CHIEF EXAMINER REPORT

JANUARY 2025

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 JANUARY 2025 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
Section A Question 4, regarding unfair dismissal was very popular with the candidates. The same was true for Section B Question 2(a-c), which also concerned unfair dismissal. This is consistent with previous exam sessions and is always a popular choice for the candidates. However, although the candidates overall knew the area of law well and displayed good knowledge of this area, generally candidates did not score highly on the application of the law and the critical analysis required as part of the question.

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 may be limited.

Section A

Question 1	25 marks
Candidates generally knew the area of law well, but fell down on critical assessment of the law.	
Suggested Points for Response:	

- Define implied duties.
- Explain that the employer does not have a duty to provide work, except in certain circumstances including damage to reputation or publicity, reduction of an employee's actual or potential earnings or their ability to have a reasonable opportunity to maintain skills, Langston v Auew (1974). Critically evaluate the protection offered by these exceptions.
- Identify that an employer does not have a general legal obligation to provide an employee with a reference. Critically evaluate the impact of this on an employee's future prospects if a reference is refused.
- Note that an employer cannot refuse to supply a reference on the basis of any discriminatory reasons.
- When an employer provides a reference, they create a duty of care between themselves and the employee with respect to the content of that reference, Spring v Guardian Assurance (1995), Harris v Trustee Savings Bank (2000).
- Critically evaluate the balance between the duties created when a reference is given and the lack of duty to provide a reference.
- Identify the common law implied duty to provide a safe system of work, Wilsons & Clyde Coal Co Ltd v English (1937), including warnings and protective materials and equipment, Pape v Cumbria County Council (1991).
- Identify that this includes a duty to provide competent staff/ co-workers, Hudson v Ridge Manufacturing 1957.
- Flatman v Essex County Council (UKEAT/0097/20) the relevance of timing in a fundamental breach of contract arising out of the implied duty to provide an employee with a safe working environment.
- Reference to the 'three safes' of a safe system of work.
- Critically evaluate the protection offered by these duties as they cover a broad range of physical and mental health, and extend to cover the working environment and co-workers.

Question 2	25 marks
Some candidates included in their answers all types of disability discrimination, showing a good knowledge of the area - although, this was not part of the question.	
Suggested Points for Response:	

- Identify that the Equality Act 2010 prohibits discrimination on the basis of disability, s15.

Defining a disability (15 marks)

- Explain that 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.
- Substantial means more than minor by reference to what the individual could do with or without the impairment, Paterson v Metropolitan Police Commissioner (2007).
- Critical assessment of these criteria including but not limited to, recent case law suggesting increased willingness to recognise conditions, including menopause, Davies v Scottish Courts and Tribunals Services (2017), Rooney v Leicester City Council (2021)

Reasonable adjustments (10 marks)

- s39(5) EA 2010 duty to make reasonable adjustments and provision of adjustments, and aids provided, without any cost to the employee s20 (7).
- Mr A Hurle v London Fire Commissioner 3202069/2019 reasonable adjustments and mental health disability (PTSD).
- Critical assessment of these duties , including but not limited to, an employer can defend against failure to make adjustments by claiming they were not 'reasonable'
- Cordell v Foreign and Commonwealth Office (2011) noted several factors considered in this respect, including the degree the employee would benefit from the adjustment and budgetary considerations.

Question 3a	9 marks
This question was not a popular one. The candidates that did attempt it did not have a great deal of knowledge in the area, in addition to showing a lack of knowledge as to the purpose of gender pay gap reporting.	
Suggested Points for Response:	
• Gender pay gap reporting obligation on employers with more than 250 employees. • Equality Act 2010 (Gender Pay Gap Information) Regulations 2017. • Gender Pay Report must be submitted online at the Government's gender pay reporting website. • The report must also remain available on the organisation's website for a minimum of three years. • Employers must publish the mean and median hourly pay gap and bonus gap between men and women. • There is a requirement that companies report on the proportion of men and women in each of four pay bands (quartiles), based on the employer's overall pay range. This will show how the gender pay gap differs across the organisation, at different levels of seniority. • New data based upon the 'snapshot date' of 5 April must be published each year	

Question 3b	16 marks
Those candidates who did attempt this question showed a reasonable knowledge of the area of law and the requirements of shared parental leave. However, there was a lack of critical analysis of the protection this affords mothers.	
Suggested Points for Response:	
• Explain the aim of shared parental leave in redressing gender imbalances in paternal leave, with a specific focus on the rights given in the first year of having or adopting a child. • Identify the relevant statute of the Shared Parental Leave Regulations (2014) and 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. • Critical assessment of protection given to mothers, including but not limited to: • The 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. • A mother must take a minimum of two weeks maternity leave following birth – four if she works in a factory - whether the remainder of her leave is shared or not. • This suggests that the legislation, while facilitating shared parental responsibilities, nonetheless recognises the need for leave immediately following the birth of a child and the need to avoid placing pressure on females to share leave after giving birth.	

Question 4	25 marks

Generally, candidates showed a detailed knowledge of this area of law, including case law and legislation. However, only a few candidates showed critical analysis of the importance of an employer showing substantive and procedural fairness and did not show a reasoned conclusion.

Suggested Points for Response:

- Identify that an employer can dismiss an employee for a potential fair reason, s98 ERA 1996.
- However, the employer must demonstrate that the dismissal was reasonable by showing both substantive and procedural fairness in the dismissal.
- Explain that substantive fairness relates fair reason to dismiss, and procedural fairness considers the procedure followed in dismissing an employee.
- 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).
- Furthermore, the tribunal will consider if the employer's actions fell within the band of reasonable responses: Iceland Frozen Foods v Jones (1982) and HSBC Bank v Madden (2001). The employer must act reasonably in the circumstances and consideration will be given to the resources of the employer, as well as the seriousness of the allegation, Hargreaves v Manchester Grammar (2018
- Identify the relationship between procedural fairness in dismissal and the requirement to follow the ACAS Disciplinary and Grievance Code. 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.
- Explain the requirements of proper procedure under ACAS, including investigations, meetings, and appeal opportunity.
- Critical analysis of the importance of following substantive and procedural can include, but not limited to: the employer ensuring the reason for dismissal is legally valid, allows the employee opportunity to defend any allegations against them, protect the rights of the employee and help guard against the employer being found to have unfairly dismissed the employee
- The importance of following proper procedure is further reinforced by the financial award being increased by up to 25% where an employer is found to have failed to follow proper procedure and codes, EE Dayton Services Limited (1988).
- However, where proper procedure would not have made any difference to the outcome, the award can be reduced to an amount the tribunal considers just and equitable appropriate, up to nil.

Section B

Question 1A	8 marks
Generally the candidates answered this question well, with a good knowledge of the requirements of making a flexible working application and came to a reasoned conclusion on whether the application was valid.	
Suggested Points for Response:	
• Amita has been an employee of Coats and Jackets Ltd for one year, so has the required duration of employment and has not made an application before i.e. within the past year. • The request is in writing and states the change requested, as required. However, the request must also state the date of application, the proposed date of effect of this change, any effect the change may have on the employer and how this may be dealt with, as well as confirming that it is a statutory request. None of these have been met. The application does not meet statutory requirements. • Employers may only reject a request on grounds stated under s80G ERA 1996, including detrimental effect on ability to meet customer demand and inability to reorganise the work among existing staff. • Amita's request has been rejected on the basis of staff shortages. This could fall under the above reasons.	

Question 1B	17 marks
Candidates did have a sound knowledge of harassment when answering this question and applied it well. Where candidates lost marks was there were a number of candidates who did not cover the victimisation claim.	
Suggested Points for Response:	
• Define harassment under s26 EA 2010 • identify that harassment may be on the basis of a protected characteristic or in relation to sexual conduct • The comment made to Irene by Carl has made her feel uncomfortable. She has been harassed as the comment is of a sexual nature. • Irene has also been harassed on the basis of sex as Carl has referred to her as 'a hysterical women…' The comment is related to sex and is demeaning and offensive. • Carl is a senior employee and is training Irene, there is a power imbalance making a finding of harassment more likely. • Explain that the fact that the incident was a one off does not mean no action should have been taken against Carl. • A single incident can be harassment depending on the nature of the work environment, incident and parties dynamics, Bracebridge Engineering Ltd v Darby [1990, Insitu Cleaning Co Ltd & Anor v Heads [1994]. De Souza E Souza v Primark Stores Ltd (2018) • Coats and Jackets Ltd may be liable as they took no action against Carl, s109 and s110 EA 2010 • Identify that Irene has been victimised under s27 EA 2010 as she has been made to move office and her training period extended. Irene has been treated less favourably due to raising a complaint of harassment. • Remedies include a declaration and damages • Explanation that Irene will likely be awarded damages in the low to middle band of Vento amounts. Although it is a one off incident, she has also been victimised.	

Question 2A	10 marks

The question asked whether there was a fair selection criteria for redundancy. Some candidates wrote a significant amount of content regarding whether there was a genuine redundancy situation, which was not what the question asked them. This led to their inability to respond with sufficient content regarding the law regarding fair selection criteria and its application.

Suggested Points for Response:

- Explain that there has been a redundancy situation under Section 139 Employment Rights Act (ERA) 1996, therefore a fair selection process is required.

Henry:

- an employee's attendance record may be considered in selection for redundancy. However, the employer must not consider any absence related to disability. Henry had been late due to 'public transport', he has also received warnings for his lateness. His selection appears fair.

Kelly:

- The 'last in, first out' (LIFO) basis is only acceptable if it can be objectively justified and seniority is only one factor among many considered in selection for redundancy, Hobson v Park Brothers (1973).
- It does not appear Kelly has been fairly selected as this is the only basis for her selection.

Question 2B	7 marks

Candidates did generally identify the basic and compensatory award for unfair dismissal, however generally, did not go into detail regarding how the basic award is calculated and considerations for the compensatory award.

Suggested Points for Response:

- Failure to follow proper procedure results in a redundancy being treated as an unfair dismissal.
- Remedies under ERA s.112 and Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) s.157(1)
- Reinstatement, an order of reengagement and an order for compensation of a basic award and a compensatory award.
- If the redundancy was unfair, there will be an additional right to compensation under s123 ERA.
- This payment is also subject to a maximum statutory amount of 52 weeks gross pay or a statutory amount that increases each year.

Question 2C	8 marks
Given this was an eight-mark question, candidates generally fell down on the level of content in their response. Most candidates discussed and applied the facts in relation to whether it was a reasonable alternative position offered, but did not provided a conclusion as to whether Leonardo had a valid reason to reject the alternative role.	
Suggested Points for Response:	
• The tribunal will consider the status of the job as a factor in whether the offer was 'suitable', Taylor v Kent County Council (1969), s141 ERA 1996. • The fact that Leonardo will no longer be a 'senior' member of staff may be reasonable ground to reject the offer. • There is nothing to suggest Leonardo he had a mobility clause in his employment contract. • This will also support a suggestion he was entitled to reject the alternative offer of work as his contract does not require her to work at another location. • However, payment is an important contractual term, and this has remained the same. The new location is only one mile away • Any reasonable conclusion credited. • This payment is also subject to a maximum statutory amount of 52 weeks gross pay or a statutory amount that increases each year.	

Question 3	25 marks

Most candidates outlined well the law regarding equal pay in their response, however, where candidates lost marks was because they did not discuss and apply the law to the facts in regard to whether there was a material factor for the difference in pay.

In relation to bereavement leave, most candidates answered this well and outlined the law in this area and applied it well. In regard to the agency worker element to this question, possibly due to time limitations, generally candidates lacked content on the law and the application for this issue.

Suggested Points for Response:

Tania

- Sex is a protected characteristic under s4 EA 2010.
- Every contract of employment contracts contains an implied sex equality clause, s66 EA 2010.
- Tania is being paid less than Ibrahim
- Ibrahim appears to be a 'real comparator' with Tania as he is doing like work or work rated as equivalent or of equal value (S65 EA 2010). They are also employed by the same employer, at the same time and in the same role, and they are the same age.
- BeannBakes Ltd is unlikely to be able to rely on the defence that the difference in pay is not based on gender but on a material factor s69 EA 2010.
- A material factor includes length of service, Cadman v Health and Safety Executive (2007). However, Tania has four years experience at the company, Ibrahim has just joined. Although he has two years experience, this is still less than Tania.
- The material factor of qualifications will also likely not be relied upon as both Tania and Ibrahim hold a security qualification, with Tania holding an 'advanced' qualification.
- BeansnBakes Ltd has breached Tania's rights under the s66 Equality Clause.
- The Parental Bereavement (Leave and Pay) Act 2018, parents who lose a child under 18 years of age are entitled to take leave of at least two weeks leave under this statute.
- The leave can be taken without notice.
- The rights under the statute are 'day one' rights, so Tania qualifies.
- Paid leave requires 26 weeks continuous employment (s 171ZZ6 Social Security Contributions and Benefits Act 1992, as inserted by the 2018 Act),
- Tania has the right to paid leave as she has worked for BeansNBakes Ltd for four years.
- By requiring Tania to wait to take her leave and offering her just one week of unpaid leave, BeansNBakes Ltd has breached her rights.

Michael

- Breach of National Minimum Wage Act 1998
- Under the NMWA 1998, all employees are entitled to be paid a minimum wage, the amount being dependent on the employees' age.
- Michael is 38 years old and is being paid the same wage as Tania, who is paid the minimum wage for a 22 year old.
- Michael has been underpaid for the duration of his employment of six months.
- The right to statutory minimum wage is extended to agency workers and is a day one right, under the Agency Worker Regulations 2010
- Michael is an agency worker and has rights under the AWR 2010.
- AWR 2010- day one right to be entitled to access to shared facilities, including canteen facilities, such as tea and coffee.
- Credit any reasoned conclusion on this point.
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Question 4	25 marks

Most candidates answered the issue regarding working time really well and knew the law and applied it. This was also the case for the unauthorised deductions from wages claim. Candidates lost marks on not sufficiently discussing constructive unfair dismissal and wrongful dismissal.

Suggested Points for Response:

- An employer cannot compel an employee to work over 48 hours per week. However, an employee may choose to work in excess of these hours by opting out of the 48-hour working week, Working Times Regulations 1998.
- Giorgio has agreed to work 55 hours per week but appears to have done so under duress. He has also not signed an opt out agreement. Credit any reasoned conclusion
- Deduction of wages may only be made in relation to overpayment of wages and expenses, disciplinary proceedings held by virtue of statutory provision, industrial action or court order, s 14 ERA 1996. None of these exceptions apply to Giorgio breaking a lock, his rights have been breached under this statute.
- Define constructive dismissal and wrongful dismissal
- Identify that a constructive dismissal takes place when an employee can demonstrate that the employer has made it impossible for them to continue in their job, effectively forcing them to resign from their job.
- Explain that constructive dismissal requires that the employer commits a fundamental breach of the employment contract.
- This includes a breach of the implied duty of trust and confidence, which includes actions and words of the employer, Five Elms Medical Practice v Hayes (2012), Ogilvie v Neyrfor-Weir Ltd (2003)
- Breach of this duty can include reputational damage to the employee, Malik v BCCI (1997.
- Giorgio has been spoken to in a way that damages the trust and confidence in the relationship, and also potentially damages his reputation by suggesting he is slow and incapable in the workplace.
- This has led to Giorgio being unable to continue working in the environment, particularly as the comments were on-going and also extended to his co-workers commenting on him and isolating him.
- 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).
- Giorgio resigned after a total of six months, however two of these months were spent looking for alternative employment. Credit any reasoned conclusion on this point.