

**OPTION 2**

**SUBJECT NAME** : INTRODUCTORY LABOUR LAW  
**SUBJECT CODE** : IAB0012  
**DATE** : SUPPLEMENTARY EXAMINATION – JULY 2020  
**DURATION** : 3 HOURS  
**WEIGHT** : 50 : 50  
**TOTAL MARKS** : 60

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**EXAMINERS** : MRS ME ROSTOLL  
MS K LETSIRI  
**MODERATOR** : DR E FOURIE  
**MODE** : ONLINE

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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)**

A male employee applied for maternity leave in terms of the employer's maternity leave policy when he and his partner became the parents of a baby following a surrogate agreement. The employer's maternity leave policy provided for four months' paid maternity leave and two months' paid leave for adoptive parents. The employer refused paying the employee four months' maternity leave, arguing that maternity leave was only available to biological mothers since pregnancy and birth create a physiological effect on the mother, preventing her from working. The employer offered two months' payment applicable to adoptive parents.

Advise the employee on the following:

- 1.1 Which judicial authority (in other words case law) changed the position that will allow the employee to claim full parental leave benefits in relation to his newborn child? (1)  
***MIA v State Information Technology Agency (1)***
- 1.2 Which of the recent 2019 amendments to the Basic Conditions of Employment Act 75 of 1997 will be applicable to the above set of facts? Briefly motivate your answer. (3)  
**Commissioning parent leave (surrogacy arrangements) (1) – section 25C (1)**  
**An employee who is a commissioning parent in a surrogate motherhood agreement is entitled to at least 10 consecutive weeks (1) commissioning parent leave.**
- 1.3 Refer to your answer in question 1.2 above. When does this type of leave commence? (1)  
**Commences on the birth of the infant.**
- 1.4 What notice period should be given by the employee to the employer for this type of leave? (2)  
**At least one month's written notice (1) should be given to the employer in respect of**
  - a. commencement of commissioning parental leave (1/2)
  - b. intended date of return to work (1/2)
- 1.5 Which legislation regulates the payment of this type of leave and how will the amount be determined? (3)  
**Parental leave, adoption leave and commissioning parental leave will be paid**
  - a. in terms of UIA (Unemployment Insurance Act); (1)
  - b. at a rate of 66% of the earnings of the beneficiary at the date of application; (1)
  - c. subject to a maximum income threshold. (1)

**[10]**

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**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

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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 Would this scenario fall within the ambit of the Employment Equity Act 55 of 1998 (in other words would the Act be applicable)? Motivate your answer. (4)

**EEA (in section 6(3) of the EEA) declares the harassment of an employee or job applicant to be a form of unfair discrimination. (1)**

- **Harassment is prohibited if it is based on any one (or a combination of) the listed grounds. (1)**

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- **The most prevalent forms of harassment encountered in the workplace are**

- **sexual harassment, (1)**

**full mark for identifying the scenario as pertaining to this form of harassment**

- **racial harassment,**
- **sexual-orientation harassment and**
- **religious harassment.**

**½ mark each for naming any other two forms of harassment (1)**

- 2.5 According to the *Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (2005) certain factors should be considered to establish whether sexual harassment is taking place in the workplace and if the rights of an employee is being violated. Identify and apply these factors to the given set of facts. (6)

- **whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; (1)**
  - **whether the sexual conduct was unwelcome; (1)**
  - **the nature and extent of the sexual conduct; and (1)**
  - **the impact of the sexual conduct on the employee (1)**
- Two marks for application of factors to set of facts. (2)**

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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? (2)

- **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)**
  - **The reason for the dismissal is a reason that falls into a list of particularly despicable reasons listed in the LRA. (1)**

- 3.2 Charlotte is a 30-year-old female and she and her husband decide that it is time to start a family. She falls pregnant and informs her employer. Charlotte is subsequently dismissed and is told that she will be a liability to the organisation as she will always be tired and moody, she will not meet deadlines as a result, and she will later be taking maternity leave, leaving the employer short-staffed. The employer further tells Charlotte that after giving birth she will not be solely focused on her work and that this was simply “a bad time to fall pregnant”.

Charlotte approaches you for advice and you have to explain to her why this dismissal constitutes an automatically unfair dismissal. (4)

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- The Labour Relations Act 66 of 1995 makes it clear that a dismissal can either be fair, unfair, or automatically unfair. (1)
- Where a dismissal is automatically unfair, the employer will find it very difficult to prove that a valid reason existed for the dismissal. (1)
- The LRA provides a list of automatically unfair reasons for a dismissal and this includes pregnancy. (1)
- Charlotte was dismissed due to the fact that she is pregnant. (1)
- The LRA provides broad protection for female employees who have been dismissed for reasons relating to their pregnancy or intended pregnancy. (1)
- This includes dismissals linked to “any reason related to her pregnancy”. (1)
- An employer cannot argue that the operational needs of the company are such that pregnant employees can no longer work for the company after the birth of the child. (1)

**Any four of the above.**

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**QUESTION 4 (UNIT 6 - COLLECTIVE LABOUR LAW)**

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

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

4.1 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).**

4.2 Explain in your own words what the difference is between a strike and protest action? (2)

- **The difference between a strike and protest action is found in the purpose of each**
- **The purpose of a strike is to remedy a grievance or resolve a dispute of mutual interest; (1)**
- **Whereas, the purpose of protest action is promoting or protecting the socio-economic interests of workers. (1)**

- 4.3 The Constitution of the Republic of South Africa, 1996 guarantees the right to freedom of association. The right is afforded to all employees however, there has been some uncertainty regarding the extent to which the right to freedom of association of senior managerial employees may be limited or even excluded. Explain the position of senior managerial employees with reference to the right to freedom of association. (5)

- **The positions held by senior managerial employees may place them in a situation where they have conflict of interest on account of union-related obligations**
- **Senior managerial employees may have access to very confidential information of the employer – information that the employer may not wish to disclose during negotiations with the trade union at its workplace**
- **These employees may without a doubt join a trade union as the LRA and the Constitution grant an unrestricted right to freedom of association in the sense that it is afforded to “all employees”.**
- **However, in terms of the common law, a senior managerial employee owes a duty of fidelity to the employer and must at all times act in good faith towards the employer, rather than the trade union of which he/she is also a member.**
- **Evidently, the exercise of the right to freedom of association by senior managerial employees is not unlimited.**

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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)

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- an existing/alleged dispute between the parties (1)
- 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 At the end of the conciliation process, the commissioner issues a certificate of outcome stating that the matter remains unresolved. Siphso decides to take the matter further at the CCMA. What is the next step? Explain this process to Siphso. (5)

- Arbitration. (1)
- Arbitration is a process in which an arbitrator, appointed by the CCMA or bargaining council, listens to the evidence (1) of both the parties to a dispute.
- The arbitrator generally allows the representatives of the parties, or the parties themselves, to question or cross-examine the witnesses of the other side after these witnesses have given their evidence (1)
- The arbitrator then makes a final decision as to which party should succeed in the case by considering the onus of proof and the evidence (1)
- An arbitration process is a new hearing (1)
- Any evidence that might have already been presented by an employer at a disciplinary hearing needs to be presented again to the arbitrator (1), who will typically spend time at the start of the hearing (after listening to opening remarks) assisting the parties to narrow the issues in dispute, in order to streamline the arbitration hearing process (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)

[15]

**TOTAL**

**[60]**