CHIEF EXAMINER REPORT

JANUARY 2024

LEVEL 6 UNIT 4 – 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 November 2023 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.

Chief Examiner Overview
The good pass rate is largely due to good identification of the legal issues examined along with supporting laws. Both statutory provisions and, to a lesser extent, case law, specific to the fundamental legal issues examined were found within answers to all questions posed. This high level of legal citation allowed for an overall good pass rate, despite the fact that many lower scoring papers tended to provide relevant but descriptive answers. These results are typical within the paper generally and in many aspects reflect the findings of the report on the last cohort. Failing papers were overall clear fails that resulted from not identifying the issues examined within the questions or failing to provide level appropriate detail, supporting law or application, per the wording of the questions posed.

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.

Section A

Question 1a	11 marks
This was a very popular question resulting in relevant but descriptive answers. The majority of responses identified key statutory provisions but failed to provide adequate case law specific to gender re-assignment issues. Answers needs to include more basic critical assessment of the laws cited.	
Suggested Points for Response:	
• Identify the s7 Equality Act 2010 (EA 2010) protected characteristic of gender reassignment • Equality and Human Rights Commission- legal protection extends to any stage in the gender transition • EA 2010 protection extends to absences from work because of gender reassignment medical appointments, and counselling. • EA 2010 also allows 'positive action' in recruitment of transgender persons in underrepresented sectors. • Explain the EA 2010 definition of gender reassignment discrimination includes direct discrimination, harassment and victimisation. These can never be justified. • Explain indirect discrimination and how this can be justified if a proportionate means of reaching legitimate aim, s19 EA 2010. • Case law examples including but not limited to EA 2010 extends to non-binary and genderfluid identities, Taylor v Jaguar Land Rover (2020) • Employers direct discrimination on grounds of gender reassignment (De Souza E Souza v Primark (2017). • Critical assessment of the statute and case law cited must be evident within the response as a whole.	

Question 1b	14 marks
As above, there was identification of relevant laws, but a lack of critical assessment. However, this part of the questions did result in good answers due to the citation of case law and some basic but critical comments.	
Suggested Points for Response:	
• Identify the s4 Equality Act protected characteristic of age • Explain that age discrimination differs from other protected characteristics as there is no defence to direct discrimination in relation to any of the EA 2010 protected characteristics, with the exception of age discrimination • Identify the 'proportionate means of achieving a legitimate aim' defence as applicable only to indirect discrimination, with the exception of age discrimination, where it can be a defence to direct discrimination • Explain that direct age discrimination can be justified if the employer can demonstrate that the treatment of the employee was a proportionate means of achieving a legitimate aim, s13 EA. • Identify various examples of legitimate aims, including but not limited to, physical and mental demands of the post; there must not be an assumption of decline in ability, safety, promotion of diversity in terms of age and race. • The aim of avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, and related disputes on these type of matters, have also been held to be legitimate aims, Seldon v Clarkson Wright and Jakes (2012), Prof J Pitcher v University of Oxford (2019).	

- The employer must be able to show the link between the measure and the specified retirement age, failure to do so could render their policy discriminatory, Prigge and others v Deutsche Lufthansa AG (2011).
- Critical assessment of the judicial reasoning within the case laws cited should be evident

Question 2	25 marks

The vast majority of responses passed the question through citation of relevant statutory provisions specific to the area of law examined. However, only few high scoring papers include critical consideration of the provisions cited. The majority of answers were relevant, adequately detailed but quite descriptive rather than critical, with a few notable exceptions.

Suggested Points for Response:

- Identify the historical, and continuing, imbalances in the allocation of parental responsibility between mothers and other caregivers.
- Explain the Shared Parental Leave Regulations (2014) aim to redress this imbalance and facilitate more fair distribution of responsibilities.
- Identify the legislation allows mothers to share their leave, while ensuring a minimum of two weeks maternity leave following birth – four if the mother works in a factory
- Explain the qualifying criteria for shared parental leave under this legislation.
- The child's mother or adoptive parent must be eligible for maternity leave, pay or allowance or adoption leave or pay.
- The employee seeking shared parental leave, either the mother or partner, must meet the 'continuity of employment test': worked for the employer continuously for at least 26 weeks by the end of the 15th week before the due date, still be employed by the employer while they take shared parental leave, give the employer eight weeks' notice of intention to take the leave and provide a declaration that their partner meets the employment and income requirements which allow the employee to receive shared parental leave.
- Therefore, opportunity to share leave is available only to those who already have a steady income and meet certain tests connected to their employment.
- This may result in lack of accessibility to those with a non - traditional working pattern and partners on a low income. Furthermore, the statute does not recognise parents who do not have a partner , they are unable to share leave with anyone other than a recognised 'partner'.
- Leave only given in the first year after birth or adoption.
- The disparity in payment of SPL and maternity leave may deter some males or partners from taking shared parental leave, defeating the purpose of the legislation, Capita Customer Management v Ali (2018)
- Shared parental pay is xxx (the current rate at Jan 2024) a week or 90% of the average weekly earnings, whichever is lower. This amount could be a deterrent to taking SPL as there will be a drop in the income for most households, at a time when the expenses increase with the birth/adoption of a child.
- Critical analysis per the specifics of the question must be evident within the response as a whole.

Question 3	25 marks
The majority of papers cited relevant statute and gave a sufficient level of detail per explaining the consultation process. However, some responses were too broad in explaining overarching redundancy features. The majority of answers provided relevant statute but failed to add critical consideration of the laws cited. Some papers added few critical statements in concluding sentences.	
Suggested Points for Response:	

- Explain redundancy under ERA 196 s139 and that prior to carrying out a redundancy, the employer must undertake proper consultation.
- The requirement to consult arises where the employer intends to dismiss 20 or more employees within a 90 day period, s188 TULR(C)A 1992, Dewhirst Group v GMB (2003), Securicor and Omega Express Ltd v GMB (2004).
- Consultation must be carried out to liaise with representatives in an attempt to avoid dismissals, reduce the number of dismissal and mitigate the consequences of any dismissals.
- S188-194 Trade Union and Labour Relations (Consolidation) Act 1992 requires the employer to consult the authorised representatives of recognised independent trade unions or other elected representatives about redundancy.
- There must be a 'genuine attempt' to consult with a view to minimising disruption caused by redundancies, and parties given opportunity to express their views, British Coal Corporation and Secretary of State for Trade and Industry, ex pate Price and Others (1994).
- Where an employer has made an employee redundant and failed to follow proper procedure, including consultation, the redundancy will be treated as an unfair dismissal.
- Consultation required even where the employer company is in administration/anticipated insolvency, but not in a 'sudden' insolvency of a business, Clarks of Hove Ltd v Bakers Union (1979).
- An employer may claim exemption from the consultation provisions on the ground its own consultation scheme is at least as favourable, s198 TULRCA.
- Remedies for unfair dismissal are under ERA s.112 and Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) s.157(1)
- Remedies include reinstatement, reengagement and compensation.
- Basic award: calculation of the basic award is the same as that of a redundancy payment. It is half a week's pay for each full year the employee was under 22, one week's pay for each full year they were aged 22 to 41 years, one and half week's pay for each full year the employee was aged 41 years or older.
- The length of service is capped at 20 years, and calculation of a week's pay is subject to the maximum statutory redundancy payment.
- Compensatory award: if the redundancy was unfair, there will be an additional right to compensation under s123 ERA. Subject to a maximum statutory amount of 52 weeks gross pay or a statutory amount that increases each year.
- The employee has a duty to mitigate their losses and the compensatory award can be reduced to nil if the tribunal deems equitable, University of Sunderland v Drossou (2017).
- If the employer breaches the duty to consult s188, a tribunal may make a protective award, Hardy v Tourism South East (2005).

Question 4	25 marks
Most responses provided descriptive but relevant explanation of ETO reasons, with supporting case law. However, some more limitedresponses did not adequately identify the specific aspect of TUPE in assessment and provided broad explanations of the law in general. Critical consideration of the laws cited, even where detailed answers provided, was often lacking.	
Suggested Points for Response:	

- Identify the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 2006 aim to protect employees rights in a 'traditional' or 'extended' transfer Reg (3)..
- Reg 4 a transferred employee's contract of employment is automatically transferred to the transferee employer, includes all contractual rights and liabilities, and any statutory employment claims, any severance or redundancy schemes, bonuses, commission and liability for personal injury.
- Where the transfer is the sole reason for variation of a term within a transferred employee's contract, this variation will be void, Reg 4 (4).
- Identify that variations to the contract of employment may be allowed where the business can prove an Economic, Technical or Organisational (ETO) reason for the variation.
- TUPE 2006 does not explicitly define an economic, technical or organisational (ETO) reason. However, the Department of Business, Innovation and Skills provides some guidance by stating that economic is likely to refer to 'profitability', technical to refer to the 'equipment or processes' and organisational to consider the 'management structure' of the entity
- Cite case law demonstrating interpretation of ETO reasons, including but not limited to
- ETO reasons include a change to the structure of the workforce by reducing the numbers or changing the functions that individuals perform, Osborne and others v Capita Business Services Ltd and others (2016)
- A new outsource provider cannot rely on the ETO reason defence where it relocated work to its own offices, Royden & ors vs. Barnetts Solicitors (2009)
- Reg 7 (1) the employee is automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer; this includes redundancy of an employee before the specific transferee has been identified but the idea of the transfer was in the mind of the employer at the time of the dismissal, Spaceright Europe Ltd v Bailiavoine (2011). However, 'changes in the workforce' can include a change in the place employees are employed to work. Therefore, redundancy can be considered an ETO reason Reg 4 (5).
- The ETO justification would not apply to situations where the transferor anticipates redundancies after the transfer and carries out those dismissals before the transfer, Hynd v Armstrong and Others (2007).
- Wheeler v Patel (1987) an economic reason must relate to the conduct of the business. Therefore, dismissal of an employee by the transferor as a means of facilitating the transfer was not an ETO reason
- Harmonisation of transferred employee's contractual terms would not be considered an ETO reason.
- Any relevant case law

Section B

Question 1	25 marks
The majority of responses addressed both aspects of the question, with citation of statutory provisions on both dismissal and discrimination being well addressed overall. The majority of answers also provided a good level of case law specific to dismissal issues. There was also consistent effort to apply the laws cited to the question in an overall reasoned and accurate manner.	
Suggested Points for Response:	
• Identify that Ajay is an employee with more than two years continuous service and is not in any excluded category. He is protected from unfair dismissal, s94 ERA 1996. • Identify that Ajay has been dismissed for conduct (gross misconduct) and this is a potentially valid reason for dismissal under s98 Employment Rights Act 1996. However, the employer must demonstrate that the dismissal was reasonable. • Explain that Sally's Supermarket must show substantive fairness and that Ajay's dismissal fell within a band of reasonableness s98(4,) HSBS v Madden (2000), Iceland Frozen Foods Ltd v Jones (1982). • Sally's Supermarket must also show procedural fairness in Ajay's dismissal. • Identify that fairness can include where the employer genuinely believed the employee was guilty of the misconduct and had reasonable grounds for that belief, appropriate review of circumstances, warnings, seriousness of the allegation upon which the dismissal is based and corresponding level of investigation, BHS Ltd v Burchell (1978); Sainsburys Supermarkets Ltd v Hitt (2003). • Explain that, when a serious allegation of misconduct is made, only an appropriately in depth, independent and thorough investigation will be reasonable, Hargreaves v Manchester Grammar (2018). • As the accusation against Ajay is of a serious nature, with criminal repercussions, the expected level of investigation will be proportionately high. • Identify that there does not appear to be any suggestion that proper investigation has been undertaken by Sally's Supermarket prior to dismissing Ajay. • Identify the relationship between procedural fairness in dismissal and the requirement to follow the ACAS Disciplinary and Grievance Code. • Explain the ACAS Code of Practice guidelines as to the proper disciplinary procedure. • Failure to follow the ACAS Code can be taken into account by employment tribunals in deciding whether employers have acted properly in connection with an unfair dismissal claim. • Identify that Sally's Supermarket has not followed the ACAS Code: the meeting was held at short notice and was very brief, Ajay was not accompanied and just one member of staff present, and there was an assumption of his guilt in the statement 'how long have you been stealing…?'. • Sally' s supermarket/Balvinder has not followed proper procedure. • Identify the Equality Act 2010 protects against discrimination on the basis of' race, s9. Race includes 'national origin', such as coming from 'Asia'. Discrimination includes harassment s26. • Janet has made a derogatory comment likely to cause humiliation and embarrassment to Ajay in relation to the protected characteristic of race. • Ajay's rights have been breached under the EA 2010. • Janet may be liable under s109. Sally's Supermarket may be vicariously liable as the manager Balvinder has not addressed Ajay's allegation of racism, s110	

Question 2	25 marks

Candidates who attempted the question tended to identify the majority of legal issues with some reasoned application and supporting statute. Few lower scoring papers did not adequately address agency worker rights, although these were broadly identified along with other areas being appropriately addressed. Candidates on occasion failed to recognise the relevant areas examined with sufficient detail nor its application.

Suggested Points for Response:

- Identify that Carmel is an agency worker and has rights under the Agency Worker Regulations 2010 (AWR).
- Reg 3 AWR, an agency worker is an individual supplied by an agency to work temporarily and for and under the supervision of a hirer.
- AWR Regs 5 and Reg 7 (2), once an agency worker has completed a 12-week qualifying period, they will be entitled to the same basic working conditions as if they were hired by the company they work. As Carmel worked for Eva's Events for a total of 10 weeks, she is entitled to 'day one' rights only.
- Carmel is 34 years old and is paid £8.60 per hour, this is less than the minimum wage for person her age of xxx(rate at Jan 2024)
- Under the National Minimum Wage Act 1998, all employees are entitled to be paid a minimum wage, the amount being dependent on the employees age. This is a day one right under the AWR 2010. Remedy: Carmel can make a claim to an ET and she will be compensated for the underpayment, ERA 1996.
- Identify that Carmel has a right to use the staff room. AWR 2010- day one right to be entitled to access to shared facilities, including staff room. Remedy: Carmel can bring a complaint to an employment tribunal, the tribunal can make a declaration, recommendation or compensation.
- Carmel is entitled to receive an explanation in different in treatment. She can make a written request to the agency for a written statement Reg 16(1) within 28 days. As Do More Ltd has failed to provide this, Carmel can apply to the hirer who within 28 days, should provide information on the rights of a comparable worker and the reason for the treatment of the agency worker.
- Carmel may bring a claim for breach of rights against the hirer or the agency. She must bring the complaint to the ET within three months of alleged breach, although can be heard out of time if ET believes just and equitable. ET can make a declaration of rights, order compensation or recommend the respondent take a specified action.
- Identify that Carmel has a right to antenatal leave, s55 ERA 1996,
- The time off is paid and does not need to be made up by the employee, s56 ERA 1996.
- Carmel's rights have been breached by requiring her to make up the time she took off for the first antenatal appointment and for refusing the leave for her second appointment, and she may bring a claim to ET under section 57 (section 57ZC for agency workers) of the Employment Rights Act 1996. Remedy would likely be compensation for refusal of leave and requirement to make up the time off.
- Time off must not be unreasonably refused the employer and being needed at a wedding event appears an unreasonable refusal.
- Agency workers with less than 12 weeks service are not entitled to paid leave, therefore, there is no breach of this right in relation to Carmel.

Question 3a	8 marks
This was a popular question resulting in overall high passing grades. The relevant area of law was well explained and applied. A few responses gave broad answers detailing redundancy but also nominally addressed the key areas examined. Overall, several good answers with law and application.	
Suggested Points for Response:	

George

- The employer must use a fair and objective way of selecting persons for redundancy and demonstrate the basis of the selection process, Cox v Wildt Mellor Bromley Ltd (1978), how it was applied in practice, Protective Services (Contracts) Ltd v Livingstone (1992).
- Williams v Compair Maxam (1982) reference should be made to measurable facts that can be objectively checked, including disciplinary record.
- Selection may be fair. Credit any reasoned conclusion.

Heather

- Selection on 'last in first out' basis is fair, although not in isolation, Anderson v Pringle of Scotland Ltd (1998). • Length of service may be one criteria for selection for redundancy but cannot be the only basis for selection as it may result in age discrimination.
- The 'last in, first out' (LIFO) basis is only acceptable if it can be objectively justified and only one factor among many considered in selection for redundancy, Hobson v Park Brothers (1973).
- Selection does not appear fair.

- Identify that the proper selection requirement on the employer to consider a pool of employees. Selection for the redundancy pool must be reasonable in the circumstances, Capita Hartshead Ltd v Byard.
- The LIFO approach may also be potentially indirectly discriminatory against women as they are more likely to work part time and therefore have less service, Clarke v Eley (1982).

Question 3b	17 marks
Several answers provided broad explanation of various issues with constructive dismissal being considered overall within these details. A number of high scoring papers recognised the key area of constructive dismissal and gave this appropriate focus. Overall, moderate to good grades were found within the two parts of the question taken together.	
Suggested Points for Response:	

- Identify that a constructive dismissal takes place when an employee feels the employer has made it impossible for them to continue in their job, effectively forcing them to resign from their job.
- Where a constructive dismissal occurs, an employee can bring a claim for wrongful dismissal.
- Constructive dismissal often occurs where there is a breach of the implied duty of trust and confidence, which includes actions and words of the employer, a broad interpretation, Five Elms Medical Practice v Hayes (2012), Ogilvie v Neyrfor-Weir Ltd (2003).
- The breach of a fundamental term of contract by the employer must be considered sufficiently serious to constitute a constructive dismissal, Western Excavating Limited v Sharp (1979).
- An objective test is used to determine if the trust and confidence has been broken, Malik v BCCI (1997)., Tullet Prebon plc v BGC Brokers LP [2010).
- An employee may resign over one 'serious' incident, or several incidents.
- The employee must resign reasonably promptly or may be considered to have affirmed the contract and the right to claim constructive dismissal will be lost, Brown v Neon Management (2018).
- It is likely that there has been a breach of the implied duty of trust and confidence between Linus and his employer due to the words spoken and their effect on his ability to continue in his role. The fact that Linus' co workers also now call him the offensive name following Nina's initial use of the term 'Large Linus', also supports his claim.
- The fact that Nina has made previous comments about Linus's weight support his claim for wrongful dismissal.
- The six week lapse between the incident and Linus's resignation may affect his claim as he could be seen to have affirmed his contract within that time, Brown v Neon Management (2018).
- Credit any reasoned conclusion.

Remedies

- Linus may bring a claim for wrongful dismissal to the employment tribunal within 3 months of the breach. An ET has the power to award compensation for financial damages flowing from the breach of the implied terms of trust and confidence.
- Linus may also bring a claim for breach of contract to the civil courts within 6 years of breach. The damages amount will reflect the value of his contract of employment, usually the notice period.
- The award is capped at £25,000 in the ET, damages are not capped in the courts.

The breach may be of an express or implied term.

- Linus has a duty to mitigate his losses, Yetton v Eastwoods Froy (1967).
- Identify that, unlike constructive unfair dismissal, wrongful dismissal claims do not require a particular length of service. Linus will not be able to bring a claim for unfair constructive dismissal as he does not meet the 2 year duration of employment requirement, s98 ERA 1996. 'Weight' is not a protected characteristic under the EA 2010. There is nothing to suggest the weight gain has resulted in, or is connected to, s6 disability.

Question 4a	7 marks
This part of the question resulted in very good answers with detailed consideration of case law, and higher scoring papers, of which there were many, also providing reasoned application per the question.	
Suggested Points for Response:	
• No single aspect will be decisive in determining employment status. The courts will utilise tests of function, rather than merely contractual labels, in considering employment status. • The multiple/economic reality test, Ready Mixed Concrete Ltd v Minister of Pensions (1968). Applying this test, it appears Michael is an employee as he is controlled in wearing a uniform and receiving a non negotiable timetable. He is also unable to delegate his duties, MacFarlane and Another v Glasgow City Council (2001), and has worked for the company for a lengthy duration of time (5 years), both of which reinforce employee status. His method of payment and taxation also reflect employee status. • The only aspect of Michael's working life that suggests he is self employed is the contractual label. • Consistent Group Ltd v Kalwak (2007) where there is disparity between express contractual provisions and the reality of an individual's working life, the latter should take precedence where the contractual provisions do not accurately reflect the 'actual nature' of the working relationship, Pulse Healthcare Ltd v Carewatch Care Services Ltd and Others (2012. • It appears Michael is an employee of Times3 Ltd.	

Question 4b	8 marks
This aspect of the question resulted in overall relevant if descriptive responses that identified key statute. A few limited responses did not adequately recognise nor address part time workers rights, as examined.	
Suggested Points for Response:	
• Part time workers (Prevention of Less Favourable Treatment) Regulations 2000 part-time workers are protected from being treated less favourably than comparable full-time workers. • Piku is a part time worker as she works 10 hours per week. This is fewer hours than a full time worker , generally 35 hours or more per week, Reg 2 (2) PTW 2000. . • Part-time workers have the right not be treated less favourably than full time workers, this includes access to pension scheme, Reg 5 PTW 2000. An employer may raise an objective justification for the difference in treatment, Reg 5 (2) PTW 2000. • Times3 Ltd have stated the difference is based upon working hours only; this is unlikely to be accepted as an objective justification and is less favourable treatment on the basis of being a part time worker. • It appears Piku's rights have been breached.	

Question 4c	10 marks
Very few higher scoring papers identified fixed term workers rights with specific consideration of the issues examined along with statute and some reasoned application. However, the majority of answers briefly identified the relevant area within broad and overarching explanations of various points of law. Limited responses often did not recognise that fixed term workers rights were being examined.	
Suggested Points for Response:	

- Identify the relevance of the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations (2002).
- Kalry is a fixed term worker as she is on a 18 month contract with Times3 Ltd
- Reg 3 states that fixed term workers have a right not be treated less favourably regarding
- terms of contract or any detriment. This includes access to benefits, such as a company car.
- If Karly believes she has been treated less favourably, she can make a written request that Times3 Ltd provide her with a written statement giving the particulars of the reasons for the less favourable treatment, which they must provide within 21 days, Reg 5. She has only raised a verbal query.
- A reasoned conclusion.

Remedies

- Karly can bring a complaint to the ET within three months of incident, or later if ET considers fair. The ET may order a declaration, compensation of recommendation, Reg 7.
- Times3 Ltd can raise a defence of objective justification, Reg 4 .
- The lack of access to a company car could be financially justified as Karly does not often travel within her role.