

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 6 UNIT 19 – 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

Failing papers tended to not adequately recognise topics examined within certain sub section questions within the paper as a whole. While most questions within the paper allowed for some marks to be gained even where the answer contained certain oversights or errors, other highly specific, albeit low mark questions, required identification of precise legal points and laws only. Where these specific points were not recognised, there were no marks available. This meant that some papers which also scored low, albeit passing grades in other questions within the paper, failed overall. Passing papers identified the fundamental legal issues examined within the paper and raised within the case study, citing some relevant law to support responses given as a whole. However, only higher scoring papers recognised all legal issues examined within the majority of the question paper and case study, and consistently cited both relevant statute and case law to support the answers given. These points of law were then precisely applied to the broad and finer details given within the case study, resulting in legally supported and reasoned responses.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

The vast majority of candidates passed this question with high to moderate marks. The issues relating to disability discrimination were well addressed, with law and application. The perceptive discrimination issue was broadly noted, but with only higher scoring papers addressing this point in detail with supporting case law. Harassment was overall well addressed with statute in passing papers, and case law specific to the CS in higher scoring papers.

1(b)(i)

This 5-mark question examined a very specific piece of knowledge; the way in which insolvency influences ACAS ECS. This question allowed for clear distinction to be made between candidates. Several candidates did not identify the relevant provisions and failed this question. However, many others did note the provisions and received full marks.

1(b)(ii)

The majority of candidates passed this question with moderate to high marks. Most candidates recognised the relevant provisions, and higher scoring papers also applied these to the specifics of the CS. Few failing papers did not give sufficient detail to suggest level appropriate knowledge of the relatively straight forward issue examined.

1(c)

This 6-mark question resulted in low to moderate passing grades, along with several fails. The question specifically examined a very particular type of mediation; judicial mediation. Several low scoring, but passing, papers provided broad and overarching explanation of ADR processes, with only some detail relevant to judicial mediation. Failing papers did not sufficiently identify or address judicial mediation.

Question 2(a)

This relatively straight forward question resulted in moderate to high passing marks. The majority of candidates gave reasoned explanation along with good use of supporting statute. High scoring papers cited both explanation specific to the CS, along with supporting statute and case law.

2(b)

This question examined several elements of discrimination, these were recognised to varying extents, resulting in overall good to moderate passing grades. There was overall a good level of detail provided in most responses with supporting statute. However, some points, while broadly relevant, could have been further applied to the question. Sex discrimination was generally well identified; however, the specific type of discrimination could have been further discussed in many low scoring but passing papers, with further CS application. Indirect discrimination was noted in

most papers but, again, there could have been some more application specific to the finer details of the CS.

3(a)

This question resulted in overall fair to good responses. There was consistent identification of the relevant statute, with associated requirements and breaches. Relevant sections and detailed application were also found in higher scoring papers.

3(b)

This 6-mark question resulted in high to moderate scoring responses. Passing papers identified privileged documents in a more general manner. Higher scoring papers cited specific rules pertaining to the types of documents examined within the Case Study materials, with supporting law found in stronger papers.

3(c)

This relatively straight forward question resulted in overall high to moderate grades. Few basic passing grades provided relevant explanation, with case law, but did not apply these points to the Case Study materials details in sufficient depth. Higher scoring responses noted relevant case law, with reasoned application of that law per the validity of the precise clause within the Case Study materials.

3(d)

This question resulted in passing grades that provided relevant, but often quite brief, answers given the 10 marks available. The majority of responses identified relevant terms and cited seminal basic case law. Sufficient application of these laws, per the Case Study materials, was found only in several higher scoring papers.

Question 4(a)

The question was well addressed. The vast majority of candidates addressed the question with identification of relevant TUPE provisions and applied these to correctly identify protection of the employee examined. There was also accurate dispensation of the ETO issue in most papers; with higher scoring papers addressing this point is critical, CS specific detail, with some case law.

4(b)

This question was well addressed with overall high scores achieved. The vast majority of papers identified relevant TUPE provisions, and specific sections, and applied these in detail to both the breach and remedies aspects of the question.

4(c)

This 5-mark question examined a specific statutory provision, and the vast majority of papers identified the relevant law with application, scoring full marks. Few failing papers did not correctly recognise the issue examined.

SUGGESTED POINTS FOR RESPONSE

JANUARY 2023

LEVEL 6 UNIT 19 – THE PRACTICE OF EMPLOYMENT LAW

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none">• Correct identification of relevant Facts and Laws• Discussion around the above with detailed arguments, for and against being evidenced• Relevant alternatives/options available• A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none">• Mrs Young• The Equality Act 2010 recognises the protected characteristic of disability, s15. MS is recognised as a disability in Equality Act 2010.• Janey is therefore considered to have a disability under s6 of the EA 2010 and she has made her employer aware of this.• The fact that Janey is ‘fine most days’ is irrelevant. MS is a recognised disability.• 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.• The provision of more comfortable seating and the taking of more frequent breaks are examples of reasonable adjustments that Accurate Reports/Mrs Young are legally obliged to make for Janey. The fact that Janey worked late shifts and long shifts reinforces the need for reasonable adjustment.	12



	<ul style="list-style-type: none"> • It is not discrimination to treat a disabled person more favourably than a person not having a disability. Tammy Denver’s rights have not been breached/she has not been discriminated against in relation to Mrs Young’s difference in treatment between her and Janey. • Mr Frank • The Equality Act 2010 protects against discrimination on the basis of race, s9. This includes discrimination on the grounds of perceived race, <u>English v Sanderson Blinds Ltd</u> (2008) • Discrimination under the EA 2010 s 26 includes harassment as unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual. • The references to ‘Token Tammy’ could have the effect of being humiliating and degrading. • The employee has complained but accepted the treatment due to needing to maintain the employment. The power imbalance likely relevant here in finding harassment has taken place. • The fact that the treatment has gone on for 4 years may also reinforce a finding of harassment. • It appears Tammy Denver has been discriminated against/harassed on the grounds of perceived race, EA 2010. • Credit any reasoned conclusion • Responses could include • EA 2010, race can mean colour, nationality, ethnicity or national origins. So perceptions of race as ‘white and English’ are both potential grounds for racial discrimination. • S109 and s110 vicarious liability of Accurate Reports for the actions of Mr Frank, unless proven they did all they could to prevent/address the discrimination. • Any relevant case law. 	
<p>1(b)(i)</p>	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <ul style="list-style-type: none"> • Marks should be distributed in the following areas: • Correct identification of relevant Facts and Law • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Responses should include: • The Employment Tribunals (early conciliation: exemption and rules of procedure) Regulations 2014- claimant who wants to 	<p>5</p>

	<p>bring a claim to ET must first bring a claim through the ACAS Early Conciliation Scheme</p> <ul style="list-style-type: none"> • Identify that there are exceptions to the requirement to go through early conciliation, including where the employer/former employer against whom the claim is made is insolvent. • If Accurate Reports Ltd is insolvent, Tammy Denver will not have to go through early conciliation and can proceed to tribunal. • Responses could include: • Any relevant law 	
1(b)(ii)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Responses should include: • Tammy Denver believes that her former co-worker, Owen, has relevant evidence but will not attend the tribunal voluntarily. She may apply to tribunal for a witness order compelling him to attend. • Witness orders r32 sch 1, the judge may issue a witness order if satisfied the witness can give evidence relevant to the dispute and it is necessary to issue an order to secure their attendance, • Owen saw the discrimination so could possibly give relevant evidence • Credit any reasoned conclusion • Responses could include: • Dada v Metal Box Company Limited (1974) Give brief explanation why • Any relevant law 	7
1(c)	<p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification and explanations of relevant Facts and Laws • Creating clear and understandable explanations of complex events/procedures <p>Responses should include:</p>	6

	<ul style="list-style-type: none"> • Judicial mediation is form of Alternative Dispute Resolution where parties meet to negotiate and discuss their dispute with the aim of reaching a mutually satisfactory agreement. • Judicial mediation is carried out by a specially trained employment judge. • The parties will need to agree to the process at which time the regional mediation judge determines if mediation should be offered. • There will need to be a preliminary hearing at which it will be decided whether the dispute between Tammy Denver and Accurate Reports Ltd is suitable for judicial mediation. • The process is private, confidential and without prejudice. • Responses could include: • The process aims to find a resolution not argue merits of the case. 	
	Question 1 total:30 marks	
2(a)	<ul style="list-style-type: none"> • An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications. • Marks should be distributed in the following areas: • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include</p> <ul style="list-style-type: none"> • Company policies are a means of establishing the standards expected within a specific organisation. • These policies exist alongside statutory provisions governing the employer -employee relationship. The policies often support or enhance legislative aims. • Policies are only guidance but can be incorporated into the employment contract. • Allows employees to be aware of acceptable and unacceptable behaviour within their specific workplace. • Allows employees to be aware of what constitutes un/acceptable conduct including a broad definition of words, actions and gestures 	7

	<ul style="list-style-type: none"> • Encourages recruitment and raises the reputation of the company. • Can be used as a standard in disciplinary and grievance procedures, particularly where they reflect the ACAS Code of Conduct • Protects the employer against vicarious liability for the actions of the employee as the policy can evidence ‘reasonable steps’ taken to prevent inappropriate behaviour in the course of employment, including discrimination. • Such policies can be incorporated into the contract and become binding on all employees, so enforcement is simplified. <p>Responses could include</p> <ul style="list-style-type: none"> • Heather is not legally entitled to see the policies as the company is not legally obliged to have policies. • Policies can protect the employer against employee absenteeism caused by the bullying. • The mere existence of company policies is insufficient, they must also be enforced by the employer, <u>Martin v Parkam Foods Ltd (2006)</u>. • Any relevant case law. 	
2(b)	<ul style="list-style-type: none"> • An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications. • • Marks should be distributed in the following areas: • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none"> • Sex is a protected characteristic under the EA 2010 • S13 direct discrimination occurs where an individual is treated less favourably due to their having a protected characteristic, than a person not holding that characteristic. • Requiring Heather to use the toilets designed for males could be direct discrimination. Particularly as there are urinals and just one stall. • The fact that she has to use the toilets down the street could be seen as a detriment. • Credit any reasoned conclusion. 	

	<ul style="list-style-type: none"> • The requirement to assist in unloading the delivery truck could potentially be indirect discrimination on the basis of sex • s19 indirect discrimination the requirement to unload heavy boxes is a provision that is discriminatory in relation to Heather’s sex. This requirement applies to all employees but possibly puts Heather, as a woman, at a disadvantage when compared with male employees. • However, the Sweetie Ltd will likely be able to argue that the requirement to unload the boxes is a proportionate means of achieving the legitimate aim of stocking their business with the items it sells. • Credit any reasoned conclusion. • Age is also a protected characteristic under s4 Equality Act 2010 • The comments made by Jacob Ritter in relation to Heather’s age suggest a discriminatory attitude on the basis of age, but no discrimination on this basis. • Heather has not been discriminated against/ treated less favourably on the basis of her age. • Responses could include: <ul style="list-style-type: none"> • Advise Jacob Ritter that his actions and words could be discriminatory should be treat Heather less favourably on the basis of her age, or make derogatory comments on the grounds of her age. • Any relevant law 	
Question 2 total:18 marks		
3(a)	<ul style="list-style-type: none"> • An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications. • Marks should be distributed in the following areas: <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none"> • Meena McCall had a right to antenatal leave, there is no minimum qualifying service requirement for this leave, so it is irrelevant that she had worked at the company for just three months on her first request for leave, s55 era 1996, • The time off is paid and does not need to be made up by the employee, s56 ERA 1996. • Meena McCall’s rights have been breached by requiring her to make up the time and refusing the leave ‘on a few occasions’. 	7



	<ul style="list-style-type: none"> • Time off must not be unreasonably refused the employer. However, the employee must provide a certificate of pregnancy or appointment card, if requested by employer. • Although Meena McCall should have provided this proof when asked by her employer, the leave may still have been unreasonably refused. • Credit any reasoned conclusion. <p>Responses could include</p> <ul style="list-style-type: none"> • Courts take a liberal interpretation of antenatal care, <u>Gregory v Tudsbury Ltd (1983)</u> 	
3(b)	<ul style="list-style-type: none"> • An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications. • Marks should be distributed in the following areas: <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none"> • Certain documents are privileged documents, including communication between a party and its legal adviser, Civil Procedure Rules 1998 • Communications with Liam Light’s former legal adviser are privileged • Exchanges with other parties may be without prejudice if they are related to negotiations undertaken in effort to reach a settlement agreement. • These documents are not privileged but, if negotiations fail, they cannot generally be used in subsequent proceedings. • However, there is no guarantee these documents will not be used in subsequent proceedings. • Credit any reasoned conclusion • Responses could include • It is useful to head documents ‘without prejudice’, but even this does not guarantee privilege. 	6
3(c)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <ul style="list-style-type: none"> • Marks should be distributed in the following areas: <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws 	

	<ul style="list-style-type: none"> • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none"> • Clause 10 is a restrictive covenant • Restrictive covenants are prima facie void as a restraint of trade, but can enforceable under certain circumstances. • The clause must be appropriate to the seniority of the employee, protect legitimate interests of the business and be no wider than necessary, in terms of scope and duration, to protect those interests, <u>Printers and Finishers Ltd v Holloway (1965)</u>, <u>Fellows v Fisher (1976)</u>, <u>Patsystems Holdings Ltd v Neilly (2012)</u>. • Meena McCall was a senior employee of Floral Scents, she had access to perfume formulas specific to the company. • However, she worked at the company for just 5 months, so access to knowledge may have been limited. • Clause 10 is broad in terms of scope, 30 miles, and duration, 3 years. However, it may be enforceable given the level of employment. • Credit any reasoned conclusion as to the enforceability of Clause 10. <p>Responses could include:</p> <ul style="list-style-type: none"> • Any relevant case law • Blue pencil test 	
<p>3(d)</p>	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <ul style="list-style-type: none"> • Marks should be distributed in the following areas: • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • All employment contracts can have terms implied to protect certain business interests. 	

	<ul style="list-style-type: none"> • Highly confidential information, including trade secrets, are protected by the implied term of fidelity, <u>Faccenda Chicken Limited v Fowler (1986)</u>. • 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. • <u>Hivac Ltd v Park Royal Scientific Instruments Ltd (1946)</u>, <u>Roger Bullivant Ltd v Ellis (1987)</u>. • Identify that Meena McCall appears to have breached the implied duty of confidentiality which states that the employee cannot disclose, either during or after the employment, confidential information. • The perfume formulas are likely to meet the definition of ‘confidential’ information and support a finding of a breach of this implied term. • Although she was not a long-standing employee, Meena McCall but did have a senior role in the company with access to information. • The implied duty of loyalty and fidelity includes a duty not to disclose confidential information, however, this term applies during employment only. • As Meena McCall used the information after she had left her employment with Floral Scents Ltd, the company will have to prove the perfume formulas were a ‘trade secret’, for breach of the implied duty of loyalty and fidelity, <u>Faccenda Chicken v Fowler (1986)</u>. • Credit any reasoned conclusion. • Responses could include: <ul style="list-style-type: none"> • It is in the interest of Floral Scents Ltd to define what it considers ‘confidential information’ in the contract of employment, <u>Bartholomews Agri Food Ltd v Thornton (2016)</u> • Any relevant case law 	
Question 3 total:30 marks		
4(a)(i)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws 	9



	<ul style="list-style-type: none"> • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none"> • 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) as the clothing mending department of Needs Ltd has been transferred to Repairs Ltd. • Reg 7(1) where an employee is dismissed before the transfer he will be automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer itself or a reason that is not connected to an ETO reason. • Orthella Watts has been automatically unfairly dismissed, Reg 7 (2), her disciplinary record is not a recognised ETO reason for dismissal. • Responses could include: • The services transferred from Needs Ltd to Repairs Ltd are fundamentally the same before and after the transfer, Regulation 5 • The economic reason must relate to the conduct of the business. Dismissal of an employee by the transferor as a means of facilitating the transfer is not an ETO reason, <u>Wheeler v Patel (1987)</u>. 	
<p>4(b)</p>	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none"> • Reg 11 TUPE 2006, the transferor has to notify the transferee of any employee liability information relating to each transferred 	<p>8</p>

	<p>employees; including disclosure of any disciplinary procedures taken against the employee.</p> <ul style="list-style-type: none"> • This information must be in writing or made available to the transferee in a readily accessible form. Notification must be given no less than 28 days before the relevant transfer, or as soon as reasonably practicable. • Needs Ltd, as the transferor, had a duty to inform Repairs Ltd, the transferee, of Gopal Gingham’s disciplinary record. • By not providing this information, it has breached TUPE Reg 11. • Repairs Ltd can make a complaint to employment tribunal within 3 months of the transfer, or as the tribunal deems reasonable, under Reg 12. • The tribunal can award compensation in an amount just and equitable in the circumstances, normally not less than £500. • Responses could include: <ul style="list-style-type: none"> • The tribunal will consider any loss sustained by the transferee as a result of the matter complained of. • Any relevant case law. 	
<p>4(c)</p>	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pros and cons but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • A reasoned conclusion which is supported with evidence, offering the suggested best option available <p>Responses should include:</p> <ul style="list-style-type: none"> • S203 ERA 1996 includes a general prohibition on contracting out of employment legislation • This is now incorporated into TUPE 2006, Reg 18. • Clause 3 is void and will have no effect on the claims made by any of the transferred or dismissed employees. • Responses could include: <ul style="list-style-type: none"> • Any relevant case law 	<p>5</p>
<p>Question 4 total:22 marks</p>		