CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 3 – UNIT 13 – THE PRACTICE OF EMPLOYMENT LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers 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 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers 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

The vast majority of candidates were clearly prepared for this paper, well informed from the Case Study. Candidates were able to attempt all questions on the paper and time management did not appear to be an issue.

The correct terminology is at the core of most practice subjects and employment practice is no different. Future candidates are strongly advised to look at past papers to understand both the style of questions and the extent of answers. There were some questions on this paper that were not answered well and candidates are reminded of the need to revise the whole of the unit specification.

Exam questions need to be read carefully to ensure that marks are maximised. Where candidates failed to gain marks, it was because they did not understand the procedure, rather than what the question was asking.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

(a) This was on the whole poorly answered by candidates, particularly when it came to application. The case of Freshasia Foods Ltd v Jing Lu (2018), was the basis for this question and candidates are strongly advised to keep up with the most up-to-date legal reasoning. Candidates could list the requirements e.g. geographical area, etc. but failed to differentiate between the different types of clause or apply the appropriate approach to validity.

(b) A straightforward question on references, that candidates were signposted to in the Case Study. Again, candidates were less good at applying the law to the situation considered in the Case Study, i.e. the suspicions of the employer about the employee.

Question 2

(a) Most candidates achieved good marks in this question. Candidates are reminded to read the question carefully, in this case it concerned the way in which the employer acted; the focus was on procedure. A minority of candidates focused on wrongful dismissal, which was clearly not the issue.

(b)(i) A very straightforward question. Candidates almost universally were able to achieve high marks for this question. Those who could not identify the situations were clearly not prepared for the examination.

(ii) All candidates were able to identify that the appropriate situation was a diminution in the need for that work to be carried out.

(c) Candidates are again reminded to answer the question asked, not the question they wish had been asked. Here the question related to whether the employer could make the employee redundant, it did not ask for example, about the consultation requirements. No extra marks are gained for writing what in some cases amounted to substantial answers that were not focused on the question requirements.

(d) Candidates found this to be a straightforward question, with the majority achieving full marks. Where errors occurred, it was in relation to the amount of weekly pay the employee was entitled to claim for the redundancy pay computation.

Question 3

(a) The area of funding had not been examined before, even though it is a vitally important consideration in practice. A very mixed response from candidates, with some clearly not prepared for the question and gaining only limited marks. Other candidates were well prepared and were able to do very well. Candidates are reminded of the need to not solely rely on previous papers in respect of the questions likely to be asked.

(b) Candidates, on the whole, were able to identify from the Case Study, the issue of race discrimination and as a consequence were well prepared for this question. The majority of candidates were able to gain maximum marks on this question.

(c) Universally candidates were able to identify the ET1 form.

(d) Another area which candidates have not revised sufficiently in preparation for the examination is Tribunal procedure. As a consequence, a minority of candidates, who are potentially in practice from the detailed answers provided, were able to answer this question fairly well, whereas a number of candidates struggled to gain many marks.

Question 4

(a) This question on the minimum wage was left intentionally vague in relation to age so that candidates could explain the differences. A minority of candidates made assumptions and so limited the marks they gained. Where questions provide for alternative outcomes candidates need to ensure they are able to explain those alternatives.

(b) Generally, this question on wrongful dismissal was poorly done. Candidates focused on what could be claimed for wrongful dismissal, which was not the focus of the question.

(c) A straightforward question which was clearly signposted in the Case Study. The majority of candidates were able to gain high marks on this question on care for dependants.

SUGGESTED ANSWERS

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Question 1

(a) The starting point is that the clauses are void as being in restraint of trade. To be enforceable the employer must have a legitimate business interest to protect, and the covenants must be reasonable in terms of duration, geography and content. In respect of the non-poaching clause, although it is for a substantial period of time, the specialist nature of the business means the covenant is likely to be enforceable. In respect of the non-dealing clause, this is wider than needed to protect legitimate business interests so will not be enforceable. See Freshasia Foods Ltd v Jing Lu (2018), which had very similar facts.

(b) Generally, there is no obligation on an employer to provide a reference. There are a few exceptions, such as when dealing with approved persons in regulated financial roles, however there is no such exception in this case. Where a reference is provided the employer must take reasonable care to ensure that the information in the reference is true, accurate and fair, and does not give a misleading impression. The employer should consider the possibility of a claim by an employee for defamation, discrimination (and be aware that referring to sickness absence may give rise to disability discrimination issues), negligent misstatement and breach of contract (the duty of good faith). In relation to the comments from other members of staff in respect of Helen Rodgers drinking alcohol at work and being an alcoholic, the employer should not put this in the reference, unless there has been an investigation and reasons are given.

Question 2

(a) There needs to be a potentially fair reason to dismiss. In this case, the potentially fair reason would be capability, as Jake Eastman has failed to do his job properly. Barbara Gant summarily dismissed Jake Eastman and did not follow the ACAS Code of Practice on Disciplinary and Grievance Procedures. The employer must comply with procedural fairness, which includes investigating the issue and having a disciplinary meeting to ascertain the appropriate response. Here, Barbara Gant failed to follow any procedure and therefore did not comply with the need for procedural fairness.

In addition, the decision of Barbara Gant to dismiss must fall within the band of reasonable responses; Iceland Frozen Foods v Jones (1993). In this case, it is arguable that the lack of communication with a single client is unlikely to be a reason to dismiss and therefore would not fall within the band of reasonable responses. Jake Eastman appears to have been unfairly dismissed.

(b)(i) Under s.139 Employment Rights Act (ERA) 1996 there are three genuine reasons for redundancy. The first is that the employer has ceased or intends to cease to carry on the business (business closure). The other two are that the employer has ceased or intends to cease to carry on that business where the employee was employed (workplace closure) and the other, that the requirements of the business for the employee to carry out work of a particular kind have ceased or diminished (reduced requirement for employees).

(b)(ii) The requirements of the business for the employee to carry out work of a particular kind have ceased or diminished (reduced requirement for employees).

(c) Barbara Gant will not be able to make Ronnie Cash redundant without going through a fair selection process. Should she fail to do so it will be unfair dismissal.

The redundancy pool will consist of all three employees of the auditing department. In terms of the selection criteria, it must be objective, which would include for example, qualifications, skills and disciplinary record. She could also consider performance as an objective criterion.

(d) The Basic Award for redundancy is calculated based on age. For each complete years' work carried out between the ages of 22 – 40 the employee is paid at one week's pay per complete year (Ronnie Cash is aged 39); length of service (Ronnie Cash has worked for Brandabourne Accounting Ltd for 7 years); and weekly pay. Although Ronnie Cash's weekly pay is £720 per week, the statutory cap is fixed at £525. Ronnie Cash will therefore be paid 7 x £525 = £3,675.

Question 3

(a) There are potentially a number of options open to Sarita Chaudry in regard to funding any future claim. Firstly, she may opt to fund the claim by a private funding arrangement, either by an agreed hourly rate or by a fixed fee. Another option would be via a 'no win, no fee' arrangement. These may either be a Conditional Fee Agreement or a Damages Based Agreement. Both of these are contingency feebased arrangements. She may have Legal Expenses Insurance included under her home contents, motor or bank account insurance. Due to the nature of the claim, which is discrimination, she may be eligible to obtain Legal Help and Legal Aid.

(b) The decision not to employ Sarita is potentially race discrimination. Under s.4 Equality Act (EA) 2010, race is a protected characteristic. Under s.9 EA 2010 race includes ethnic or national origins. In the present case, this would relate to Sarita's Indian heritage. Under s.13 EA 2010, the actions of the employer would amount to direct discrimination. Direct discrimination is where a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(c) Form ET1.

(d) Under Rule 53 Tribunal Rules of Procedure 2013, a Preliminary Hearing is a hearing at which the Tribunal may do one or more of the following:

- conduct a preliminary consideration of the claim with the parties; and
- make a case management order (including an order relating to the conduct of the final hearing);
- determine any preliminary issue;
- consider whether a claim or response, or any part, should be struck out under rule 37;
- make a deposit order under rule 39;
- explore the possibility of settlement or alternative dispute resolution (including judicial mediation).

Question 4

(a) The Minimum Wage Act 1998, requires a minimum amount to be paid to an employee. Whether the amount he is being paid is correct will depend upon his age. If he is 21-24 years of age then he is being paid the correct amount, if he is 25 or over, he should be paid a minimum of £8.21 per hour. It is irrelevant what other employees are being paid.

(b) Wrongful dismissal is a claim for a breach of the employment contract. In this case the employer has dismissed Rachel Heathton without notice. The notice period is either the minimum under statute or what was stated in the contract. Under s.86 ERA 1996, the statutory minimum notice period cannot be less than one week for each year of service, with a minimum of one week and a maximum of 12 weeks. Rachel Heathton has worked for the employer for over 9 years, therefore she will be entitled to a minimum of 9 weeks' notice. The onus is on the employer to show, on the balance of probabilities, that the employee was guilty of the alleged misconduct, entitling the employer to summarily dismiss. It is unlikely that 'an unsuitable attitude' would amount to gross misconduct, entitling employer to summarily dismiss.

(c) Under s.57A ERA 1996, an employee is entitled to be permitted by his employer to take a reasonable amount of time off, during the employee's working hours, in order to take action which is necessary to provide assistance on an occasion when a dependant falls ill. A child is a dependant and Arthur Carlton informed his line manager and confirmed he would return to work the following day. The employer has breached a statutory right, subjecting Arthur Carlton to a detriment for taking time off, by disciplining him.