



CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 - UNIT 19 - THE PRACTICE OF EMPLOYMENT LAW

JUNE 2022

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 2022 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 performed very well, with a high pass rate and good grades overall. The few failing candidates/papers tended to not recognise the area of law examined in certain questions or provided very brief responses lacking sufficient detail to demonstrate Level 6 knowledge of the law.

The high pass rate is similar to the January 2022 session. The pass rate, while high, is within the boundaries expected for this paper, particularly given the relatively small and strong cohort. The high pass rate reflected a good level of identification of legal issues examined, as well as very good recognition and application of both supporting statute and case law. The drafting question was worth 22 out of the total 100 marks and the vast majority of candidates performed well with identification of the majority of breaches and associated remedies. This strong approach to recognition of legal issues, application of supporting law, as well as drafting skills, resulted in the high pass rate being achieved, as well as several higher scoring grades.

The overall grading reflects an appropriate variation in pass, merit and distinction papers; demonstrating that the paper allows for stronger candidates to apply their skills, and weaker candidates to pass the exam should they make level-appropriate efforts.



CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)(i)

The vast majority of candidates passed this question with a high mark. There was consistent recognition of the relevant potentially fair reasons for dismissal and statute and case law were cited in the vast majority of answers. Most papers contained some level of application of the relevant law cited to the specifics of the CS, however, only the highest scoring papers applied these points in detail.

(ii)

This straight-forward question performed very well with the majority of papers providing a detailed answer with recognition of the relevant ACAS provisions. The potential for an award to be increased if the provisions are not followed was also identified in most papers. Application was overall reasoned and accurate in most papers, with high marks being generally found.

(iii)

The relevant statutory remedies were identified in the vast majority of papers. Higher scoring papers also provided CS specific application of the remedies, along with some supporting case law.

(b)

The EJRA was identified in the vast majority of papers. Basic statute and case law were also generally identified. However, the level of detail could have been increased and further expansion of the relevant explanations provided would have improved some papers. Overall, the question resulted in moderate to higher scoring passes.

Question 2(a)

The relevant statutory breaches were identified in the vast majority of papers. TUPE sections were also cited to support answers. Application of the law cited to the specifics of the CS were also generally found. However, only the highest scoring papers identified all of the relevant points and potential breaches, regarding both consultation and recognition of the employee representative.

(b)

The question was relatively straight forward and resulted in overall high scoring answers with identification of relevant statute. Both the relevant breaches and associated remedies were very well identified with overall detailed and specific answers.

Question 3(a)

A few candidates did not pass this question, and several scored a basic pass mark. This was due to providing very brief answers. While the relevant area of examination was consistently recognised, certain responses contained just a few sentences and these did not provide sufficient detail upon which to base a pass mark, given the level of the paper and the relatively straight forward nature of the question. A few higher scoring papers provided detailed and critical answers to this question, but these were in the minority within the cohort.

(b)

This question required recognition of CS specific breaches, and associated remedies. Candidates also needed to identify and apply the relevant statute under which each breach occurred. The majority of candidates passed this question with identification of breaches and some supporting statute. However, a few papers provided quite broad points that overall addressed the relevant issues but did not give sufficient CS specific application. Remedies could have been more specific to the breaches in several responses. Only the highest scoring papers, of which there were very few, identified all legal breaches with specific remedies and supporting statute. Drafting skills were overall acceptable but the closing of the form needed to be refined in many instances. Most candidates passed this question with moderate grades, with very few higher scoring papers.

Question 4 (a)(i)

The vast majority of candidates addressed the question with identification of a good amount of relevant case law, and some brief but accurate points of application. Most papers passed the question with high marks. However, only the highest scoring papers provided detailed application the specifics of the CS.

(ii)

The garden leave clause was well identified in the vast majority of papers, with supporting law being applied in many papers. However, only higher scoring papers provided sufficient application of the relevant points to the CS specifics. Several papers identified the clause but did not provide sufficient assessment of the enforceability thereof.

(b)

Several candidates failed this question by not identifying the relevant type of potential discrimination. Associative discrimination was frequently miscited where perception was the relevant point of examination. Only higher scoring papers identified this point, of which there were quite a few. It was a split between very high and failing scores with this question with no answers being moderate.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 - UNIT 19 - THE PRACTICE OF EMPLOYMENT LAW

Question Number	Suggested Points for Responses	Marks (Max)
1a(i)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Barbie Butler meets the requirements to claim potentially unfair dismissal, s94 Employment Rights Act 1996; she is an employee, with the required service, she has been dismissed and she is not in an excluded category. Barbie Butler appears to have brought her claim within three months dismissal (also credited if mentioned in 1a(iii)). • Under s98 ERA 1996, Acute Aims may be able to cite capability, conduct or some other substantial reason, as a fair reason to dismiss Barbie Butler. • Acute Aims will need to show that the dismissal of Barbie Butler for her unwillingness to use the new system was within the range of reasonable responses of an employer in those circumstances, <u>Iceland Frozen Foods Ltd v Jones (1983)</u> <u>HSBC v Madden (2000)</u>. • Barbie Butler was given time to adapt and was made aware of the need to learn the new system. • In addition to showing fair reason, Acute Aims will also need to demonstrate fair procedure, one way of demonstrating this is to show that the ACAS code was followed in the dismissal. • Responses could include: • Clarify that Barbie Butler’s age must not be a consideration in her dismissal. If she had been dismissed for reasons related to her age, this would be age discrimination and her dismissal would be automatically unfair, EA2010 . • Any relevant case law. 	8

Question Number	Suggested Points for Responses	Marks (Max)
1(a) (ii)	<ul style="list-style-type: none"> • Responses should include: • The ACAS Code of Practice on Disciplinary and Grievance procedure is relevant to determine if Acute Aims followed proper procedure when dismissing Barbie Butler and whether her dismissal was 'fair'. • Procedural fairness under the ACAS Code would include writing to the employee setting out the alleged offence and inviting them to a meeting to address the allegations with sufficient time to prepare. • The employee must be made aware of a right to be accompanied at the disciplinary meeting. They must also be notified of the right to appeal any decision or sanction. • Although a meeting was held with Barbie Butler, it does not appear that Acute Aims followed proper procedure prior to her dismissal, supporting a conclusion that she has been unfairly dismissed. • Responses could include: • Failure to follow the ACAS Code when dismissing Barbie butler may result in the Tribunal increasing any award she receives. 	6
Question Number	Suggested Points for Responses	Marks (Max)
(iii)	<ul style="list-style-type: none"> • Responses should include: • Remedies for unfair dismissal, ss112 and 113 ERA 1996 reinstatement, reengagement, basic and compensatory award. • The basic award is calculated under s118 ERA and takes into account the age of the employee and duration of continuous employment. • 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. The maximum number of weeks' pay that can be awarded is 30. Barbie Butler was aged over 41 for the duration of her employment at Acute Aims Ltd. • Barbie Butler may be entitled to a compensatory award to cover loss suffered as a result of the dismissal, including loss of earnings and statutory rights. If it is proved that Acute Aims did 	6



	<p>not follow proper procedure, an uplift of up to 25% may be awarded, <u>Polkey v AE Dayton Services Limited</u> (1988).</p> <ul style="list-style-type: none"> • The courts may consider loss of earnings from date of dismissal to date of hearing, future loss and loss of statutory rights accrued. • The compensatory award will be limited to the maximum statutory amount as of June 2022. • Credit any reasoned conclusion on remedies. • If age is reason for the dismissal, this is automatically unfair dismissal and also breach of EA 2010 rights. ET may make an order, recommendation or compensation s 124 (2) (a) EA. 	
		20 marks
Question Number	Suggested Points for Responses	Marks (Max)
1(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Age is a protected characteristic under s4 Equality Act 2010 • S13 direct discrimination occurs where an individual is treated less favourably due to their having a protected characteristic, than a person not holding that characteristic. • Requiring employees to retire at a certain age would be direct age discrimination, unless it is a proportionate means of achieving a legitimate aim, s13 (2), allowing for an Employer Justified Retirement Age. • Acute Aims Ltd will need to show that there are no reasonable alternative ways to achieve their aim, and that the benefits of this aim significantly outweigh the discriminatory effect. • Acute Aims would need to show a link between the legitimate aims of the EJRA and the specified retirement age, <u>Prigge and others v Deutsche Lufthansa AG</u> (2011). • Examples of legitimate aims include, retirement policy promotes diversity in terms of race and age, aim of avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, <u>Seldon v Clarkson Wright and Jakes</u> (2012), <u>Prof J Pitcher v University of Oxford</u> (2019). • Acute Aims can have such a policy but it must be justified on the ground stated above <p>Responses could include:</p> <ul style="list-style-type: none"> • Any relevant case law • S13 (2) defence to direct discrimination applies to age discrimination only. 	10
		Question 1 Total: 30 marks



Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<ul style="list-style-type: none"> • There has been a transfer of an undertaking under TUPE 2006, an organised grouping (veil making department) transferred from Details01 Ltd, the transferor, to EveforEver, the transferee. • In this transfer, affected employees have a right to be formally consulted before during and after the transfer. There is a duty to inform and consult employee representatives, Reg 13. • Details01 Ltd must consult with a representative of the employees, with the aim of seeking the agreement of the employee representatives to the changes proposed, Reg 13 (6). • This has not happened as the meeting was brief, with minimal notice and sought to inform rather than consult. There was also inadequate information given as to affect the transfer would have on employees. • This is a breach of Reg 13 by Details 01. • EveforEver has also breached Reg 6 by refusing to recognise Faisal Finnish as the employee representative. The transferee must recognise the trade union in the same extent as the transferor; it cannot say it does not recognise Faisal Finnish as the employee representative as Details01 Ltd recognised him as such. <p>Responses could include</p> <ul style="list-style-type: none"> • Both Details01 Ltd and EveforEver have breached TUPE 2006 regulations and they will be jointly and severally liable in respect of compensation payable. • There is no need for Details01 Ltd to arrange an election of employee representative as there is a recognised trade union representative, Faisal Finnish, Reg14. <p>Any relevant case law.</p>	10

Question Number	Suggested Points for Responses	Marks (Max)
2(b)	<ul style="list-style-type: none"> • Responses should include: • EveforEver had a right to know about Hubert Hodges' disciplinary record, however, it is the transferor, Details01 Ltd, and not Faisal Finnish, that carries a duty to inform EveforEver of these records. • Reg 11 TUPE 2006, the transferor has to notify the transferee of any employee liability information relating to each transferred employees; including disclosure of any disciplinary procedures taken against the employee. • This information must be in writing or made available to the transferee in a readily accessible form. Notification must be given no less than 28 days before the relevant transfer, or as soon as reasonably practicable. • By not providing this information to EveforEver, Details01 Ltd has failed in its obligation under TUPE Reg 11. • EveforEver can make a complaint to an employment tribunal within 3 months of the transfer, or as the tribunal deems reasonable, under Reg 12. • The tribunal can award compensation in an amount just and equitable in the circumstances, normally not less than £500. • Responses could include: • The tribunal will consider any loss sustained by the transferee as a result of the matter complained of. • Any relevant case law. 	10
Question 2 Total: 20 marks		
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation that a company policy; • Allows employees to be aware of acceptable and unacceptable behaviour within their specific workplace • Allows employees to be aware of what constitutes bullying including a broad definition of words, actions and gestures 	8

	<ul style="list-style-type: none"> • Encourages recruitment and raises the reputation of the company • Can be used as a standard in disciplinary and grievance procedures, particularly where they reflect the ACAS Code of Conduct • Identify the relationship between workplace bullying and a claim for harassment under the Equality Act 2010 if the bullying is related to a protected characteristic or of a sexual nature • 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 <p>Responses could include:</p> <ul style="list-style-type: none"> • The mere existence of company policies is insufficient, they must also be enforced by the employer, <u>Martin v Parkam Foods Ltd (2006)</u>. • Policies can protect the employer against employee absenteeism caused by the bullying • Such policies can be incorporated into the contract and become binding on all employees, so enforcement is simplified. 	
Question Number	Suggested Points for Responses	Marks (Max)
3(b)	<ul style="list-style-type: none"> • The ET1 Form should contain the following points, all information available in the Case Study. • The name, age and address of claimant • The name and address of respondent • The name and address of the claimants’ representative • The dates of employment, salary and the role • Explanation of the nature of the claim and the cause of action per each of the claims Imran Intel can make • s55 Employment Rights Act 1996, unreasonable refusal of the right to accompany his partner to 2 antenatal appointments; this is his first request for any such appointment as he has never requested leave before/this is his first child. The employer has not given legal justification for refusing this leave. Imran Intel qualifies for paid leave due to his duration of employment. • Remedies sought compensation of twice the hourly rate for the period when Imran Intel would have been entitled to be absent. • Refusal of paternity leave rights under Ss80A-E ERA 1996, Paternity and Adoption Leave Regulations 2002. Imran Intel is eligible for ordinary paternity leave, he meets the requirements; worked for 4 years, married to mother of his child, he has made 	22



	<p>a proper application/met notice requirement, earns more than the lower limit for national insurance as he is paid £30,500, pa</p> <ul style="list-style-type: none"> • Remedies sought: statutory paternity pay at the lower statutory rate per week and 90 per cent of his average weekly earnings during his paternity leave. • Refusal of time off for emergencies. Employment Rights Act 1996 s57A an employee is allowed paid time off to respond to emergencies involving a dependant or a child under the age of 18 years. Emergencies include when a dependant is injured. • Remedies sought: ET can make a declaration under s57(3) ERA 1996 and order employer to pay the employee if leave unreasonably refused. • Breach of rights under the Equality Act 2010, Jocelyn Jacob is treating Imran Intel disadvantageously on the basis of his sex, a claim for sex discrimination under s6 EA 2010. It appears from her comments that the withholding of rights is, at least partly, based on his sex. • Imran Intel may also have been harassed under 26 EA 2010 as the comment made about him 'breastfeeding' and 'men getting in the way' are, potentially and reasonably, humiliating and offensive. Furthermore, Imran is made to feel like an 'idiot' in front to junior staff. • Remedies sought: declaration of rights and compensation with no upper limit s124 (2). Aggravated and exemplary damage, as the court deems appropriate, ss48 and 49 ERA 1996. Including injury to feelings, <u>Brown Hill v Gateway</u> 1991 • Potential vicarious liability of Knight200 Ltd for not addressing the discrimination harassment, ss109 and 110 Equality Act 2010. • Confirmation of claim e.g. I believe I have been indirectly discriminated against on the grounds of disability • Explanation of remedies sought e.g. I seek a declaration of my rights and compensation. • ET1 form must be signed and dated. 	
Question 3 Total:30 marks		



Question Number	Suggested Points for Responses	Marks (Max)
4(a)(i)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Clause 2.1 is a restrictive covenant, a non-compete clause • Restrictive covenants are <i>prima facie</i> void as a restraint of trade but can be enforceable under certain circumstances. • The clause must be appropriate to the seniority of the employee, protect legitimate interests of the business and be no wider than necessary, in terms of scope and duration, to protect those interests, <u>Printers and Finishers Ltd v Holloway (1965)</u>, <u>Fellows v Fisher (1976)</u>, <u>Patsystems Holdings Ltd v Neilly (2012)</u>. • Katie Kachchhi is a junior employee; she has had no access to confidential company information nor clients during her three years of employment. It is unlikely her role in the company justifies a non-compete restrictive covenant. • However, the clause could arguably be reasonable in terms of scope, five miles, and duration, three months. • Credit any reasoned conclusion as to the enforceability of Clause 2.1. <p>Responses could include:</p> <ul style="list-style-type: none"> • Restrictive covenants are <i>prima facie</i> void for public policy reasons/ prevention of restraint of trade • Any relevant case law 	9
Question Number	Suggested Points for Responses	Marks (Max)
4(a)(ii)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Clause 2.2 is a garden leave clause. • Such clauses are assessed on the same basis of restrictive covenants, reasonable in all the circumstances of the employment. • Garden leave clauses can protect an employer from giving the employee opportunity to access further privileged information during their notice period. • As Katie Kachchhi does not have, nor has she ever had, access to such information, this garden leave clause may be an 	6

	<p>unnecessary restriction on her, <u>Provident Financial Group Plc v Hayward</u> (1989).</p> <ul style="list-style-type: none"> • Credit any reasoned conclusion as to the enforceability of Clause 2.2. <p>Responses could include:</p> <ul style="list-style-type: none"> • The clause does not financially disadvantage Katie Kachchhi as she is still earning a living during her notice period. • Nonetheless, her inability to pursue her career goals may be seen as a restraint of trade. 	
		15 marks
Question Number	Suggested Points for Responses	Marks (Max)
4(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • s13 Equality Act 2010 defines direct discrimination on the basis of an actual or perceived protected characteristic, <u>English v Sanderson Blinds</u> (2008). • If the reason for Katie Kachchhi’s exclusion from company meetings and lack of progression in the company is based upon a perception of her race, this will be direct discrimination on the basis of perceived race. • Responses could include: <ul style="list-style-type: none"> • Any relevant conclusion • Katie Kachchhi has been disadvantaged through not being allowed to progress within the company and being excluded from meetings. • Any relevant case law 	5
		Question 4 Total:20 marks

