CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 6 - UNIT 19 – 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 more 'popular' areas of assessment, such as laws pertaining to discrimination and those governing unfair dismissal, are those where candidates tended to score the higher grades. However, the paper as a whole appears to represent a good balance of outcomes, with Q2 presenting the most challenging issues due to the somewhat narrow wording of the question (please see further specific comments below). The relative difficulty of this question was balanced out with the straightforward and accessible nature of Q4 as a predominantly 'explanation-based' question.

Overall, the questions appear to have been well understood and the failing grades are due to a lack of relevant knowledge, rather than any confusion or misunderstanding as to the areas of law being assessed. The papers that failed were generally clear fails.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

The vast majority of candidates recognised that harassment and victimisation had taken place and cited relevant statute. Stronger responses also cited case law noting the relevance of perception of the recipient/the nature of the relationship with reference to determining harassment. Most papers recognised the possibility of vicarious liability. Overall, this was a relatively high scoring question that presented no issues for the majority of candidates.

1(b)

The statutory aspects of the question overall performed well, with the majority of candidates noting the relevant rights to attend ante natal appointments. Many candidates also recognised the protected characteristic being assessed and potential discrimination. However, only few stronger papers noted the fact that both direct discrimination and harassment appear to have taken place, with most papers recognising only one or the other of these claims.

1(c)

Candidates generally responded well to this question. Some candidates included comments relevant to part b within part c and vice versa. However, where the information was correct and relevant, it was credited. The relevance of both the ACAS Code and case law governing 'reasonable' employer responses were thoroughly noted by the vast majority of candidates, resulting in an overall well performing question.

Question 2(a) (i and ii)

Most candidates recognised the relevance of implied terms and presented some pieces of seminal case law reinforcing that understanding as applicable to the question. However, despite the question expressly precluding reference to restrictive covenants in part a, several candidates still referred to these clauses. Only the stronger, higher scoring papers referred explicitly to the common law focus and did not mention restrictive covenants. Nonetheless, the question performed adequately overall as these irrelevant explanations were generally accompanied by explanation of the relevant common law focus. Cross credit was given to any relevant information or law whether presented in i or ii.

2(b)

This drafting exercise was overall performed well. The majority of candidates drafted a basic restrictive covenant and recognised the need for clear language and a 'narrow' focus. However, a few papers contained several different types of covenant within the response for this question and, where this occurred, credit was given to the best drafted of these clauses.

A minority of candidates excelled in this practical element of the paper and produced exceptionally thorough and detailed covenants.

Question 3(a)(i and ii)

Candidates generally recognised the relevant law and cited the provisions applicable to the question. Both parts of the question require identification and application of the law, rather than any critical assessment. This straightforward approach allowed the vast majority of candidates to score a good to reasonable grade. A few candidates, however, referred to broad issues of liability that were not related to the question. However, these points were generally included in addition to the relevant points, so these papers also scored fairly well overall.

3(b)

The responses to this question tended to be quite vague and lacked adequate reference to the focal point; examination of the ability to preclude 'future claims'. The majority of candidates recognised the requirements of a valid settlement agreement and these points were nominally credited. However, only higher scoring papers recognised that the preclusion of 'future claims' is a contentious goal that is not readily available. Few high scoring papers also cited case law with reference to the difficulties of precluding future claims. Several papers noted COT3 agreements and these were credited if referenced in relation to the 'future claims' element of the question.

Question 4(a) (i and ii)

Both parts of this question required straight forward identification and citation of relevant statutory provisions. The vast majority of candidates met this expectation and scored high grades in response to both elements of this question. In particular, point ii) saw the majority of candidates noting all relevant points within the MS and scoring full marks.

4(b)

Overall, this question produced strong and relevant responses. In particular, explanation of the processes involved, in bringing a claim to an employment tribunal, were clear and highly detailed. Reference to the financial costs, however, were at times overlooked. Higher scoring papers managed to clearly and expertly note both the processes and the financial cost issues, as examined. However, the majority of papers managed to score well overall by thoroughly explaining the process of bringing an ET claim, as well as briefly, but relevantly, considering the financial elements of the question.

Question 1(a)

Dear Mr Carlisle,

Thank you for your email dated 1 Nov 2019, regarding employee issues.

I will begin by addressing your concerns regarding Kasey Tanner. All employees, irrespective of their length of employment, are entitled to freedom from discrimination in the workplace under the Equality Act 2010. Discrimination must relate to a protected characteristic. Discrimination under this statute includes harassment, which is defined under s26 as occurring where a person engages in unwanted conduct in relation to a protected characteristic, or of a sexual nature, which has the purpose or effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. The fact that you did not intend any offence and that you perceive Ms Tanner as welcoming similar comments from other employees, are not relevant under the Equality Act 2010 definition of harassment, as the courts look to the perception of the person to whom the statement is made, rather than the intention of the maker of the statement. As long as the recipient's reaction is deemed a 'reasonable' response to the comments, then it will fall under the definition of harassment.

The courts will look at the relationship of the individuals as just one factor in establishing whether the reaction of the claimant was reasonable in the circumstances. In the case of Evans v Xactly Corporation Limited (2018), it was held that due to the long standing and informal relationship of the individuals concerned, the statements which would otherwise be harassing were not deemed so as the claimant did not object at the time and had also engaged in such 'banter' themselves. However, you would need to establish that Ms Tanner also viewed your relationship in this informal way, which may prove difficult particularly as your relationship is one of an imbalance of power, as you are her manager, rather than peers as in the case mentioned. In Minto v Wernick Event Hire Ltd (2011), it was held that comments take on a more harassing dynamic where the relationship is one where the employee feels they have to accept the comments or risk losing their job. The fact that Ms Tanner may or may not accept comments from other colleagues is therefore not particularly relevant, especially if these are her peers. I would therefore suggest that you may have breached Ms Tanner's rights and discriminated against her on the basis of sexual harassment by commenting upon her appearance and suggesting that she should wear a certain type of outfit more often to the workplace. The company for which you work may also be vicariously liable for your comments, if there is a finding of harassment, under s109 Equality Act 2010.

With reference to your follow up communication where you explain that Ms Tanner has initiated proceedings against Fancy Fabrics Ltd based on your alleged harassment, I must warn you that your reaction of moving her to a different work area and not allowing her to engage in company meetings can be seen as victimisation under the Equality Act 2010. Victimisation is a form of discrimination under this statute and occurs when an individual is treated less favourably or unfairly for performing a 'protected act'. This includes

bringing or supporting proceedings against an employer, McGurk v Kelvin Timber Ltd (1987).

Although you state you have moved Ms Tanner due to not wanting her to affect staff morale or spread allegations, it is unlikely this will justify your actions in the eyes of a tribunal. You note that you took the decision to alter Ms Tanner's working arrangements as a direct reaction to her bringing the claim of harassment, so your actions satisfy the definition of statutory victimisation. I strongly suggest you reinstate her position.

1(b)

I will now move on to discuss the issues you are having with your other employee, Paul Costa. Mr Costa is also protected under the Equality Act 2010 under which discrimination on the basis of being transgender is prohibited. Gender reassignment protection includes those who are going to have or have undergone gender reassignment, irrespective of medical supervision. Mr Costa therefore meets this definition.

I refer you to the definition of harassment stated above, you will note that the comments made by Mr Gurdy meet this definition as they would arguably and reasonably have the effect of causing Mr Costa to feel degraded or humiliated on the basis of his being transgender. The company may be vicariously liable for the comments of Mr Gurdy under s109 Equality Act 2010 as the verbal warning you issued may not be seen as sufficient given the gravity of the breach of rights.

With reference to Mr Costa's request for time off to accompany his partner to her first antenatal appointment , he does have a statutory right to such time off as he is the partner of a pregnant woman and being transgender in no way lessens these rights. Under s55 Employment Rights Act 1996 an expectant father or the partner (including same sex) of a pregnant woman is entitled to take unpaid time off work to accompany the woman to up to 2 of her antenatal appointments of up to 6.5 hours each. As this is Mr Costa's partner's first such appointment and he is requesting an afternoon off, rather than a full day, he is entitled to this unpaid leave. If you deny Mr Costa the time off on the basis of his gender reassignment, this will be considered direct discrimination under the Equality Act 2010.

1(c)

With regard to Mr Costa's termination, I would advise you that employees with at least two years' service who are not in an excluded category have a right not be unfairly dismissed, s98 ERA 1996; Mr Costa meets these requirements. This includes a right to fair warning and a disciplinary process. The fact that Mr Costa insulted Mr Gurdy using an 'offensive racial slur' would likely be considered misconduct and a potentially fair reason for dismissal under s98 ERA 1996.It will be necessary to consider whether the company acted reasonably in treating the potentially fair reason as a reason for dismissal. Reasonableness is determined by considering several factors including whether the employer genuinely believed the employee was guilty of the misconduct, whether the employer had reasonable grounds for that belief, whether the employer carried out reasonable investigation into the matter and whether dismissal was an appropriate sanction, BHS v Burchell (1978). Procedural fairness under the ACAS Code of practice on Disciplinary and Grievance Procedure must also be established. This would include writing

to the employee setting out the alleged offence and inviting them to a meeting to address the allegations with sufficient time to prepare. The employee must be made aware of a right to be accompanied at the disciplinary meeting. They must also be notified of the right to appeal any decision or sanction. It does not appear any of the procedures were followed prior to dismissing Mr Costa, meaning that he has probably been unfairly dismissed. If proper procedure is not followed, the tribunal can increase any compensation award up to 25%. However, if it is deemed that Mr Costa's comment is gross misconduct, then summary dismissal would be justified; however, procedural fairness must still be found.

Please do get back in touch with me if you require further clarification.

Best regards,

Katharine Arias

Question 2(a)

Dear Adam,

Thank you for your email re Jaclyn Bower.

I have set out some key points for you to consider below.

i) As Ms Bower's consultancy sideline may be in direct competition with your company, it would be preferable to be able to rely on express contractual terms prohibiting such conduct, such as restrictive clauses. However, as no such clauses were included in Ms Bower's contract of employment, the company may also find protection under implied terms. Implied terms are incorporated into every contract of employment and include an employee's duty of loyalty and fidelity to their employer, which extends to not competing with their employer.

   In Hivac Ltd v Park Royal Scientific Instruments Ltd (1946) it was held that employees can be prohibited from working for a competitor in their own time. Here, it will be necessary to establish the nature of the employment and the amount of harm they could potentially cause their employer, as this will determine the scope of the duty not to compete. As Ms Bower is a senior level employee privy to highly confidential information, it is likely she could cause the company a great deal of harm if she used her position to benefit her own consultancy services. She may therefore be in breach of her duty of loyalty and fidelity for the running of this consultancy 'sideline'.

ii) The implied duty of employee loyalty and fidelity has also been held to in a duty not to disclose confidential information in Faccenda Chicken v Fowler (1986), where it was held that confidential information is determined by considering the nature of the employment and the nature of the information. Again, as the information to which Ms Bower was privy was very sensitive, it could well meet the definition of such 'trade secrets' under the law and she would be prohibited from using any such information to her benefit. She would also be prohibited from using company contacts for the benefit of her consultancy services, Roger Bullivant Ltd v Ellis (1987). You may also seek an injunction preventing

Ms Bower from using confidential company information for her own benefit.

2(b)

During the course of your employment, you agree you will not, for yourself or on behalf of any other person or entity, work for or provide any services to a competitor of Wired Connections Ltd (the company). 'Work' is defined as any competitive business activity, including the offering of freelance services that compete with the company and the setting up of a business in competition with the company. This restriction will remain in place for 6 months following termination of your employment and will extend 10 miles from the location at which you were employed. You agree you will not, either during your employment or at any time after, use or disseminate business information obtained through your role with the company. The definition of 'information' includes details of former and existing customers, clients and business contacts of the company.

Question 3(a)(i)

Dear Ms Chung,

Thank you again for attending a meeting with me. Please find below my response to the issues raised within our discussion.

I will firstly address your lack of knowledge of Mr Lette's prior disciplinary hearings when taking over service provision from Superb Lunches Ltd. Such a change would be governed by the Transfer of Undertakings and Protection of Employment Regulations 2006 (TUPE) Reg 3 (1) where a service activity by employer A ceases and is taken on by employer B where there was a group of employees whose main duty it was to carry out those activities for employer A. Reg 5 TUPE (Amendment) Regulations 2014 amended Reg 3 also requires that the service must be fundamentally the same as before and after the transfer. All of these requirements are met, as you took over the catering services previously provided by Finest Lunches Ltd, so the situation will be governed by TUPE 2006.

Under this legislation, you have a right to be made aware of the disciplinary record of any transferring employees. Under Reg 11, the transferor has a duty to notify the transferee of employee liability information relating to employees who are transferred. This includes information relating to any disciplinary procedures taken against the employee. This information should have been given in writing or made readily available to the transferee.

Question 3(a)(ii)

Under Reg 11, if there is a breach of the regulations, the transferee can make a complaint to the ET on basis that the transferor has failed to comply with the regulations. If the tribunal finds in favour of the complainant, they can make a declaration to that effect and make an award of compensation to be paid by the transferor to the transferee reg 12 (3). In calculating the amount of compensation, the tribunal will consider what is just and equitable in the circumstances, a minimum of £500 per employee, unless a lesser amount is deemed fair. The tribunal will consider any loss suffered by the transferee, any contractual provision defining a sum to be paid for failure to provide employee liability information. Transferee has a duty to mitigate any loss.

Although 24 months have passed since the transfer, you note that you only came to know of this dismissal within the past month. Reg 12 (2) states you have three months to bring the claim after the transfer, or such time as it was reasonably practicable to bring the claim in the circumstances. As you were unaware of these matters you obviously could not have brought the claim earlier.

3(b)

Lastly, you note that you are considering offering Mr Lette a sum of money to take the matter of his dismissal no further. Such an agreement would be termed a settlement agreement and there are certain requirements that must be met before any such an agreement will be considered valid under s230 (3) ERA 1996. However, with specific reference to your desire to cover yourself from all future claims from Mr Lette, this would necessitate the conclusion of a full final settlement agreement. These are not generally considered valid if challenged in the courts. Therefore, if any other issues have arisen or been discussed during Mr Lette's employment with Finest Burgers Ltd, it is preferable to expressly include these issues in the settlement agreement and specifically preclude Mr Lette from bringing any future actions on that basis. The more specific you are the more protection you will receive from the agreement, as seen in Hinton v University of East London 2005 ; Hilton UK Hotels Ltd v McNaughton 2004. Clauses such as settlement of all claims will not provide you any protection, therefore, we will include settlement of unfair dismissal claim and any claims related to Mr Lette's dismissal. If any other potential issues have arisen during his employment you need to explicitly include these within the agreement if you wish to protect from later actions brought by Mr Lette.

If you have any further questions, please do get in touch.

Best regards,
Katharine Arias

Question 4(a)

i) Under Ss99(3)(a) and (b) ERA 1996 you will enjoy protection against dismissal during maternity and will be considered to have been automatically unfairly dismissed if the reason for the dismissal relates to your maternity; including pregnancy and childbirth. Furthermore, under s47C ERA 1996 and reg MPLR 1999, you, as an employee, have the right not to be subjected to a detriment by your employer for any reason connected with your maternity leave. The Equality Act 2010 also protects against discrimination on the basis of pregnancy and maternity.

ii) Under the Maternity and Parental Leave Regulations 1999 regulation 8 you have the right to take ordinary maternity leave (OML) which is a period of 26 weeks, regardless of length of service. When taking OML, you have the right to return to your former job s71(4), ERA 1996. The regulations also allow you to take additional maternity leave (AML), which is a period of 26 weeks which a woman can take off work immediately after the ordinary maternity leave. If you choose to take AML, you can return to the work in which you were employed, or if this is not reasonably practicable for the employer, to an alternative and

appropriate job on the same terms and conditions as your previous job regs 18 and 18A MPLR 1999.

4(b)

I will briefly outline the key points of taking a claim to employment tribunal should you wish to do so. This will hopefully shed some light on the process for you and help put your mind at ease. Firstly, you will need to engage with the ACAS early conciliation procedure as this is a requirement under the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014. You will be allocated a conciliation officer who will attempt to facilitate a settlement, although they cannot advise on the merits of the case. If conciliation is unsuccessful or the respondent cannot be reached or refuses to engage, a certificate will be issued to confirm that the claimant complied with the early conciliation process. You can then proceed to bring a claim to the ET. To do so, you as the claimant will need to complete an ET 1 form and submit this to the appropriate tribunal within the time limits applicable to the claim. The ET 1 form should contain:

1. Personal details of the claimant, date of birth, any representation and correspondence address.
2. The respondent's identity and any representation,
3. The nature and details of the claim and remedies sought.

This form must be submitted by the prescribed time limits, in your case three months (less one day) from the date of the 'event' i.e. being excluded from meetings. You can submit the claim online, by email, by fax, post or in person. If it is not made in the prescribed form it may be rejected. This could include a missing ACAS certificate number or being lacking in other important information regarding the claim r 10 r12 Sch 1 ET(CRP)R 2013. If the case proceeds to the ET, there may be a judicial sift, as well as preliminary and full hearings.

With regard to your concerns about incurring financial losses, I can confirm that the losing party in an employment tribunal is not generally ordered to pay the legal costs of the winning party, unlike in civil court proceedings. However, costs may be awarded if the tribunal determines that the party has, in bringing or conducting proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably or where the claim or response had no reasonable prospect of success r76 (1) Sch 1 ET(CRP)R 2013. The tribunal may also make an award where the actions of a party have led to the hearing being postponed or adjourned r76(2) ET(CRP)R 2013. Costs are a maximum of £20,000. It is highly unlikely you would be liable for costs if you lost the case as your claim does not appear likely to fall within any of these definitions.