CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 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 paper performed well with an overall pass rate of 86%. This is slightly higher than in previous sessions. The slightly higher pass rate may be attributed to a number of potential factors, including the fact that the exam was delayed due to global events, meaning candidates had more time to revise. Question 1 in particular resulted in some very strong responses which may have contributed to raising the overall pass rate. The question examined two popular and generally very well understood topics of employment law; discrimination and remedies for dismissal. The inclusion of this 25 mark question allowed the majority of candidates to bank a good amount of marks that assisted in reaching the 50 mark pass target.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)(i)

Candidates tended to perform very well in this question; with this being the highest scoring question on the paper for many scripts. The majority of responses identified the need to apply statutory provisions to assess whether there was a recognised disability and whether harassment had occurred. Stronger papers also identified and applied seminal case law examples of harassment and disability to assess the likelihood of liability in the specific scenario facts. Higher scoring papers also noted the potential for relevance of vicarious liability of the employer and supporting statute. Overall, this question produced some of the highest marks within the paper.

(ii)

Stronger papers noted the potential for employer liability in relation to both indirect discrimination and failure to make reasonable adjustments, as well as noting the required statutory provisions. However, several papers referred to only one of these two essential points. These responses were only awarded half the marks as there was a breach of two provisions that needed to be recognised.

(b)

This was a relatively straight forward question that produced good responses. The vast majority of papers referenced the relevant statutory provisions, as well as mentioning the Vento guidelines. Stronger responses commented upon the remedies in light of the specific issues and circumstances within the scenario.

Overall, Question 1 produced the highest marks throughout the cohort. This is largely due to the fact that discrimination is a generally well understood area of the syllabus. Furthermore, the case study provided some guidance as to salient areas to research.

Question 2(a)(i) and(ii)

Responses to Part (i) noted basic relevant case law tests, however, stronger responses applied the content of these tests to the specifics of the question to critically determine if the reasons for dismissal were valid. Furthermore, most responses noted one to two basic supporting cases, with stronger responses applying a more topical range of critical cases. Part (ii) was overall well addressed with the relevant ACCA provisions being noted, however, only stronger papers critically applied these provisions to the scenario and considered the actions of both the employer and the employee. While responses were generally good, there needed to be a more clear differentiation between the 'reasons' and the 'procedure' aspects of the examination. While responses overall addressed procedural and substantive fairness, and some cross credit was allowed, only the stronger papers appropriately differentiated between these two elements of the question and applied specific material to each aspect.

Question 3(a)

The question essentially required identification of the rights that had been breached and the relevant legislation. The vast majority of candidates did well on this aspect by recognising the breach of statutory rights. Stronger candidates also applied some case law examples to reinforce arguments as to a finding of breach of rights. The question also required identification that a detriment had been suffered via the 'warning' issued and recognition of the relevant statutory provisions. This latter element was overlooked in several scripts, noted briefly in some, and only critically explained and applied in stronger papers.

(b)

The early conciliation process and ET1 contents were identified in the vast majority of responses. However, many scripts were quite descriptive in explaining both elements. As the question required 'advice' to be given, it was necessary to also explain the underlying purpose of the conciliation; this was noted only within the stronger scoring papers. Furthermore, only a few of the high scoring papers applied the contents specifically to the scenario when 'advising' the client, as required. Nonetheless, the answers overall tended to score well due to identification of relevant provisions relating to both aspects of the question.

Question 4(a)

Several moderate scoring papers responded to this question by citing quite broad explanation as to the validity of restrictive covenants in general; higher scoring papers critically applied this information to the specifics of the question. In some instances, candidates noted relevant laws and interpretation, and then reached a conclusion without applying those legal standards to the scenario. This, at times, appeared to be a time management issue and candidates gave a relevant overview of salient information, but appeared to run out of time to adequately apply those laws to the question.

(b)

The majority of candidates drafted a relevant but brief covenant. At times, the parameters of the restriction needed refinement and there could be more details as to specific parties. Furthermore, the 'worldwide' restriction aspect tended to cause some issues and perhaps contradict the advice given in part (a). Nonetheless, the drafting within this cohort was overall of a higher standard than seen in some previous sessions and very few candidates failed this question.

(c)

The majority of candidates noted the requirements of a valid settlement agreement and cited relevant statute. However, only stronger papers noted all of the requirements. The 'future claims' aspects were also overall well addressed. However, stronger papers noted case law examples of interpretation of such clauses. While raising the possibility of COT3 agreements was fine, a few papers focused too much on this point, given the specific wording of the question. Again, a few responses outlined relevant statutory provisions and judicial interpretations but failed to provide a critically in-depth response due to appearing to run out of time.

Question 1(a)

Dear Andrew,

Thank you for your email.

(i)

Firstly, with regard to the mocking of your speech by Jake Cooper. This treatment can be classed as a form of discrimination. S4 Equality Act 2010 prohibits discrimination on the basis of nine protected characteristics, including disability. Section 6 of the statute defines disability as a physical or mental impairment having a substantial and long term adverse effect on an individual's ability to carry out their normal day-to-day activities. Substantial in this regard means more than minor by reference to, what the individual could do with or without the impairment, Paterson v Metropolitan Police Commissioner (2007). Long term impairment under s6 means at least 12 months, or likely to last the rest of the person's life.

Applying this to your situation, it is likely your stammer meets the definition of a disability under s6 Equality Act 2010 as it effects your day-to-day activities in that you often need to rehearse interactions and write out notes to aid communication. Furthermore, you have had this stammer since childhood and unsuccessfully sought treatment in your teenage years, so it is clear this has been a life-long problem and is likely to remain as such, making it a long-term impairment under s6. Therefore, your stammer will likely be classed as a disability under the Equality Act 2010, as was the case in Wakefield v HM Land Registry (2009). Your case is further supported by Para D17 of the 2011 Statutory Guidance on Definition of Disability under the Equality Act 2010, which cites a specific example of where a stammer will be considered a disability.

As mentioned, disability is one of the protected characteristics under s4 and any less favourable treatment on the basis of a disability will be classed as discrimination. Discrimination under the statute has a wide definition and includes under s26 harassment which is "unwanted conduct related to a relevant protected characteristic, which has the purpose or effect of violating an individual's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that individual". As the comments, both verbally and on the company noticeboard, have made you feel very uncomfortable and unable to enter the communal staff room, it would seem that the definition has been met.

Furthermore, the fact that your manager, Ms Mukerjee, appears to have largely disregarded your complaint is also of relevance as it exposes both Ms Mukerjee and the company to a claim of vicarious liability under s110 and s109 respectively. Although such liability may be avoided by demonstrating sufficient measures were taken to address/prevent the discrimination, this is unlikely to be a successful defence in your case as you note the mocking of your stammer and posting of notices continued even after you raised the issues with your manager.

1(a)(ii)

With regard to the requirement to speak during company meetings, this may also be a form of discrimination under the Equality Act 2010. Section 19 Equality Act recognises indirect discrimination which occurs where A discriminates against B if A applies to B a provision, criterion or practice which is discriminatory to relation to a relevant protected characteristic of B. The practice will be discriminatory if it is applied to persons with whom B does not share the characteristic, and puts or would put persons with whom B shares the characteristic at a particular disadvantage when compared to person not holding the characteristics, it puts or would put B at that disadvantage and it is not a proportionate means of achieving a legitimate aim.

As such, the requirement to speak within company meetings may be seen as a form of indirect discrimination as this practice puts you at a disadvantage when compared to a colleague not having the disability of a stammer. The company may try to defend this by stating the meetings are a proportionate means of achieving the legitimate aim of encouraging better staff morale and your lack of contribution would defeat this effort. However, this is unlikely to be a successful defence, particularly as you offered to present your comments in written form and this was rejected.

Furthermore, the Equality Act s20 requires employers to make reasonable adjustments to allow disabled persons to fulfil their employment duties. This includes the duty to provide an auxiliary aid where a disabled person would, but for the provision of that aid, be put at a substantial disadvantage compared to persons who are not disabled (Section 20(5)). Failure to provide this aid will be considered discrimination under s21. It is important to note that the courts take a broad and pragmatic view of what may be considered a reasonable adjustment, *Mitchell v Marks and Spencer plc* [2017]. Therefore, failure to make reasonable adjustments to allow you to use written props as an aid to contribute to the meetings may be considered discriminatory.

1(b)

Therefore, it appears you have been discriminated against on the basis of your disability. If you do decide to pursue this claim, you would be entitled to substantial remedies if your case were successful. You can make a claim for the mockery of your speech and the harassment suffered and in relation to the indirect discrimination of being required to speak in company meetings. Under s124 Equality Act 2010, an employment tribunal may make an order declaring the rights of the parties and a recommendation that the respondent takes a particular course of action designed to reduce the effects of the discrimination suffered by the claimant. However, the remedy most relevant to your case is monetary compensation. In claims of discrimination, there is no upper limit to compensation and both financial losses and injury to feelings can be compensated. Vento v Chief Constable of West Yorkshire Police (2003) explains how injury to feelings will depend on the extent of the bullying/ harassment with £42,900 being the highest award, received only in exceptional cases; £900-£8600 for less serious cases with an isolated incident, £8600-£25700 for serious cases and £25700-£42900 for a lengthy campaign of discriminatory harassment. Aggravated damages can also be awarded where there is evidence of malicious and oppressive forms of discrimination, Alexander v Home Office (1988). Exemplary damages may also be available to punish the wrongdoer, but this is rarely awarded. You

have suffered more than one incident of harassment in both verbal and written form with an apparent element of malice, as well as being indirectly discriminated against. It is therefore likely your award would fall in the middle range of the Vento bands.

Question 2(a)(i)

Dear Ms Petrillo,

Thank you for your correspondence. I have outlined the key points relating to the issues raised within your email.

Firstly, I understand you take a serious view of the persistent lateness of your employee, Tomas Kershaw, however, your dismissal of him for this reason may not be legally sound. Mr Kershaw is protected under S94 ERA 1996 as he is an employee, has more than two years continuous service and is not in any excluded category, so, as long as he has brought a claim within three months, he will meet the requirements to claim unfair dismissal.

Potentially fair reasons for dismissal under s98 Employment Rights Act 1996 include conduct/misconduct, such as persistent lateness. However, case law examples of conduct being considered a fair reason for dismissal suggest the conduct must be quite serious, for example, stealing in Sainsburys Supermarkets Ltd v Hitt (2003), or an 'appalling' attendance record in Co-operative Society Ltd v Tipton (1986). With regard to persistent lateness, although this would not be considered gross misconduct, the cumulation of these minor offences could be seen as serious, particularly as you told him to arrive on time and he ignored your request and you state his behaviour was negatively affecting your company.

Misconduct has been considered in British Home Stores Ltd v Burchell (1978) where it was held that the tribunal will consider whether the employer genuinely believed the employee was guilty, had reasonable grounds for that belief and carried out reasonable investigation into the matter. Furthermore, in addition to there being a fair reason for dismissal, S98 ERA 1998 requires that the employer only takes actions that a reasonable employer would take. If the employee's dismissal fell within a band of reasonable responses it is likely fair, if not, it is likely unfair, Iceland Frozen Foods Ltd v Jones (1982) HSBC Bank plc v Madden (2000).

It is clear you appear to have grounds for genuinely believing Mr Kershaw to be guilty of the misconduct in his persistent lateness, however, there does not appear to be sufficient investigation into this matter. Your actions may be seen as that of a reasonable employer, however, the fact that you did not follow certain procedures in his dismissal will count against you. Indeed, irrespective of the whether or not your reasons for dismissing Mr Kershaw prove valid, there are certain procedures that should be followed in dismissing any employee and these do not appear to have been adhered to in your dismissal of Mr Kershaw.

2(a)(ii)

Even if you establish a potentially fair reason for dismissal, the dismissal itself must also be reasonable with regard to procedural fairness. The dismissal must be substantively and procedurally fair, as Tomas' dismissal relates to conduct, it is important to adopt the provisions of the ACAS Code of Practice

on Disciplinary and Grievance procedure. The ACAS Code of Practice provides detailed guidelines as to the proper disciplinary procedure that should be followed before dismissing an employee. The ACAS Code of Practice should ideally be followed during any disciplinary action. This is reinforced in s13 Employment Relations Act 1999. The ACAS disciplinary code states the process should: write to the employee setting out the alleged offence and inviting them to a disciplinary meeting, allow the employee to be accompanied at that meeting and allow the employee time to prepare for the meeting. In this meeting, the employer should establish facts of the case, inform the employee of the problem, decide on the appropriate action and provide the employee with an opportunity to appeal. It is good practice to maintain written notes during the disciplinary procedure. Failure to follow the ACAS Code can be taken into account by employment tribunals in deciding whether employers have acted properly in connection with an unfair dismissal claim. None of the above measures appear to have been followed in your dismissal of Tomas. If it is found that you did not follow the proper procedure, any award obtained against your company for unfair dismissal may be increased by up to 25% due to your failure to follow the code, Polkey v AE Dayton Services Limited (1988).

Regards,

M. Jericho.

2(b)

The taking over of services from Cleanliness Ltd is a service change provision and this type of change will fall under the ambit of the Transfer of Undertakings Protection of Employment) Regulations 2006 ('TUPE 2006'). For a change in service provision to fall under this regulation, the activities carried on after the change in service provision must remain "fundamentally or essentially the same" as those carried on before it (Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 2013, Spijkers Case, Cheesman v Brewer Contracts EAT (2001) IRLR 144. As your company is taking over provision of cleaning services, the activities appear to be fundamentally the same and meet this definition.

Regulation 4 TUPE governs the effect of a service provision transfer on contracts of employment and states a transfer does not terminate the contracts of employment of the employees working in the grouping which is to be transferred. These contracts are treated as if they had been entered into by the new employer as Reg 4 (2) (3) transfers the transferor's rights, powers, duties and liabilities under the contract. Therefore, under such a transfer, employee's rights are protected and there should be no changes made to their contracts, including termination, except for very limited reasons, discussed below.

When the transfer takes place, the contracts of employment and all terms and conditions are preserved, as is the continuity of employment (TUPE 2006 regulation 4). The only reasons upon which variation may be validly made would be for ETO reasons. Under TUPE Reg 4 (4) (5) variations to contract may be permissible if the sole or principal reason for the variation is economic, technical or organisational (ETO) reason entailing changes in the workforce, Berriman v Delabole Slate Ltd (1985) and this ETO reason relates to the transferor's future conduct of the business (e.g. Hynd v Armstrong and others (2007). It is only when an employer seeks to change the structure of their

workforce by reducing or changing the functions that individuals carry out, that the reason will be considered an ETO change. Furthermore Reg 7 (1) TUPE 2006 states that where, either before or after the transfer, an employee of the transferee/transferor is dismissed, the employee is automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer. It appears the sole reason for the dismissal of the three new staff is the transfer, particularly as you concede you did not wish to take on these individuals as employees but did so to facilitate the transfer. Furthermore, new staff not 'fitting in' with existing staff is not an ETO reason for dismissal. Therefore, as your sole reason for wishing to dismiss the three new employees is the transfer, this would expose your company to legal claims of unfair dismissal should you terminate their contracts of employment.

Question 3(a)

Dear Yusuf,

Thank you for your email.

The Employment Rights Act 1996 s57A entitles an employee to take a reasonable amount of unpaid time off for family emergencies involving dependants, including incidents involving the child of an employee which occurs unexpectedly in a period when an educational establishment is responsible for the child. The inconvenience or disruption the leave causes to an employer's business is irrelevant. The amount of time off is not explicitly stated, however the employment tribunal will determine what is a reasonable amount of time off given the facts of the case and whether notice was given as soon as practicable.

Your six-year old son clearly meets the definition of a dependant, furthermore, the situation was one with no advance notice and should reasonably be classed as an emergency. Furthermore, you gave notice of the additional leave on the day of the incident. It would seem that two days off is a reasonable amount of leave, particularly as the doctor suggested you needed to keep an eye on your son until his headaches had eased.

It therefore appears you had a legal right to take the unpaid leave, as well as a right not to be subjected to a detriment for taking this leave under s 47C ERA. The verbal warning can be seen as a detriment as it was issued despite your legal right to take the leave, Royal Bank of Scotland plc v Harrison (2009). Furthermore, the changing of your working hours, particularly when this option had never been utilised in the preceding eight years, again suggests you are being treated less favourably due to taking emergency leave. In the circumstances, you may bring a claim against the company, if successful, you could receive compensation. I have highlighted below the process of bringing a claim should you wish to pursue this option.

(b)

Section 48 ERA provides for a complaint to be made to the Employment Tribunal in relation to a S47C detriment. The Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014 state that an individual who wants to bring a claim to the ET must first submit an ACAS Early Conciliation Scheme form, available on their website. This form contains basic personal details and contact details but not details of the claim. The Early Conciliation Support Officer will then contact the employment tribunal

to inform it that the early conciliation process has been engaged with and will also contact the individual to explain the conciliation process. If you wish to engage in conciliation, the ECSO will the pass the case to a conciliation officer who has one month to facilitate a settlement between claimant and respondent. If conciliation is unsuccessful or one of the parties refuses to engage, a certificate will be issued to confirm the claimant complied with the early conciliation process. The claimant will be given a unique EC number to put on their ET1 from if they make a claim to ET. The ET1 form contains personal details of claimant, respondent details, claimants' employment details and earnings, the nature and details of the claim being made, remedies sought and details of claimants' representative. The claimant must identify the appropriate tribunal and submit the claim within three months, submission can be online or via email, fax, post or in person. The importance of the procedure cannot be over emphasised as a claim will be rejected if it is not in the proper format and does not follow proper procedure.

Question 4(a)

Hello Georgina,

Clause 14 is a restrictive covenant, and such clauses are prima facie void as a restraint of trade. However, a restrictive covenant may be enforceable if it protects legitimate interests and is no wider than necessary to protect the employer's business interest. Furthermore, the clause must be reasonable in terms of scope and duration, Fellows v Fisher (1976). It is also important that the restrictive covenant is appropriate for the level of job involved, Patsystems Holdings Ltd v Neilly (2012).

Although Clause 14 arguably protects legitimate interests, it is wider than necessary to protect business interests as the restriction is 'perpetual and worldwide' suggesting there is no geographical nor time limit to the enforcement of the restrictive covenant; this would not be considered reasonable. Furthermore, Clause 14 does not appear to be reasonable as it restricts all employees without reference to the level of seniority or access to clients and sensitive material. This suggest Clause 14 will not be valid. However, the blue pencil test could be used to sever the elements that are not reasonable and leave the rest of the clause intact.

(b)

This is an Agreement between [Name of Employee] hereafter referred to as "You" and [Name of Company] hereafter referred to as the "Company". The Agreement is effective from _____ ("Effective Date").

Covenant of non - dealing

You agree that upon termination of your employment, you willl not have any direct contact with the former employer's clients, customers or suppliers, even if the client, customer or supplier initiates the contact.

This restriction will remain in place for a period not exceeding 12 months immediately following the termination of your employment. You will not, for yourself or on behalf of any other person or business enterprise, engage in any dealing with the former employer's clients, customers or suppliers.

The definition of clients, customers and suppliers includes any entity or person with whom you had direct contact or specific knowledge of through your role with the former employer. The definition of dealing includes any form of verbal or written contact, including through agents.

This Agreement contains the entire agreement between the parties and supersedes all prior understandings, agreements, or representations as to the facts.

By your signature below you acknowledge that you have read and understand and agree to comply with all of the terms of the Agreement.

Date:
Employee Signature:

Date:
Name of Company:

4(c)

The formalities of settlement agreements are found in s203 (3) Employment Rights Act 1996 and S111A of the ERA 1996 and state that any such agreement must be in writing and relating to a particular proceeding or complaint. Furthermore, for the settlement agreement to be valid, the employee must have received independent advice from a qualified professional; this adviser must be completely independent of the employer. This adviser must inform the employee on the terms and effect of the proposed agreement and in particular its effect on his ability to pursue his rights before an Employment Tribunal. The adviser must be a relevant independent adviser under the Employment Rights Act 1996 s203 (3A), Employment Rights (Dispute Resolution) Act 1998 s9 and must be covered by a professional indemnity insurance in respect of the advice given. Furthermore, the adviser must be identified in the agreement and the agreement must state that the above conditions are satisfied.

The settlement agreement will set out the terms agreed in the negotiation and will include the names of parties, amount to be paid to the employee, details of the claims the employee agrees not to take against the employer and details of the employee's legal adviser along with the adviser's signature. Whilst settlement agreements are legally binding, they are certain exceptions to the use of such agreements. These exceptions include claims relating to dismissal for automatically unfair reasons, union membership, whistleblowing and asserting any statutory right.

With regard to restricting claims, this would require a 'full and final settlement' clause, however, even these do not preclude 'all future claims'. In Hinton v University of East London (2005), the court suggested settlement agreements should be tailored to the particular circumstances even when including 'full and final settlements 'clauses. In this case, the court confirmed that the requirement of s203 ERA 1996 that an agreement to preclude the right to bring tribunal proceedings must relate to the particular proceedings, so the settlement agreement had to identify the particular or potential claims to be covered. In Royal Orthopaedic Hospital Trust v Howard 2002, the EAT suggested specific wording may allow for preclusion of future claims, however, again, there would need to be some connection to the particular proceedings.

Therefore, the exclusion clause you suggest restricting 'all future claims' is not likely to be considered valid.

Regards.