

Specialist Employment Law Assignment (5OS01)

Task

After meeting with Charlotte and Madeleine, you have some concerns and decide that you must provide them with detailed written advice on how to proceed with each of the matters below. To help the reader, please make use of headings and assessment criteria references to signpost the assessment criteria being addressed. You decide to:

1. Evaluate the aims and objectives of employment regulation. (AC 1.1)

Employment law regulates the relationship between employers and employees. It guides what employers can expect from employees, what they can ask from them and employees' rights (CIPD, 2022a). This means that rules are enforced which sets expectations to ensure consistency and fairness. Therefore, it establishes that regulations are upheld on both sides. For example, ensuring the correct processes are followed around employee dismissal. Furthermore, this means that employees are treated fairly, government policy is implemented, and organisations are complying with legal compliance.

Social Justice

Is based on the belief that everyone should have a right to equal access based solely on merit. Additionally, everyone has the right to be free of any direct or indirect discrimination, harassment or bullying (CIPD, 2022b). This is stated in legislation where everyone has the right to be treated fairly, as set in The Equality Act 2010. Furthermore, also for all individuals to have basic employment rights including minimum wage, statutory annual leave, and statutory sickness.

Fairness

The Equality Act 2010 provides a legal framework to protect the rights of employees ensuring equal opportunities through eradicating discrimination and promoting fairness (Equality and Human Rights Commission, 2022). It ensures employees are treated fairly and diversity and equality are respected ensuring everyone feels inclusive in the work environment. This fosters good employee welfare and increases the likelihood of them staying within the organisation. Additionally, employees are paid in accordance with legislation with the National Minimum Wage as well as the agreements in their contract.

Protection of employees

All workers are protected by The Employment Rights Act 1996. This legislation includes protecting employees in the workplace against discrimination including race, colour or religion and workplace injury. The Health and Safety at Work Act 1974 protects workers by ensuring they operate in a safe working environment and to be provided with any personal protective equipment (HSE, 2022).

Additionally, to be compensated for any working hours completed including additional labour.

Employees are entitled to other factors such as parental leave, maternity and paternity pay, time off for dependents, redundancy pay, protection against unfair dismissal and the right to request flexible working (ACAS, 2022a).

To enforce these rules employers, need to establish clear policies. These include being compliant with regulations such as minimum wage. Failing to establish these may result in financial consequences or liability claims.

2. Examine the role played by the tribunal and courts system in enforcing employment law.

(AC 1.2)

The tribunal and court systems are in place to ensure employers and employees comply with the law and enable them to address any matters that may have been treated unfairly. Employment Tribunals deal with claims brought against employers by employees relating to their employment or termination. These can include unfair and wrongful dismissals, discrimination, equal pay, and deductions from wages (CIPD, 2022g). The purpose of this is to resolve employment disputes effectively. If they are successful in their claim, the tribunal can order the employer to take remedial action or pay compensation. Cases that are appealed move to the Employment Appeal Tribunal and from there to the court of appeals to the Supreme Court.

The first part of an Employment Tribunal is early conciliation which is used to facilitate to attempt to resolve a dispute and reach a settlement between the two parties. If this is not successful, next is bringing a claim to the employment tribunals by completing the claim form 'ET1' which must be lodged within three months minus one day of the alleged incident. The next stage is responding to the claim where the respondent is sent a 'ET3' to complete and return to the Employment Tribunal within 28 days including an outline of the defence. In accordance with The Employment Tribunals Regulations 2013 all claims, and responses must be stated on the 'ET1' and 'ET3' forms. In some circumstances a claim may require a review before the hearing proceeds, this is known as a preliminary hearing. The purpose of this is to address specific issues that need resolving before a full hearing can take place. The hearing will then take place where all the evidenced will be presented,

and witnesses will be cross-examined to reach a verdict where the majority agree on the outcome decided. The decision will also be confirmed in writing to both parties. The decision is not purely who won the case but what remedies are to be implemented (CIPD, 2022g).

If the result does not sit with the claimant, they can proceed to take it to the Supreme Court presenting the law was not followed by lower courts but will only be considered in the most significant matters. Additionally, it can seek judgement from the European Court of Justice but will only hear cases that involve European labour laws (Daniels, 2022).

3. Explain how cases are settled before and during legal procedures. (AC 1.3)

Settling employment disputes can be achieved through various alternative ways before and during legal procedures. The Employment Rights Act 1996 features the processes used for resolving employment-related disputes. It is strongly advised that before going to an employment tribunal, an employee should firstly submit a formal complaint to ACAS. This process is called early conciliation, where ACAS aims to mediate workplace disagreements and to help both parties by airing their grievances and reaching a mutual resolution without having to go to an employment tribunal (ACAS, 2022b). A claim to an Employment Tribunal needs to be made within 3 months minus 1 day, this is called the limitation date. Once ACAS receive this, the date can be extended to allow early conciliation to take place. This process can last up to 6 weeks. If both parties reach a mutual agreement the conciliator will communicate this through a formal agreement using a 'COT3' form. This may include sum of money to be paid, when payment will occur, what claims are settled and confidentiality terms. When all parties sign the agreement, this concludes the matter (CIPD, 2022).

When a case is settled during legal procedures, both parties will negotiate the terms of a settlement agreement. CIPD (2022f) states that settlement agreements are legally binding contracts used to cease employment on agreed terms which must be in writing. This can be achieved through mediation or arbitration. This process must be in writing, as it is a voluntary process so either party does not have to agree to enter discussions if they do not wish to. Therefore, this means they waive any right to make a claim into an Employment or Court Tribunal. Additionally, the employee must receive independent legal advice on the terms and effect of the proposed agreement that will be implemented. The discussions involved to reach a settlement agreement are often done on without prejudice basis, which therefore cannot be used as evidence in a court or tribunal. Under a settlement agreement an agreed reference can be agreed between the parties (ACAS, 2018).

And provide tailored advice for each of the following scenarios:

- 4. Charlotte and Madeleine are aware discrimination legislation exists. They are unsure how this might affect their approach to recruitment and selection of employees for their two new branch openings. They want to avoid dealing with retirement and do not want their business disrupted by employees taking maternity leave. To overcome this, they decide to appoint young men. Advise them on the decision of appointing young men only. (AC 2.1)**

Discrimination law protects employees, workers, applicants, and ex-workers from being treated unfairly against protected characteristics including age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation (ACAS, 2020a). Regarding recruitment and selection employers therefore cannot treat applicants less favourably. If an organisation doesn't employ an individual because of a protected characteristic, they are discriminating against this individual and breaking the law in accordance with The Equality Act 2010.

Charlotte and Madeleine appointing young men only is a poor approach. By not employing those near retirement age is direct age discrimination (Section 5) and someone who is pregnant (Section 18). This is direct discrimination (Section 13) for possessing those characteristics rather than their ability. Opposed to indirect discrimination (Section 19) where it disadvantages some individuals who share a protected characteristic (Equality and Human Rights Commission, 2019). However, they should take the approach of selecting the most qualified and carrying out a selection process that is non-discriminatory. Charlotte and Madeleine are not allowed to inquire about an individual's protected characteristic including age and pregnancy (GOV UK, 2022). So, in this case, they are not allowed to only employ young men. However, Charlotte and Madeleine can inquire about an applicant's age if it is an occupational requirement such as employing those aged 18 or over to permit the sale of alcohol.

If one of their employees can demonstrate they are subject to unfair treatment, they must be able to evidence a 'comparator' of the opposite gender or race of being treated differently. To defend this, Charlotte and Madeleine can argue all reasonable steps have been taken. It is problematic to argue all reasonable steps have been taken as evidenced in case law *Allay (UK) Ltd v Gehlen (2021)* where the employer argued all reasonable steps had been taken in training. Nonetheless, this was rejected as the training was outdated and managers had failed to report discriminatory behaviour when they had become aware of it. If an Employment Tribunal finds discrimination has occurred, they can be awarded through compensation or recommendation of actions. This could include injury to feelings, guidelines were set for ranges of compensation known as Vento Bands. In April 2021 the

bands currently set at lower band (£900-£9,100), middle band (£9,100-£27,400), top band (£27,400-£45,600) and in exceptional circumstances £45,600 or more (Daniels, 2022).

- 5. Cat, a restaurant manager, has recently become aware that she is paid less than Kit, another manager who is male. Her salary is £28,000 a year, whereas Kit earns £30,000 a year. She asked Charlotte to increase her salary to match Kit's, but she refused saying Kit deserved the extra money. (AC 2.2)**

The law states that both men and women have the right to receive equal remuneration for equal work as highlighted in The Equality Act 2010. Therefore, being legally entitled to be paid at the same rate for like work, work rated as equivalent and work of equal value (CIPD, 2022c). Therefore, it makes it unlawful to offer different employment terms based on sex.

In Cat's scenario, she could enter an equal pay claim for like work, as she is completing the same job roles and responsibilities as her male co-worker but is receiving a salary that is less. This means completing work of a similar nature. For Cat to make an equal pay claim she must evidence that her pay, and conditions is worse than Kit's. This person is named as a 'comparator', they are an individual who is of the opposite gender, working for the same employer, doing like work who is paid more or has more beneficial terms and conditions of employment than the claimant.

Furthermore, Cat can use more than one comparator and include someone who currently works for the organisation or someone who worked for them previously (ACAS, 2022c). For Cat's employer to defend the claim they need to evidence that Cat bringing the claim and the comparator are not engaged in like work. As evidenced in the case law of *Capper Pass v Lawton (1997)* where two employees did like work an equal pay claim was upheld. The EAT stated that the skills and experiences to do the job and a general consideration of the type of work required was essential.

If Cat is successful in her claim, she would be entitled to receive the same pay and benefits as her male counterpart. Additionally, she could also be entitled to back pay which is the difference in wages that she should have been paid if she was not discriminated against up to a maximum of 2 years before the proceedings were instigated (Daniels, 2022). The Enterprise and Regulatory Reform Act 2013 introduced legislation surrounding pay audits. Therefore, if an organisation loses an equal pay or sex discrimination claim relating to pay, they will be ordered to carry out a pay audit. The audit will identify any gender-related pay differences (Daniels, 2022).

6. The lease on an existing site is due to expire in four months' time and the new terms are prohibitively expensive. Charlotte and Madeleine decide to close the restaurant when the lease expires, rather than renew the lease. When the restaurant closes, they intend to dismiss all six employees, paying each person two weeks' notice as stated in their contracts of employment:
- a. Angelica, the manager (eight years' service, 53 years old, salary £700 per week)
 - b. Saffron, the supervisor (five years' service, 30 years old, salary £350 per week)
 - c. Chip and Cherry, full-time sales assistants, who are 18 years old, and Reese and Carmel, full-time sales assistants who are 19 years old. All four employees have one year's service, are paid £9.00 per hour, and work 25 hours a week)

Advise why their approach is risky and what they should do instead. (AC 3.1)

Redundancy is a form of dismissal which occurs when an organisation needs to reduce the size of the workforce to save expenses (CIPD, 2022e). Under The Employment Rights Act 1996 redundancy can include the employer has ceased or intends to cease and carry on the business for which the employee was employed or in the place where the employees were employed or for employees to carry out work of a particular kind in the place they were employed (Section 139).

Charlotte and Madeleine's approach is risky as their employees are entitled to consultation if they are being made redundant (GOV UK, 2023c). They are making fewer than 20 jobs redundant, so no collective consultation is required. Charlotte and Madeleine should still engage in individual consultation. Legislation states that the employer must give the following information in writing prior to consultation including reasons for redundancies, number and description of each type, total of those affected, proposed method of selection, procedure, and method of calculating redundancy payment if different from statutory payment. If they aren't supplied with this information, the consultation cannot begin. Otherwise, it can be ruled as insufficient time for meaningful consultation as evidenced in the case law *Green and Son (Castings) Ltd and others v ASTMS and AUEW (1983)* where the information was supplied 8 days previous. Therefore, a protective award can be made when the appropriate length of consultation has not been observed in wages that would have earned during the period.

Charlotte and Madeline's employees should get at least the statutory notice period which is the legal minimum (ACAS, 2021). Statutory notice period is one week for those with two years' service and one week for each year worked between 2-12 years. Anyone with 12 years or more will receive 12

weeks. Their employees are entitled to the following redundancy pay Angelica (£7,716), Saffron (£1,750), Chip, Cherry, Reese, and Carmel are not entitled to any statutory pay as they require to have 2 years' service to qualify. However all the employees will receive pay for 2 weeks' notice as stated in their contracts of employment. Pay is capped at £643 per week and length of service is capped at 20 years. Nonetheless, an employer can choose not to cap it as a gesture of goodwill or if it is in a redundancy policy. Additionally, their contract may state differently which is their contractual notice along with any holiday pay owed.

- 7. The takeover of Crumbly Cakes is due to be complete in four months. Ownership will transfer to Peachy Desserts Ltd, and the identity of the owner will change. Charlotte and Madeleine consider the takeover a 'good fit' with their business, as the nature of the business is the same and they will take over all tangible assets. Charlotte and Madeleine do not dispute that Peachy Desserts Ltd will become the employer of the 12 employees of Crumbly Cakes but plan to give the employees of Crumbly Cakes new contracts on the same terms and conditions as their existing employees. Advise on the legal risk of this approach and what should be done instead. (AC 3.2)**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) is to protect employees from dismissal or redundancy when a business transfer occurs. TUPE applies in two distinct ways which include a business transfer when a business is merged or taken over. Also, a service provision changes including outsourcing, insourcing, and transferring to another contractor (Taylor and Woodhams, 2022).

Peachy Desserts Ltd giving the employees new contracts on the same terms and conditions is a risky approach. CIPD (2022h) states that employees are protected to the same terms and conditions of employment in the event of a transfer. The new employer can only make changes to the contract if they improve the terms and conditions such as increasing their holiday entitlement or if there is an economic, technical, or organisational (ETO) reason involving a workforce change such as restructuring. This can harm as evidenced in this case law *Taylor v Connex South Eastern Ltd (2000)* where an employer sought to change terms and conditions two years after the transfer. EAT ruled this was unfair dismissal because it related to the transfer, irrelevant on the timescale. Although this will mean that the contracts will differ from the existing employees who already work for the employer. However, this doesn't mean you automatically have the right to the same terms and conditions. Peachy Desserts Ltd has the choice of harmonising the terms and conditions but can only do so if it improves them. Secondly, they could keep them as the same before but not make them worse without ETO reasoning.

Peachy Desserts Ltd are legally required to provide the transferees with information and must be provided at least 28 days prior. This should include names of those who will transfer, details of employees' statements, information on any disciplinary or grievances, or any legal action. If this information is not provided an Employment Tribunal can award £500 per employee (Daniels, 2022).

They should also conduct consultations with the transferrers at the earliest convenient point. There is no specified minimum consultation period unlike collective redundancy consultation, although they must provide the relevant information to employee representatives to enable consultation. Employers who fail to inform and consult can be required to pay each employee up to 13 weeks' pay in compensation.

- 8. Charlotte and Madeleine are aware there are changes to the National Minimum Wage each year. They firmly believe that all sales assistants work hard regardless of age and as such should be paid the same. All sales assistants are currently paid £9.00 per hour. They want to check their approach is lawful and wonder whether there are any rights related to pay statements they need to comply with. (AC 4.1)**

The major statutory rights workers have regarding pay is to be paid the national minimum wage and the right to not have deductions made from their pay without written consent. The National Minimum Wage (NMW) Act 1998 gives the right for workers to receive a minimum hourly rate. The NMW from April 2022 is £9.50 per hour for workers over 23 years of age which is also known as The National Living Wage. Workers aged 21-22 are entitled to receive a minimum of £9.18 per hour, and those aged 18-20 are entitled to £6.83 per hour. Workers who are 16 or 17 years of age are entitled to receive £4.81 (GOV UK, 2022). Charlotte and Madeleine's approach of paying £9.00 per hour is currently unlawful as the NMW is £9.50, therefore if they want to pay all their workers the same rate regardless of age, they need to pay the NMW for those over 23 years of age. However, they could also lawfully pay those employees a lesser rate for those either 21-22, 18-20 or 16-18.

Organisations who underpay their workers risk being named on the Government and Low Pay Commission websites. Claims can be made to Employment Tribunals and HMRC can take court action against organisations who don't pay the NMW resulting in fines of up to £20,000 per worker (Waite et al., 2021). This means that employers cannot deduct or cover charges. As evidenced in case law *Leisure Employment Service v HMRC (2007)* where the employer argued that weekly amount deducted was formed part of the employees' wages, but the Court of Appeal did not permit this argument.

Charlotte and Madeline additionally need to comply with workers' rights to itemised pay statements. In accordance with The Employment Rights Act 1996 employees are entitled to receive a written pay statement detailing payment of wages or salary the day of or before payment. This should include gross salary, any variable pay, labelled deductions from the gross amount and net salary. If an employee doesn't receive their pay statement, they can apply to The Employment Tribunal and declare the specifics that should have been included (CIPD, 2022c). Deductions from their wages are only permitted by law in circumstances such as income tax or national insurance contributions. If an employee is unable to work due to illness, they may be eligible to receive Statutory Sick Pay (SSP). This is currently set to £109.40 per week, which is paid by the employer for up to 28 weeks (GOV UK, 2023d).

- 9. Charlotte has received a complaint from Kit, manager of a restaurant that trades seven days a week. Kit states his working hours are too long, and that he does not have adequate breaks or sufficient days off. He normally works five days a week from 9.30am to 9.30pm but when his supervisor is on holiday, he must cover their days off. Advise on whether Kit has a legal cause for complaint, with reference to employment law. (AC 4.2)**

The regulation which governs statutory rights on working time is the Working Time Regulations (WTR) 1998. This covers conditions on weekly working time, rest periods and annual leave. A worker is an individual who is under a contract of employment or by another party. Employers have a duty of care to their employees' protecting them from consistent long hours and overworking. The provisions include a limit of 48 hours a week over a 17-week period on average, 5.6 weeks annual leave per year, 20 minutes' rest period working 6 hours or more and 11 hours rest in any one 24-hour period (CIPD, 2022i). Furthermore, there are provisions for night workers where they can work maximum of 8 hours in a 24-hour period. Young workers can only work a maximum of 12 hours per week in term time, maximum of 2 hours on school days and Sundays. Those between the ages of 16-18 must receive a 30-minute break for over 4.5 hours worked (CIPD, 2020).

Kit has a legal cause for complaint as he is currently working over 48 hours per week. Kit can sign an 'opt-out' agreement if he wishes to work more than 48 hours per week. However, Kit's employer cannot force their employees to sign it and they should willingly consent to this and cannot be dismissed. Additionally, Kit is also entitled to adequate rest periods which he currently isn't receiving as workers are entitled to have a 20-minute unpaid break in a working day that exceeds 6 hours. Also, he is entitled to one day off per week.

According to legislation Kit is also entitled to 5.6 weeks paid holiday a year (GOV UK, 2023a). Those who work a 5 working day week are required to receive a minimum of 28 days' worth of paid leave

per year. Some employers require their employees to take their annual leave at certain times and may refuse some requests in certain circumstances. Calculating annual leave can present complexities including ensuring considerations of commission, overtime, bonuses and other allowances and public and bank holidays counting towards annual leave entitlement (CIPD, 2022i). As evidenced in case law *Lock v British Gas Trading Ltd (2014)* where it was argued that holiday pay should include commission, this case was referred to the Court of Justice which decided that commission should be included when calculating pay.

10. Coco, a restaurant manager with eight years' service, was delighted to inform Charlotte and Madeleine that she is pregnant and that her baby is due in six months' time.

Charlotte, who took two weeks off after the birth of her baby, is unhappy at the disruption this will cause but is happy to let Coco book two weeks' annual leave to coincide with the birth of her baby. Charlotte feels a small business cannot afford the maternity leave and maternity pay that a larger organisation could offer, and she knows from experience that two weeks off is sufficient. Advise Charlotte and Madeleine on Coco's maternity rights. You are concerned about Charlotte and Madeleine's lack of knowledge in this area and decide to add a brief overview of paternity and adoption rights in case they make mistakes in this area too. (AC 4.3)

While Coco is pregnant, she is covered under maternity protection through periods of antenatal care where she has the right to take paid time off for antenatal appointments during working hours. Additionally, she is entitled to Compulsory Maternity Leave (CML), Ordinary Maternity Leave (OML), and Additional Maternity Leave (AML) as she has entered a contract of employment. Coco is entitled to CML for two weeks immediately after the birth, OML for 26 weeks and AML which is an additional 26 weeks regardless totalling 52 weeks. During this period Coco is allowed to work for up to 10 Keeping in Touch days without losing any entitlement to Statutory Maternity Pay (SMP) (Daniels, 2022).

Coco is entitled to SMP for 39 weeks as she has more than 26 continuous weeks employment before the qualifying week of 25th week of pregnancy. Coco will receive 90% of her average weekly earnings before tax for 6 weeks. Then the remainder 33 weeks she will be entitled to 90% of her average weekly earnings or £172.48 whichever is lower (GOV UK, 2023b). It is advisable for Charlotte and Madeleine to offer Coco her maternity rights as Coco could make a claim to an Employment Tribunal for discrimination.

It is crucially important that Charlotte and Madeleine are aware of other paternity and adoption rights. Paternity leave is for a father of the baby or has a role in the upbringing of a child. They can
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be eligible if they have 26 weeks' continuous employment. The leave must be taken between the baby's birth date or within that week and 56 days and can be one to two weeks continuous leave. They are entitled to resume the same position post leave (Daniels, 2022). Where it is used alongside parental leave it may not be reasonably practicable and an alternative may be proposed.

Since April 2005 in the UK Statutory Adoption Leave has been put in line with Statutory Maternity Leave with up to 52 weeks leave available. They can be eligible for 26 weeks of Ordinary Adoption Leave (OAL) and 26 weeks of Additional Adoption Leave (AAL) if they are adopting a child or fostering a child permanently. They are entitled to resume the same position and the date commences once the child has been placed with the adopters. Statutory Adoption Pay (SAP) is eligible for up to 39 weeks if they have 26 weeks' continuous employment (CIPD, 2022d).

11. Chelsea, a restaurant manager, has made a flexible working request and wants to change from working full-time to working three days a week. Charlotte informs you she will let Chelsea know that Peachy Desserts Ltd 'don't do' flexible working and if she does not like it, she should leave and find a part-time job somewhere else. Advise Charlotte and Madeleine of the risks of their approach and what they should do instead. (AC 4.4)

Flexible working is an arrangement which provides flexibility on how long, where, when and what times employees work. Practices include part-time, term-time and hybrid working (Taylor and Woodhams, 2022b). In April 2003 the government introduced the right to a flexible working request which applied to parents and carers. The legislation Flexible Working Regulations 2014 now encompasses all employees are legally able to request flexible working if they have 26 weeks' continuous employment, an employee and not made any other requests in the last 12 months (ACAS, 2020b). They may request flexible working to reduce or vary working hours, day worked or location change.

Charlotte and Madeleine are required to consider all flexible working requests in a reasonable manner. Chelsea must inform her employer by making a written request outlining her proposal. Charlotte and Madeleine must arrange a meeting to discuss the proposed arrangements and Chelsea has the right to be accompanied by a co-worker or trade union representative. The final decision on the request must be made within three months of receiving the application and follow ACAS Code of Practice. If the request is granted, this must be specified in writing and will be a contractual change (Daniels, 2022). Charlotte and Madeleine could suggest with Chelsea to agree to a trial period as this will allow the opportunity to see how the arrangements will work and if any problems arise and extend the time to make a final decision.

If Charlotte and Madeleine are to refuse the request, they need to demonstrate that at least one of the eight statutory grounds apply. For example, that it will have a detrimental effect to meet customer demand. If the refusal isn't permissible this can have a damaging effect as demonstrated in case law *Commotion Ltd v Ruddy (2006)* where her request was refused due to an impact on teamworking, although the EAT established this was not reasonable grounds. If the request is denied, the employee may appeal against the decision. The decision of the appeal should be communicated in writing. If the request is still refused, they can refer the matter to an Employment Tribunal, where they cannot challenge the validity of the decision. They will consider whether the request has been given serious consideration, reason for refusal was permitted by legislation and the employer acted reasonably in the manner it was addressed (Daniels, 2022).

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