CILEx CHARTERED INSTITUTE OF LEGAL EXECUTIVES

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 September 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 majority of candidates were prepared for this paper, no doubt well informed from the Case Study. Candidates were able to attempt all questions on the paper and it was good to see that answers were written for all questions. Time management did not appear to be an issue.

Changes to the approach to questions have indicated that some candidates are tending to 'learn' answers e.g. for a redundancy question and then replicate the same. The problem is that the answer they have does not fit with the question being asked. This means that they achieve limited marks.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

The majority of candidates scored full marks on this question, knowing the requirements under s.6 Equality Act 2010. The precise wording was required to get full marks.

(b)

Overall, this question was very poorly done. It appears that candidates are not aware of s.15 Equality Act 2010, which specifically relates to disability discrimination. Candidates instead focused wrongly on s.13. This is perhaps due to s.13 being of a more general nature in terms of application and is something which would have been focused on in delivery, possibly to the exclusion of s.15.

(c)

Generally, no issues with this question, candidates recognised that reasonable adjustments would need to be made. Some candidates missed the point about the adjustments being reasonable, stating that for example, the employer would need to get a ramp installed for the interview – this is not reasonable.

(d)

Most candidates did well on this question, however a failure to read the case study carefully meant that a lot of the answer related to selection – something which is not necessary where all employees are being made redundant.

Question 2(a)

Candidates understood that the employee was entitled to the greater of the notice period of the contractual or statutory period and were able to ascertain the correct amount provided under statute.

(b)

A well-done question, with candidates clearly aware of what a garden leave clause is and the impact of a breach. The only issue that some candidates had was that they failed to consider all the remedies which are potentially available for breach.

(c)

This type of question on restrictive covenants has been asked before and the majority of candidates were able to gain good marks. Where candidates failed to do so, it was due to a reliance on implied duties and a failure to apply the knowledge to the actual scenario.

Question 3(a)

Too many candidates wrote generally about the Working Time Regulations and therefore did not achieve all the marks available. Candidates are reminded that it is imperative that where questions of this nature are signposted in the case study, they need to prepare thoroughly to ensure they maximise the marks they are awarded.

(b)

Universally, candidates were able to identify the ET1 as the document.

(c)

A large proportion of candidates were unable to identify the effect of a failure and relied instead on when the statement should be provided. This was not what the question asked, and it was disappointing that some candidates merely recited their knowledge, rather than considering the circumstances of the client.

(d)

It is clear from the approach taken by many of the candidates that their focus is on the law, rather than employment procedure. The question clearly stated that candidates should explain the procedure to be adopted at the Employment Tribunal, however a large proportion of candidates focused on things such as the remedies available and upon whom the burden of proof rested. This indicates that this area needs more extensive revision.

Question 4(a)

A fairly straightforward question, in which candidates should have gained good marks on. It was disappointing to see that a number of candidates indicated that the client could have obtained legal aid – something which would not be available in the circumstances.

(b)

Candidates had few problems with this question, the majority gaining high marks. Where candidates did not get full marks, it was due to a lack of application to the scenario e.g. failure to consider how long the client had been employed for.

(c)

Disappointingly, candidates did not realise that the ACAS Code of Practice did not apply and therefore considered substantive and procedural fairness. This meant that the marks gained by most, were limited.

(d)

Most candidates did well on this question concerning s.55 ERA 1996. This is to be expected, as the case study clearly indicated that there would be a question on this subject and consequently candidates should have prepared an appropriate answer.

Question 1

(a) Under s.6 Equality Act (EA) 2010, a person with a disability is defined as a person who has a physical or mental impairment and the impairment has a substantial and long term adverse effect on their ability to carry out day to day activities.

(b) S.15 EA 2010 - discrimination arising from disability: (1)A person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. It is unlikely that Daina Jansons could show that it is a proportionate means of achieving a legitimate aim in this case and has, therefore, acted in a discriminatory way.

(c) S.20 EA 2010 places an obligation on employers to make reasonable adjustments for disabled people. This obligation is applicable to the recruitment process, not just with regard to those who are employed. The Equality Act prohibits the asking of health-related questions (subject to limited exceptions). The employer should consider making adjustments to the interview process in terms of time and location. Daina was made aware that Sonia had mobility problems and therefore should have made sure the interview took place in room that was accessible to her.

(d) Firstly, Daina must identify the employees who are at risk of redundancy, she must warn the employees, and she must consult individually. Daina should ask for volunteers and provide the employees with adequate information. Alternatives to redundancy must be considered, especially important in this case as there is an alternative role in respect of the online business. Employees must be notified of the decision and informed of their redundancy payments. As there are only six employees there is no minimum consultation period (s.188 Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) 1992).

Question 2

(a) Minimum notice periods for the termination of employment are covered by s.86 Employment Rights Act (ERA) 1996. It will be the greater of either the contract or the statutory minimum. In this case, Kerry's contract states that she will be entitled to 4 weeks' notice, however under statute she would be entitled to 5 weeks (not less than one week's notice for each year of continuous employment (up to a maximum of 12 weeks) if the employee has been employed for two years or more).

(b) Clause 4.1 is a garden leave clause. The clause requires the employee to remain at home and be available to work if required. If the employee works for another employer during the period of garden leave they will

be in breach of contract, which means that the employer could apply for an injunction, however they are more likely to be awarded damages.

2(c) Clause 4.2 of the contract is a restrictive covenant. All such clauses are *prima facie* void as being in restraint of trade. To be effective such clauses must only protect legitimate business interests and be reasonable in terms of duration, geography and content. The role of sales executive is not a senior role and Kerry is unlikely to have knowledge/information that requires protection. The extent of the clause (50 miles and 6 months) is likely to be too wide, therefore it is unlikely to be enforceable, e.g. Freshasia Foods Ltd v Jing Lu (2018).

Question 3

(a) Regulation 4 Working Time Regulations (WTR) 1998 states that an employee's working time shall not exceed an average of 48 hours for each seven days. In this situation, it will depend on whether the 60 hours per week was to be for a substantial period of time (17-week reference period). It is vague, as the employer has stated it would be for the 'foreseeable future'. It will also be dependent upon whether Geoffrey Mint has signed an 'opt out'. Otherwise, he can insist on working a maximum of 48 hours per week (8 hours overtime).

(b) Form ET1 must be submitted to the Employment Tribunal.

(c) Geoffrey Mint may be entitled to further compensation of between 2-4 weeks' pay (s.38 Employment Act 2002). There is a requirement that it be connected to a substantive claim, in this case unfair dismissal and secondly that the claim is successful (Advanced Collection Systems Limited v Gultekin (2015)).

(d) Either an Employment Judge sitting alone or an Employment Judge and two lay members will hear the final hearing. The witnesses for the Claimant and Respondent will usually give evidence by way of a witness statement. The other party will then have an opportunity to cross examine the witness and the Tribunal members may also ask the witness questions. After one party's witnesses have all given evidence, the other party's witnesses will give evidence and the procedure is repeated. Once all the evidence has been given, each party will have an opportunity to sum up the evidence and provide legal submissions. The tribunal will then decide whether the claim has been successful and, if so, will decide on the remedy.

Question 4

(a) There are potentially a number of options to fund the 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 fee-based arrangements. Finally, she may have Legal Expenses Insurance included under her home contents, motor or bank account insurance.

(b) Fiona Holmes is an employee who has worked at Gemini Designs Ltd for four years (two years continuous employment are required to be eligible

to make a claim). She has been dismissed and she is not in an excluded category of employment. Therefore, she is eligible to make a claim for Unfair Dismissal.

4(c) Redundancy is a potentially fair reason for dismissal (s.98(2) ERA 1996). The ACAS Code expressly states that it does not apply to dismissals for redundancy, however there still has to be procedural and substantive fairness. An employer will not act reasonably, and the dismissal will therefore be unfair, unless an employer warns and consults employees or their representatives about the proposed redundancies. In this case, there is no evidence that the selection criteria is objective and quantifiable, rather than subjective. It is likely that the 'redundancy' is unfair dismissal.

(d) Under s.55 ERA 1996, pregnant employees are entitled to attend antenatal appointments. Employees should show the employer, if requested, an appointment card or other documents showing that an appointment has been made. The employee is then entitled to reasonable time off for antenatal appointments and should be paid at their normal rate of pay while doing so.