

**CHIEF EXAMINER COMMENTS WITH
SUGGESTED POINTS FOR RESPONSES**

JANUARY 2021

LEVEL 3 - UNIT 6 – EMPLOYMENT LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses 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 points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Overall, the candidates performed well and were able to apply the law well. However, it is important to focus on the questions; for example, some candidates switched between the different types of dismissal when applying the law.

CANDIDATE PERFORMANCE FOR EACH QUESTION

It is a requirement for all questions and sub-questions to be referenced and commented on.

SECTION A

- 1.** There was a mixed response to this question, some candidates just listed two employee rights and did not consider whether or not a worker had those rights. Others suggested there was a right to be unfairly dismissed. Overall, most candidates responded well to this question. It is worth remembering that some rights are subject to the satisfaction of a qualifying period.

2. Most candidates were able to provide a relevant example and cite case law. Overall, this was well answered.
3. There was a considerable number of candidates who did not realise that the law in this area had been updated last year.
4. Overall, this question was answered well most candidates gaining a mark for the explanation and some correctly cited the Equality Act 2010.
5. This was answered well with most candidates explaining the law and giving example.
6. Unfortunately, some candidates answered this question as if it were asked in a tort or contract paper rather than focusing on when or if it could be a potentially fair reason for dismissal.
7. Overall, this question was answered well.
8. Most candidates provided a good explanation as to the advantages and disadvantages.
9. Most candidates were able to explain non-dealing covenants and the circumstances when they would not be enforceable.
10. Most candidates were able to identify two conditions under the Act.

SECTION B

Scenario 1

Q1(a). This is a standard question on employment law papers which was reflected in the responses given.

Q1(b). This question required the candidates to apply the law to all the facts of the scenario to see if criteria for unfair dismissal could be established. Candidates should consider all the facts and explain whether they are relevant or not. There was a broad range of responses to this question and unfortunately some contained little application.

Q1(c) Generally, this was answered well with most candidates recognising that an employer must show that they acted with procedural and substantive fairness.

2. This question was answered well.

3(a) This is a standard question, and most candidates identified the criteria for a wrongful dismissal.

3(b) Here the candidates were required to apply the criteria for wrongful dismissal. Most candidates were able to do this. Some candidates also discussed the possibility that, when taking into consideration that he had worked for the company for a long time, his long service could be considered when assessing his competency for the role.

4. It is important to recognise the different remedies available for the distinct types of dismissals. Some candidates still mix up the remedies for wrongful dismissal with those available for unfair dismissal.

Scenario 2

Q1. This question was answered well with the rules stated clearly and applied well to the facts.

2. Candidates who chose this scenario applied the law well to this question.

3. The responses to this question were mixed. Some responses were superbly detailed and contained the corresponding legal authority. However, some candidates began by explaining substantive fairness then switched between procedural and substantive fairness. Having said that most candidates were able to explain some of basic principles in relation to substantive fairness.

4. This question was answered well.

5(a) This question was answered well.

5(b) This part of the question was answered reasonably well. Most candidates recognised that she should get the minimum wage for her age range however, not all candidates took into consideration that the other receptionists are paid more than this.

Scenario 3

Q1. This question was answered well

Q2. There was a mixed response to this question. Most candidates recognised that there was a potential case for age discrimination. However, in some cases there was no consideration of the fact that it is not discrimination to pay different age ranges different amounts under the National Minimum Wage Act 1998. Candidates need to apply the law to all the relevant facts and not, automatically, assume that the minimum wage would apply when others are receiving more than the minimum.

Q3(a) The responses to this were good with most candidates explaining the burden and citing the relevant Act and section.

Q3(b) This question was answered well. Although it lacked case law in some responses.

Q4(a) The responses to this were good with most candidates focussing on the Equality Act 2010.

4(b) This question required an explanation and the application of the remedies available rather than a list of them.

4(c) Most candidates recognised that action was required in this situation, however they failed to mention why, from a legal point of view, why he had to prevent the harassment.

SUGGESTED POINTS FOR RESPONSE

LEVEL 3 - UNIT 6 – EMPLOYMENT LAW

The purpose of this document 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 Points for Responses 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.

Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

SECTION A

Question Number	Suggested Points for Responses	Marks (Max)
Q1	An identification that makes reference to the following points <ul style="list-style-type: none">• if unfairly dismissed after a qualifying period• for redundancy after the qualifying period• the right to maternity, paternity leave, etc	2
Q2	An explanation that makes reference to the following <ul style="list-style-type: none">• Implied duty to protect the health and safety of employee• e.g. <u>Wilson & Clyde Coal Ltd v English (1938)</u>• now statutory under the Health & Safety at Work Act 1974 examples e.g. <ul style="list-style-type: none">• a safely operating system of work• Safe tools, plant and materials,• adequate supervision• trained and efficient personnel	2
Q4	An explanation that makes reference to the following points <ul style="list-style-type: none">• Under s18 Equality Act 2010• The protected period starts when a woman becomes pregnant and can continue for up to one year	2
Q5	An explanation that makes reference to the following <ul style="list-style-type: none">• Employer's conduct forces the employee to resign• The employer must have repudiated the contract• This is a fundamental breach of the contract as it goes to the root of the contract. examples e.g. <ul style="list-style-type: none">• Harassment• Unilaterally changing the terms of the contract/ employee status• Demotion• Breach of implied duty of trust and confidence• e.g. <u>Morrow v Safeway Stores 2002</u>	5

Q6	An explanation that makes reference to the following points <ul style="list-style-type: none"> • illegal act was related to the work that the employee was employed to do • where there is no alternative employment available • e.g. <u>Appleyard v FM Smith (Hull) Ltd (1972)</u> 	3
Q7	An explanation that makes reference to the following points <ul style="list-style-type: none"> • If notice is given by the employer • then the date on which the notice expires • No notice • then date the dismissal takes effect – usually date they leave • Fixed term contract • then the date contract ends and is not renewed • Repudiation • Date the injured party accepts the repudiation 	4
Q8	An explanation that makes reference to the following points <ul style="list-style-type: none"> • ET only three months to issue claim whereas civil courts are 6 years • Maximum of £25,000 awarded in ET whereas civil courts are potentially unlimited • ET has no minimum claim but has to be £25,000 for the high court • No costs in the ET whereas there are costs in the Civil courts 	4
Q9	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Prevents an employee from soliciting clients from their current employer after the employment has ended • Prevents the ex-employee from working for clients of the former employee even if they are approached by the client • Only enforceable if go they go no further than is necessary to protect a legitimate business aim • It must be expressly stated in contract 	3
10	An explanation that makes reference to the following points. <ul style="list-style-type: none"> • HIV • Cancer • Aids • Multiple sclerosis 	2
Section A Total: 30 marks		

Section B - Scenario 1

Question Number	Suggested Points for Responses	Marks (Max)
Q1a	<p>An identification that makes reference to the following points</p> <ul style="list-style-type: none"> • Burden starts with the employee to establish • they satisfy the employee status tests • they are dismissed • have brought claim within 3 of months of EDT 	3
Q1b	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> • It states Beni is an employee but he often works overseas so could be excluded category • He must show he has a sufficiently strong connection to the UK • e.g. <u>Ravat v Haliburton Manufacturing 2012</u> <p>The connection should be proven as he</p> <ul style="list-style-type: none"> • is paid in Sterling into a UK account • 3 years continuous employment meets the criteria • under s108 Employment Rights Act 1996 • Providing this is not broken by his sickness • under s213 ERA 1996 • He has been ill less than 26 weeks • He has also received actual notice of his dismissal • He must bring is claim within 3 months of the EDT • Reasoned conclusion 	10
Q1c	<p>An identification that makes reference to the following points</p> <ul style="list-style-type: none"> • That there was a potentially fair reason to dismiss • That the employer has acted with substantive and procedural fairness • e.g by following theirs or the ACAS code of practice 	3
<i>Question 1 Total: 16 marks</i>		
Q2	<p>An explanation that makes reference to the following points e.g.</p> <ul style="list-style-type: none"> • Wrongful is a common law action for a breach of contract • Unfair dismissal is an assertion of a statutory right 	2
<i>Question 2 Total: 2 marks</i>		
Q3a	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> • Occurs where the employee is summarily dismissed without justification for the dismissal • Employee has not repudiated the contract • e.g. <u>Pepper v Webb 1969</u> • Dismissed with the incorrect notice • Either statutory s86 Employment Rights Act Act 1996 • Or contractually • No PILON is given • Claim has a maximum time limit of 6 years 	7

Q3b	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Beni has been summarily dismissed / not the correct notice • CCP will need to show this was justified • Beni has lied in his application • This is a breach of the implied duty of trust and confidence • Breach must be serious and go to the root of the contract • If he is competent in his job this may be difficult to show • Credit discussion as to whether or not 3 years evidences competence. • He should have received minimum of 3 weeks' notice, or • Contractual notice if higher • Reasoned conclusion 	10
<i>Question 3 Total: 17 marks</i>		
Q4	An explanation that makes reference to the following points <ul style="list-style-type: none"> • Areas of wages and salary earned during notice period • Values of his contractual benefits • e.g flights • any holiday pay accrued but not taken before the dismissal • as well as that which they would have accrued during the notice period • credit other relevant valid points 	
<i>Question 4 Total: 5 Marks</i>		
Scenario Total: 40 Marks		

Section B - Scenario 2

Question Number	Suggested Points for Responses	Marks (Max)
Q1	An explanation that makes reference to the following points <ul style="list-style-type: none"> • This relates to intellectual property rights • His contract should state that anything / written/ created etc by Archie • Becomes the property of the employer (KPP) • These are usually enforceable • provided that they were created during their employment • when carrying out their normal duties • were given as a specific assignment from the employer • The app belongs to KPP • reasoned conclusion • Credit reasonable responses 	7
<i>Question 1 Total: 7 marks</i>		

Q2	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> • This falls within s98(2) ERA 1996 • The Potentially fair reason of Conduct/ Misconduct • Archie’s conduct has led to a breakdown of the implied duty of trust and confidence • Archie conduct- remarketing the app himself /making secret profits • Likely to undermine the trust and confidence required for the working relationship to continue • This could be considered a repudiatory breach • Fundamental to contract / contract can no longer continue • allowing KPP to be justified in terminating the contract • e.g <u>Metroline West Ltd v Ajaj</u> (2015) 	10
<i>Question 2 Total: 10 marks</i>		
Q3	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> • S98(4) Employment Rights Act 1996 • KPP must act reasonably in all the circumstances • When dismissing Archie for adapting and using their app • This will be decided by the ET based on Equity and the substantial merits of the case • <u>Frozen Foods v Jones</u> 1983 • The decision to dismiss must fall ‘within the band of reasonable responses’ the employer would adopt • Not what the ET would have done • KPP acted reasonably / reasonable employer would have dismissed • Archie continued to use the app / refused to stop using it • Reasoned conclusion 	10
<i>Question 3 Total: 10 marks</i>		
Q4	<p>Identification of the following</p> <ul style="list-style-type: none"> • Re-engagement • Reinstatement • Financial award 	3
<i>Question 4 Total: 3 Marks</i>		
Q5a	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> • Contracts do not have to be in writing • Section 230 Employment Rights Act 1996 • This Act Identifies your rights should there be an issue. • Credit other relevant advantages 	3

Q5b	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> • National Minimum Wage Act 1998/ National Minimum Wage (Amendment) Regulations 2016 • Entitled to be paid the same the amount as the other receptionist • All entitled to at least the national minimum wage for their age range • Sandy is over 25 so £7.50 is breach / She would get £8.72 under the Act • But should be paid £10 same as others • Under the Working Time Regulation 1998 • She is also entitled to holiday pay which is 28 days per year for full time workers • Equivalent to 5.6 weeks • This includes bank holidays <p>if she is a full-time worker this is incorrect</p>	7
<i>Question 5 Total: 10 marks</i>		
Scenario Total: 40 marks		

Section B - Scenario 3

Question Number	Suggested Points for Responses	Marks (Max)
Q1	<p>Identification of the following points</p> <ul style="list-style-type: none"> • Discrimination • Harassment • Victimisation 	3
<i>Question 1 Total:3 marks</i>		
Q2	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> • Nadia is not being paid the same rate of pay as the other workers • As she is the 'baby' this implies age discrimination / she is younger • It is not discrimination to pay different age ranges different amounts under the National Minimum Wage Act 1998 • Pritesh is also of the same age range /21-24 • He is paid £10 per hour • Nadia is the only female worker and receives less pay than the men • This is Direct discrimination s13 • On the basis of sex s11 • Under s66 Equality Act contracts include a sex equality clause • They are doing like for like work • Nadia should receive the same as the male workers • 	9
<i>Question 2 Total: 9 marks</i>		

Q3a	<p>Responses should refer to the following</p> <ul style="list-style-type: none"> • Burden is on the claimant to establish a prima facie case • The employer will then be liable unless they can establish that their conduct was not unlawful • S136 EA 2010 	3
Q3b	<p>An explanation that makes reference to the following points</p> <ul style="list-style-type: none"> • Victimisation • S27 Equality Act 2010 • This is because he has suffered a detriment • By trying to assert his or • in this case somebody else's right not to be discriminated against • He tried to assert Nadia's right not be discriminated against • e.g <u>St Helens Borough Council v Derbyshire & others (2007)</u> 	7
<i>Question 3 Total: 10 marks</i>		
Q4a	<p>Responses should refer to any of the following</p> <ul style="list-style-type: none"> • S26 Equality Act 2010 • Harassment • Where A engages in unwanted conduct relevant to a protected characteristic • Xavier has a Disability • HIV • His colleague's conduct has the effect of creating an intimidating environment for him • Here the workers refusing to work with Xavier • And sniggering at him creates such an environment 	6
Q4b	<p>Responses should refer to any of the following</p> <ul style="list-style-type: none"> • S124 Equality Act A 2010 • A declaration of the rights of the parties • A recommendation as to action the employer should take • If the employer fails to comply with the recommendation, then compensation could be awarded instead • Financial compensation • Which has no statutory limit • Injury to feelings could also be awarded • <u>Vento v Chief Constable of West Yorkshire Police (No2) 2002</u> • There are three bands ranging from less serious to lengthy claims • Here likely to be serious but not within the highest band 	9

Q4c	Responses should refer to any of the following <ul style="list-style-type: none">• Richards is incorrect that there is nothing he can do• No requirement for the employees to intend to harass• Richard should consider how it effects Xavier• Not whether Richard sees it as harassment• Richard will be liable for the employees' remarks	3
<i>Question 4 Total: 18 marks</i>		