CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

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 2021 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

Candidates that did well were those that recognised the legal issues examined within the case study/questions and cited relevant law when answering all questions; along with application of some of these crucial points of law. The highest scoring candidates also noted the finer detail specifics of the case study dynamics and applied these points when 'advising' the clients. Stronger candidates also provided highly detailed, yet legally specific, responses, with some exceptionally good and precise answers noted and credited within the cohort as a whole.

Weaker candidates tended to provide only a brief overview of, albeit relevant, areas of law. It was evident that the fundamental issues had been established, however, the explanation and application of law specific to those issues was lacking in detail, supporting law and specificity in failing papers.

There were several legal issues examined within most of the questions and stronger candidates recognised all issues and dealt with each in a methodical manner. Weaker, but passing, papers also noted these areas but did not sufficiently address all elements. Failing papers merely noted areas of law examined without sufficient elaboration, or presented broad and unspecific explanations of law that did not address the questions. This could be remedied

with more investment in terms of preparation. It was clear that the areas of law had been recognised within the case study materials, however, failing papers had considered only the fundamental issues surrounding these areas. At Level 6, the examination will require knowledge and practical application not only of the most obvious legal issues within the dynamics, but also identification and application of the finer specific details that surround and inform the case study. The Chief Examiner suggests a more meticulous approach is taken in terms of highlighting all of the information given within a case study and investigating as to the significance of those details and the legal issues they are likely to raise in an exam. It is suggested that the practice of drafting documents forms a greater element of revision. This would have raised the overall standard of the drafting exercise within the exam.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

The majority of candidates performed very well when answering this question. Stronger papers recognised the relevant statutory provisions and the type of discrimination that had potentially occurred. This was further supported with evidence of case law interpretation of discrimination and the factors specific to the case study in determining whether liability will be found. Arguments as to a finding of discrimination were generally well balanced and higher scoring papers noted seminal judicial interpretation and applied these points to the case study materials. Weaker papers tended to be too broad in explaining discrimination legislation in general without sufficient specific application. There was also some confusion as to the type of discrimination that had occurred within failing papers.

(b)

The majority of candidates recognised the type of discrimination that had potentially occurred and cited relevant statutory definitions. Lower scoring papers did not further elaborate on the specific variables the courts will consider in determining whether harassment had occurred, as specific to the case study scenario. Higher scoring papers noted these factors and applied relevant case law reasoning to present balanced arguments as to whether or not harassment had occurred. Overall, the few candidates that failed Q1 did so due to a lack of presentation of relevant detail, suggesting poor revision of materials.

Question 2(a)

The majority of candidates answered this question by presenting relevant case law and ACAS provisions, any reasoned conclusions were also credited. Stronger papers also made efforts to cite recent developments in the judicial interpretation of proper investigation and apply these points to the specific circumstances within the case study. Overall, the recognition and citation of legal principles specific to the area of law examined were well addressed. However, the application of these principles to the finer points of the case study could have been slightly more narrow and precise.

(b)

A straightforward and relatively high scoring question. The vast majority of candidates cited the proper statutory remedies, with stronger papers also noting the relevance of the age of the case study character in relation to the award. The few papers that did not score well on this question were very brief and noted just a few sentences to present a brief, and, at times, vague, overview of general remedies.

(c)

The shared parental leave element of the question was overall well addressed with the majority of candidates recognising the recent case law development in the area, as specific to the case study. Stronger candidates also referenced the principles underlying this interpretation of the law. However, certain papers also presented unnecessary discussion on parental leave in general, rather than purely focusing on the issues within the question. The issues relevant to the new statutory bereavement leave rights were recognised by most papers, with good application. The papers that failed this question tended to address only one of the two aspects examined and largely overlooked the other area.

Question 3(a)

This question produced a mixture of results. Stronger papers recognised the protected disclosure and the automatically unfair dismissal. This was supported with citation of law and application specific to the case study scenario with reasoned conclusions being credited. However, weaker papers presented broader points touching on general principles of unfair dismissal, including investigation and health and safety issues. While credit was given for any relevant material, the passing papers needed to also recognise the protected disclosure issues, in addition to any broader points of law and discussion.

(b)

This question produced overall very good and specific responses. The majority of papers cited relevant legal principles on tribunal reporting and stronger papers also noted broader relevant points relating to the ECHR and case law. The application was also overall specific to the case study and accurate conclusions reached. The few papers that failed this question did so by presenting little to no relevant detail, suggesting a complete lack of reading around the area examined.

(c)

This question produced good responses. The area of law was clearly well researched and case law examples consistently given. The application was also generally reasoned and any logical application credited. Very few papers failed this question.

(d)

This drafting exercise produced overall fair to poor outcomes. This is something found in many cohorts and the need to reinforce drafting skills is clear. The general approach tended to be too brief and general with

insufficient reference to the specific type of clause examined and the appropriate contents and level of detail. Nonetheless, most papers achieved some marks for this element, allowing for an overall very good pass rate for Q3 when subsections b, c and d are balanced out.

Question 4(a)

The response to this question tended to be quite detailed and within this information the specific points of law were generally addressed. The majority of candidates noted the ETO elements of the question, with stronger papers also mentioning the harmonisation arguments. Answers tended to be quite strong overall and the papers that failed this question provided too general an overview of few points related to the relevant statute.

(b)

The majority of candidates passed this question with a good grade. The stronger papers noted reasons specific to the policies governing the 'internet use' aspect of the question, while weaker papers tended to give a broader overview of the general benefits of polices. Nonetheless, the answers given were overall relevant and many also provided some case law examples to reinforce understanding. There were a few exceptional answers to this question that contained evidence of in depth and critical knowledge of the need for governance and consequences of failure to provide proper guidance on internet use.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 19 –THE PRACTICE OF EMPLOYMENT LAW

Question 1(a)

Hello,

Thank you for your email.

Firstly, the Equality Act 2010 (EA) protects against discrimination on the basis of age. Direct discrimination occurs where an individual is treated less favourably due to their having a protected characteristic than a person not holding that characteristic, s4 EA. Age is a protected characteristic and you cannot be treated less favourably due to your age. Requiring you to retire on attaining the age of 65 would satisfy the definition of direct discrimination.

However, the law does recognise employer justified retirement ages as one situation in which direct age discrimination can be justified if the employer can demonstrate that the treatment of the employee was a proportionate means of achieving a legitimate aim, s13 EA. This defence to direct discrimination is an exception to the rule that direct discrimination cannot be justified and applies to age discrimination only.

Therefore, Leaf Preparatory School will need to demonstrate that the policy of compulsory retirement for all teachers at age 65 has a legitimate aim and is a proportionate means of achieving that aim. The school cites the need to

meet the physical and mental demands of the post and secure the safety of the children being one of the reasons behind the policy.

Although this is a legitimate aim, the school will nonetheless need to prove that compulsorily retiring teachers at age 65 years is a proportionate means of achieving that aim. The school will need to show that there are no reasonable alternative ways to achieve their aim and that the benefits of this aim significantly outweigh the discriminatory effect. Furthermore, they must be able to show the link between the safety of the children and the specified retirement age, failure to do so could render their policy discriminatory, Prigge and others v Deutsche Lufthansa AG (2011).

The school also claims that the retirement policy promotes diversity in terms of race and age; both of these have been held to be examples of legitimate aims that support an employer justified retirement age. Furthermore, the aim of avoiding the need to dismiss older workers on the grounds of incapacity or underperformance, and related disputes on these type of matters, have also been held to be legitimate aims, Seldon v Clarkson Wright and Jakes (2012), Prof J Pitcher v University of Oxford (2019). Therefore, the school could also cite the legitimate aim of retiring you with dignity by avoiding your dismissal and any dispute with parents concerning your ability.

It would appear Leaf Preparatory School has some potentially valid reasons underpinning their retirement policy, including the safety of the children, the promotion of diversity in the workforce and the avoidance of employee disputes and dismissals. However, the school will need to adduce evidence that retiring teachers at 65 years of age is a legitimate means of achieving those aims.

(b)

With regards to Mr Paul and the claims of harassment. EA protects against discrimination on the basis of the protected characteristic of sexual orientation. Harassment is a form of discrimination under this legislation and occurs where a person engages in unwanted conduct related to a protected characteristic or of a sexual nature, which has the purpose or effect of violating another's dignity or creating a hostile, degrading or humiliating or offensive environment for the individual, s26 EA. This also extends to feeling discriminated against due to abusive language surrounding a protected characteristic, even if the individual does not hold that protected characteristic, Noble v Sidhil Ltd & Anor (2016). Therefore, the comment you made on Mr Paul's perceived sexual orientation is likely to be considered discriminatory.

Furthermore, the intention of the person making the offensive statement is of no relevance, so long as the recipient reasonably felt harassed by the comment. Therefore, the fact that you 'meant no harm' by the comment made to Mr Paul is not a defence. Finally, the making of just one discriminatory verbal comment has been held to be harassment, particularly where a more senior employee makes a remark to a junior employee, Insitu Cleaning Co Ltd v Heads (1995). As Mr Paul is a teaching assistant within your team, he is a junior member of staff and your 'joke' is likely to have a more negative impact and create a hostile environment for Mr Paul, thereby discriminating against him.

I am happy to further discuss either of the issues above with you.

Regards.

Question 2(a)

Ian Faire has been an employee for over two years and is not in any excluded category, he is therefore protected against unfair dismissal, s94 Employment Rights Act 1996 (ERA).

Under s98 ERA, an employee may be dismissed for potentially fair reasons including conduct/misconduct, such as that alleged against Ian Faire. However, the dismissal for a potentially fair reason must also be reasonable and the court will require evidence that the employer's actions fell within a 'band of reasonableness', with the dismissal being considered unfair if the actions of the employer fell outside this band of reasonableness, s.98(4) ERA, HSBC v Madden (2000). Many factors will be considered in this decision, including the level of investigation undertaken into the alleged misconduct. When considering whether the investigation was sufficient, the court will assess many variables including the resources of the employer, as well as the seriousness of the allegation of misconduct against the employee.

Reasonableness of the employer's actions is also determined by the tribunal considering whether the employer genuinely believed the employer was guilty of the misconduct and whether they had reasonable grounds for that belief, BHS Ltd v Burchell (1978). A significant determinant of this 'reasonable belief' will lie in the court considering the level and depth of investigation the employer conducted into the alleged misconduct. Furthermore, the employer will need to demonstrate that they undertook a reasonable level of investigation given the circumstances; the more serious an allegation of misconduct, the higher the standard of investigation required, Hargreaves v Manchester Grammar (2018).

As a finance manager, Ian Faire is in a position of trust within your company. The accusation of theft from his employer is one that would likely destroy his future career prospects, as well as his personal and professional reputation. Therefore, the court will need evidence that the level of investigation reflected the seriousness of this allegation and the consequences of being dismissed for this reason.

In the circumstances, the 'brief' investigation conducted into the alleged misconduct is unlikely to be sufficient. Reaching the conclusion Mr Faire was responsible purely on the basis of his sister's name appearing on the bank account to which the funds were transferred may appear to be jumping to a conclusion, particularly given Mr Faire's clean disciplinary record and the four other employees that had access to the bank accounts from which funds were taken. You state that the company investigation into the misconduct was 'internal' and this is generally acceptable. However, given the nature of the allegation against Ian Faire, it may have been beneficial to involve an external agency to undertake the investigation to avoid any suggestion of bias and reinforce that you undertook proper investigation into the misconduct. There was clearly material to connect Mr Faire with the thefts, but it would have been more appropriate to suspend him on full pay while further investigations were carried out and then hold a formal disciplinary hearing at which he could be represented.

Ultimately, given the seriousness of the allegation, it does not appear Quality Ltd adequately investigated the allegation of misconduct against Ian Faire. If the tribunal makes such a finding, Ian Faire will be considered to have been unfairly dismissed.

(b)

The remedies available to Ian Faire if he is found to have been unfairly dismissed are under ss112 and 113 ERA. These include reinstatement, where he will be given his job back, and reengagement, where the company will take him back as an employee but on a different basis. However, the remedy most likely to be applicable to Ian Faire is financial compensation in the form of a basic and compensatory award.

The basic award is calculated under s118 ERA and takes into account the age of the employee. Ian Faire joined Head to Toe Ltd when he was 21 years old and had been with the company for three years prior to his recent dismissal, making him 24 years of age. For the one year he was under 22 years of age, he will be entitled to half of one week's pay for each complete year of employment, and from age 22 to 24 years of age, he will be entitled to one weeks' pay for each complete year of employment. This is subject to the statutory maximum, currently £525 per week.

Furthermore, Ian Faire may be entitled to a compensatory award to cover loss suffered as a result of the dismissal. This may include loss of earnings from the date of the dismissal to the tribunal hearing date, as well as future loss to cover the time it takes him to find a new job. Ian Faire may also be entitled to an amount to reflect his loss of statutory rights, as well as loss of pension benefits and contractual benefits.

Importantly, an uplift of up to 25% may be awarded if proper procedure was not followed in a dismissal. Therefore, if it is found that Quality Ltd did not undertake sufficient investigation into the alleged offence against Ian Faire, they will have failed to follow proper procedure and any award obtained against the company for unfair dismissal may be increased by up to 25%, Polkey v AE Dayton Services Limited (1988).

(c)

With regards to the issue raised by Mr Hart in relation to the disparity in payment for shared parental leave and maternity leave, it is important to note that the two types of leave differ greatly in terms of purpose and are not comparators for reasons of discrimination. The courts have recently made clear that it is not discriminatory to pay men on shared parental leave less than women on maternity leave by way of contractual entitlement as the purposes of maternity leave is to protect the welfare of the new mother and baby, Ali v Capita Ltd; Hextall v CC of Leicestershire Police (2019). Head to Toe Ltd have therefore not discriminated against Mr Hart on this basis.

With regards to the second issue of leave for bereavement, the Parental Bereavement (Leave and Pay) Act 2018 amends ERA to allow parents and primary carers who lose a child under 18 years of age to take at least two weeks' leave: s 80EA ERA. This is a day one right so Mr Hart does not need to meet any qualifying criteria to access this leave. Furthermore, as Mr Hart has the required 26 weeks continuous service with the company, his leave will be paid at the statutory rate: s 171ZZ6 Social Security Contributions and

Benefits Act 1992, as inserted by the 2018 Act. Mr Hart does not need to provide a death certificate as evidence of his loss and he is entitled to take the leave without notice, irrespective of the 'busyness' of the company at that time.

Quality Ltd has breached the rights of Tyrone Hart by delaying his leave, allowing him unpaid leave when he is entitled to paid leave, giving him just two days leave despite his entitlement to two weeks minimum and by asking that he provide a death certificate.

Question 3(a)

Under s94 ERA, an employee will be automatically unfairly dismissed if their employment is terminated because they have made a protected disclosure that they reasonably believe is in the public interest, s103A ERA. Unlike potentially unfair dismissal, in claims of automatically unfair dismissal, the tribunal does not consider whether the employee acted reasonably and there is no required minimum duration of employment. Therefore, Ms Kaur may bring a claim for automatic unfair dismissal despite being employed by Pretty Spaces Ltd for just ten months.

The comments made by Ms Kaur in relation to the safety of the equipment used by Pretty Spaces Ltd may be considered a protected disclosure as s43B ERA recognises statements concerning danger to health and safety as one of the categories that constitute a protected disclosure. As it appears Ms Kaur has had her employment terminated due to making these protected statements, she may have been automatically unfairly dismissed.

Tanisha Kaur has also made the protected disclosure to an appropriate person, her employer, in accordance with ss43C to 43H ERA. However, the fact that she also raised her concerns with fellow employees will be of relevance and the court will consider the motives behind these statements. If the court believes that Ms Kaur raised the issues as a matter of safety and concern for others, rather than out of malice or self-interest, her claim will be unaffected, Chesterton Global v Nurmohamed (2017). If, however, they believe she was motivated by vindictiveness, her claim will still stand, however, the level of compensation available to her for unfair dismissal will be lessened.

(b)

As a general rule, cases brought to tribunal can be heard in public and freely reported upon. However, there are some exceptions to this rule found under r50 Sch 1 Employment Tribunal (Constitution and Rules of Procedure) Rules 2013 which deals with tribunals power to prevent or restrict public disclosure of proceedings, so far as it considers necessary in the interests of justice or to protect any rights under the ECHR. These powers are used sparingly and restrictions on reporting are generally only granted where the case is of an intimate nature involving sexual misconduct or other cases which are likely to cause significant embarrassment to the complainant. For example, where they will need to disclose highly sensitive matters, such as in disability cases. When considering whether to make an order restricting reporting of a case, a tribunal must balance the ECHR principles of freedom of expression and open justice, Storer v British Gas (2000). As mentioned, these powers are rarely used and there is nothing in the nature of the claim, nor in the characteristics of the parties involved, that suggests the tribunal would make such an order

restricting reporting in the case Ms Kaur has brought against Pretty Spaces Ltd.

(c)

Clause 8 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 in terms of scope and duration, Fellows v Fisher (1976), Printers and Finishers Ltd v Holloway (1965). It is also important that the restrictive covenant is appropriate to the level of the job involved, Patsystems Holdings Ltd v Neilly (2012). As Clause 8 is included in all employee contracts, it is not tailored to Ms Kaur's level of seniority nor does it reflect the duration of her employment at your company. As Ms Kaur is a gardener, and therefore an operative rather than an executive, who has been with Pretty Spaces Ltd for just ten months, a 20-mile restriction that lasts one year is likely to be excessive in her case. The clause will therefore likely be unenforceable.

(d)

Covenant of non – solicitation

'You' agree that upon termination of your employment, you will not, on your own behalf or on behalf of another legal or natural person, solicit or entice any current or former clients of 'The Company'. The definition of solicitation includes any form of verbal or written encouragement or diversion of business activities away from 'The Company'. The definition of clients and customers includes any entity or person with whom you had direct contact with, or specific knowledge of, through your role with 'The Company'. This restriction will remain in place for a period of 12 months immediately following the termination of your employment with 'The Company'. You will not during this time, for yourself or on behalf of any other person or business enterprise, engage in any form of solicitation of current or former clients or customers of 'The Company' within 10 miles of the location of your former employment.

Question 4(a)

The acquisition of the mobile pet grooming activities from Best Dogs Ltd constitutes the acquisition of part of an undertaking and this type of change will fall under the ambit of the Transfer of Undertakings Protection of Employment) Regulations 2006 ('TUPE 2006'). Under TUPE Reg 4 (4) (5) variations to contract may be permissible if the sole or principal reason for the variation is an 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). ETO reasons are interpreted narrowly by the courts as a means of preserving the rights under TUPE 2006 and it has been established that any changes in a role must be significant if they are considered an ETO reason justifying dismissal of a transferred employee, Litster v Forth Dry Dock Ltd (1990), Osbourne v Capita Business Services Ltd (2016). Furthermore, a mere change in working location will not amount to an ETO reason, RR Donnelly Global v Besagni (2014). Therefore, moving to new, smaller offices would not be considered an ETO reason justifying Mr Langer's dismissal. Furthermore, harmonisation of transferred employee's contractual terms would also not be considered an ETO reason. Therefore, Mr

Langer did not have to accept the same wages as existing employees and this is not a legal reason for his dismissal.

(b)

Online communication and the completion of electronic work tasks are becoming more prevalent in the workplace, making it more important than ever for companies to establish boundaries as to what is acceptable behaviour when using the internet in the workplace. It is beneficial for employers to create their own company specific policies on internet use that complement statutory provisions and can be part of the employment agreement with employees.

Such policies will ensure employees are aware of the type of material that is restricted when in the workplace, thereby avoiding disputes. This would further help avoid situations where the employee can defend the accessing of inappropriate material by claiming they were unaware that legal, 'adult' content was restricted; a defence currently used by Kerry Eagles against your company. Furthermore, this will protect your company from malicious software and viruses that could infect your computer systems when employees access unacceptable material using company equipment.

Internet use policy may also protect your company against law suits which may arise due to viruses entering your computer systems and resulting in clients' private information being made public. In such an instance, your company may be held vicariously liable for the actions of the employee that led to the material becoming public; particularly if the company has no specific policy in place prohibiting such activities in the workplace.

Ultimately, the importance of having a company policy on internet use is evidenced by your dispute with Kerry Eagles. Although Ms Eagles may not win her case, the damage caused to your business by her claim could have been avoided with a clear internet use policy that is supported with a statement on enforcement so employees are aware of the consequences of breach, Henderson v London Borough of Hackney (2009).