FEEDBACK TUTORIAL LETTER

1st SEMESTER 2019

ASSIGNMENT 1

Labour Law

LAL111S

The marker-tutor should populate course details, including the Moodle course enrolment key.
ASSIGNMENT 1 FEEDBACK TUTORIAL LETTER

Dear Student

I wish to use this opportunity to thank you for submitting your first assignment for the subject Labour Law. Though, a significant percentage of you made it, i.e. managed to obtain marks above the 50% mark, I have to admit that your overall performance was lacklustre to say the least.

Therefore this first tutorial feedback letter is aimed at providing you feedback on the shortcomings I observed when marking your assignments. My comments at the back of each assignment are a true reflection of how you answered the assignment and no matter how harsh they seem, they are meant to encourage you to work harder in your next assignment.

Below are some of the shortcomings that I observed when marking your assignment:

1. Plagiarism
Most of you failed to adequately acknowledge your sources of information. Those that did, didn’t do a good job either. Please be warned that plagiarism is a serious academic offence punishable by NUST in accordance with the University’s rules and regulations. According to the Council of Writing Program Administrators in an instructional setting, plagiarism occurs when a writer deliberately uses someone else’s language, ideas, or other original (not common-knowledge) material without acknowledging its source. In order for you to avoid being punished for plagiarism, you are advised to consult NUST’s guidelines against plagiarism and other forms of academic transgressions. Indeed, plagiarism is a serious academic offence and once found guilty of the offence, your future academic and career progression will be blighted by this stain.

2. Failing to read questions and understanding them
I also noticed that a good number of you didn’t thoroughly read and understand the questions. It seems you just read the questions on face value without scrutinising them further. This resulted in some of you providing irrelevant answers to questions asked.

3. Overreliance on the study guide

It seems most of you, if not all of you over relied on the Study Guide for answers. Please be reminded that the Study Guide is what it is—i.e. a Guide. Although it is a useful tool for the course, it is nevertheless not sufficient. Labour Law is a legal course and as such it requires students to research beyond the Study Guide. They are many textbooks and other materials pertaining to the subject in your library and the internet. Please be advised that students tend to score more marks when consulting more than one source for their assignments. You are thus encouraged to consult, while acknowledging your sources, as many materials as you can in your future assignments.

4. Giving long answers to questions that requires you to be concise

Some of you provided long and irrelevant answers to questions that required you be crisp and concise. When providing answers, you are required to be guided by marks allocated to the question. Providing long answers to questions will not result in you getting all the marks availed to you. Please heed this warning and do better in your next assignment.

5. Unable to fully comprehend the legal nature of the subject

Importantly, by reading through your assignment sheets, one can deduce that most of you are unable to fully comprehend the legal nature of the subject. I am re-emphasising the point that Labour Law is a legal course and as a consequence, it should be treated as such. I am aware, that most of you lack the necessary legal background to fully understand the nature and content of this subject, but you are nevertheless expected to think like a “lawyer” when approaching questions asked. You will score more marks if you refer to legal authorities when making your argument. Examples of legal authorities are: case law, statutes to mention but a few.

6. Using the equivalent of the South African Labour Act to answer questions that pertains to the Namibian situation.

Although the legal system of Namibia and South Africa are similar, they are nevertheless not the same. Some students used the South African equivalent of the Namibian labour Act to argue a Namibian scenario in the assignment. This is unacceptable and should not be repeated in your next assignment. You are advised to use Namibian labour related laws and policies in all your assignments as this will be crucial when you enter the industry.
Below are answers to the assignment questions

Assignment 1
Study Units 1-6 from your Labour Law 1A study guide as well as use other materials on labour law before answering this assignment.

QUESTION 1
There is only ONE correct answer for each question. Negative marking will not be applied but answers to questions will not be marked where more than one answer has been given. Choose the correct answer.

MEMO FOR ASSIGNMENT 1.

Question 1

1.1 Choose the false statement from the following:

(a) The basic principles in terms of which disputes have to be heard are known as the civil law rules of natural justice and these rules are: audi alteram partem and nemo iudex in sua causa
(b) Case Law, often used interchangeably with the term Common Law, refers to the precedents and authority set by previous court rulings, judicial decisions and administrative legal findings or rulings.
(c) Namibian Labour Law is influenced by international law
(d) Bona fide is a Latin term meaning “good faith” and it is used to indicate genuineness and honest intention
(e) A and C are false statements

1.2 Choose the correct statement from the following:

(a) Namibian Law is the product of different sources, such as Roman law, Roman Dutch Law, French Civil law and African Union Law.
(b) Customary law (Indigenous law) is also known as custom
(c) Legislation can only be primary and after a court challenge, the primary legislation can be downgraded to secondary legislation.
(d) Apartheid era laws remain in force at the date of independence until declared otherwise by a court of law.
(e) All the above are correct statements

1.3 In a criminal case the Court has to decide:

(a) Whether a crime has been committed
(b) Who committed the crime
(c) An appropriate punishment for the convicted person
(d) On remedies and a declaratory order
(e) A, B and C

1.4 Judicial officers in the Supreme Court and High Court are called:

(a) Chief Legal Officers
(b) Judges
1.5. Jurisdiction can be defined as a:

(a) The authority of customary courts to hear and adjudicate land disputes
(b) That authority vested in Parliament to make laws
(c) The responsibility for magistrate courts to sentence convicts
(d) The authority which a Court has to decide a case before it and to take cognizance of matters presented for decision.
(e) The ability for judges to refer to previous cases when making a judgement

1.6. Consensus can only be reached if the parties have a serious intention to create:

(a) Valid Contract
(b) Gentleman’s agreement
(c) Legal Obligations
(d) Specific Performance
(e) All of the above

1.7. Which of the factors below diminish contractual capacity:

(a) Physical impairment and Gender
(b) Mental illness and intoxication
(c) Lower educational attainment and poor interpersonal skills
(d) Divorce and allegations of adultery
(e) Unjust enrichment and restitution

1.8. It would not be valid to employ someone as a:

(a) Teacher
(b) Security Guard
(c) Medical Doctor
(d) Bouncer at a night club
(e) Sex worker

1.9. Which section of the Labour Act deems individuals as employees?

(a) 12B
(b) 128B
(c) 128A
(d) 128 C
(e) 12C
1.10 The definition of an independent contractor in terms of the Labour Act (as amended) now includes services rendered:

(a) By a professional person  
(b) By an independent contractor  
(c) Insurance broker  
(d) Any person who is deemed to pay tax in Namibia  
(e) None of the above

(2)

**Question 2**

In scenarios below, state whether a requirement for a valid contract of employment has been met.

2.1 Klaus von Shtroom is 15 years and 9 months and he dropped out of school at 12 years old. He recently concluded a contract with Jack and Jill Security Solutions in which he is to work as a security guard for a period of 12 months. His parents are pensioners and are unaware of Klaus's recently concluded employment contract.

(5)

2.2 Adan Espinosa runs a seemingly successful travel and tourism business. He recently concluded an employment contract with El Chapo Vargas, a recent grade 12 graduate who was desperately looking for a job. As per some of the contractual clauses, El Chapo is expected to procure underage girls for male tourists lodged in Adan’s hotel rooms.

(3)

2.3 Sebulos ya Hamukoto recently concluded a contract of employment with Kay-Kay Enterprises. Kay Kay Enterprises is an up and coming black owned business specialising in diamond polishing. Sebulos he is of the opinion that he is to be employed as a General Manager (supervising diamond polishers) but only to be told that he will only be working as an ordinary diamond polisher until after a probation period of 12 months.

(5)

**Question 3**

Jonas Diabulus works as a Senior Shopkeeper at a mini grocery store called Itongwani Family Grocers in Katutura, Windhoek. He is a loyal employee of the business and has never had any disciplinary issues with his employers. 2018 marked 15 years in the employee of the said business. A few metres away from his place of employment is another mini grocery owned by the Habdab family. The two stores are known to be fierce competitors and have at times threatened to take each other to the Competition Commission for unfair competition practices. Upon, hearing that the Habdabs were going to have a massive sale at the end of the month on selected items, Jonas was summoned by his bosses to the company’s boardroom and was told to undertake a mission to sabotage the Habdabs envisaged sale. He was instructed to break into the shop at night and defecate in the building. This they hoped will attract the attention of health inspectors who will be obliged to take action against the Habdabs and as a result their business’s name will be tarnished and customers will abandon them. Jonas refused and being the sole breadwinner of the family, resignation is not an option. A week later, he was demoted to a position of Assistant Shopkeeper. He approaches the Labour Commissioner for relief.
You are appointed by the Labour Commissioner to handle this case. How are you going to advise him? (8)

Question 4

Charity works as an Accountant at a prestigious Accounting firm Called A and O Accountants in Windhoek. After working for the company for 8 years she decided to call it a day and pursue other ventures. She has always wanted to open her own Accounting firm whose principal business mirrors that of her soon to be ex employers. However, a clause in Charity’s contract of employment provides that after the termination of the contract, she may not start or join any Accounting related business whose objectives mirrors those of A and O for a period of 10 years.

Is the clause in Charity’s contract of employment valid? (10)

Total marks (50)

Feedback to question 1. 2 marks each

1. A
2. D
3. E
4. B
5. D
6. C
7. B
8. E
9 D
10 A

Feedback to question 2. 12 marks

Question 2

In scenarios below, state whether a requirement for a valid contract of employment has been met.

2.1 Klaus von Shtroom is 15 years and 9 months and he dropped out of school at 12 years old. He recently concluded a contract with Jack and Jill Security Solutions in which he is to work as a security guard for a period of 12 months. His parents are pensioners and are unaware of Klaus’s recently concluded employment contract.

- In order for this for this contract to be valid, both parties must have contractual capacity. 1
- Contractual capacity means the ability to enter into contracts, i.e the ability to be the bearer of rights and duties, and is usually determined by referring to the age of the respective contracting parties. 1
• In this case, this contract is invalid. His parents and guardians did not assist him when he concluded this contract. 1

• A child between the ages of 7 (seven) and 21 (twenty-one) years can enter into a valid contract with the assistance of his or her guardian. 1

2.2 Adan Espinosa runs a seemingly successful travel and tourism business. He recently concluded an employment contract with El Chapo Vargas, a recent grade 12 graduate who was desperately looking for a job. As per some of the contractual clauses, El Chapo is expected to procure underage girls for male tourists lodged in Adan’s hotel rooms.

This is an invalid contract. 1 Procuring underage girls for male tourists is a criminal offence, therefore unlawful. 1 The conclusion of the contract and the obligations in terms of the contract must be lawful. 1

2.3 Sebulos ya Hamukoto recently concluded a contract of employment with Kay-Kay Enterprises. Kay Kay Enterprises is an up and coming black owned business specialising in diamond polishing. Sebulos he is of the opinion that he is to be employed as a General Manager (supervising diamond polishers) but only to be told that he will only be working as an ordinary diamond polisher until after a probation period of 12 months.

• There is no consensus and therefore no contract. 1

• Consensus can only be reached if the parties have a serious intention to create legal obligations and they are in agreement about the same subject or thing. 1

• “Agreement” implies that parties enter into employment contracts freely and voluntarily. 1

• It is imperative for the parties to reach consensus on the essentialia of the contract. 1 The essentialia of a contract are those terms that the law provides as essential to place the contract in a particular class or category, for example, contract of purchase and sale, contract of employment and so forth. 1

Feedback to question 3. 8 marks
• The grocer’s conduct amounts to unfair labour practice in terms of Section 50(1) (e) 1 of the Labour Act. 1. It is an unfair labour practice for an employer to unilaterally alter any term or condition of employment. 1

• In the event Jonas is dismissed, it will further be regarded as an unfair dismissal if the employee is dismissed for failing or refusing to do anything an employer must not lawfully
permit or require an employee to do. The employer is thus not allowed to dismiss an employee if he refuses to accept a change in the terms and conditions of the contract of employment.

**Circumstances in which a change is allowed**
- Mutual agreement between the parties.
- Change(s) in basic conditions of employment legislation.
- Change in work practices.

**Feedback to question 4. 10 marks**
- This is called restraint of trade.
- Restraint of trade clause prevents Charity from starting her own business in competition with the employer or working for competitors for a specified period in a specified geographical area after leaving the services of the employer.
- This restricts Charity’s freedom to partake in commercial activities.
- The purpose of the restraint of trade clause therefore provides protection to the employer after the employee has left the services of the employer.
- The courts regard contractual commitment as stronger interest than the freedom to freely partake in commercial activities.
- The restraint of trade clause is therefore valid and enforceable if the employer has a protectable interest after the termination of employment and if the restraint is reasonable.
- Charity should prove to the court that it would be against public interest to enforce the restraint of trade if she does not want to be kept bound to the restraint of trade.
- A restraint of trade would be unreasonable if a person is prevented from using his/her own skill to generate an income. The period of restriction and the geographical area is also considered in determining if a restraint is unreasonable.
- Charity is prevented to generate an income by using her skill in any aspect of the accounting related trade for an unlimited period in the whole of Namibia.
- The restraint of trade clause in Charity’s contract might be seen as unreasonable. A and O Accountants will in all probability not succeed in enforcing the restraint of trade clause.