Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2009 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

ILEX is currently working with the Level 3 Chief Examiners to standardise the format and content of suggested answers and welcomes feedback from students and tutors with regard to the ‘helpfulness’ of the January 09 Suggested Answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners’ reports which provide feedback on student performance in the examination.

SECTION A

1. Candidates were required to simply ‘list’ three statutory rights using the definition of “workers” under the employment legislation. Candidates should be aware that the developing concept of “workers” means that those who do not enjoy employment status still receive some protection. Candidates may have referred to a number of examples to demonstrate their awareness including:

- The right to receive a national minimum wage under the National Minimum Wage Act 1998.
- The right to a minimum paid annual holiday, rest breaks etc under the Working Time Regulations 1998.
- Protection under the "whistleblowing" provisions contained in the Employment Rights Act 1996 and the Public Interest Disclosure Act 1998
- The right to be accompanied at a disciplinary or grievance hearing in Employment Relations Act 1999 section 10

2. Candidates may have referred to two of the following examples together with a brief description of the nature of the term including:

- a duty to provide safe working conditions together with an explanation that an employer must ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
• a limited duty to provide work-together with an explanation that there is an implied term to provide work particularly where there is work available to do and earning ability depends on work being available.
• A duty to pay—an employer must pay a reasonable amount for work undertaken in default of an express agreement with respect to remuneration.
• A duty to provide personal service-together with an explanation that there is an implied term to undertake work personally.
• A duty to be ready and willing to work-together with an explanation that the employee must be available for work and must co-operate in performing reasonable tasks requested.
• To take reasonable care of the employer's property-together with an explanation that the employee must respect the employers property and take care in the performance of his duties generally.
• To carry out reasonable and lawful instructions given by or on behalf of the employer.
• Duty of fidelity-together with an explanation that this may entail a duty of confidentiality and non competition with the employer this duty of confidentiality can continue after the employment has ended.

3. Candidates should explain that if the employee has not been provided with the written statement of specified particulars within two months of starting employment then the tribunal can:

• determine what ought to have been included in the written statement and the employer will then be deemed to have given the employee a statement including those particulars; and
• award compensation of either 2 or 4 times a week’s pay (unless there are exceptional circumstances which would make an award or increase unjust or inequitable).

The right to compensation is a dependent right, so there must be a complaint under another jurisdiction e.g. unfair dismissal for the compensation to be payable.

4. Candidates should explain that an employment contract may contain different dates for the 'commencement of employment' and 'the date of continuous employment' because the first is the date when that particular employment starts. By contrast, continuous employment refers to earlier employment with that employer or an associated employer. An employee may therefore have a different earlier continuous employment date and a later date for the commencement of that particular contract.

5. Candidates should explain that as Alison is a full-time worker she will be entitled to a minimum of 24 days. This holiday should be paid holiday from 1st October 2007 (28 days as from 1st April 2009).

Bank holidays may be counted towards this entitlement.

6. Candidates should explain that Peter will have a claim for direst sex discrimination. The definition entails considering whether the person concerned was treated less favourably than a person of the other sex would have been on grounds of his sex. Here there is less favourable
treatment because he has not been considered for the post on the grounds that he is male.

7. Candidates should explain that Anish would have to meet the following preliminary qualifying requirements before he could present a claim for unfair dismissal:

- That he was an employee; and
- He was employed for one year's continuous employment; and
- He brings a claim within three months; and
- He is not in an excluded category.

(In a limited circumstance it may be possible to extend the time limit for unfair dismissal).

8. Candidates should explain that the employee would be entitled to a statutory minimum of 6 weeks notice (in accordance with ERA 1996 s.86). This is because he has worked for 6 complete years and employees are entitled to one week’s notice for each year of continuous employment between two and twelve years.

He would of course be entitled to longer notice than the statutory minimum if his contract so provided.

9. Candidates should explain that wrongful dismissal damages are designed to place an employee in the position they would have been in had the contract been performed.

Wendy would be entitled to net salary and benefits for the two month notice period. The salary amounts to £300 net per week and the benefits would have to be continued for that period or compensated for by providing a sum equivalent to the cost of the private health insurance, gym membership and full use of a mobile telephone.

SECTION B

Scenario 1 Questions

1. Candidates are required to recognise that the courts and tribunal have evolved tests to decide if a person is an employee or self-employed. Candidates should summarise at least the following aspects:

**Control test**: under this test the courts/tribunals would consider who controls what work is done, where it is done, and how it is done, weighing the control of XS Limited with Emily’s independence.

**Mutuality of obligation**: under this test the courts/tribunals consider if there is an obligation on Emily to provide work personally and whether there is mutuality of obligation between her and XS Limited.

**Integration Test**: under this test the courts/tribunals would consider whether Emily is an integral part of XS Limited.

**Composite/Economic Reality Test**: under this composite test the courts/tribunals consider the above tests and look at wider issues.
leading case was Ready Mixed Concrete v Minister of Pensions [1968] which mentions the following criteria:

- does the employee provide own work and skill
- is there a sufficient degree of control
- are there inconsistencies in the contract

Under this test numerous factors would be relevant in deciding if Emily is an employee or is self-employed such as whether she provides her own equipment and the nature of the equipment involved; whether she can delegate; the degree of financial risk that she takes; the understanding or intentions of both parties; the degree of continuity in the working relationship; how many times she works and if she works for a number of different people; whether she is "part and parcel" of XS Limited.

2. Candidates should apply the tests above to analyse whether Emily is likely to be self-employed or an employee:

**Composite/Economic Reality Test:**

Candidates should select the numerous factors which would be relevant including:

- Emily supplies some of her own equipment and pays for her copyright licence.
- She can delegate if she is sick.
- She takes a degree of financial risk as she gets paid more depending on the amount of people who sign up to the classes.
- Although it is only one factor the intention of both parties is for self-employment and Emily deals with payment of her own tax.
- She works for a number of different people.

**Control**

Although XS Limited have control over where the work is done and when. Emily appears to have control over the content of the classes and how the work is done giving her considerable independence.

**Mutuality of obligation:** Although there is some obligation on Emily to provide work personally there appears to be no problem if she delegates to her sister and there is no ongoing obligation on XS Limited to keep providing work other than the terms classes which have been agreed in advance.

**Integration Test:** Emily does not appear to be an integral part of XS Limited she does not have to wear a uniform and does not receive paid holiday, sick pay and pension contributions like the other employees.

On balance looking at all of the above candidates should conclude that Emily is probably self-employed.

3. Candidates should explain that if Emily is found to be self-employed rather than an employee then the advantages for XS Limited include:
Emily will not be entitled to any of the main statutory rights such as unfair dismissal rights, redundancy protection, statutory sick pay, maternity rights etc.

- Lighter administrative burden as Emily will be responsible for her own tax and NI.
- Free to decline to renew the agreement with her.
- Less likely to be vicarious liable for any wrongful acts.
- Lesser health and safety obligations.
- No need to give written statement of employment particulars.
- Employer has no direct liability for acts of a self-employed person who should carry their own insurance.
- The duty of care to a self-employed person is lower than that of an employee.

4. Candidates should explain that one of the important reasons to establish employee status is to establish the right to present a claim for unfair dismissal. If, as it appears Emily is self-employed she will not be able to present a claim. Whether she is an employee or not would be heard by the tribunal as a preliminary issue.

5. (a) Candidates should identify that if XS Limited allow the abusive treatment of Ed to continue the common law implied term which would be relevant is the implied term of mutual trust and confidence. Candidates should explain the nature of this duty i.e. that the employer must not without reasonable cause behave in a way which would destroy or seriously damage the relationship of confidence and trust between employer and employee. This would include a duty to prevent ill treatment. Although an employee may have to accept some degree of unpleasantness from other employees here the head chef’s behaviour seems quite extreme and humiliating.

XS Limited appears to know that the behaviour is taking place as a result of Ed’s grievance. They will, therefore, be in breach of this term if they fail to take reasonable steps to prevent the treatment continuing.

If XS Limited continues to ignore the situation then Ed will have the right to treat his contract as being terminated as long as the breach of the implied term is serious and goes to the heart of the contract. He could then state that he has been constructively dismissed and use that dismissal as the basis for a subsequent claim.

5. (b) Candidates should identify that the head chef has only been employed for one month and therefore does not have the one year’s continuity of employment in order to present a claim of unfair dismissal. Therefore he cannot present a claim. None of the exceptions to the one year rule appear to apply.

Scenario 2 Questions

1. Candidates should identify that Fiona has failed to be promoted to the position of manager and that a less experienced man has been appointed instead. The type of claim she is likely to present is one of direct sex discrimination.
Candidates should provide the definition of this type discrimination namely that a person directly discriminates against a woman if on the grounds of her sex he treats her less favourably than he treats or would treat a man. (Sex Discrimination Act 1975 s.1(1)(a)). This appears to be the case here.

Fiona has to discharge a prima facie burden of proof and then the burden passes to XS Limited to show a non gender based reason for the decision. The motive for the less favourable treatment is irrelevant. Candidates must refer to some of the evidence that Fiona may use to support her claim for example that:

- The manager indicated to her that she was the most experienced candidate and that he would recommend her for the position.
- XS Limited appear to have a history of promoting male candidates.
- She has 16 years experience of working in the fitness industry.
- She has a degree in sports science.
- She has eight years experience with XS Limited and has proved to be a diligent and popular employee.
- She has regular experience of running the whole club during the manager’s absence.
- By contrast the man appointed has no sports qualifications and less management experience than Fiona.
- The fact that she was told the other candidate would be in a better position re coaching facilities for male dominated sports and would command more respect from the male staff suggest a gender based reason for the decision.

2. Candidates should explain that if a complaint of direct sex discrimination is upheld the potential remedies available include:

- an order requiring compensation to be paid (SDA 1975, s.65(1)(b));
- an order declaring the parties rights (SDA 1975, s.65(1)(a));
- a recommendation of action to be taken.

Compensation is uncapped and an extra sum may be available for injury to feelings. There can be aggravated damages in bad cases which is unlikely here as XS Limited have not behaved in a malicious manner.

3. Candidates should explain that if Fiona does present a claim in the employment tribunal and Georgina gives evidence to support then the discrimination claim that Georgina could bring is a claim of Victimisation (under SDA 1975, s.4(1)).

Candidates should explain that such a claim arises if Georgina is treated unfavourably because she has done or intends to do any the protected acts specified in the Sex Discrimination Act which includes giving evidence or information in proceedings brought under the Act.

Georgina would have to show:

- less favourable treatment- which would be losing the lucrative overtime and/or having to cover all the unpopular overtime slots; and
- that the reason for such treatment was the doing of a protected act- which would be giving evidence to support Fiona’s sex discrimination claim.
4. Candidates should explain that if Geoff’s bad back is likely to constitute a disability in accordance with the definition in the Discrimination Act 1995 it must be one which "has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities" (see Disability Discrimination Act 1995 s.1).

Geoff’s bad back is stated to be following a slipped disc which may satisfy the substantial requirement. However long term means more than 12 months, he has had a lot of time off sick over the last 12 months but further information may be required about his ongoing medical prognosis.

In order to assess the effect on his day to day activities one of the things listed in the Discrimination Act 1995 must be affected, in Geoff’s case the potential functions affected would include his mobility; ability to lift, carry or otherwise move everyday objects.

As long as the long term requirement is satisfied a bad back may constitute a disability, although if the prognosis is a speedy recovery the back will not constitute a disability.

5. Candidates should explain that if XS Limited decide to dismiss or demote Geoff the other potential discrimination claim which he may present is a direct age discrimination claim. In accordance with the Employment Equality (Age) Regulations 2006 regulation 3(1)(a), direct discrimination arises if a person is treated less favourably than another on grounds of his age.

If XS Limited try to force Geoff to take a part-time post, demote or dismiss him then that may constitute less favourable treatment.

The evidence which suggests that the treatment is on the grounds of age is the fact that they want to appoint a younger fitter caretaker and groundsman as he does not fit in with their young dynamic healthy image.

There is a justification defence to a direct age discrimination claim namely if the aim is a proportionate means of achieving a legitimate aim. However the aim of maintaining a young dynamic healthy image has an age discriminatory aspect and is not a legitimate claim.

Scenario 3 Questions

1. The notice provided in the contract between XS Limited and Ian Morgan is two months.

The statutory minimum notice entitlement, in accordance with the Employment Rights Act 1996 s.86(1), is one week if the period of continuous employment is between one month and two years. This period rises to one week for each year of continuous employment between two and 12 years up to a maximum of 12 weeks.

Accordingly the two month period is sufficient to comply with the statutory minimum requirements relating to notice periods as he has only been there one month. (However if he were to remain in employment for 8
years then the statutory notice period would supercede the contractual one.)

2. Candidates should explain that if XS Limited fails to pay Ian Morgan in lieu of his notice period and he presents a claim for wrongful dismissal then damages would be calculated in the same way as damages breach of any other contract.

The employee must be placed in the same situation with respect to damages as if the contract had been performed which means that the employee will receive the net amount of salary and benefits which the employee would have earned if he had been paid in full for his contractual notice period.

The starting point will therefore be 2 months salary at £558.32 net per week. In addition XS Limited will be liable to pay an amount representing compensation for 2 months loss of pension contributions, health insurance, gym membership and share options depending upon the applicable scheme.

Under ordinary contract law principles, an employee has a duty to mitigate his loss. A deduction from damages will therefore normally be made to take account of any failure to mitigate his loss. As he has already found another job if this has a better remuneration package there may be no loss and therefore damages may be partially or completely reduced.

3. Candidates should identify that if XS Limited did not resolve matters amicably with Ian Morgan and he presented a claim for wrongful dismissal then theoretically the claim could be pursued in either the employment tribunal or the civil courts. The county court should be mentioned in preference to the High Court due to the amounts involved.

This is because the tribunal and the civil courts have concurrent jurisdiction. Candidates should identify the following differences between the two namely:

There is a £25,000 ceiling on the amount a Tribunal may award in respect of a wrongful dismissal contractual claim. However here due to the employee’s salary, even with benefits the claim is only likely to amount to a maximum of under £5,000 and so is well within this limit.

Public funding is not available in Tribunal matters so an employee like Ian with a good wrongful claim might therefore still prefer to take that matter to the court rather than to a Tribunal although he is unlikely to be entitled to public funding on financial grounds in any event.

Another difference is the applicable time limits to claim which is three months in the tribunal and six years in the courts.

Costs are usually irrecoverable in the tribunal and may be recoverable by a successful party in the court unless the matter proceeds on the small claims track as would be likely here.

4. Candidates should explain that clause 5.2 is what is known as a garden leave clause.

This is invoked when an employee who has been dismissed or given notice and is asked by the employer not to work during the notice period. The employee will continue to receive normal salary and will be said to be on
"garden leave". The reasons behind the inclusion of such clauses in an employment contract are to protect the employer against competition or poaching of clients (or staff) by an employee who has given notice or is to be dismissed.

As restrictive covenants are often difficult to enforce against ex-employees it may be an advantage for the employer to send the employee home on "garden leave" whilst they consolidate their business relationships.

Employers may have difficulty in imposing "garden leave" if there is no specific contractual provision authorising this.

5. Candidates should explain that in addition to the notice and garden leave clauses the remainder of Ian Morgan’s contract of employment would be expected to comply with sections to 1-7 of the Employment Rights Act 1996 governing written particulars.

The essential minimum provisions which candidates would expect XS Limited to have included in the contract would therefore include the following:

- the names of employer and employee;
- date when the employment began;
- date when period of continuous employment began;
- details of remuneration-whether pay is weekly, monthly;
- any terms re hours of work;
- holidays and holiday pay;
- job title or description of job;
- place of work;
- pension details-i.e. statement as to whether the employment is contracted-out of the SERPS part of the State Pension Scheme
- details of a person to whom the employee can apply for seeking redress of any grievances
- disciplinary rule details including a person who deal with appeals against disciplinary decisions
- where the employment is not intended to be permanent the period for which it is expected to continue (or if it is for a fixed term, the date when it is to end);
- any collective agreements which directly affect the terms and conditions of the employment;
- where the employee is required to work outside the United Kingdom for a period of more than one month details of that employment.