



CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 3 UNIT 6 – 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

Overall, the performance of the candidates was wide ranging with some clear and detailed answers submitted.

Most candidates were able to provide answers that were detailed and contained the right amount of law and application. In order to achieve higher grades more legal authority could be applied throughout.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was answered reasonably well.



Question 2

Most candidates were able to identify an implied term but were not always able to explain the terms.

Question 3

This was answered reasonably well. Use of case law to illustrate an answer.

Question 4

This was answered reasonably well, however it is also important that candidates write in full sentences to make it clear as to what they are referring to.

Question 5

Most candidates answered this very well.

Question 6

This was answered reasonably well. It has been noted in previous Chief Examiners reports that there is no right to be unfairly dismissed. There is a right not to be unfairly dismissed if a person meets the preliminary requirements,

Question 7

The responses to this were varied, some candidates were able to identify different relevant situations.

Question 8

Most candidates successfully identified the venue and the time scales to bring a claim.

Question 9

The candidates were asked to identify and explain 2 situations. Some merely identified how a dismissal could occur.

Question 10

This was answered well.

Section B

Scenario 1

Question 1

This question was answered reasonably well. It was acceptable that candidates discussed either capability or misconduct as a potentially fair reason.

Question 2

The response to this question should have outlined the procedure an employee should take with investigating a misconduct case rather than a general discussion about disciplinary procedures.

Question 3

This question was answered well.

Question 4(a)

This was generally answered well, however when applying the law to the facts it is better to use legal language / authority where possible.

4(b)

Generally, most candidates identified some of the remedies available. It is important, however, not to mix compensation for discrimination with compensation for unfair dismissal.

Scenario 2

Question 1(a)

This question was answered well, with most candidates identifying and correctly placing the key points.

1(b)

This question was answered well, with most candidates identifying and correctly placing the key points.

Question 2

This was reasonably well answered, with some candidates discussing whether the illegality directly affected the job role and the possibility of alternative employment.

Question 3(a)

Discrimination claims are often popular and this one was no exception. It was answered generally well with a good use of authority.

3(b)

There were no issues with this question.

Scenario 3**Question 1(a)**

Most candidates were able to explain summary dismissal and some also gave valid examples of what could amount to a summary dismissal

Question 1(b)

This was answered reasonably well

Question 2(a)

This was answered reasonably with most candidates recognising the need for a repudiatory breach

Question 2(b)

This was answered reasonably well

Question 2(c)

There was a mixed response to this but most candidates were able to give a reasoned conclusion.

Question 3(a)

Most candidates answered this well

Question 3(b)

Most candidates were able to explain the harassment that had taken place, but few explained what would be taken into account when deciding if harassment had taken place.

SUGGESTED POINTS FOR RESPONSE**JANUARY 2023****LEVEL 3 UNIT 6 – EMPLOYMENT LAW****SECTION A**

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>Responses should include the identification and explanation of any two of the following e.g:</p> <ul style="list-style-type: none"> • People who work under a contract of employment/service • S.230(1) ERA – subsection number required <p>Credit is given for other relevant definitions</p>	2
2	<p>Responses should include the identification and explanation of any two of the following:</p> <ul style="list-style-type: none"> • The duty of trust and confidence; to treat your employee with respect • e.g., Ogilvie v Nyrfor-Weir (2003) <p>or</p> <ul style="list-style-type: none"> • The duty to pay wages • must be paid the correct amount <p>or</p> <ul style="list-style-type: none"> • The duty to take reasonable care for employee's health and safety • e.g., adequate training <p>or</p> <ul style="list-style-type: none"> • Duty to provide work in certain circumstances • e.g., professional workers or piece work <p>or</p> <ul style="list-style-type: none"> • The duty covering the content of references • there is no duty but if written the reference must be fair and honest 	4
3	<p>Responses should include the Identification of any four of the following:</p> <ul style="list-style-type: none"> • Where the employee has committed a fundamental breach • that goes to the root of the contract • E,g acting dishonestly • A single incident is unlikely to justify summary dismissal • unless gross dishonesty / a serious crime • e,g Pepper v Webb 1969 	4
4	<p>Responses should include Identification of any two of the following:</p> <ul style="list-style-type: none"> • Name of employer and employee • Date on which employment began/ date of continuous employment • Details of pay 	2



	<ul style="list-style-type: none"> • Working hours • Holiday <p>Credit is given for other relevant examples</p>	
5	<p>Responses should include the following</p> <ul style="list-style-type: none"> • Subjected to a detriment • Because he has enforced <p>Or tried to enforce his or someone else's right not to be discriminated against</p>	3
6	<p>Responses should include the identification of any three of the following</p> <p>Any three rights e, g</p> <ul style="list-style-type: none"> • Not to be unfairly dismissed after 2 years CE (no right otherwise) • Right to notice periods • After two years continuous employment right to be compensated if made redundant (no right otherwise) • Right the minimum wage for their age range <p>Credit is given for other relevant examples e.g. Maternity leave</p>	3
7	<p>Responses should include the identification of any three of the following:</p> <p>e.g.</p> <ul style="list-style-type: none"> • Occupational requirement • lower wages under NMW Act • older workers higher redundancy payments • organised religion • retirement ages (e.g., army, pilots etc) <p>Credit is given for other relevant examples</p>	3
8	<p>Responses should include the Identification of the following:</p> <ul style="list-style-type: none"> • ET • Within 3 months <p>And</p> <ul style="list-style-type: none"> • County Court or High Court • within 6 years 	4
9	<p>Responses should include the identification and explanation of any two of the following:</p> <ul style="list-style-type: none"> • fixed term contract: • contract ends on fixed date <p>or</p> <ul style="list-style-type: none"> • redundancy, e.g. organisational changes or lack of business need • notice, eg. correct notice / no PILON <p>Credit is given for other relevant examples</p>	4
10	<ul style="list-style-type: none"> • One week 	1
Section A Total: 30 marks		

Section B - Scenario 1

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>Responses should include and explanation of the following:</p> <p>Potential reason one</p> <ul style="list-style-type: none"> • Capability • There is an implied duty to adapt to new technology • He has had training on the new system • And the opportunity for further online training • He has refused to undertake the training • He is incapable of performing his duties as a complaint's handler <p>Potential reason two</p> <ul style="list-style-type: none"> • Misconduct / gross misconduct • There is an implied duty to obey all reasonable and lawful orders • George has breached this duty • He was rude to customers and • Did not deal with the telephone complaint 	8
2	<p>Responses should include an explanation of the following points</p> <ul style="list-style-type: none"> • Relates to the procedure that an employer must follow when investigating a misconduct case. • Karen must establish that she has a genuine belief in George's guilt. • She must have reasonable grounds for that belief. • Karen's belief is based on the conversation with the customer. • She must have carried out as much investigation as is reasonable. • Here, Karen should have spoken to George and checked the telephone recording system • Reasoned discussion and conclusion • E.g. Karen has not complied with these requirements. 	7
3	<p>Responses should include an explanation of the following</p> <p>Josh would have a potential claim for</p> <ul style="list-style-type: none"> • direct discrimination • under s.13 of the Equality Act 2010. • on grounds of sex which is a protected characteristic • under s.10. It requires that an employee is not subject to less favourable treatment • Here, the dress code requires men to tie long hair back but not women • This issue was discussed in the case of Smith v Safeway plc (1996) 	8

	<ul style="list-style-type: none"> • which found that it was lawful to apply different specific rules to men and women; • for example, in terms of tying long hair back, • provided the overall impact of the dress code on each sex is similar. • This does not amount to sex discrimination. 	
4(a)	<p>Responses should include an explanation of the following</p> <ul style="list-style-type: none"> • s.19 of the Equality Act 2010 • for indirect discrimination on the grounds of sex • This is a protected characteristic under s.10. • Indirect discrimination arises where the employer applies a provision, criteria or practice (PCP) • That puts a particular group at a disadvantage. • here, this would be the decision to introduce a compulsory nightshift • It would be women, who are the group who tend to be primary carers. • The PCP puts Lydia at a disadvantage. • Lydia cannot do the night shift because she is a single mum with childcare issues. • Finally, the employee must show that the PCP cannot be shown to be a proportionate means of achieving a legitimate aim. • There is no indication of a defence on these facts • Lydia would have a potential claim under 	10
4(b)	<p>Responses should include an identification of and explanation of the following</p> <ul style="list-style-type: none"> • Remedies for discrimination claims are set out under S.124 Equality Act 2010. <p>These include</p> <ul style="list-style-type: none"> • a recommendation • that Kempston Insurance takes a particular course of action. • a declaration • of Lydia's rights in relation to this matter • compensation • for injury to Lydia's feelings • based on the Vento guidelines • credit for discussion of the bands 	7
Question 4 Total: 17 marks		
Scenario Total: 40 marks		

Section B - Scenario 2

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> • applying the Multiple test: • She is told what to wear by Adam. • t-shirt and red trousers • must provide a personal service • Frank was not allowed to cover her shift • has worked there for three years; • is subject to the company's disciplinary procedures. • She is given a written warning • E.g. Ready Mixed concrete • Reasoned conclusion 	9
1(b)	<p>Responses should include an identification of and explanation of the following:</p> <ul style="list-style-type: none"> • She works on a causal basis • No indication of a written contract • Although this is not conclusive • Submits invoices • Responsible for own TAX and NI • Pays for her own uniform • Which she can deduct the cost of from her Tax and NI • Thought her brother could cover her shift • Reasoned conclusion 	7
Question 1 Total: 16 marks		
2	<p>Responses should include an identification of and explanation of the following:</p> <ul style="list-style-type: none"> • Harry is employed as a driver • Harry as Harry has been disqualified from driving. • This means Harry can no longer drive / lacks the capability to do his work • Adam may also consider the potentially fair reason of illegality. <p>In order to use illegality as a reason to dismiss</p> <ul style="list-style-type: none"> • Adam would need to show that the illegality • directly affected Harry's ability to do the work he was employed to do • kl, • Harry is also a prop maker so he could still be employed in this capacity. • e.g. Appleyard v FM Smith (Hull) Ltd (1972), Taylor v Alidair Ltd (1978) 	10

3(a)	<p>Responses should include an identification of and explanation of the following:</p> <p>Claim 1</p> <ul style="list-style-type: none"> • direct discrimination • s.13 Equality Act 2010. • This would be on the grounds of his sexual orientation • s.12 Equality Act 2010. • Jason has been dismissed • which means he has suffered less favourable treatment. <p>Claim 2</p> <ul style="list-style-type: none"> • s.26 Equality Act 2010. • Harassment • unwanted conduct that violates a person's dignity by creating an intimidating and hostile working environment. • The comments from the other staff members such as 'people like you' or 'not right to work with children' • could be considered as harassment • Therefore the academy would again be liable. 	10
3(b)	<p>Responses should include an identification of and explanation of the following:</p> <ol style="list-style-type: none"> 1. The burden of proof in a discrimination claim is on the claimant to prove a prima facie case. 2. The burden then shifts to the employer 3. who must then establish that discrimination did not take place 4. S.136 Equality Act 2010. 	4
Question 2 Total: 14 marks		
Scenario Total: 40 marks		

Section B - Scenario 3

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>Responses should include and explanation of the following</p> <ul style="list-style-type: none"> • A summary dismissal occurs where the employer dismisses the employee immediately • usually for gross misconduct • e.g fighting in the workplace. • The employer is entitled to dismiss if a fundamental breach has occurred • The dismissal must be justified • or it could lead to a claim for wrongful dismissal 	5
1(b)	<p>Responses should include and explanation of the following</p> <ul style="list-style-type: none"> • employer's conduct forces employee to resign • employer has repudiated the contract 	5



	<ul style="list-style-type: none"> • breach must go to the root of the contract • e.g harassment, demotion, humiliation • it can be a series of events /'last straw' situation • (Western Excavating Ltd v Sharp [1978]) 	
Question 1 Total:10 marks		
2(a)	Responses should include and explanation of the following <ul style="list-style-type: none"> • The duty of trust and confidence is an implied term • contained in all contracts of employment • Sally must not do anything to damage the working relationship • e.g Ogilvie v Nyrfor-Weir Ltd (2003) 	4
2(b)	Responses should include and explanation of the following: <ul style="list-style-type: none"> • She has fundamentally breached this duty by • Cancelling Donald's holiday • Humiliating Donald in front of patients • Called him an old fool • telling him to retire / P45 • One-off comment is sufficient to bring an action • Morrow v Safeway Stores plc [2002] 	6
2(c)	Responses should include and explanation of the following <ul style="list-style-type: none"> • He will need to show it is impossible for him to continue working there • He has walked out as a direct response to Sally's actions • Conclusion – likely to be successful 	3
Question 2 Total: 13 marks		
3(a)	Responses should include and explanation of the following <ul style="list-style-type: none"> • Direct discrimination. • He would need to show that he has been treated less favourably due to a protected characteristic • Age • person belonging to a particular age group/age range • s.5 Equality Act 2010 • she has cancelled his time off to allow younger midwives time off • likely to succeed 	7
3(b)	Responses should include and explanation of the following <ul style="list-style-type: none"> • Harassment • S26 • Unwanted conduct relating to a protected characteristic • age that violates dignity • Creates an intimidating hostile humiliating environment • This is decided by taking into account • B's perception 	10

	<ul style="list-style-type: none"> • The circumstances • If reasonable for the conduct to have that effect on Donald • She has created a humiliating work environment by • Making comments about his age • Suggesting he should retire/ He can collect is p45 • All done in front of patients • E.g. Insitu Cleaning Co Ltd v Heads (1995) • Likely to succeed 	
Question 3 Total: 17 marks		
Scenario Total: 40 marks		