

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 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

Overall, performance was good. Section A was answered well however, there was in some cases a lack of application in section B.

Scenario 3 was the most popular and overall candidates did well

Scenario 2 was not answered as well as the others. Those that attempted this scenario tended to repeat their responses throughout questions 2 & 3. Question 2 b was particularly poorly answered.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

1. Most candidates answered this question accurately.

2. This question produced some accurate explanations from candidates. Most were able to give examples or case law to support their answer.
3. Overall, this was answered well. Candidates who did not do as well here were mistaken as to when notice entitlement would start or did not include the statute within their answer.
4. This question was answered well with most candidates gaining good marks.
5. Most candidates were able to explain that collective agreements could affect the terms of a contract but did not explain that they could be made with an employers' association or trade union.
6. This question was answered well.
7. Overall, this question was answered well, most candidates were able to explain repudiation and give an example of what may or may not amount to a repudiatory breach.
8. This question asked how damages for wrongful dismissal are calculated. Overall, it was answered reasonably well. Some candidates also included the fact that damages for hurt feelings would not be included.
9. Overall, this question was answered well. Candidates were asked to identify three potentially fair reasons and most were able to do this.
10. There was a mixed response to this question. Some candidates identified the remedies for a claim of unfair dismissal rather the powers of the Tribunal where procedural fairness has not been established.

Scenario 1

This was the least popular scenario

1(a) Most of the candidates who answered this question explained the key points and the law was applied reasonably well.

1(b) This question proved challenging. Most candidates were unable to apply to the law in this situation.

1(c) Most candidates found this question challenging. The question was asking candidates to explain whether there was a case for wrongful dismissal. Candidates needed to explain the criteria to establish wrongful dismissal, such as the correct notice periods and whether or not his dismissal was justified.

2 The responses to this question were good and the law was applied accurately.

3(a) Candidates defined and applied the law in relation to disabilities well.

3(b) This question was reasonably explained, and most candidates did well. Those that did not perform as well did not apply the law to the facts in the scenario. Relevant suggestions could have been put forward as to what would or would not be reasonable here.

Scenario 2

1(a) Most candidates were able to recognise and explain the protected characteristic of gender reassignment.

1(b) This question was answered reasonably well. However, a number of candidates did not recognise that this fell within s.26 Equality Act, therefore they were unable to apply the law.

1(c) Most candidates were able to identify the available remedies, but the question asked for an explanation of the remedies, therefore, they needed to give a brief explanation of each. Those who achieved higher marks also stated that the remedies are found in s.124 Equality Act 2010.

1(d) This question related to injury to feelings in relation to a claim under the Equality Act 2010. Some candidates did recognise that claims for injury to feelings could be awarded.

2(a) This question was asking the candidates to explain the requirements to claim constructive dismissal. Candidates should be mindful of the marks awarded per question. Some of the responses were very brief.

2(b) This question focused on the duty of mutual trust and confidence. Those that did not perform as well in this part generally, did not give the correct the legal authority or enough detail as to what the duty entails. Candidates should be mindful of the mark allocation.

3(a) Most candidates performed well and, overall, the law was applied well.

3(b) Overall the candidates performed well in this question.

Scenario 3

1(a) Candidates responded well to this question. The facts were applied well in most cases, those who didn't score as highly generally missed one of the requirements such as whether there was a dismissal or the time limits to bring a claim.

1(b) Rather than listing the disciplinary procedures the candidates needed to apply the procedures to the facts of the scenario. It is also important to state the relevant legal authority within the answer.

2 Candidates should be reminded to read the questions carefully. This question asks for the remedies for wrongful dismissal. Numerous candidates explained the remedies for unfair dismissal.

3(a) It was essential for this question to identify the relevant potentially fair reason to dismiss that is most likely to succeed, and then give a reasoned conclusion as to whether the reason would succeed.

3(b) Many candidates failed to recognise the need to act reasonably when dismissing an employee. Some candidates were able to give a brief description of the need to act reasonably; that is within the band of reasonable responses. Overall, the explanation could have been more detailed and relevant case law could have been provided.

3(c) This question required candidates to explain the remedies available for a successful claim of dismissal. Most candidates were able to do this successfully. Those who did not perform as well did not break down the financial award into the separate parts.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 6 – EMPLOYMENT LAW

SECTION A

1. When a company is obliged to provide paid work and an individual is obliged to then accept and complete the work, this is considered mutuality of obligation. Carmichael v National Power (1999).
2. The implied duty applies to the employee to obey reasonable and lawful orders made by their employer. As such an employee can refuse to follow orders which are not reasonable or lawful (Pepper v Webb (1969)).
3. Under s.86 Employment Rights Act (ERA) 1996, after 1 month, employees are owed 1 week's notice for up to 2 years employment then, after 2 years, 2 weeks' notice are owed. For every additional year, 1 more week's notice is owed, up to a maximum of 12 weeks' notice.
4. Terms that are required to be given to an employee under s.1 ERA 1996 include the name of employer and employee, the date on which employment began, details of pay and holiday entitlement and place of work.
5. Collective agreements are those made between an employer, or an employers' association, and a trade union, that directly affect the employee's terms and conditions of employment. Terms and conditions are reached through collective bargaining.
6. Examples of specific exclusions that do not meet the definition of disability set out in the Equality Act (EA) 2010 could include tattoos, pyromania, kleptomania and smoking.
7. In relation to summary dismissal, repudiation is 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 it is gross dishonesty or a serious crime, e.g. Stuart v London City Airport (2013).
8. Quantum of damages will include loss of wages and benefits. It will not include injury to feelings, Johnson v Unisys (2001).
9. Section 98(2) ERA 1996 includes capability, conduct, redundancy, illegality, statutory restriction and some other substantial reason as a potentially fair reason for dismissal.

10. Where there are issues surrounding procedural fairness, the Employment Tribunal has the power to increase or decrease compensation by up to 25%.

SECTION B

Scenario 1

Question 1(a)

It is an implied term that an employee will serve their employer with good faith and fidelity. This is not the same as a fiduciary duty, which requires an employee to act in the interests of the employer. Fidelity requires the employee to merely have regard to their employer's interests, it does not require the employee to subordinate their interests to those of the employer. In the current situation, Robin is making a profit on the sale of the lollies when he should be selling the ice creams, he is in effect making a secret profit. He will have to account for the profit, as he was using the employer's goods (the ice cream van) to sell his lollies (Samsung Semiconductor Europe Ltd v Docherty and another (2011)).

(b)

The situation concerning the use of social media is not so clear cut, as it was outside of working hours and not specifically directed at FIC. This is unlikely to amount to a breach of an implied term.

(c)

Robin will need to show that a breach of contract has occurred. He would need to demonstrate that he has not been given notice in accordance with his contract of employment and that he has been dismissed with less than the statutory notice, or with no notice. He would need to show that the dismissal was not justified and that he had not repudiated the contract. He must also show that he has suffered a loss. In this case, making a secret profit, in competition with his employer, is likely to amount to gross misconduct and therefore entitle the employer to summarily dismiss without providing notice. It is most likely that this will not be wrongful dismissal.

Question 2

Under the Working Time Regulations (WTR) 1998, the number of hours an employee can be required to work is limited to 48 hours per week. The period of work is calculated over a 17-week reference period. In the current situation, Bai has worked 60 hours per week over a 9-month period. It appears that there is a breach of the WTR 1998 and, unless Bai has signed an opt-out, Jack cannot insist that Bai continues to work these hours.

Question 3(a)

Under s.6 of the Equality Act (EA) 2010 a disability is defined as a physical or mental impairment that has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities. In this case, Asim has a recognised physical impairment (nut allergy), which has a substantial and long-term effect, as he must take particular care in preparing his food and has a restricted diet, Wheeldon v Marstons plc (2013).

(b)

Under s.20 EA 2010, an employer is required to make reasonable adjustments. The factors that the employer should consider when making a reasonable adjustment are the effectiveness of the change, the practicality of the adjustment and the cost of the adjustment. Here, not moving Asim to the new line or having an epinephrine kit would be appropriate.

Scenario 2

Question 1(a)

Section 7 Equality Act (EA) 2010 relates to gender reassignment. Under s.7(2) EA 2010, a reference to a transsexual person is a reference to a person who has the protected characteristic of gender reassignment. Therefore, Zuzanna has a protected characteristic.

(b)

Under s.26 EA 2010, harassment is defined as unwanted conduct which has the purpose or effect of violating a person's dignity or by creating an intimidating, hostile, degrading, humiliating or offensive environment. The intention of the offending party is immaterial (just 'banter'). In this case, Zuzanna is clearly upset, it is a violation of her dignity and also creates a degrading and humiliating environment in which to work.

(c)

Under s.124 EA 2010, there are three remedies available. A declaration is a statement of the Tribunal's findings. A Recommendation is provided for the purpose of preventing or reducing the effect of the discrimination. Finally, compensation can include financial losses as well as injury to feelings.

(d)

Zuzanna will be able to claim for injury to feelings. Aimed as a remedy for the hurt, humiliation and degradation suffered by the employee, this is achieved by reference to the Vento Guidelines, where there are three bands. It is likely that Zuzanna will be awarded the lower band.

Question 2(a)

Under s.95 Employment Rights Act (ERA) 1996, constructive dismissal is a termination by the employee in circumstances where the employee is entitled to terminate. It is dismissal through language or action, a repudiatory breach by the employer, entitling the employee to resign and claim constructive dismissal. In particular, it relates to the duty of trust and confidence.

2(b)

The duty of mutual trust and confidence is an implied duty, that neither employer nor employee will act so as to breach that duty. An employee needs to show that the effect of the employer's conduct was likely to destroy or seriously damage trust and confidence between the parties. Employees can rely on a course of conduct by the employer culminating in a 'final straw' event that leads the employee to resign Morrow v Safeway Stores (2002).

Question 3(a)

Frankie has breached the implied duty of trust and confidence, as she has humiliated Jane in front of the audience. This has been a regular occurrence, a possible slow burn situation. Even a one-off comment can be sufficient i.e. until she gets the message, Ogilvie v Nyrfor-Weir Ltd (2003).

(b)

Jane will need to show that it is impossible for her to continue working there and that she has resigned as a direct response to the humiliation by Frankie. Jane is likely to succeed in a claim for constructive dismissal, but this is arguable.

Scenario 3

Question 1(a)

In order to claim unfair dismissal, Harry would need to establish that he meets all the requirements. He must establish that he is an employee and not a member of an excluded category. In this case, he is described as an employee. He must have at least two years continuous employment, here he has been employed for three years. Dismissal in this case is established by Mary dismissing him summarily. Provided that he brings the claim within three months (less one day of the dismissal), Harry will qualify to bring a claim for unfair dismissal.

(b)

The failure to follow a proper procedure can result in a finding of unfair dismissal. Procedural fairness requires following a disciplinary policy and the ACAS Code of Practice. An investigation should be conducted and the employee made aware of findings. In this case, there has been no investigation (BHS v Burchell (1978)). Mary has not followed the proper procedure in relation to meetings etc., giving short notice and not informing Harry that it was a disciplinary meeting. Here, Harry has been summarily dismissed and the dismissal is procedurally unfair.

Question 2

The remedies that Harry could claim include damages to reflect all losses sustained flowing from the employer's breach. This will include salary and other benefits e.g. staff discount, that would have been earned or accrued during the contractual notice period. In some circumstances, an injunction may be granted (unlikely here). Wrongful dismissal does not give rise to a claim for damages for hurt feelings Johnson v Unisys (1999).

Question 3(a)

Under s.98(2) Employment Rights Act (ERA) 1996, a potentially fair reason would be capability. This relates to James' failure to pay the invoices on time. This is part of James' designated duties and, therefore, it is arguable that it is potentially fair reason for dismissal.

3(b)

Under s.98(4) ERA 1996, the question to consider is whether the employer's decision fell within a band of reasonable responses (Iceland Frozen Foods v Jones (1983)). Need to consider the decision against the objective standards that a reasonable employer in those circumstances and in that business might have adopted. The Tribunal is not allowed to substitute their own view. In the current situation it will be reliant on the seriousness of the errors e.g. cost to the business of the change of terms.

(c)

The remedies that are available are re-engagement, re-instatement, and compensation. The three types of financial awards in an unfair dismissal case are the basic, compensatory and additional award.