



## CHIEF EXAMINER REPORT

**JANUARY 2024**

**LEVEL 6 UNIT 19 - The Practice of Employment Law**

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the January 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

### Chief Examiner Overview

This pass rate is on par with previous sessions. The high pass rate is largely due to good identification of legal areas examined, along with supporting law and some basic application within most papers.

Moderate scoring papers could be improved with further detail given in relation to consideration of the finer case study details, and application thereof to the answers given. Moderate passing grades identified relevant areas and fundamental legal issues examined with some law; all of these points could have been enhanced to improve the answers to high scoring passes.

## Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance is limited.

Question 1a	7 marks
<p>The majority of candidates answered this question by recognising the area of law examined with citation of relevant supporting statute and question specific explanation of law. This resulted in moderate to high grades overall. Stronger passing grades also applied the law critically to produce a reasoned consideration of the question. Lower scoring papers identified the key areas but answers were either very brief or lacking reasoned application.</p>	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• The Equality Act 2010 recognises the protected characteristic of disability, s15.</li> <li>• Apply the s6 EA 2010 definition of disability to Adam: does this impairment affect his ability to carry out normal day-to-day activities and does it have an adverse effect? Is the adverse effect long term? Is the adverse effect substantial?</li> <li>• Being blind in one eye would be regarded as a disability. Adam is disabled under the act.</li> <li>• Alcohol addiction is specifically precluded as a disability under The Equality Act 2010 (Disability) Regulations 2010 (SI 2010/2128. Bina Carter is not disabled under the act.</li> <li>• It is not discrimination to treat a disabled person more favourably than a person not having a disability. Bina Carter has not been discriminated against on the basis of disability.</li> <li>• An employer has a duty to make to make reasonable adjustments to accommodate a disabled person within the workplace. s39 (5) EA 2010, s20 EA 2010.</li> <li>• Allowing Adam to take time off work when his migraines flared up could be seen as a reasonable adjustment that the employer is legally obliged to make.</li> </ul>	

Question 1b	23 marks
<p>This drafting exercise produced moderate to low grades, with very few exceptions. The majority of papers identified some of the claims applicable, but few papers identified all the claims and cited relevant remedies sought, along with supporting statutory citation.</p>	
Suggested Points for Response:	
<p>The ET1 Form should contain the following points</p> <ul style="list-style-type: none"> <li>• all information available in the Case Study.</li> <li>• The name, age and address of claimant</li> <li>• The name and address of respondent</li> <li>• The name and address of the claimants representative</li> <li>• The dates of employment, salary and the role (2 marks)</li> <li>• s4 Equality Act 2010, Bina Carter has been directly discriminated against as she has been treated in a less favourable way on the basis of her sex, s11 and on the basis of her sexual orientation, s12. The comment 'leave only applies to male and female partners, not your situation' results in denial of antenatal leave on the basis of her being gay and being a female.</li> </ul> <p>Remedies sought:</p> <ul style="list-style-type: none"> <li>• declaration of rights and compensation s124 (2), ss48 and 49 ERA 1996. Including injury to feelings, <i>Brown Hill v Gateway</i> 1991</li> <li>• Bina Carter has been unreasonably denied the right to accompany her wife to two antenatal appointments, s55 Employment Rights Act 1996. This right includes same sex couples. This is the first request for any such leave per 'I have never asked for any time off in the 12 months....'.</li> </ul>	

- declaration and compensation of twice the hourly rate for the period when Bina Carter would have been entitled to be absent. (6 marks)
- Bina Carter has been dismissed on the basis of her sexual orientation. This is automatic unfair dismissal, s98 ERA 1996, so the 12 month duration of employment does not preclude a claim.
- Remedies for unfair dismissal: Remedies for unfair dismissal are under ERA s.112 , compensation is sought, not re engagement nor reinstatement.
- Basic award of one week's pay for the one year (12 months) Bina Carter was employed; she is 30 years of age.
- Compensatory award under s123 ERA. Subject to a maximum statutory amount of 52 weeks gross pay or a statutory amount (per Jan 2024).
- The compensatory award is uncapped as the dismissal is based on an unlawful discrimination and breach of the EA 2010.
- Potential vicarious liability of DrinksNCo for not addressing the discrimination , ss109 and 110 Equality Act 2010.
- Remedies under the EA 2010
- ET1 form must be signed and dated.
- Any other relevant points

Question 2ai	9 marks
This relatively straight-forward question produced overall high passing grades. There was detailed identification of key case law and application was generally well reasoned per the specifics of the case study.	
<b>Suggested Points for Response:</b>	
<ul style="list-style-type: none"> <li>• Identify that Clause 2.4 is a restrictive covenant and prima facie void for public policy reasons/ restraint of trade.</li> <li>• Clause 2.4 will be enforceable if it protects a legitimate business interest and is reasonable in terms of scope, duration, nature of information protected and appropriate to the seniority of the individual employee.</li> <li>• Although the clause has not been enforceable against a junior employee, this does not preclude its application against Katy Keller as she is a senior employee, of considerably longer employment duration and with access to privileged information.</li> <li>• Clause 2.4 is broadly drafted and unlikely enforceable due to the 'worldwide ' restriction. The definition of 'competitor' this should noted. The 24 month restriction appears reasonable against Katy Keller and there are legitimate interests to protect.</li> <li>• Dada v Metal Box Company Limited (1974) Fellows v Fisher (1976), Printers and Finishers Ltd v Holloway (1965) Patsystems Holdings Ltd v Neilly (2012)..</li> <li>• The Blue Pencil Test could be utilised to enforce the clause on Katy Keller.</li> <li>• Any other relevant law</li> </ul>	

Question 2ai	12 marks
<p>This part of the question resulted in overall moderate passing grades, with few exceptionally good answers, and a few failing answers lacking identification of implied terms and associated remedies. High scoring papers identified the contractual breaches and explained and applied relevant remedies per the case study, with supporting case law. Cross credit was allowed between parts i and ii.</p>	
<p><b>Suggested Points for Response:</b></p>	
<ul style="list-style-type: none"> <li>• Identify that all employment contracts can have terms implied to protect certain business interests, so the employee cannot disclose, either during or after the employment, confidential information.</li> <li>• If the information disclosed by Katy Keller is determined to be trade secret, there may be a breach of contract for disclosure thereof, Faccenda Chicken Limited v Fowler (1986).</li> <li>• implied terms only protect the employer in certain circumstances, depending on the nature of the employment and the employee's awareness of the confidentiality of the information. • Hivac Ltd v Park Royal Scientific Instruments Ltd (1946), Roger Bullivant Ltd v Ellis (1987).</li> <li>• Katy Keller is a senior employee, with access to confidential information and a long-standing relationship of employment.</li> <li>• If Katy Keller is found to have breached the implied duty of fidelity this will result in a breach of the contract. The remedies for breach of contract are damages.</li> <li>• An injunction may be possible to prevent further disclosure of information, but these equitable remedies are rarely awarded.</li> <li>• The remedies for breach of the duty of fidelity also include additional awards, including duty to account of profits, as deemed at the discretion of the courts.</li> <li>• Credit any reasoned application</li> <li>• The restriction in Clause 2.4 also reinforces Katy Keller's awareness of confidentiality restraints.</li> <li>• It is in the interest of ISea Ltd to define what it considers 'confidential information' in the contract of employment , Bartholomews Agri Food Ltd v Thornton (2016)</li> <li>• The common law contractual remedies are obtained in the courts within a 6 year time limit.</li> </ul>	

Question 2b	7 marks
<p>While candidates consistently identified relevant points, there was a lack of detail within answers overall. Given the simple nature of the question, more critical detail was needed to justify higher mark allocation.</p>	
<p><b>Suggested Points for Response:</b></p>	
<ul style="list-style-type: none"> <li>• Explanation that a company policy on internet use;</li> <li>• Allows employees to be aware of acceptable and unacceptable use of internet within their specific workplace, encouraging avoidance of disputes and denial of awareness/ responsibility when rules breached</li> <li>• Such policies can be incorporated into the contract and become binding on all employees, so enforcement is simplified</li> <li>• It is useful to also include a statement on enforcement so employees are aware of the consequences of breach, Henderson v London Borough of Hackney (2009).</li> <li>• Protects the company from vicarious liability if the employee accesses illegal content or that containing viruses comprising company/client security</li> <li>• The mere existence of company policies is insufficient, they must also enforced by the employer, Martin v Parkam Foods Ltd (2006).</li> </ul>	

Question 3a	8 marks
Moderate passing grades identified both aspects of law assessed with statute, but required further application. High scoring papers identified all issues examined, with law, and provided critical, case study specific application.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Define EA 2010 s26 harassment and identify that Ms Marquette may have a claim for harassment as she is being treated adversely due to her rejection to Mr Wright. The suggestion she 'work late' reinforces harassment.</li> <li>• The fact that Ms Marquette consented to the 'one off encounter' does not preclude her from being discriminated against, nor influence the validity of her claim.</li> <li>• Victimisation is a form of discrimination under the EA 2010 and occurs where a person is treated less favourably after making, or supporting another in, a claim of discrimination under the statute s27.</li> <li>• Upon raising her complaint against Mr Wright, Ms Marquette is subjected to 'increased' unfavourable treatment in the form of being required to work late /a change in working hours. Ms Marquette has been victimised under the EA 2010.</li> <li>• The Equality Act 2010 s13 identifies direct discrimination as less favourable treatment on the grounds of a protected characteristic</li> <li>• The preclusion from company meetings has hindered Patricia Marquette's ability to progress within the company. This adverse treatment appears to be based on Ms Marquette's refusal to continue with a romantic interaction with Mr Wright, as it began immediately following her expressing this intention.</li> <li>• Ms Marquette may have a claim under s13 for direct discrimination</li> <li>• Any relevant case law</li> </ul>	

Question 3bi	7 marks
The majority of papers identified key points with some basic application. Higher scoring papers identified key issues and applied these critically to the case study with supporting law and detail.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• The losing party in an employment tribunal is not generally ordered to pay the legal costs of the winning party.</li> <li>• Costs may be awarded if the tribunal determines that the party has, in bringing or conducting proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably or where the claim or response had no reasonable prospect of success r76 (1) Sch 1 ET(CRP)R 2013.</li> <li>• The tribunal may also make an award where the actions of a party have led to the hearing being postponed or adjourned r76(2) ET(CRP)R 2013.</li> <li>• It is unlikely Patricia Marquette would be liable for costs if she lost the case as her claim does not appear to fall within any of these definitions.</li> <li>• Costs are a maximum of £20,000.</li> <li>• Tribunal proceedings differ from civil court proceedings where costs can be awarded to the winning party.</li> </ul>	

Question 3bii	7 marks
Most papers provided a 'correct' conclusion, with some reasoning, but only few high scoring papers gave a detailed explanation of supporting legal provisions with case study specific application.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• As a general rule, cases brought to tribunal can be heard in public and freely reported upon. Exceptions under r50 Sch 1 Employment Tribunal (Constitution and Rules of Procedure ) Rules 2013 which deals with tribunals power to prevent or restrict public disclosure of proceedings, so far as it considers necessary in the interests of justice.</li> <li>• These powers are used sparingly and restrictions on reporting are generally only granted where the case is of an intimate nature involving sexual misconduct or other cases which are likely to cause significant embarrassment to the complainant.</li> <li>• It is unlikely Ms Marquette's claim would be kept private on the facts.</li> <li>• When considering whether to make an order restricting reporting of a case, a tribunal must balance the ECHR principles of freedom of expression and open justice, <i>Storer v British Gas</i> (2000).</li> </ul>	

Question 4a	8 marks
This straight-forward question resulted in high grades overall. The answers given were detailed and there was also citation of supporting law and basic application.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Explain the requirements of a settlement agreement under s203 (3) Employment Rights Act 1996 and S111A of the ERA 1996.</li> <li>• The employee must have received independent advice from a qualified professional completely independent of the employer.</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.</li> <li>• The settlement agreement is invalid due to the adviser not being independent of the employer.</li> <li>• Tony Taylor must give credit for the amount already received against any award of damages.</li> </ul>	

Question 4b	12 marks
<p>The majority of papers identified the several legal provisions examined. Moderate answers gave an overview of these points with some application. High scoring papers, of which there were several, identified key issues with clear and case study specific application, along with relevant statutory provisions being cited consistently.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> <li>• Identify that there has been a service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') 2006 Reg 3 (1) (b) and 3 (3) .</li> <li>• S203 ERA 1996 includes a general prohibition on contracting out of employment legislation. This is now incorporated into TUPE 2006, Reg 18.</li> <li>• Employees cannot opt out of TUPE 2006. Therefore, the TUPE 2006 rights of the transferred employees remain, and have been breached in the following ways:</li> <li>• TUPE 2006 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, with the aim of seeking the agreement of the employee representatives to the changes proposed and giving employees information on the effect the transfer will have upon them Reg 13 (6). The duty is on the transferor to supply such information, not on the employee to seek independent legal advice</li> <li>• Regulation 4(3) contractual rights and liabilities under or in connection with the employment relationship are transferred. Reg 4 (4) (5) variations to contract may be permissible only for ETO reasons. Harmonisation of transferred employee's contractual terms would not be considered an ETO reason.</li> <li>• Berriman v Delabole Slate Ltd (1985) and this ETO reason relates to the transferor's future conduct of the business(e.g. Hynd v Armstrong and others (2007)).</li> </ul>	