



January 2021 SPECIAL SUPPLEMENTARY EXAMINATION

SUBJECT : LABOUR LAW
CODE : BAH11B1/LLA41B1
DATE : TBC
DURATION : 2 HOURS and 30 minutes
TOTAL MARKS : 80

EXAMINER : MS S NGCOBO
MODERATOR : MS L VAN DER MERWE
NUMBER OF PAGES :

INSTRUCTIONS TO STUDENTS

1. Answer all questions in the answer sheet provided.
 2. Read each question carefully.
 3. Write legibly.
 4. Use a blue or black pen only.
 5. Number each question clearly.
 6. Leave a line open between answers.
 7. Follow the instructions provided carefully.
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Part 1: SHORT QUESTIONS

Question 1 – MCQ (This question is taken from a previous assessment. The questions within this question will form part of a pool, where the system will randomly select 5 questions)

- 1.1. In 1994, there was a need to reform the labour laws of South Africa. The following statements represent the many issues, which necessitated the aforementioned reform – Choose the **INCORRECT** statement:
- (a) The lack of an integrated legislative framework.
 - (b) Extensive discretion given to administrators and adjudicators.
 - (c) The limited number of laws governing labour relations.**
 - (d) The lack of compliance with the Constitution and public international law.
 - (e) None of the statements are incorrect. (1)
- 1.2. Which of the following statements is **INCORRECT** - Significant Changes brought about by the Labour Relations Act 65 of 1995 (LRA) include:
- (a) Establishment of the Labour Court and Labour Appeal Court.
 - (b) Employee participation in decision-making.
 - (c) Introduction of statutory councils.
 - (d) Recognition of the employee's right to strike and employer's recourse to lock-out.
 - (e) None of the statements are incorrect.** (1)
- 1.3. Which of the following statements is **INCORRECT** – The primary objectives of the Labour Relations Act 65 of 1995 (LRA) are:
- (a) To give effect to obligations incurred by the Republic of South Africa as a member state of the ILO.
 - (b) To provide a framework for collective bargaining.
 - (c) To give effect to the fundamental rights conferred by the Bill of Rights contained in the constitution.
 - (d) To promote orderly collective bargaining
 - (e) None of the statements are incorrect.** (1)
- 1.4. Choose the **INCORRECT** option – According to the NEDLAC Act 35 of 1994, in line with its objectives and functions, NEDLAC shall:

- (a) Consider all significant changes to social and economic policy before it is implemented or introduced in parliament.
- (b) Encourage and promote the formulation of coordinated policy on social and economic matters.
- (c) Strive to promote the goals of economic growth, participation in economic decision making and social equity.
- (d) Consider all proposed labour legislation relating to the labour market policy after it is introduced in Parliament.**
- (e) None of the statements are incorrect. (1)

1.5. Choose the **CORRECT** statement – In terms of the Unemployment Insurance Act 63 of 2001 (UIA):

- (a) Application for maternity benefits must be made at least 17.32 weeks before childbirth.
- (b) A pregnant contributor who is entitled to paid maternity leave in terms of her employment contract is not entitled to claim for maternity benefits in terms of the UIA.**
- (c) A contributor who suffers a miscarriage in the third trimester or bears a stillborn child is not entitled to any maternity benefits.
- (d) If an application for maternity benefits does not comply with the provisions of the Act, the claims officer must advise the applicant thereof either in writing or verbally, and provide her/him with reasons.
- (e) None of the statements are correct. (1)

1.6. Choose the **INCORRECT** option – Only one contributor of the adopting parties is entitled to adoption benefits, in respect of each adopted child, provided:

- (a) The application is made within twelve months after the date of the order for adoption.**
- (b) The child has been adopted in terms of the Child Care Act of 1983.
- (c) The contributor spent time away from work to care for the child.
- (d) The adopted child is below the age of 2 years.
- (e) None of the statements are incorrect. (1)

1.7. Choose the **INCORRECT** option – A contributor is not entitled to illness benefits if:

- (a) He/she is ill for less than 14 days.
- (b) He/she is entitled to unemployment benefits or adoptions benefits.

- (c) He/she refuses/fails to carry out the instructions of a medical practitioner.
 - (d) He/she refuses/fails to undergo medical treatment.
 - (e) None of the options are incorrect.**
- (1)**

1.8. Choose the **CORRECT** statement – In terms of the Occupational Health and Safety Act 85 of 1993 (OHASA):

- (a) An employee who has more than 20 employees in his employment, must appoint a health and safety representative/s.
 - (b) A health and safety representative must be appointed within 4 months of commencing business.
 - (c) Employees and/or their representatives must be consulted prior to the appointment of a health and safety representative.
 - (d) In shops or offices, one health and safety representative must be appointed for every 100 employees.
 - (e) All of the statements are correct.**
- (1)**

1.9. Jeremy's wife visits her husband at work. Whilst climbing a flight of stairs to get to her husband's office, her right shoe gets caught in a rubber strip, which has been hanging loose for a considerable amount time, but which the health and safety representative failed to bring to the attention of his employer. Jeremy's wife loses here balance and falls, hitting her head against the railings, resulting in a momentary loss of consciousness. Choose the correct option:

- (a) The employer cannot be held liable for the injuries sustained by Jeremy's wife, as she is not an employee of the company.
 - (b) Jeremy will be held liable for his wife's injuries, as his wife should not have been visiting him during working hours.
 - (c) The health and safety representative will be held liable in his/her personal capacity, since he failed to report the issue.
 - (d) The employer will be held liable, as it is the duty of the employer to ensure that the workplace/premises is safe and to ensure that persons other than employees are not exposed to hazards.**
 - (e) This incident is irrelevant for the purposes of the Occupational Health and Safety Act 85 of 1993, since Jeremy's wife did not sustain any serious injuries.
- (1)**

1.10. Choose the **CORRECT** option:

- (a) A Learnership consists of a structured learning component and practical work experience.
- (b) A learnership must lead to an occupationally related qualification.
- (c) A learnership is a vocational education and training programme.

(d) All of the options are correct.

(e) None of the options are correct.

(1)

[5 marks]

Question 2 – MCQ (This question is taken from a previous assessment. The questions within this question will form part of a pool, where the system will randomly select 3 questions)

2.1. In order for a transaction to fall within the scope of section 197 of the Labour Relations Act 65 of 1995 (LRA), these three elements must be simultaneously present: – Choose the **INCORRECT** option:

(f) A transfer by one employer to another;

(g) The business must be transferred as a going concern;

(h) The transfer of a solvent entity;

(i) The transferred entity must be the whole or part of a business;

(j) None of the options are incorrect. (1)

2.2. Which of the following options **ARE NOT** examples of transactions that constitute a transfer of business for the purposes of section 197:

(f) Sale of a business

(g) Outsourcing

(h) A merger

(i) All of the options.

(j) None of the options. (1)

2.3. Which of the following statements is **INCORRECT** – The old and new employer must conduct a valuation of the outstanding benefits that are due to the transferring employees. The old employer must agree with the new employer to a valuation as at the date of transfer of:

(f) The severance pay that would be payable to the transferring employees in the event of a retrenchment.

(g) The leave pay that is owed to the transferring employees and has not yet been paid by the old employer.

(h) The salary that the new employer intends to pay the employees.

(i) Any other payments that the old employer owes the transferring employees and that have not yet been paid.

(j) None of the statements are incorrect. (1)

2.4. Choose the **CORRECT** option – During the consultation process provided for by section 189 of the Labour Relations Act 66 of 1995, parties must agree on the following matters:

- (a) Appropriate measures to avoid dismissals.
- (b) The method of selection.
- (c) Appropriate measures to change the timing of dismissals.
- (d) The severance pay.

(e) All of the options are correct. (1)

2.5. Choose the **INCORRECT** statement – In order for large-scale dismissals for operational requirements to be substantively fair, the following factors must be considered:

- (f) Was the selection criteria fair and objective?
- (g) Were the retrenchments justifiable on rational grounds?
- (h) Were the retrenchments necessary to give effect to the operational requirements of the company?
- (i) Was there a proper consideration of alternatives?

(j) None of the statements are incorrect. (1)

[3 marks]

Question 3 – MCQ (This is new set of questions, The questions within this question will form part of a pool, where the system will randomly select 6 questions)

3.1. Enquiry by an arbitrator is a process whereby, an employer with the agreement of an employee, requests a bargaining council, an accredited agency or the CCMA to conduct an enquiry into allegations about the conduct or capacity of that employee – Choose the **INCORRECT** statement:

- (k) The ruling made by the arbitrator has the same status as an arbitration award.
- (l) Employers might suggest an enquiry by an arbitrator in cases where the working environment is not suitable for conducting a disciplinary hearing regarding a particular matter.
- (m) The arbitrator must direct what action, if any, should be taken against the employee.
- (n) A period of 14 days' notice of the commencement of enquiry by an arbitrator is usually given.

(o) None of the statements are incorrect. (1)

3.2. Any party to a dispute who alleges a defect in any arbitration proceedings may generally apply to the Labour Court for review of that decision. A defect could refer to: A commissioner having committed misconduct in relation to his/her duties as an arbitrator. Which of the following options are examples of misconduct on the part of a commissioner-

- (k) Gross negligence
- (l) Acting in bad faith on the part of the commissioner.
- (m) Gross mistake of fact.
- (n) Gross mistake of law.

(o) All of the options constitute examples of misconduct on the part of a commissioner. (1)

3.3. Any party to a dispute who alleges a defect in any arbitration proceedings may generally apply to the Labour Court for review of that decision. A defect could refer to: Instances where a commissioner exceeded his/her powers in executing the duties of an arbitrator. Which of the following options **are not** examples of instances where a commissioner could be seen to have exceeded his/her powers-

- (k) Ordering more than the maximum permissible amount of compensation.
- (l) An award obtained as the result of a corrupt relationship.**
- (m) Ordering reinstatement in the case of a dismissal that was only procedurally unfair.
- (n) All of the options
- (o) None of the options. (1)

3.4. Choose **INCORRECT** Option – The Labour Court may make any appropriate order, including:

(f) Order compliance with any provision of the Labour Relations Act 66 of 1995.

(g) Make an order with regard to an unresolved dispute even if the Labour Relations Act 66 of 1995 requires that particular dispute to be resolved through arbitration.

(h) Condone the late filing of any document or the late referral of any dispute to the court.

(i) Make any arbitration award or any settlement agreement an order of court.

(j) None of the options are incorrect. (1)

3.5. Arbitration is a process whereby an arbitrator appointed by the CCMA or bargaining council, listens to the evidence of both the parties to a dispute – Choose the **CORRECT** statement:

(k) An arbitration process is a new hearing.

(l) Any evidence that might have already been presented need not be presented again.

(m) Parties are not allowed to question or cross-examine the witnesses of the other side.

(n) Any party may within 30 days, request that the dispute be resolved through arbitration.

(o) None of the statements are correct. (1)

3.6. Under what circumstances can an arbitration award be varied or rescinded

(f) When a commissioner realises that he or she has made an error.

(g) When the losing party wants to challenge the reasonableness of the award by taking it on review to the Labour Court.

(h) When a dissatisfied party applies to the CCMA for variation or rescission.

(i) F and H are correct.

(j) All of the statements are correct. (1)

NB This question will be uploaded using numbering, without randomising the options.

3.7. Choose the **CORRECT** option – During arbitration proceedings, a party to the dispute may do any of the following:

- (f) Question the witnesses of any other party;
- (g) Call witnesses;
- (h) Give evidence under oath;
- (i) Address concluding arguments to the arbitrator

(j) All of the options are correct. (1)

3.8. Choose the **CORRECT** statement – When reviewing arbitration awards the labour court:

- (f) Must ascertain whether the arbitrator considered the principal issues, evaluated the facts presented at the hearing and came to a conclusion which was reasonable to justify the decisions he/she arrived at.
- (g) Determine whether the arbitrator had arrived at a decision that no reasonable decision-maker could have made.
- (h) The court is not allowed to consider the merits of the matter, as the focus is on the way in which the decision was reached.

(i) All of the statements are correct. (1)
 (j) None of the statements are correct.

~~3.9. What happens if a referring party does not appear at an arbitration hearing without explanation?~~

~~**(f) The arbitrator may dismiss the case.**~~

- ~~(g) The arbitrator may postpone the matter to a later date.~~
- ~~(h) May proceed to arbitrate the dispute by listening only to the version of the employer.~~
- ~~(i) All of the options are correct.~~
- ~~(j) None of the options are correct injuries. (1)~~

NB This question will no longer be included due to its close proximity to a question within the part 2.

3.10. Choose the **INCORRECT** option -

- (f) Con-arb is a combination of conciliation and arbitration.
- (g) The con-arb process allows the CCMA or a bargaining council to commence arbitration immediately after certifying that a dispute remains unresolved at conciliation.
- (h) The conciliation and arbitration phases remain separate but they are dealt with as one hearing on the same day.

(i) None of the options are incorrect. (1)
 (j) All of the options are incorrect.

[6 marks]

Question 4 –True or False Questions (The questions within this question will form part of a pool, where the system will randomly select 5 questions)

4. In light of your knowledge of the various labour legislation and case law, indicate whether the following statements are true or false:
- 4.1. The Commission for Conciliation and Arbitration (CCMA) is a court of law. (1) **(False)**
 - 4.2. An arbitration proceeding is a continuation of conciliation proceedings, evidence that has already been presented at conciliation, need not be presented again. (1) **(False)**
 - 4.3. Conciliation is a mediation process. (1) **(True)**
 - 4.4. When referring a matter to the CCMA, the referring party must choose whether they want the matter to be resolved through conciliation, or arbitration. (1) **(False)**
 - 4.5. Conciliation requires a neutral third party to act as a facilitator in order to assist the parties to resolve their disputes. (1) **(True)**
 - 4.6. During conciliation proceedings; an employee must be represented by a trade union representative. (1) **(False)**
 - 4.7. The CCMA is required to conciliate a dispute within 90 days of having received the referral. (1) **(False)**
 - 4.8. A settlement agreement must be issued if a matter cannot be resolved through conciliation. (1) **(False)**
 - 4.9. A deadlock refers to a situation where a dispute is not able to be resolved. (1) **(True)**
 - 4.10. A settlement agreement is binding on both parties. (1) **(True)**
 - 4.11. Legal representation is generally not permitted at conciliation proceedings. (1) **(True)**
 - 4.12. All disputes must be referred for conciliation within 30 days. (1) **(False)**
 - 4.13. The CCMA does not make any provision for late referral of disputes. (1) **(False)**
 - 4.14. The Labour court has the status of a high court. (1) **(True)**

Question 5 –True or False Questions (The questions within this question will form part of a pool, where system will randomly select 5 questions)

5. In light of your knowledge of the various labour legislation and case law, indicate whether the following statements are true or false:

- 5.1. Illness benefits may be more than the remuneration the contributor would have received , had she/he not been ill.. **(False)** Illness benefits are “top-up” benefit and cannot be more than the employees actual remuneration.
- 5.2. An employer must agree to provide a learner with a permanent position, once the learnership has ended. **(False)** There is no such obligation on the part of the employer. The employer only has to provide the learner with employment during the course of the learnership.
- 5.3. Foreign nationals who suffer bodily injury as result of the negligent driving of motor vehicles, on South African roads, are entitled to claim compensation from the Road Accident Fund (RAF). **(True)**
- 5.4. If an employee contracts a listed disease, the employee must establish that the disease arose “out of and in the course of employment”. **(False)** If an employee contracts a listed disease, it is presumed to have been caused by employment
- 5.5. The High Court has found that the exclusion of domestic workers under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), is unconstitutional. **(True)**
- 5.6. The Compensation Fund is funded by contributions made by employees and employers. **(False)** The fund is funded only by contributions made by employers.
- 5.7. Dependant’s benefits may only be claimed by a surviving wife or husband of the deceased. **(False)** They may be claimed by the surviving spouse or life partner of a deceased or a child (including an adopted) of the deceased.
- 5.8. To take reasonable steps to eliminate or mitigate any hazard or potential hazard to the safety and health of employees before resorting to protective equipment **(True)**
- 5.9. The Industrial Act of 1956 was only applicable to white employees working in the private sector. **(True)**
- 5.10. A contributor who is a father is entitled to parental leave of ten consecutive days, following the birth of his child and may then claim parental benefits. **(True)**

[5 marks]

Question 6

- 6.1. Lwandle is cashier at Jinge Wingle Convenience Store. He is accused of stealing two hundred rands (R200) from the till and subsequently dismissed without a hearing. He was not provided with any reasons for his dismissal. Lwandle now wants to prove that he is innocent and get his job back. He has taken a decision to refer his dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). He specifically wants the dispute to be resolved using the 'conarb' process. In order to assist Lwandle, identify the instances where conarb may be used to resolve disputes. (5)

Choose five (5) options:

- (a) The employee alleges that the reason for his or her dismissal is that the employer made continued employment intolerable (constructive dismissal).**
- (b) Dismissals based on operational requirements.
- (c) The employee alleges that the reason for his or her dismissal is that the employer made continued employment intolerable (constructive dismissal).**
- (d) The employee does not know the reason for the dismissal.**
- (e) Dismissals relating to participation in an unprotected strike.
- (f) The employer alleges that the reason for dismissal relates to the employee's conduct or capacity, except where the alleged reason for dismissal relates to the employee's participation in an unprotected strike.**
- (g) Relating to organisational rights.
- (h) Relating to the interpretation or application of collective agreements
- (i) A dismissal where the employee alleges the reason for the dismissal was because the employee refused to join, was refused membership or was expelled from a trade union party to a closed shop agreement.
- (j) The dispute relates to an unfair labour practice.**

ACDFJ (5)

[5 marks]

Question 7

- 7.1. Jade works as a truck driver, for Mzansi Logistics. Whilst transporting goods from Durban to Johannesburg, Jade is involved in an accident, caused by the negligent driving of another road user, who was overtaking whilst it was not safe

to do so. Upon finding out about the accident, Jade's employer dismisses her with immediate effect. Jade initially sees her dismissal as a 'blessing in disguise' because she was no longer happy working for her employer. She therefore decides not to challenge her dismissal. After 40 days, Jade changes her mind.

Identify the factors that must be taken into account by a commissioner in order to allow Jade to refer her dispute for conciliation, at the Commission for Conciliation, Mediation and Arbitration (CCMA).

(a) Whether this is the first time that the aggrieved party is referring a matter to the CCMA.

(b) Consider the employee's period of delay.(1)

(c) The explanation for the late referral.(1)

(d) Consider the aggrieved party's level of education.

(e) The employee's prospects of success in the matter. (1)

(f) Whether the aggrieved party will be able to afford to pay for the conciliation process.

(g) Any prejudice to the parties. (1)

(h) The type of matter that is being referred.

(i) Whether the CCMA has capacity and resources to accept the application.

(j) Any submissions received on the part of the employer. (1)

BCEGJ (5)

[5 marks]

Question 8

Link the description in Column A to the most suitable phrase contained in Column B. Example: 1A.

	COLUMN A		COLUMN B
1	The type of jurisdiction exercised by the Labour Court, in cases that involve the violation or breach of a constitutional right related to employment and labour relations.	A	Is final and binding and may generally be enforced as if it were an order of the labour court.
2	Arbitration.	B	Superior Jurisdiction .
3	Certificate of Outcome Conciliation.	C	May not be followed in cases where the dispute relates to automatically unfair dismissals.
4	The type of jurisdiction exercised by the Labour Court, in cases that involve a labour dispute if it remains unresolved at conciliation and if the	D	Being open with the parties about their chances of Success.

	employee has alleged that the reason for dismissal is automatically unfair.		
5	Settlement Agreement.	E	An application for condonation.
6	Conciliation.	F	A commissioner must try to attempt to resolve disputes through this process within 30 days of receiving a properly completed referral form.
		G	Exclusive Jurisdiction.
		H	A written agreement in settlement of a dispute that a party had the right to refer to arbitration.
		I	A commissioner may issue this document; indicating that the dispute referred for conciliation remains unresolved.
		J	A party has 90 days to 'apply/request' for a dispute to resolved using this process.
	[Total: 6 marks]	K	Concurrent Jurisdiction
		L	Taking into consideration any submissions received on the part of the employer.
		M	Is issued at the beginning of arbitration proceedings.

1.	2.	3.	4.	5	6.
K	J	I	G	H	F

[6 marks]

Subtotal: Part 1

[40 Marks]

Part 2: Long Questions

Question 1

1. Kenneth and Armando are in a same sex marriage. They have been happily married for the past 4 years. Kenneth works as a partner at a law firm, whilst Armando is an assessor for a major insurance company. They have been working for their respective employers for 3 years and 7 years respectively. Kenneth and Armando are both contributors in terms of the Unemployment Insurance Act 63 of 2001 (UIA).

The couple has decided that it is time for them to start a family. They are currently weighing up the options, available to them as a gay couple. On the one hand, they are considering adoption; they are looking at adopting a baby that is no older than 18 months. On the other hand, they are also looking into using an egg donor. Using an egg donor would require that the eggs be fertilised through the process of in vitro fertilization. Thereafter the resulting embryos will be transferred into a woman's uterus, who will carry the baby on behalf of the couple.

At this stage Kenneth and Armando are undecided, they're not sure which option will work best for them, yet. Kenneth and Armando fear that they will have to take unpaid leave for a prolonged period, to care for their young their baby, regardless of the option that they end up pursuing.

They approach you for advice. Which option would you advise them, to pursue? In light of the option that you that you have chosen, fully advise Kenneth and Armando of any entitlements that they may have in terms of the UIA. (10)

Surrogacy:

Award a max of 7 marks

Kenneth/ Armando can claim for commissioning parental benefits. (1)

A contributor who is a commissioning parent is entitled to commissioning parental leave of ten consecutive weeks and may then claim commissioning parental benefits if the following conditions are met: (1)

If the child has been born as a result of a surrogate agreement as envisaged in the children's Act;(1)

If the period absent from work was spent caring for the child; (1)

If the contributor was in employment for at least 13 weeks prior to the application for benefits. (1)
If the application is made in accordance with the prescripts of Part EA of the UIA; (1)
Only one contributor of the commissioning parents is entitled to the commissioning parental benefits. (1)
The application must be submitted using the prescribed form. (1)

Award a max of 3 marks

The other partner can claim for Parental benefits. (1)
A contributor who is a parent is entitled to parental leave of ten consecutive days and may then claim parental benefits if the following conditions are met; (1)
If a baby is born as a result of a surrogate motherhood agreement as defined in the Children's Act);(1)

Both applications must be submitted within 12 months after the birth of the child. (1)

Adoption:

Award a max of 7 marks

Only one contributor of the adopting parties is entitled to adoption benefits, in respect of each adopted child, (1) provided:
The child has been adopted in terms of the Child Care Act of 1983; (1)
The contributor spent time away from work to care for the child; (1)
The adopted child is below the age of 2 years; (1)
The application is made in accordance with the provisions of part E; (1)
Entitlement to adoption benefits commences on the date that a competent court grants an order for adoption in terms of the Child Care Act. (1)
Application must be made within six months after the date of the order for adoption. (1)
The application must be submitted using the prescribed form. (1)

Award a max of 3 marks

The other partner can claim for Parental benefits. (1)

A contributor who is a parent is entitled to parental leave of ten consecutive days and may then claim parental benefits if the following conditions are met; (1)

The application must be submitted within 12 months after the adoption order/ or the date the child has been placed in the care of the prospective adoption parent. (1)

[10 Marks]

Question 2

2. Olufolake works as a flight attendant at Africa and Beyond Airways (ABA), a global airline headquartered in South Africa. Prior to the Covid-19 pandemic ABA was already experiencing financial difficulty. The situation has inevitably, been worsened by the Covid-19 pandemic and subsequent lockdown together with the resultant travel ban imposed as a result thereof.

ABA is now in severe financial distress. Olufake has not received his salary in more than 3 months. Simply put, the airline does not have any money and has failed to meet its debt obligations. The court has subsequently granted an order to this effect. Although other airlines are gradually taking back to the skies, ABA remains grounded. The Airline lacks the financial resources to resume operations.

Milk and Honey Airways (MHA) is also a global airline. In an attempt to grow MHA's global presence, the shareholders of MHA have passed a resolution for MHA to acquire ABA through a very comprehensive amalgamation agreement. Once all the formalities have been complied with, a new airline will be born. The new airline is set to be bigger and better than both the existing airlines.

- 2.1. Based on your understanding of section 197 of the LRA, discuss the consequences of the transaction illustrated in the set of facts above. (4)

Employment contracts are automatically transferred ;(1)

Continuity of employment is preserved; (1)

Anything done by the old employer in respect of each employee is deemed to have been done by the old employer and not the new employer; (1)

All rights and obligations that were in existence before the transfer, between the older employer and each employee are not transferred to the new employer.(1)

- 2.2. How would your answer to 2.1 above differ, if ABA were a financially 'healthy' and thriving business? (2)

Anything done by the old employer in respect of each employee would be deemed to have been done by the new employer and not the old employer; (1)

All rights and obligations that were in existence before the transfer, between the older employer and each employee would be transferred to the new employer.(1)

- 2.3. Assume that the agreement has been finalised and Olufolake is now an employee of the new airline. Olufolake's new employment contract contains new responsibilities and benefits. Olufolake was of the view that his employment contract would remain exactly the same. Discuss the extent to which Olufolake's new employer may make changes, to his responsibilities and benefits within his employment contract. (2)

Award a max of 2 marks:

A new employer is allowed to employ the transferred employees on different terms and conditions of employment from those that were offered by the old employer. (1) On condition that they must not on the whole be less favourable to the employees than the conditions of the old employer. (1) The new employer is allowed to transfer an employee to a pension, provident, retirement or similar fund, other than the fund to which the employee belonged prior to the transfer.(1)

- 2.4. Assume that his new employer expects him to work longer hours and is paying him less than his previous employer. Olufolake is generally unhappy with his new working conditions; he wants to leave the employ of his current employer to start his own business. In light of these new working conditions, advise Olufolake as to how he can proceed to leave his employer. (2)

Olufolake may terminate the contract of employment/resign (1) and claim constructive dismissal. (1)

[10 marks]

Question 3

3. Adjua works as a truck driver, for Mzansi Logistics. Whilst transporting goods from Durban to Johannesburg, Adjua is involved in an accident, caused by the negligent driving of another road user, who was overtaking whilst it was not safe to do so. Upon finding out about the accident, Adjua's employer concludes that Adjua acted negligently; in fact her conduct is seen as being tantamount to gross negligence. Adjua is further informed, that her conduct falls short of that which have been expected of a reasonable person 'in her shoes'. Adjua's employer proceeds by dismissing her, without a hearing.

Adjua subsequently refers the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. The parties are not able to reach an agreement, the matter therefore remains unresolved. Is this the end of the road for Adjua? Answer the following questions:

- 3.1. Assume that Adjua sustains severe injuries, because of the accident. Discuss Adjua's entitlement to compensation in terms of the Compensation for Occupational Injuries and Disease Act (COIDA). (5)

An "accident" is one that arises out of (1) and in the course of an employee's employment (1) and results in a personal injury, illness or death of an employee; (1)

Adjua was injured while at work, doing her job. (1) She is therefore entitled to claim from the compensation fund. (1)

- 3.2. Briefly discuss how the CCMA commissioner should document, the fact that Adjua and Mzansi Logistics were not able to reach an agreement, during conciliation proceedings? (2)

The commissioner must issue a certificate of outcome/certificate of non-resolution,(1) indicating that the dispute remains unresolved. (1)

- 3.3. Advise Adjua, of any dispute resolution processes/mechanisms which she can use to take the matter further. (1)

Adjua may refer the matter to arbitration.

- 3.4. Following your advice in 3.3 above, assume that Adjua decides to take the matter further. Adjua strongly believes that she needs a lawyer in order to be able to 'win' against her employer. Paying particular attention to the type of dispute in question, fully discuss whether Adjua is allowed to be represented by a lawyer, during the proceedings identified in 3.3 above. (5)

Since this is a dispute pertaining to the fairness of a dismissal for misconduct, (1) legal representation is generally not allowed. (1) Reason being that Lawyers are believed to make the process legalistic and expensive/ (1) lawyers may be responsible for delaying the proceedings due to their unavailability and the approach they adopt. (1)

However there are exceptions:

the commissioner and all the other parties agree to legal representation. (1) or

Award a max of 2 marks:

The commissioner decides that it is reasonable to allow legal representation, after considering the nature of the questions of law raised, the complexity of the dispute, the public interest and the comparative ability of the parties to deal with the dispute.(2)

- 3.5. Following your advice in 3.3 above, assume that Adjua decides to take the matter further. Further assume that Mzansi Logistics' nominated representative, the company's transport manager (Adjua's former line manager), decides not to attend the proceedings on the scheduled date. The transport manager was duly notified but decided not to attend the proceedings. According to the transport manager, he "needs to attend to serious business and doesn't have time to entertain disgruntled former employees like Adjua." Identify a dispute resolution process/mechanism designed to prevent this sort of situation. (1)

Con-Arb. (1)

- 3.6. Identify a dispute resolution process/mechanism designed to allow allegations against an employee, to be determined in a short period without the need for a disciplinary hearing. (1)

Enquiry by an arbitrator. (1)

- 3.7. Discuss the key elements of the dispute resolution process/mechanism identified in 3.6 above. (5)

A process whereby, an employer with the agreement of an employee, requests a bargaining council, an accredited agency or the CCMA to conduct an enquiry into allegations about the conduct or capacity of that employee. (1)

Award a max of 2 marks:

The employee may only consent to this once he or she has been informed about the allegations in question. (1)

An arbitrator will then be appointed. (1)

Most of the general provisions relating to the conduct of ordinary arbitration hearings apply. (1)

Award a max of 2 marks:

A period of 14 days' notice of the commencement of a pre-dismissal arbitration is usually given. (1)

The parties may be represented, by a legal practitioner on agreement between the parties or if permitted by the arbitrator;

The arbitrator must, direct what action, if any, should be taken against the employee. (1)

The ruling made by the arbitrator has the same status as an arbitration award. (1)

[20 marks]

Subtotal: Part 2

[40 Marks]

GRAND TOTAL

[80 MARKS]
