**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. The sex discrimination laws in the UK have offered increasing levels of protection to women workers. Some commentators have suggested that this is unfair and should be restricted, particularly in matters to do with pregnancy. With specific reference to the Equality Act 2010, explain how the law protects women workers and whether these Acts have been successful.

**Indicative content outline answer:**

* The Equality Act 2010 has created a more unified system of regulation of equality laws. It has codified previous legislation and added to this important case law – both domestic and from the Court of Justice to provide a more coherent set of anti-discrimination protections.
* The protected characteristics and prohibited conduct should be identified and commented upon. Particularly the rights being extend (in some instances) to associative and perceptive discrimination assists a wider range of people.
* You may also wish to explain how the EA 2010 goes further than just employment law but extends to the State and providers of good and services.
* The law protecting pregnant workers has been effective and placed a strong emphasis on the employer protecting such workers and their unborn children.
* Wider discrimination rights have certainly helped protect women against the most excessive and outright cases on discrimination, but there are still many instances of discrimination (evidenced through claims at Employment Tribunals).
* Legislation is a good starting point, but it requires changes in the views of society – legislation in isolation will not solve the problem.

1. ‘Despite a rather benign interpretation by the judiciary, and judicial development over the last 40 years, the practical impact of the Equal Pay legislation has been very disappointing in securing equality of pay between men and women.’

Critically analyse the above statement.

**Indicative content outline answer**

* Equal pay legislation has been in force for over 35 years and whilst the pay gap is being reduced, a significant distinction exists between the pay men and women receive for the same work.
* This gap is still evident when the man and woman are doing the same / similar work, and are each working full or part-time.
* Problems exist when the claimant attempts to make a claim – remember to highlight the problems in the legislation, but also make note of the fact that problems are present due to the nature of such a claim.
* To establish a claim of equal pay the claim must be that the reason for the difference in pay is due to the gender of the claimant. The legislation is not designed to give fair pay or enable the claimant to bring an action because someone in another job has better pay and the claimant believes they should be provided with the same. Rather, the EA 2010 requires a claim between a woman and a man, and this involves establishing a comparison between workers.
* Cases brought after 1st October 2010 involving direct gender pay discrimination may involve the use of a hypothetical comparator rather than an ‘actual’ comparator (and the problems associated with this). In all other instances, an actual comparator will still be required. Section 78 identifies that (apart from excluded groups) employers are required to publish information relating to the pay of employees for the purpose of showing whether, by reference to factors of such description as is prescribed, there are differences in the pay of male and female employees.
* The comparator may also be employed at the same establishment or at an establishment where common terms and conditions (*British Coal Corporation v Smith* [1996]) are observed (EPA 1970 s. 1(6).).
* The comparator may consist of a person employed at the same time as the claimant, but not successors (*Walton Centre for Neurology v Bewley* [2008]) of the claimant, although their predecessors may be used (as the time limits and extensions to back-pay enable greater access to claims - *Macarthys Ltd. v Smith* [1980]).
* Having established the appropriate comparator, the next stage is to base the claim for equal pay on one of the ‘heads’ of claim.
* The claimant has to select the most appropriate ‘head’ under which they are to base the claim. There are three heads - like work; work rated as equivalent; and work of equal value. The tribunal is not entitled to choose the head and it is important for the success of the claim that the claimant selects the most appropriate head based on their circumstances.
* It was held in *Pickstone v Freemans Plc* that an equal value claim is possible even where a ‘token’ man is employed in the same job as the claimant. This prevents an employer from employing the tactic of hiring a man in order to prevent the claimant pleading under this section of the Act.

***Material Factor Defence***

* Once the claimant has established their claim under one of the three heads above, the employer may be in a position to avoid equalizing the pay between the claimant and the comparator. The employer is entitled to demonstrate that the difference in the pay is not based on the sex of the parties, but rather it is genuinely based on a material factor, that can be objectively justified on the needs of the business, and is proportionate in achieving that aim:
* Responsibility: An employer may attempt to justify differences in pay based on the additional responsibilities undertaken (an employer can provide promotions / advancement (for example roles with greater responsibility) to men rather than women).
* Market Forces: It may be necessary for an employer to provide pay at different rates between jobs, which would otherwise enable a ‘work of equal value’ claim, because of the nature of the market that the jobs are in.
* Collective Bargaining Agreements: It may be possible for an employer to rely on agreements between workers’ representatives and the employer regarding collective bargaining agreements or pay structures, although they cannot provide an automatic defence.
* Experience: The general rule has been that those workers who have longer service at an employer’s business will, generally, be paid higher wages due to their seniority (women generally will leave the workforce to have children, and often they will also be the parent who stays at home to care for sick children / relatives).
* Regional Variations: An employer may seek to justify differences in pay because the claimant and comparator’s work exist in different locations.
* Red-circle Agreements: A red-circle agreement is where an employer has performed, for example, a job evaluation study and the result of which has led to groups of workers being downgraded. The agreement protects the affected workers’ salaries at the current rate, despite being moved to a lower grade.

# *Preparing for a Claim*

* Where a worker wishes to bring an equal pay claim, due to the complexity in establishing such actions, advice from a trade union, or local not-for-profit advisory agency may be very beneficial. Proportionately few claims would succeed if the claimant is not provided with guidance and assistance in the preparation and presentation of their claim.
* The worker may, before a claim or within 21 days following the claim being lodged at the tribunal, issue the employer with an equal pay questionnaire that assists in establishing facts and ascertaining whether a potential claim should be pursued. There is no legal requirement for the use of a questionnaire but an employer must respond to one provided within eight weeks.
* An employer who does not comply, without a reasonable excuse, will have this viewed negatively by the tribunal.
* The claimant must also adhere to the statutory grievance procedures before the claim is to be presented, otherwise they may be subject to the relevant reductions in any awards.
* As such, the claimant may have difficulties in establishing the correct comparator to use for their claim. The wrong choice of comparator will probably result in the claim not proceeding.
* Finding information from the employer can be difficult and many employees will not wish to be used as a comparator and become involved in a workplace dispute of which they have no real interest.
* Unlike a claim of unfair dismissal where the employment relationship is dispensed with, a claim of equal pay exists where the employment relationship continues. Most workers are employed in small / medium sized enterprises where they are likely to personally know and have involvement with their employer. Never underestimate the implications of bringing a legal action against the employer and the tension that will introduce to the working environment.
* Much research in the 1980’s focused on the reasons behind the lack of success of the legislation and often the findings included the post-claim problems experienced by the claimant. They (although typically it is she) were subject to other discriminatory acts by the employer; the possibility of promotion was significantly reduced; colleagues distanced themselves from the claimant for fear of being subject to ill-treatment by the employer, and hence these practical problems have played a part in why the success of the legislation is less than successful in achieving its aims.
* Remember the legislation is written in very clear language. There must be equal pay between men and women and this is implied into every contract of employment.
* It may be useful to raise the issue of governmental initiatives to reduce the stereotypical view of women leaving work to raise children with the increase in paternity rights, and the sharing of maternity pay – hence preventing employers from discriminating against women of child-bearing age.

**PROBLEM QUESTIONS**

1. All Bright Consumables (ABC) Ltd has placed an advertisement in the local newspaper for the recruitment of a new member of staff to act as assistant manager in a new shop it is opening. Due to the high proportion of immigrants from Poland living in the area, the advert specifies that the applicant must be able to speak Polish. Margaret, who has several years’ experience in management, applies for the position but is rejected as she only speaks English. Despite this shortcoming, she satisfies each of the essential characteristics identified in the job specifications.

Sofia also applies for the position of assistant manager at ABC. Sofia is a wheelchair user and is informed at the interview that whilst she satisfies the criteria for the position, the office where the management team are based is on the second floor of the building and the only access is via stairs. The toilets in the building are also located on the second floor and ABC has no plans to move either the office or the toilets. As such, Sofia’s application is rejected.

Lena is appointed to the position of assistant manager having satisfied all the relevant criteria and performing well in the interview. She lives in a same sex relationship with Carla. ABC has a policy of providing its staff with a travel discount for flights in Europe, and this extends to the spouse of the staff. When Lena claims the discount for herself and Carla she is informed that ABC only recognizes marriage or co-habitation between persons of the opposite sex, and therefore ABC refuses to provide the discount to Carla. Soon after this request, Lena begins to receive abusive notes on her desk and on the staff notice board about her sexuality. When she complains to senior management, Lena is told to ‘grow thicker skin’ and there is nothing ABC can do about it.

Advise each of the parties as to any legal rights they have.

**Indicative content outline answer:**

* The following issues should be raised.

***The Protected Characteristics***

* Age (s. 5);
* Disability (s. 6);
* Marriage and civil partnership (s. 8) – single people are not covered;
* Race (s. 9);
* Sex (s. 11); and
* Sexual orientation (s. 12).

***Forms of Prohibited Conduct***

*Direct Discrimination*

* Direct discrimination occurs when a person treats another less favourably because of their protected characteristic than they would of a person without the characteristic. The less favourable treatment has been extended in the EA 2010 in the following ways. A person is treated less favourably than another due to:

1. a protected characteristic they possess; or
2. a protected characteristic it is thought they possess (this amounts to perception discrimination); or
3. their association with someone who has a protected characteristic (this amounts to associative discrimination) (s. 13).

* Therefore, perceptive and associative forms of discrimination are included in the Act (these are covered in the following sections).

*The protected characteristics*

* There are no changes to this form of discrimination (from the legislation it replaced) and it covers all the protected characteristics.

*Occupational Requirements*

* Where the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina); or in dramatic performances (for example, a leading man in a film); or for authenticity (for example, the role of playing Othello). The OR of authenticity has been used to prevent a male applicant for a job on a ‘chat line’ that was advertised as ‘live girls . . . 1–2-1 chat’. The nature of the employment was restricted to female applicants.
* The holder of the job provides individuals with personal services promoting their welfare or education (or similar services) that can be most effectively provided by (for example) a man; or of a person of a particular race. In Tottenham Green Under Fives Centre v Marshall (No. 2) the case involved a day care centre where 84 per cent of the children at the centre were of Afro-Caribbean decent. The previous nursery worker (who was of Afro-Caribbean decent) left the employment and it was considered by the Centre’s committee to appoint a replacement of the same ethnic origin. Mr Marshall (a white man) applied for the position and when it was discovered that he was not of the required ethnicity, his application was rejected. It was held by the EAT that this requirement was included under RRA 1976 s. 5(2)(d) (the previous applicable legislation) as the ability to read and speak in dialect was a OR.

*Indirect Discrimination*

* Following enactment of the EA 2010, there is a common definition of what will amount to indirect discrimination. Indirect discrimination is a seemingly neutral provision, criterion or practice that is applied to everyone but it particularly affects people who share a protected characteristic and it puts them (or would put them) at a particular disadvantage. A simplistic example of indirect effect is if a university, in recruiting lecturers, stated that the applicants had to be 6ft tall or over. This criterion has no discriminatory element as it is applied to all applicants. However, the reality is that a greater proportion of men than women can comply with it. Hence it may be discriminatory unless the employer can objectively justify its inclusion as a legitimate aim.
* Indirect discrimination may be justified if the measure is ‘a proportionate means of achieving a legitimate aim’ (s. 19).

*The protected characteristics*

* Age; Race; Religion and belief; Sex; Sexual orientation; and Marriage and civil partnership remain covered under the EA 2010.
* Disability; and Gender reassignment are now covered as protected characteristics.
* The protected characteristics of Marriage and civil partnership; and Pregnancy and maternity are NOT covered (although in pregnancy and maternity indirect sex discrimination may still apply).

*Harassment (and by third parties)*

* The types of harassment covered by s. 26 include:

1. Harassment related to a person of a relevant protected characteristic;
2. Sexual harassment; and
3. Less favourable treatment of a worker because of the sexual harassment or harassment related to sex or gender reassignment.

* Harassment continues to be ‘unwanted conduct’ related to a protected characteristic, which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. The right gives employees the power to complain of offensive behaviour, even if not directed at them, and complainants also are not required to personally possess the protected characteristic. Employees are further protected from harassment due to association or perception (s. 26). The harassment may involve the harasser performing actions that gradually lead to a complaint, but if the action is sufficiently serious, a one-off act may enable a claim of harassment to be made.
* The words ‘**purpose or effect’** are important as they enable a claim for harassment even where the harasser did not intend for this to be the effect of their actions. For example, male workers may be downloading an image of a naked woman.
* Harassment may also occur through the action of third parties: This will be particularly a concern for employers as it will apply to acts of harassment by customers / clients.
* There is no need for the claimant to establish a comparator in harassment cases.

*The protected characteristics*

* The protected characteristic of Sex remains covered by the EA 2010.
* The protected characteristics of Age; Disability; Gender reassignment; Race; Religion or belief; and Sexual orientation were already covered through existing legislation (or are newly covered by the introduction of ‘third party harassment’) which is now subject to change through the EA 2010.
* Marriage and civil partnership; and Pregnancy and maternity are still NOT covered.

***Disability discrimination***

A person (A) discriminates against a disabled person (B) if—

1. A treats B unfavourably because of something arising in consequence of B's disability, and
2. (2) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

* Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
* Under EA 2010 s. 6 a person is defined as having a disability if they have a physical or mental impairment that has a substantial and long term adverse effect on their ability to carry out ‘normal day-to-day activities’.
* Requirement to make reasonable adjustments - The EA 2010 identifies the following three steps as being reasonable to comply with the law:
* Avoid substantial disadvantage where a provision, criterion or practice applied by or on behalf of the employers puts the disabled person at a substantial disadvantage compared with persons without the disability;
* Remove or alter an existing physical feature (or provide the means to avoid it) where it puts the disabled person at a substantial disadvantage compared with persons without the disability;
* Provide an auxiliary aid/service where a disabled person would (but for this aid) be put at a substantial disadvantage compared with persons without the disability.
* The above laws simply need applying to the facts of the case.

1. Consider Redmount Borough Council’s (RBC) potential liability in the following circumstances:

Benny applied for an advertised post in the parks department of RBC as a delivery operative. Following his rejected application for a post he considered himself to be qualified for, he asked RBC for the reason and any other feedback. Benny was informed that RBC had recently adopted a policy, following discovery of an under-representation in the workforce of women and persons from ethnic minority groups, that these groups would be given priority of appointment and promotion. Any person not from these groups would not be considered for the position.

Dora was recently appointed as a speech therapist for RBC. She was appointed at the top of the pay scale. Diego is employed by RBC as a consultant and is paid £10,000 per annum less than Dora although he considers his job as being of equal value to RBC as the speech therapists. Further, most of the speech therapists are women whilst most of the consultants are men. RBC state that the reason for the difference in pay is to facilitate the recruitment of speech therapists from the private sector where salaries are higher. There are very few speech therapists in the public sector so RBC has to match / improve on the salaries paid in the private sector to entice the therapists to work for the Council.

RBC employed Isa five months ago as a care assistant at a home for delinquent girls, which is under the control of the Council. When Isa’s sexual orientation was discovered, she was dismissed as it was considered that she would be an ‘inappropriate role model for troubled teenagers.’ The dismissal letter to Isa read ‘Given that these are highly impressionable girls, often from broken homes, your lifestyle choice makes you unsuitable for continued employment.’

Advise each of the parties as to their legal rights.

**Indicative content outline answer:**

***Benny***

* Positive discrimination may be used in cases to justify better treatment in opportunities to obtain employment (e.g. using phrases such as ‘we welcome applicants from under-represented sectors of society’) but it may not be used to substitute one form of discrimination for another.

***Dora***

* EA 2010 s. 66 imposes an equality clause in the terms of a contract of employment, even where one is not included.
* The law relating to sex equality in pay (ss. 66-70) is based on a person employed on work that is equal to that of a comparator of the opposite sex.
* This ensures that (for example) a woman’s terms of employment are no less favourable than a man’s (the comparator). If the man’s contract contains a term that benefits him, and it is not present in the contract of the woman, s. 66(2)(b) provides that the woman’s contract is modified (equalized) to include this term.
* The legislation is applicable to workers regardless of age; there is no qualification period to gain protection; the law is applicable to those employed full-time and part-time; and there is no exemption for small businesses.
* An employer may discriminate in pay insofar as this is not related to the sex of the parties. Hence, where there exists a material factor that is the reason for the difference, this will be justified. One such reason is market forces. It may be necessary for an employer to provide pay at different rates between jobs, which would otherwise enable a ‘work of equal value’ claim, because of the nature of the market that the jobs are in (see and explain the case of Rainey v Greater Glasgow Health Board).

***Isa***

* The question relates to discrimination based on sexual orientation.
* A worker may not be discriminated against on the basis of their sexual orientation following provisions in the EA 2010 s. 12.
* An individual’s sexual orientation is defined as their orientation towards persons of the same sex (homosexual), opposite sex (heterosexual), or both sexes (bi-sexual).
* The EA 2010 prohibits unwanted conduct (either based on the individual’s sexual orientation or on their perceived orientation).
* The EA 2010 allows for the Occupational Requirement defence of an employer where being of a particular sexual orientation is a genuine and determining occupational requirement (and it is proportionate to those ends); and in the case of organized religions where the sexual orientation contradicts the beliefs of the members of the particular religion.
* In Isa’s case, there is no OR. The Council would not have an ethos which would legitimately allow for the dismissal of workers other than of a heterosexual orientation.
* It would be very difficult to explain why a person whose sexual orientation is homosexual would make them unsuitable for further employment.
* Further, you could question why girls in the home would be more susceptible and impressionable to sexual orientation than anyone else in society.
* Such a dismissal would be unfair.