

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 3 - UNIT – 6 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

Overall, performance was good, with candidates able to answer all the questions in the paper.

Not all candidates who did well in section A were able to achieve good marks in section B, as they lacked application skills, although some candidates who did not score well in Section A, managed to apply the law well in section B.

There was a broad range of grades for all three scenarios. The majority of questions were answered as expected and the responses demonstrated different levels of understanding.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Q1 The question asked for sources of law and, therefore, the candidates should list 2 sources, this does not include company policies or guidance.

Q2 When asked to explain the test candidates should explain the economic reality of the situation and the conditions that need to be satisfied to demonstrate a contract of employment. It is not enough to just list the factors that the court will consider.

Q3 This required the candidates to name the tests used to imply terms into a contract, most candidates could name at least one of the tests.

Q4 This question asked what an employer could do to protect his interest after an employee has left. It is important for candidates to identify which express terms can apply during employment and which apply post-employment.

Q5 Candidates who scored well in this question were able to identify the relevant section of the Act that applied, along with a description of what is needed to establish victimisation.

Q6 Here candidates who scored well were able to identify the correct legislation and/or case law, and explain what substantive fairness is and how it is determined if the employer has acted fairly.

Q7 This question was answered well.

Q8 Overall this question was answered well.

Q9 Most candidates answered this question correctly.

Q10 It is important that candidates can state the authority, in this case statute and section numbers were required in their responses to gain full marks.

Section B

Scenario 1

Q1 This was an application question. Many candidates applied the law well, although some lacked application.

Q2 Candidates answered this question well.

Q3a Most candidates answered this question well. A lack of application let some candidates down.

Q4a This question required the candidates to apply the law in relation to constructive dismissal to establish whether the employer has repudiated the contract. Most candidates were able to answer this question well.

Q4b Overall this question was answered well.

Scenario 2

This was the most popular scenario.

Q1 There was a mixed range of responses to this question. It is not enough to list factors that a court may take into consideration, as the question asked for the facts relevant in this scenario. Candidates should identify what facts are likely to make Fraser an employee and differentiate from those that would indicate he is self-employed.

Q2 This question was applied well, and most candidates scored well.

Q3a Candidates needed to apply the law and give legal authority. Some candidates did not apply the law to the facts at all and this was reflected in their marks. Those that achieved good marks applied the law and gave the correct legal authority within their answer.

Q3b This question was answered reasonably well with most candidates identifying and applying the procedure that should have been followed in relation to the facts.

Q4a and 4b Both parts of this question produced good answers and most candidates did well.

Scenario 3

Q1 Most candidates were able to identify direct discrimination, the correct section of the act and the reason why it was direct discrimination. They were then able to also identify indirect discrimination, but some candidates did not consider whether the indirect discrimination could be justified as a means of achieving a legitimate aim.

Q2 Most candidates responded well to this question.

Q3 This question was not answered as well and lacked some application.

Q4 Most candidates performed well with this question.

Q5a and 5b

Candidates tended to struggle with the application. Some candidates identified both disability discrimination and the possibility of a claim for constructive dismissal. 5a generally lacked case examples. In 5b, most candidates identified the remedies available.

SUGGESTED ANSWERS

LEVEL 3 - UNIT – 6 EMPLOYMENT LAW

SECTION A

1. This could include case law, statute, EU regulations.
2. Candidates should explain that the test looks at the economic reality of the situation, by considering a variety of factors, to establish employment status. The test states that a contract of employment will exist if three conditions are satisfied: that there is sufficient control over the worker; that there is mutuality of obligation; and that all other terms are consistent with it being a contract of employment. Ready Mixed Concrete (1968)
3. Two tests used to imply terms into a contract of employment are the business efficacy test and the officious bystander test.
4. This could include for example; restrictive covenants/restraint of trade; intellectual property ownership; non-dealing clauses; non-solicitation clauses.
5. Victimisation, under s.27 of the Equality Act 2010, is defined as a situation where a person is the subject of less favourable treatment because that person enforced (or tried to enforce) their own (or someone else's) right to be protected from discrimination. St Helen's Borough Council v Derbyshire and Others (2007).
6. The 'band of reasonable responses' test considers the issue of whether an employer acted reasonably and/or with substantive fairness. It asks the question whether the decision to dismiss was something that a reasonable employer would have done HSBC Bank v Madden (2001).
7. A dismissal can occur under s.95 Employment Rights Act 1996 with termination by the employer; the expiry of a fixed term contract; or termination by an employee without notice due to the conduct of the employer (constructive dismissal).
8. Candidates should state any two protected characteristics and the corresponding section number e.g. age (s.5) or disability (s.6)
9. PILON stands for payment in lieu of notice.
10. Contracts of employment do not have to be in writing, s.230(2) Employment Rights Act 1996.

SECTION B

Scenario 1 Questions

1. Wioleta is correct in that there is a duty of obedience, which is an implied term that an employee should obey all reasonable and lawful orders relating to their contractual duties. Failure to do so could be a breach of contract and could lead to dismissal, Pepper v Webb (1969). However, here, the hours that Jon is expected to work are in breach of his statutory rights, so the order is not reasonable/lawful, and he can refuse to obey them.
2. The contract says Jon must work 10 hours per day, 6 days per week. Under the Working Time Regulations 1998, the statutory hours are a maximum of 48 hours per week, calculated over a 17-week reference period. As Jon does not appear to have opted out, he cannot be forced to work those hours.

Jon has worked at Rapid Repairs Ltd for 5 years, so he is entitled to 5 weeks' notice by virtue of s.86 Employment Rights Act (ERA) 1996.

Jon is not receiving the National Living Wage for his age range. He is entitled to £8.21 per hour, National Minimum Wage (Amendment) Regulations 2016.

3. (a) Wrongful dismissal is where the employee is dismissed with less notice than they are entitled to, or they did not receive any notice and no PILON. The employee must not have committed a repudiatory breach, otherwise the dismissal will be justified.
- (b) Roger has been summarily dismissed. He has been dismissed without any notice or PILON. However, if Roger is making secret profits by fixing cars on a Sunday, this would be considered a breach of the implied duty of good faith. This duty requires Roger to account to his employer for all monies received during his employment. Failure to do so would entitle an employer to repudiate the contract. Boston Deep Sea Fishing v Ansell 1888. Roger's claim is unlikely to be successful.
4. (a) Alma may be able to claim constructive dismissal, if she can show that Wioleta has committed a repudiatory breach of the implied term of trust and confidence. This could be where there is a series of events by an employer that effectively force the employee to resign. Here, Alma has been subjected to public reprimands and inappropriate comments. Morrow v Safeway Stores (2002).
- (b) Wioleta has no legal obligation to provide a reference for a past or present employee. However, if she does provide a reference then she must do so with due care and skill. If the reference is written negligently, she could be liable for any economic loss incurred. Spring v Guardian Assurance plc (1994)

Scenario 2 Questions

1. There are several factors that would indicate that Fraser is an employee. This includes the fact that Fraser's tax and National Insurance are deducted from his wages. He is provided with, and has to wear, a company uniform. An important factor here is that there is a limited power of substitution in his contract of employment; meaning he could send another person to do his job, in this case he sent his friend Sunny. This would usually indicate a person is more likely to be self-employed. Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance (1968). However, a limited right of substitution can be included in a contract of service, depending on the degree of control by the employer. In this situation, DDC has a degree of control with an approved list, meaning that Fraser is likely to be employee.
2. DDC should have followed either their own procedure or the ACAS Code of Practice 1. DDC should have investigated the allegations and established the facts. British Home Stores v Burchell (1978). Following this, DDC should have confirmed the specific allegations in writing and invited Fraser to a disciplinary meeting. It is important that Fraser should have been permitted to be accompanied at that meeting. Following the meeting, DDC should have notified Fraser of the action they intended to take, and should have given him the opportunity to appeal that decision. The appeal should have been heard by a manager not involved in the case. Fraser is also permitted to be accompanied at the appeal hearing. The outcome should be confirmed to Fraser in writing and it is also important that DDC act consistently and fairly throughout.
3. (a) For the purpose of this question, it is stated that Fraser is an employee and that he has the correct amount of continuous employment (four years), as per s.108 Employment Rights Act (ERA) 1996. Fraser would then have to show that he has been dismissed under s.95(1) ERA 1996. When meeting with Fraser, Dani says that the matter is closed. This indicates that she has terminated the employment contract and that this dismissal is her unequivocal intention to dismiss him. Under s.111 ERA 1996, Fraser must submit his claim within three months of the Effective Date of Termination (EDT). Fraser is eligible to claim.

Fraser must make sure that he submits his claim within the strict time limits, as this is an unfair dismissal case, this will be 3 months from the effective date of termination (subject to early conciliation). Section 111 ERA 1996.
- (b) The remedies available to Fraser could include re-engagement, where DDC must offer Fraser a comparable job to the one that he has lost; re-instatement, where DDC must give Fraser his old job back; or compensation, which involves a basic award which is calculated by reference to age, length of service and pay.
4. (a) Sunny is entitled to a written statement of particular terms. He should have received this within two months of starting work. S.1 ERA 1996. DDC is in breach of this obligation, as Sunny has been employed for three months.

- (b) Two particulars that should be included in the s.1 statement include e.g. name and address of employer and employee; and the place of work.

Scenario 3 Questions

1. Direct discrimination is defined under s.13 of the Equality Act (EA) 2010. Yusuf's situation falls under s.10(1) religion or belief. Here, Yusuf has been treated less favourably as he not been given an interview based on his beliefs.

There is also the issue of the prayer time clashing with the staff meetings. This could be considered indirect discrimination (s.19). Not changing or varying the staff meeting is a practice which affects people of the same religion as Yusuf. CC will have the burden of justifying this practice by showing it is a proportionate means of achieving a legitimate aim. Here, it is likely to be a discriminatory practice.

2. Section 136 EA 2010 outlines that the claimant bears the initial burden to show that he has a *prima facie* case; that CC has acted unlawfully. Yusuf has enough here to show that 'but for his religion' he could have been interviewed. The burden then shifts to CC to show that they did not act unlawfully. Ayodele v Citylink and Napier (2017).
3. Under s.124 EA 2010, Yusuf may obtain a declaration that he was discriminated against. He may also obtain a recommendation as to what action CC should take to reduce the discrimination. There is also financial compensation. Here, the appropriate and, generally, the most common remedy is likely to be compensation, which is potentially unlimited. There is also the possibility of damages for injury to feelings in discrimination claims
4. Stan has a disability within the meaning of s.6 EA 2010, as Stan has a mental impairment which is substantial. It has also had a long-term effect upon his ability to carry out day to day tasks. Therefore, Stan's depression qualifies as a disability.
5. (a) Stan may have a claim for disability discrimination due to CC's failure to make reasonable adjustments. As Stan suffers from depression, adjusting his working hours would be considered to be a reasonable adjustment. Alternatively, given his employers refusal to adjust his hours, which has led Stan to resign, he could claim constructive dismissal if his employer's actions were so unreasonable. Western Excavating v Sharpe 1978.
- (b) The remedies available for unfair dismissal are re-instatement, re-engagement or compensation.