

**CHIEF EXAMINER COMMENTS WITH
SUGGESTED ANSWERS**

JANUARY 2021

LEVEL 3 – UNIT 13 – 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

The results, for this examination, illustrate the ability of candidates to read the Case Study Materials in preparation for the questions in the examination.

The small number of candidates who sat the paper makes any consideration of overall performance slightly difficult. However, it is clear that candidates were generally well prepared. The narrow specification has meant that there has been a tendency, in respect of past papers, to have the same type of questions (and answers). This has meant that where some candidates 'know' the law, they have not necessarily applied that law to the scenario. This means that they attain limited marks. Where possible, candidates should ensure that they can use their knowledge in different situations, not just prepare an answer and try and make it fit to the examination question.

The majority of candidates were prepared for this paper and were well informed from the Case Study Materials. Candidates were able to attempt all questions on the paper and it was good to see that answers were written for all questions. Time management did not appear to be an issue.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

(a) Candidates were largely able to gain 2 marks for this accessible question on non-contentious work. Where candidates failed to actually name a policy, then this impacted on the marks given. It is far too general to just write 'a policy', an example needs to be provided for the mark.

(b) This question on working hours was clearly signposted in the Case Study Materials and it was pleasing that the majority of candidates did well, gaining 4 or 5 marks. At this level candidates are expected to know the correct regulation (in this case Regulation 4), and this was, in a number of cases, missing from answers.

(c) The question on restrictive covenants was, on the whole, well done. Where candidates failed to gain full marks, it was due to a lack of application to the scenario. Candidates are reminded that practice papers are very much based on the application of the law, not just being able to replicate a stock answer.

Question 2

(a) The law changed in December 2020 in respect of the time period for conciliation, however applying the CILEx rules concerning changes in the law, no candidate was disadvantaged if they stated the 'old' law. Nearly all candidates were able to gain good marks on this question, illustrating a good understanding of how the ACAS early conciliation process operates.

(b) Drafting a response is not always an easy task, however it was pleasing to see that the majority of candidates made a good attempt at doing so. Where candidates dropped marks, it was where they tended to replicate almost word for word the content of the claim. Candidates are reminded that in 'real life' this would not be appreciated by the Tribunal.

(c) As in previous papers, it is clear from the approach taken by many of the candidates that their focus is on the law, rather than employment procedure. Questions such as this differentiate the law paper from the practice paper and need to be considered as an integral part of the qualification. Most candidates did not do well on this question, at best gaining a mark.

(d) The vast majority of the candidates gained full marks on this question. Where a mark was dropped it was due to candidates not explaining that there is a statutory cap on the weekly wage.

Question 3

(a) As would be expected the majority of candidates scored full marks on this question, knowing the requirements under s.6 Equality Act 2010. The precise wording was required and application to the client's situation.

(b) It appears that some candidates are not aware of s.15 Equality Act 2010, which specifically relates to disability discrimination. A substantial minority focused instead on indirect discrimination, for which no marks were available. Some marks were available for discussing reasonable adjustments. Candidates are reminded that it is imperative that where questions of this

nature are signposted in the Case Study Materials, they need to prepare thoroughly to ensure they maximise the marks they are awarded.

(c) A fairly straightforward question, which candidates should have gained full marks on. As it was, most candidates gained at least half marks. Funding is a vital consideration in any case and candidates need to know the options to advise clients accordingly.

Question 4

(a) Candidates had few problems with this question, the majority gaining high marks. Where candidates did not get full marks, it was due to a lack of application to the scenario, for example, failure to consider how long the client had been employed for.

(b) Nearly all of the candidates were able gain high marks on this question, which was clearly signposted in the Case Study Materials. Some leeway was provided in terms of the wording of some answers, with a generous interpretation being given.

(c) A mixed response to this question concerning redundancy. Some candidates wrote far too much about mobility clauses, rather than concentrating on redundancy. It should be noted that marks were available for mentioning a potential mobility clause, but the majority of the marks related to redundancy.

(d) Another signposted question from the Case Study Materials, which candidates had few problems with. Most candidates gained at least 2 of the 3 marks available for this question. Where candidates failed to gain a mark, it was mainly due to a failure to recognise the length of time required to be an employee.

SUGGESTED ANSWERS

LEVEL 3 – UNIT 13 – THE PRACTICE OF EMPLOYMENT LAW

Question 1

(a) Non-contentious work is very broad and can include drafting employment contracts and policies or providing guidance on restructuring and redundancy.

(b) Under Regulation 4 Working Time Regulations 1998, an employee's working time shall not exceed an average of 48 hours for each seven days. The 48 hours per week is based on a 17-week reference period. Therefore, it will depend on whether the employees work 55 hours per week throughout that reference period, as to whether there is a breach or not. They will be required to work the 55 hours if they have signed an 'opt out', otherwise they can insist on 48 hours.

(c) The starting point is that the clause is void as being in restraint of trade. This is unless the employer has a legitimate business interest to protect, and the covenant is reasonable in terms of duration, geography and content. Considering the scope of the clause, as it covers the whole of

the United Kingdom it at first appears that it may be unreasonable. The nature of business may well negate this and Holly's role as the chief designer, is likely to mean that she has access to sensitive information, therefore the clause may protect a legitimate business interest. The 6-month duration is not an unreasonable amount of time.

Question 2

- (a) Once referred to ACAS, time will pause for up to 1 month. This can be extended by 14 days if necessary (from January 2021, it is a standard 6-week period). Once conciliation has been concluded/the certificate has been received from ACAS, the time limit will start to run again and the claimant will have at least one calendar month in which to present their claim.
- (b) Suggested content of Response:
1. The Respondent admits that the Claimant was employed by the Respondent from 14 August 2018 as an Installations Operative, fitting alarm systems.
 2. The Respondent admits that the Claimant was dismissed on 24 September 2020.
 3. The Respondent denies that the dismissal was unfair, the dismissal was due to the misconduct of the Claimant.
 4. The Respondent denies that the Claimant was not made aware of the case against her, the Respondent wrote to the Claimant requesting her attendance at a disciplinary meeting and informing her of the reasons why.
 5. The Respondent denies that the Claimant was dismissed in the manner claimed. Having entered the office of Brian McCloughlin, the Managing Director, the Claimant refused to engage in discussion and left after threatening him.
 6. The Respondent denies that the Claimant has not received warnings in the past, having received a written warning on 22 January 2020 concerning her inflated claim for expenses.
 7. The Respondent sent a letter on 25 September 2020 to the Claimant confirming her dismissal and informing her of her right to appeal, which she chose not to exercise.
 8. There was a fair reason for the dismissal and the dismissal was both procedurally and substantively fair.
- (c) Standard directions will cover such issues as:
- producing a list of relevant documents and sending it to the other side;
 - producing a Schedule of Loss for the Claimant;
 - sending copies of relevant documents to the other side;
 - agreeing a bundle of all the relevant documents for use at the hearing;
 - exchanging statements for witnesses who will give evidence at the hearing.
- (d) The Basic Award is calculated based on age and length of service. It is subject to a statutory cap on weekly pay. The Compensatory Award, is the actual money lost because of the dismissal e.g. failure to find another job.

Question 3

- (a) Under s.6 Equality Act (EA) 2010, a person with a disability is defined as a person who has a physical or mental impairment. Asperger's syndrome is a recognised mental impairment. The impairment must have a substantial and long-term adverse effect. Asperger's syndrome has a substantial and long-term adverse effect – it is a lifelong impairment. It must also impact on their ability to carry out day to day activities. Asperger's syndrome is characterised by significant difficulties in social interaction and nonverbal communication, along with restricted and repetitive patterns of behaviour and interests.
- (b) Under s.15 EA 2010, discrimination arising from disability, (1) A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim. The employer had a legitimate aim in operating the test, the means of achieving that aim was not proportionate (Government Legal Service v Brookes (2017)).
- (c) There are potentially a number of options open to Fiona in regard to funding any future claim. First, she may opt to fund the claim by a private funding arrangement, either by an agreed hourly rate or by a fixed fee. Another option would be via a 'no win, no fee' arrangement. These may either be a Conditional Fee Agreement or a Damages Based Agreement. Both of these are contingency fee-based arrangements. She may have Legal Expenses Insurance included under her home contents, motor or bank account insurance. Due to the nature of the claim, that is discrimination, she may be eligible to obtain Legal Help and Legal Aid.

Question 4

- (a) Sandy Roberts is an employee who has worked at the local swimming pool for five years (two years continuous employment is required to make a claim). He has been dismissed and he is not in an excluded category of employment. He was dismissed only the previous week, which is within the three-month time limit, therefore, Sandy Roberts is eligible to make a claim for Unfair Dismissal.
- (b) Under s.80G Employment Rights Act (ERA) 1996, there are a number of grounds upon which an application for flexible working could be rejected. These include the burden of additional costs, the detrimental effect on ability to meet customer demand, the inability to re-organise work among existing staff, the inability to recruit additional staff, the detrimental impact on quality, the detrimental impact on performance, the insufficiency of work during the periods the employee proposes to work or planned structural changes.
- (c) First, it should be noted that there is no evidence of a mobility clause in the contract. Under s.139 ERA 1996, it will be a redundancy situation where there is a workplace closure, as is the case here. The offer of the role at the Medshire office will amount to an offer of alternative employment. The issue will be whether the offer is suitable or not. Suitability includes location of the alternative employment, here the alternative role is 50 miles away from the current role. This is a

substantial distance and, therefore, she could decline the offer and claim redundancy.

- (d) The person requesting the unpaid parental leave must have been an employee for at least a year and must be the parent (or adoptive parent) or have parental responsibility for the child. The child must be under 18.