (UNIT 7 - DISPUTE RESOLUTION)

Sipho is employed at Wood Timber Manufacturers. The company has a strict zero-tolerance policy for the use of drugs and alcohol and this is thoroughly communicated to all employees at the commencement of their employment, as well as during the course of employment. The policy states that employees at Wood Timber Manufacturers seldom deal with extremely heavy machinery and the operation of such machinery under the influence of drugs and alcohol could be very detrimental. After conducting routine medical tests, the employer discovers cannabis in Sipho's bloodstream, he is called to a disciplinary hearing and is subsequently dismissed for misconduct.

5.1 Sipho refers an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on the basis of procedural fairness deficiencies. What is the primary function of the CCMA? (1)

To try and resolve any dispute referred to it in terms of the LRA through conciliation (1)

5.2 From the date of dismissal, how many days does Sipho have to refer the unfair dismissal dispute to the CCMA? (1)

Unfair dismissal disputes must be referred to the CCMA for conciliation within 30 days of the dismissal. (1)

5.3 The referral of a dispute to the CCMA must be proper. Explain how a proper referral of a dispute to the CCMA for conciliation should be made and also identify the correct form that should be completed and accompany such referral. (5)

- **an existing/alleged dispute between the parties (1)**

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- an existing employment relationship at the time of the dispute (in most cases) (1)
- the correct form should be properly completed, signed and sent to the CCMA + proof that the document has been sent to the other party (1)
- referrals must be made on time (1)
- the correct form is the LRA Form 7.11 (1)

5.4 Refer to your answer in question 5.2. Sipho refers the unfair dismissal dispute to the CCMA beyond the stipulated time period and the referral is consequently late. Name and discuss the application that essentially asks the CCMA to excuse the late referral of a dispute. (5)

- The application is called an application for condonation (1)
- It highlights the reasons for the delay and the applicant's chances success in the matter (1)
- The application for condonation must also have been sent to the employer party, giving the employer the chance to counter the employee's explanation and argument regarding the late referral (1)
- The dispute will not proceed to a conciliation meeting unless any late referral has been excused. This is what is meant by the granting of condonation (1)
- The commissioner will, in particular, consider the employee's period of delay, the explanation for the late referral, the employee's prospects of success in the matter, prejudice to the parties and any submissions received on the part of the employer, before deciding whether the employee has demonstrated good cause for the late referral (1)
- An employee's late referral of an unfair dismissal or unfair labour practice dispute will be condoned if the employee shows good cause for this (1)

5.5 When is the con-arb (conciliation-arbitration) process used? (3)

- In cases where the dispute relates to the dismissal of an employee for any reason relating to probation; (1)
- Or if the dispute concerns an unfair labour practice relating to probation; and (1)
- For other dismissals/unfair labour practices if no party objected to this. (1)

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TOTAL

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