



## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 3 UNIT 13– THE PRACTICE OF EMPLOYMENT LAW

### 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 January 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

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

### CHIEF EXAMINER COMMENTS

A high pass rate for this paper (80%), indicates that those candidates who sat the exam, on the whole, have a strong interest in the subject.

The majority of the questions can be discerned from the case study and due to the questions being taken from previous papers in their entirety, there should have been no surprises. Regard must be had not only to the employment law aspects of the specification, but also the purely practical elements, such as in respect of Employment Tribunal practice (an area which candidates seem to struggle with).

Candidates are reminded to read the question carefully. There is a tendency for candidates to write all they know on a subject, rather than focusing on what the question is asking. This can mean that points are missed or that a great deal is written which does not attract any marks. The number of marks available is also a good indicator of how much to write. On some occasions candidates failed to provide an answer at all for a question. Candidates are reminded that writing nothing will attract no marks at all, if you write something there is a chance that you may gain some marks.



## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Question 1(a)

The majority of the candidates struggled to gain good marks on this question. All were able to identify that the answer required a discussion around constructive dismissal, but failed to appreciate how constructive dismissal could be established in the context of the scenario.

### 1(b)

Mostly well done, with most candidates gaining the majority of the marks. Some only focused on whether the client was an employee or not and therefore missed out on marks.

### 1(c)

The marks given for this question varied (some candidates having a thorough knowledge and therefore gaining high marks, others gaining no marks). This is likely due to the focus being on employment law, rather than Tribunal procedure.

### Question 2(a)

Most candidates were able to gain good marks on this question in respect of funding. A minority were unable to give any supporting information about the form of funding.

### 2(b)

Clearly signposted in the case study, candidates were able to identify the definition for disability discrimination. Where marks were dropped it was due to not quoting the exact wording of s.6 EA 2010.

### 2(c)

All candidates were able to identify the need for reasonable adjustments but were less sure about how s.60 EA 2010 operates in respect of job interviews. Good that all candidates identified what would amount to a reasonable adjustment in the scenario.

### 2(d)

All candidates identified compensation as the appropriate remedy, however the majority went no further and only a few were aware of the Vento guidelines.

### Question 3(a)(i)

The majority of candidates gained high marks on this question concerning redundancy. Those that did not do so well clearly did not know how to quote the statutory language and so limited the marks that could be achieved.

**3(a)(ii)**

Most of the candidates correctly identified that the appropriate ground for redundancy was a reduced requirement for employees.

**3(b)**

It was pleasing to see that the majority of candidates were aware of the potential discriminatory action of using last in first out as the basis for redundancy selection. A lack of development in some of the answers e.g. identifying the types of discrimination limited marks.

**3(c)**

A very general question on redundancy procedure, where most of the candidates did very well. Again, a lack of depth in the written answers meant that in a minority of cases only a limited number of marks could be given.

**Question 4(a)**

As would be expected candidates did well on this question on maternity leave and pay. This was clearly signposted in the case study and as such candidates had plenty of time to prepare an appropriate answer.

**4(b)**

Generally, candidates were able to identify the 'rules' relating to restrictive covenants, however few were able to apply them appropriately to the scenario.

**4(c)(i)**

Some candidates had a good understanding of working time and were able to write about it in some depth. Where marks were dropped it was due to not writing to the scenario, i.e. not identifying that the employee was entitled to 20 minute breaks.

**4(c)(ii)**

No real issues with this question, candidates were able identify the minimum wage requirements. Some candidates did not reference the legislation.

**SUGGESTED POINTS FOR RESPONSE****JANUARY 2023****LEVEL 3 UNIT 13 – THE PRACTICE OF EMPLOYMENT LAW****SECTION A**

<b>Question Number</b>	<b>Suggested Points for Responses</b>	<b>Marks (Max)</b>
1(a)	<ul style="list-style-type: none"><li>• S.95(1) ERA 1996</li><li>• The contract is terminated by the employer</li><li>• constructive dismissal</li><li>• there is a constructive dismissal if the employer has repudiated the contract which means<ul style="list-style-type: none"><li>• a breach going to the root of the contract</li><li>• here the demotion</li><li>• humiliating in front of others</li></ul></li><li>• likely that Ottilie has been dismissed by way of constructive dismissal</li><li>• reference to Ottilie accepting her demotion</li></ul> <p>reference to relevant cases e.g. Western Excavating v Sharp, Fuddy v Brekkes</p>	6
1(b)	<ul style="list-style-type: none"><li>• Must be an employee not from an excluded class</li><li>• Nothing to suggest she is not an employee</li><li>• Must make claim within 3 months of EDT</li><li>• Letter from employer dated 27th December 2022</li><li>• Qualifying period of employment of 2 years</li><li>• Here he has been employed for 4 years</li></ul> <p>Subject to there being a dismissal, is eligible</p>	6
1(c)	<ul style="list-style-type: none"><li>• Rule 53 Tribunal Rules of Procedure 2013</li><li>• conduct a preliminary consideration of the claim with the parties</li><li>• and make a case management order (including an order relating to the conduct of the final hearing);</li><li>• determine any preliminary issue;</li><li>• consider whether a claim or response, or any part, should be struck out under rule 37;</li><li>• make a deposit order under rule 39;</li></ul> <p>explore the possibility of settlement or alternative dispute resolution (including judicial mediation).</p>	6
	<i>Question1 total: 18 marks</i>	



2(a)	<ul style="list-style-type: none"> <li>• Via a 'no win, no fee' arrangement.</li> <li>• Either be a Conditional Fee Agreement or a Damages Based Agreement. Both of these are contingency fee-based arrangements.</li> <li>• BTE Insurance/Legal Expenses Insurance</li> <li>• Included under home contents, motor or bank account insurance.</li> <li>• Legal Help and Legal Aid</li> <li>• As it is a discrimination claim</li> <li>• Pay costs herself</li> <li>• Unlikely in the situation that Tribunal would award costs to the employer should she lose.</li> </ul>	4
2(b)	<ul style="list-style-type: none"> <li>• Disability</li> <li>• if a person has a physical or mental impairment and</li> <li>• the impairment has a substantial and long term adverse effect</li> <li>• on their ability to carry out day to day activities</li> </ul> <p>Section 6 Equality Act 2010</p>	5
2(c)	<ul style="list-style-type: none"> <li>• s.60 Equality Act 2010 prohibits questions on health (subject to limited exceptions) (</li> <li>• s.20 Equality Act 2010</li> <li>• reasonable adjustments to the interview process</li> <li>• re time, location</li> <li>• here, consider a downstairs interview room.</li> <li>• credit sensible suggestions</li> </ul>	5
2(d)	<ul style="list-style-type: none"> <li>• A tribunal can order compensation.</li> <li>• There is no statutory limit on the amount a tribunal can award</li> <li>• However there are guidelines (Vento) on which amounts are based</li> </ul>	3
<i>Question 2 total: 17 marks</i>		
3(a)(i)	<ul style="list-style-type: none"> <li>• s.139 Employment Rights Act 1996 (ERA 1996)</li> <li>• Business closure</li> <li>• Where the employer has ceased or intends to cease to carry on the business with which the employee was employed.</li> <li>• Workplace closure</li> <li>• Where the employer has ceased or intends to cease to carry on that business in the place where the employee was employed.</li> <li>• There is a reduced requirement for employees</li> </ul> <p>Where the requirements of the business for the employee to carry out work of a particular kind have ceased or diminished.</p>	6
3(a)(ii)	Reduced requirement for employees	1

3(b)	<ul style="list-style-type: none"> <li>• Last in, first out</li> <li>• traditionally has been used / must not be used alone as a criterion as may be indirectly discriminatory</li> <li>• it may indirectly affect a larger number of younger people</li> <li>• may indirectly affect a larger number of women/ part time workers</li> <li>• possible indirect sex discrimination</li> <li>• possible indirect age discrimination</li> </ul>	4
3(c)	<ul style="list-style-type: none"> <li>• Identify the employees who are at risk of redundancy</li> <li>• must warn the employees</li> <li>• must consult individually</li> <li>• request volunteers</li> <li>• provide the employees with adequate information.</li> <li>• Alternatives to redundancy must be considered.</li> <li>• Employees must be notified of the decision</li> <li>• and informed of their redundancy payments.</li> </ul> <p>As there are 20 employees minimum consultation period applies - s.188 TULR(C)A 1992.</p>	5
<i>Question 3 total:16 marks</i>		
4(a)	<ul style="list-style-type: none"> <li>• Entitled to 52 weeks maternity leave</li> <li>• 26 weeks OML and 26 weeks AML</li> <li>• pay – must have been continuously employed for at least 26 weeks by the 15th week before the EWC</li> <li>• must be paid at least the lower limit for NI contributions</li> </ul> <p>SMP is paid at 90% of the woman's normal weekly earnings for 6 weeks and then 33 weeks at £156.66 (or 90% of earnings, if lower).</p>	5
4(b)	<ul style="list-style-type: none"> <li>• Starting point is that clause is void as</li> <li>• being in restraint of trade</li> <li>• unless the employer has a legitimate business interest to protect and</li> <li>• the covenant is reasonable –</li> <li>• duration and geography</li> <li>• Here, Yejide may have contacts with customers and new employer competitor</li> <li>• 3 months may not be unreasonable</li> <li>• 25 miles may be unreasonable</li> </ul>	6
4(c)(i)	<ul style="list-style-type: none"> <li>• Excessive hours</li> <li>• Working Time Regulations 1998</li> <li>• unless he has signed an 'opt out'</li> <li>• 48 hours maximum</li> </ul>	5

	<ul style="list-style-type: none"> <li>• Need more information on exact working patterns to advise him further</li> <li>• Is entitled to a 20 minute break after working 6 hours</li> </ul> Entitled to 11 hours break in 24 hours	
4(c)(ii)	<ul style="list-style-type: none"> <li>• Entitled to be paid the National Living Wage</li> <li>• National Minimum Wage Act 1998</li> </ul> The current rate is £9.50 per hour (aged over 23)	3
Question 4 total marks: 19		