

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### LEVEL 6 UNIT 19 – THE PRACTICE OF EMPLOYMENT LAW

JUNE 2023

#### Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

### CHIEF EXAMINER COMMENTS

The paper as a whole allowed for stronger candidates to excel in the application of law and reasoned advice specific to the Case Study Materials. Candidates who passed the paper but did not score a high grade were able to achieve a pass mark through the identification of several, if not all, of the legal issues examined.

The cohort was able to cite law, particularly statute, to a good standard and this allowed for marks to be gained even where the application of that good law could have been refined or more detailed.

Failing papers were those that provided very little detail when answering at least one, but usually several, questions within the paper. Failing papers also tended to not identify the area of law examined or missed out on answering some questions.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Question 1(a)

The vast majority of candidates passed this question with high to moderate marks. The issues relating to harassment were overall well addressed with statute, and case law in stronger papers. Most papers identified direct associative discrimination, but few lower scoring or failing answers did not identify this type of discrimination. Answers that failed the question also tended to not address both aspects of law examined, focusing on one or the other. Several high scoring papers identified all issues, including age discrimination, with citation of supporting statute and case law, along with case study specific application. Overall, the question resulted in good answers.

### (b)

This question resulted in moderate marks overall, with few higher scoring answers. The issue of proper dismissal procedure was well identified, however, detailed consideration specific to the case study and 'gross misconduct' was evident only in few high scoring papers. Citation of statute and seminal case law were overall good, along with reference to ACAS. Higher scoring papers identified the issues specific to the case study and applied these to the citation of supporting law; moderate pass marks identified relevant laws but required further application per the case study.

### Question 2 (a)(i)

This relatively straight forward, low mark question resulted in moderate to high passing marks. The majority of candidates clearly explained restrictive covenants with good citation of supporting law. Few lower scoring, but passing, answers identified relevant points but did not add supporting law. However, several papers did not sufficiently address the 'enforceability' aspect of the question. This essential detail was found only in higher scoring papers.

### (ii)

This question overall resulted in low scoring answers, along with several failing answers. The majority of candidates identified the relevant remedies but failed to provide sufficient detail thereon, with some papers including answers of just a few, albeit relevant, words. Very few papers failed to identify any of the remedies or noted just one of the relevant points.

### (iii)

This question resulted in overall low to moderate marks, with some failing answers. Few high scoring papers identified the relevant forum with a good level of detail, but these were an exception. Several papers failed as they did not identify the relevant forum and focused on tribunal issues. Some papers identified the relevant forum but provided insufficient detail and application, nominal credit was still given for this basic identification.

**2(b)**

The question resulted in good to moderate grades overall with an improvement in drafting seen from previous cohorts. Most papers passed the question with the drafting of a clear and relevant clause. Few failing papers provided very brief answers of just a few words, credit was given for any relevant points. Higher scoring papers included good detail and use of language, with the parameters of the clause being specific to the non-compete aspect of the question.

**Question 3(a)**

This relatively straight forward question resulted in moderate to high passing grades overall. Most papers gave relevant explanation of policies and their uses, with higher scoring papers also referencing law to support the points raised. The specific benefits of policies were considered in most papers, with only high scoring papers providing detailed explanation of this point.

**(b)**

The majority of papers passed this question with moderate grades. There were several legal issues examined and candidates tended to identify some relevant points with citation of supporting statute and basic but reasoned application. However, only few high scoring papers identified all the issues examined and applied these with detail specific to the case study, with supporting law.

**(c)**

This question resulted in moderate passing grades overall. There were two aspects of the question per 'content' and 'requirements', only higher scoring papers addressed both of these points with sufficient detail. Most moderate scoring answers identified the basic points but required further detail on one of the aspects. Very few failing responses either did not identify relevant points or failed to address the points with sufficient detail.

**Question 4(a)**

The vast majority of papers passed this question with moderate grades. There were a few failing papers that either did not attempt the question or gave very brief or irrelevant responses. Most papers identified the relevant type of discrimination and provided statutory provisions to reinforce knowledge. Several higher scoring papers applied these laws in detail to the specifics of the case study and the topical area of law examined in the question. Overall, identification of law and issues was good, but in-depth application per case study details was found only in higher scoring papers.

**(b)**

The majority of candidates passed this question with moderate grades. Few failing responses did not attempt the question or provided very brief answers lacking in relevance. Most papers identified the area of unfair dismissal with statute, along with the issue of protected disclosures. However, while these points were identified, the application of these points and supporting law could have been more specific to the case study in many low passing answers. High scoring papers not only identified the relevant law, but also applied these points with sufficient detail relating to the case study scenario. Overall, identification of legal issues and statute was fine, application specific to all

the issues raised could have been improved in all but few high scoring papers where there was good law along with reasoned application.

**SUGGESTED POINTS FOR RESPONSE**

**LEVEL 6 UNIT 19 – THE PRACTICE OF EMPLOYMENT LAW**

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The Equality Act 2010 prohibits discrimination based on nine protected characteristics, including disability, s6. Fuat is registered disabled so there is no need to apply the s6 definition.</li> <li>• Associative discrimination occurs where an individual is directly discriminated against on the basis of their association with a person holding a protected characteristic, <u>Coleman v Attridge Law and Another</u> (2006), <u>Truman v Bibby Distribution Ltd</u> (2014).</li> <li>• s13 direct discrimination occurs where an individual is treated less favourably because of a protected characteristic. The legislation does not state that the individual needs to hold the protected characteristic.</li> <li>• Cristal Devon has been treated less favourably by being denied access to the free day care she is entitled to as an employee with a child under the age of six years.</li> <li>• Mr Esher’s suggestion that there is a safety issue is unfounded as Cristal Devon confirmed the child minders found her son to be well behaved.</li> <li>• From the comments made by Mr Esher, it is Fuat’s appearance, as related to his disability, that is the only issue; not his behaviour/ safety issues.</li> <li>• The Equality Act 2010 s5 prohibits discrimination on the grounds of age.</li> <li>• The Equality Act 2010 discrimination includes s26 harassment which is “unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual”.</li> <li>• The comments made to Cristal Devon about her being ‘so old’ would likely be classed as harassment based upon age, particularly as she found them ‘too much to take’.</li> <li>• Harassment may extend to feeling discriminated against due to abusive language surrounding a protected characteristic, even if the individual does not hold that protected characteristic, <u>Noble v Sidhil</u></li> </ul>	12



	<p><u>Ltd &amp; Anor (2016)</u>. The comments on Cristal Devon’s son’s appearance being ‘unusual ‘and ‘strange’, would also likely be classed as harassment.</p> <ul style="list-style-type: none"> <li>• Responses could include</li> <li>• There is no defence to direct discrimination.</li> <li>• Mr Esher may be liable under s109 and Joyous School, as his employer, may be vicariously liable under s110 EA 2010</li> </ul>	
1(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Employees with at least two years’ service who are not in an excluded category have a right not be unfairly dismissed, s98 ERA 1996</li> <li>• Cristal Devon meets these requirements; she is an employee, three years duration, no other exclusions apply.</li> <li>• The right not to be unfairly dismissed includes a right to fair warning and a disciplinary process.</li> <li>• Conduct/gross misconduct is a potentially fair reason for dismissal under s98 ERA 1996.</li> <li>• The conduct in question must be sufficiently serious to justify the dismissal. It will be necessary to consider whether the company acted reasonably in treating the potentially fair reason as a reason for dismissal.</li> <li>• Reasonableness is determined by considering several factors including whether the employer genuinely believed the employee was guilty of the misconduct, whether the employer had reasonable grounds for that belief, whether the employer carried out reasonable investigation into the matter and whether dismissal was an appropriate sanction, <u>BHS v Burchell (1978)</u>.</li> <li>• The prior disciplinary warning may be used against Cristal Devon to justify the summary dismissal, but this is unlikely. The incident (taking keys home) was of an entirely different nature, did not reinforce any patterns of behaviour, and was unrelated to the current accusations of ‘abusive and aggressive’ language.</li> <li>• The language used by Cristal Devon does not appear ‘abusive’ nor ‘aggressive’, nor to warrant summary dismissal. Credit any reasoned arguments on this point.</li> <li>• Even if summary dismissal is justified, procedural fairness must still be found and this is lacking in the circumstances.</li> <li>• Proper procedure was not followed as the dismissal occurred the evening of the alleged ‘gross misconduct’, so no investigations or proper procedure followed.</li> </ul>	10

	<ul style="list-style-type: none"> <li>• Procedural fairness under the ACAS Code of Practice on Disciplinary and Grievance Procedure must also be established.</li> <li>• It appears Cristal Devon has been unfairly dismissed.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Any relevant law</li> <li>• If proper procedure is not followed, the tribunal can increase any compensation award up to 25%.</li> </ul>	
<b>Question 1 Total:22 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)(i)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Restrictive covenants are contractual terms that limit an employee’s ability to work for other legal or natural persons during /after leaving their current employment.</li> <li>• Such clauses are prima facie void as a restraint of trade.</li> <li>• Clauses may be enforceable if they protect a legitimate business interest and are reasonable in terms of scope, duration, nature of information protected and are appropriate to the seniority of the employee, <u>Fellows v Fisher (1976)</u>, <u>Printers and Finishers Ltd v Holloway (1965)</u>, <u>Patsystems Holdings Ltd v Neilly (2012)</u>.</li> <li>• Responses could include: <ul style="list-style-type: none"> <li>• <u>Dada v Metal Box Company Limited (1974)</u></li> <li>• Any relevant law</li> </ul> </li> </ul>	7
2(a)(ii)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Where a restrictive covenant is breached, the company may seek an interim injunction preventing the employee/former employee from working in breach of the clause.</li> <li>• However, injunctions are equitable remedies and may not always be available or suitable, particularly where the employee/former employee has begun working for a rival and sensitive information may have already been comprised.</li> <li>• In such instances, a breach of restrictive covenant may be pursued in the civil courts; High Court or County Court depending on value and complexity of case.</li> <li>• The company seeking damages will need to show damages caused by the breach.</li> <li>• If this is not ascertainable, the courts will consider probabilities and calculate losses accordingly.</li> </ul>	8

	<p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Where confidential information has been divulged/utilised, more significant damage may be recoverable.</li> </ul>	
2(a)(iii)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The issue relates to a claim of wrongful dismissal.</li> <li>• The employment tribunal has jurisdiction over wrongful dismissal claims, but these are time limited to 3 months, Extension of Jurisdiction (England and Wales) Order 1994, s123.</li> <li>• Idris Jones resigned on 1<sup>st</sup> September 2022. The threat to bring legal action against Great Greets Ltd was made/received on 26<sup>th</sup> April 2023. The claim is time barred from employment tribunal.</li> <li>• Ordinary civil courts have jurisdiction over breach of contract claims including wrongful dismissal. The time limit is up to six years for a breach of contract claim.</li> <li>• The forum available to Idris Jones against Great Greets Ltd is the civil courts.</li> </ul> <p>Responses could include ;</p> <ul style="list-style-type: none"> <li>• The employment tribunal has jurisdiction to deal with contractual claims, such as wrongful dismissal, up to a £25,000 limit</li> </ul> <p>Any relevant case law.</p>	7
		<b>22 marks</b>
2(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The clause should be drafted narrowly and specific to senior employees. Senior employees may be defined.</li> <li>• The definition of a 'competitor' and 'competition' should be clear.</li> <li>• The definition of 'work' should be clear. Including but not limited to 'work' is any competitive business activity, including the offering of freelance services that compete with the company and the setting up of a business in competition with the company.</li> <li>• The duration should generally not exceed 6-12 months following termination of employment. As the clause relates to 'senior' employees, this may be on the higher end of 12 months.</li> <li>• The extent should not exceed 10 miles from the location of prior employment, unless virtual services are referenced, where a UK wide restriction would be allowed.</li> </ul>	10

	<ul style="list-style-type: none"> <li>• ‘Information’ should also be defined, including but not limited to ‘details of former and existing customers, clients and business contacts of the company’.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Identify that non-competition clauses require particularly narrow drafting as they are a restraint of trade</li> </ul>	
<b>Question 2 Total: 32 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p><b>Responses should include:</b></p> <p>Explanation that core policies:</p> <ul style="list-style-type: none"> <li>• Allows employees to be aware of acceptable and unacceptable behaviour within their specific workplace</li> <li>• Allows employees to be aware of what constitutes bullying and harassment, including a broad definition of words, actions and gestures, reinforcing statutory protection under Equality Act 2010.</li> <li>• Can be used as a standard in disciplinary and grievance procedures, particularly where they reflect the ACAS Code of Conduct</li> <li>• Such policies will ensure employees are aware of the type of behaviour is restricted when in the workplace, thereby avoiding disputes and complaints.</li> <li>• Protects the employer against vicarious liability for the actions of the employee as the policy can evidence ‘reasonable steps’ taken to prevent harassment/discrimination in the course of employment</li> <li>• The mere existence of company policies is insufficient, they must also be enforced by the employer, <u>Martin v Parkam Foods Ltd</u> (2006).</li> <li>• A statement on enforcement of policies is beneficial so employees are aware of the consequences of breach, <u>Henderson v London Borough of Hackney</u> (2009).</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Encourages recruitment and raises the reputation of the company</li> <li>• Such policies can be incorporated into the contract and become binding on all employees, so enforcement is simplified</li> </ul>	8



	<ul style="list-style-type: none"> <li>It is beneficial for employers to create their own company specific policies that complement statutory provisions and can be part of the employment agreement with employees.</li> </ul>	
3(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>Identify that employees have the right to time off for antenatal care, s55 ERA 1996. Natasha O’Reilly is an employee of ABUXE Ltd, and her appointments fall under antenatal care.</li> <li>The time off must not be unreasonably refused and must be paid s56 ERA 1996.</li> <li>The business being ‘unable to manage without her’ is not a valid reason to decline Natasha O’Reilly’s antenatal leave. ABUXE Ltd has breached the right to leave and the right to paid leave s57 ERA 1996.</li> <li>ABUXE Ltd may also be committing sex discrimination EA 2010 by not allowing/paying for ante natal leave.</li> <li>Under the Maternity and Parental Leave Regulations 1999 regulation 8, Natasha O’Reilly has the right to take ordinary maternity leave (OML) of a period of 26 weeks, regardless of length of service.</li> <li>The regulations also allow for additional maternity leave (AML), a period of 26 weeks leave taken immediately after the ordinary maternity leave.</li> <li>When taking OML, the employee has the right to return to their former job s71(4), ERA 1996. An employer cannot make any changes to the organisation of the workforce if this results in the employee having a lower status upon return from OML.</li> <li>As Natasha O’Reilly was the only sales manager when she started her OML, the change to recruit an additional, higher-level manager may be a prohibited change in structure</li> <li>However, it can be argued that there is no breach under the precedent set in <u>M Blundell v Governing Body of St Andrews Catholic Primary School</u> [2007] IRLR 652, as only the ‘reporting hierarchy’ has been changed. Credit any reasoned comments. ly Natasha O’Reilly took 20 weeks of OML, she requested a further 8 weeks, which would have been 6 remaining weeks of OML, and two weeks of AML. By declining her request, ABUXE Ltd has breached her statutory rights.</li> <li>An employee taking AML can return to the work in which they were employed, or if this is not reasonably practicable for the employer, to an alternative and appropriate job on the same terms and conditions as the previous job, Regs 18 and 18A MPLR 1999.</li> <li>Although she requested AML, this was denied. Natasha O’Reilly has taken OML leave only 20 weeks. She has the right to return to the ‘same job level’. The rules on return to work after AML do not apply to her.</li> </ul>	9



	<ul style="list-style-type: none"> <li>• Responses could include</li> <li>• The employee must provide a certificate of pregnancy and appointment card, if requested by the employer.</li> <li>• Under s47C ERA 1996 and reg MPLR 1999, an employee has the right not to be subjected to a detriment by the employer for any reason connected with maternity leave.</li> <li>• The Equality Act 2010 also protects against discrimination on the basis of pregnancy and maternity.</li> </ul>	
3(c)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The formalities of settlement agreements are found in s203 (3) Employment Rights Act 1996 and S111A of the ERA 1996</li> <li>• Any such agreement must be in writing and relating to a particular proceeding or complaint.</li> <li>• The settlement agreement will set out the terms agreed in the negotiation and will include the names of parties, amount to be paid to the employee, details of the claims the employee agrees not to take against the employer and details of the employee’s legal adviser along with the adviser’s signature.</li> <li>• The employee must have received independent advice from a qualified professional; this adviser must be completely independent of the employer. This adviser must inform the employee on the terms and effect of the proposed agreement and in particular its effect on his ability to pursue his rights before an Employment Tribunal.</li> <li>• The adviser must be a relevant independent adviser under the Employment Rights Act 1996 s203 (3A), Employment Rights (Dispute Resolution) Act 1998 s9 and must be covered by a professional indemnity insurance in respect of the advice given.</li> <li>• The adviser must be identified in the agreement and the agreement must state that the above conditions are satisfied.</li> <li>• Responses could include:</li> <li>• Whilst settlement agreements are legally binding, they are certain exceptions to the use of such agreements. These exceptions include claims relating to dismissal for automatically unfair reasons, union membership, whistleblowing and asserting any statutory right.</li> <li>• The more specific you are the more protection you will receive from the agreement, as seen in <u>Hinton v University of East London</u> (2005) ; <u>Hilton UK Hotels Ltd v McNaughton</u> (2004), <u>Royal Orthopaedic Hospital Trust v Howard</u> (2002).</li> <li>• Any relevant case law</li> </ul>	7

**Question 3 Total:24 marks**



Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• The Equality Act 2010 prohibits discrimination on the basis of disability.</li> <li>• S6 EA 2010 defines disability as a physical or mental impairment having a substantial and long-term adverse effect on an individual’s ability to carry out their normal day-to-day activities, <u>Paterson v Metropolitan Police Commissioner (2007)</u>.</li> <li>• Menopausal symptoms can be a disability under the EA 2010 definition, <u>Rooney v Leicester City Council</u> EAT.</li> <li>• If Ms Vasquez’s symptoms cause her a physical or mental impairment that has a substantial and long term impact on her ability to carry out normal activities, this may meet the definition of a disability.</li> <li>• Ms Vasquez’s symptoms appear substantial in that she has been prescribed medication and attends a support group. The symptoms are also likely to last ‘several years’.</li> <li>• It is likely Ms Vasquez has a disability recognised under law.</li> <li>• By refusing to meet with her and discuss ways to accommodate her symptoms, WestWorld09 may have discriminated against Ms Vasquez on the basis of disability.</li> <li>• WestWorld09 may have also discriminated against Ms Vasquez on the basis of sex and age, EA 2010.</li> <li>• Credit any reasoned conclusion.</li> <li>• Responses could include: <ul style="list-style-type: none"> <li>• EA 2010 s20 employer requirement to make reasonable adjustments for disabled employees once they are aware of the disability.</li> </ul> </li> </ul> <p>WestWorld09 is aware of the menopause diagnosis.</p>	9
4(b)	<p><b>Responses should include:</b></p> <ul style="list-style-type: none"> <li>• Under s94 ERA, an employee will be automatically unfairly dismissed if their employment is terminated because they have made a protected disclosure that they reasonably believe is in the public interest, s103A ERA.</li> <li>• The tribunal does not consider whether the employee acted reasonably.</li> <li>• The social media post on safety inspections is likely a protected disclosure as s43B ERA recognises statements concerning danger to health and safety as one of the categories that constitute a protected disclosure.</li> </ul>	13

- Ms Vasquez she did not make the protected disclosure to an appropriate person, ss43C to 43H ERA in posting on social media. She did however 'mention the issues to her manager several months ago', so this is arguably a proper disclosure. *Norbrook Laboratories (GB) Ltd v Shaw (UKEAT/0150/13/RN)*, *Dr Martin Parsons v Barnabus Fund: 1403443/2019*
- There is no requirement for the employee to make a disclosure in good faith.
- Ms Vasquez has been terminated due to making these protected statements, therefore, she may have been automatically unfairly dismissed.
- Remedies for automatic unfair dismissal, s112 and 113 ERA 1996 - reinstatement, reengagement and financial compensation.
- Verity Vasquez's basic award will be calculated under s118 ERA 1996 by adding together one and a half weeks pay for each complete year of employment where an employee was aged 41 or over.
- Verity Vasquez is 50 years of age and has worked at WestWorld09 for Dec 2017 to April 2023. She was over 41 years of age for her entire employment. The maximum number of weeks' pay that can be awarded is 30.
- Verity Vasquez's compensatory award will be limited to the maximum statutory amount as of June 2023.
- The courts may consider loss of earnings from date of dismissal to date of hearing, future loss and loss of statutory rights accrued.
- The level of compensation can be lessened by up to 25% where a claim is motivated by vexatious reasons, Public Interest Disclosure Act 1998.
- Verity Vasquez's compensation will likely be lessened as she was aware of safety breaches and did not report them until she had a grievance with her employer.

Responses could include:

- Reinstatement and reengagement unlikely due to breakdown of working relationship.
- There is obligation on the employee to mitigate his losses and this will be considered in any compensatory award. *Chesterton Global v Nurmohamed (2017)*

**Question 4 Total:22 marks**

