



## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 – UNIT 19 – THE PRACTICE OF 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 2022 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

The paper as a whole performed well, with a high pass rate and good grades overall. The very few failing candidate papers tended to either not recognise the areas of law examined in certain questions or provided very brief responses lacking sufficient detail to demonstrate Level 6 knowledge of the law.

The pass rate, while higher than previous sessions, is within the boundaries expected, given the small and strong cohort. This higher passing rate appears to be partly attributed to candidates reading and following the recommendations made in the previous Chief Examiner reports, per common pitfalls and ways to avoid these. These included making more effort to apply the law cited to the Case Study details, as well as not including details that are not examined; such as citing remedies where none are mentioned in the question.

The overall grading reflects an appropriate variation in pass, merit and distinction papers; demonstrating that the paper allows for stronger candidates to apply their skills, and weaker candidates to pass the exam should they make level-appropriate efforts.



## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Question 1(a)

The vast majority of candidates passed this question with overall moderate to high marks. Any failing answers (which were extremely rare) either provided very brief responses or failed to identify the area of law examined. There was good identification of the rights of the transferred employees under TUPE 2006. A few papers were slightly broad in explanation of the TUPE sections, but critical factors, such as preservation of terms, were also noted. ETO reasons were discussed in the most responses, as were issues related to dismissal under the ERA 1998. Stronger papers went into detail as to how the specific ETO issues applied within the question posed, with application of seminal case law. The relevant types of dismissal under the ERA 1998 were generally identified, however, only higher scoring papers also noted the failure to follow the ACAS Code. There were many legal issues to consider and apply within this question as they related to each character within the Case Study. The answers overall very well identified the majority of these issues and applied relevant statute to reach logical conclusions.

### (b)

Very strong answers were generally found to this relatively straight forward, lower mark, question. The requirements were noted in detail with supporting statute, allowing for passing marks. Higher scoring papers also considered relevant case law and applied the laws cited to the specifics of the Case Study.

### Question 2(a)

There were several breaches of family rights legislation examined within this question and the vast majority of papers identified the relevant breaches with supporting statute and some basic, but reasoned, application of law. This allowed for the vast majority of answers to safely reach the pass mark for the question. Any failing papers were insufficiently detailed per the overall breaches examined. Stronger papers provided greater detail on the legislative provisions underpinning the areas examined, as well as considering how the laws cited related to the specific issues within the Case Study. Higher scoring papers also identified the potential breach of discrimination legislation, with application per the CS.

### (b)

The majority of candidates recognised certain basic remedies applicable, with some relevant statute. However, several papers failed to identify the specific remedies applicable to each breach of legislation and, rather, provided overarching examples of remedies. Only stronger papers identified the remedies specific to each potential breach, including discrimination under the EA 2010. The few papers that failed this question did not adequately identify the relevant statutory remedies, per the Case Study

**Question 3(a)(i)**

The majority of candidates passed this question by identifying the relevant types of discrimination within the Case Study, with supporting statute and basic application. However, explanation of the law, with supporting cases and detailed application specific to the Case Study, were only evident in higher scoring papers. The failure to investigate the grievance was also only identified in stronger papers. The few papers that failed this question did not provide adequate detail or failed to recognise the relevant breaches of law.

**(ii)**

The vast majority of candidates identified relevant statutory remedies under the EA 2010, with case law also often evident. Potential vicarious liability was also frequently credited, whether mentioned in (a)(i) or (a)(ii). Only very few stronger papers identified the failure of grievance procedure, as relevant to a potential ACAS uplift.

**Question 4(a)(i)**

A few papers failed this question as they did not identify the relevant area of law and either left the question blank or provided details not relevant to the area examined. Most papers however broadly identified the possibility of appeal, with provision of few basic details allowing for an overall pass of the question. Only very few higher scoring papers identified the full appeal options, as credited.

**(ii)**

The majority of papers explained implied duties with supporting case law and some basic application per the Case Study, allowing for an overall pass mark of this question. Very few failing papers did not provide adequate detail or left the question blank. Higher scoring answers demonstrated a good level of detail per the relevant implied duties examined, with inclusion of several seminal case law examples. These papers also gave more detailed and critical application of these laws, per the finer details of the Case Study.

**(b)**

The clauses drafted tended to be quite brief, but overall relevant. Any failing papers did not provide adequate detail. The vast majority of candidates gave broadly relevant parameters and details within short clauses. Few high scoring papers provided detailed and Case Study specific clauses. Overall, the drafting was better than in previous sessions.

**SUGGESTED POINTS FOR RESPONSE****LEVEL 6 – UNIT 19 – THE PRACTICE OF EMPLOYMENT LAW**

Question Number	Suggested Points for Responses	Max Marks
<b>1(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"><li>• Identify that there has been a service provision change under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') 2006 Reg 3 (1) (b) and 3 (3) as the services of the customer support and complaints department has been outsourced from Curls and Sways to Persons and Products Ltd.</li><li>• Explain that Regulation 3 (1) (b) applies as a service activity by Curls and Sways in the CSCD has been stopped and taken over by Persons and Products Ltd, and there was a group of employees whose main job it was to carry out those activities for Curls and Sways.</li><li>• The CSCD services outsourced from Curls and Sways to Persons and Products Ltd are fundamentally the same before and after the transfer, Regulation 5</li><li>• Identify that Regulation 4(3) transfers employment contracts of individuals who were employed by the transferor immediately prior to the transfer and assigned to the relevant grouping of employees that is transferred. All contractual rights and liabilities under or in connection with the employment relationship are transferred. The CSCD would be a recognised grouping of employees.</li><li>• Explain that under Regulation 4 (4) where the transfer is the sole reason for variation of a term within a transferred employee's contract, this variation will be void.</li><li>• Eli Edmond</li><li>• Reg 7(1) where an employee is dismissed before the transfer he will be automatically unfairly dismissed if the sole or principal reason for the dismissal is the transfer itself or a reason that is not connected to an ETO reason.</li><li>• Identify that the dismissal of Eli Edmond appears to be automatically unfair as dismissal as a condition of sale is not recognised within Reg 7 (2).</li><li>• The economic reason must relate to the conduct of the business. Dismissal of an employee by the transferor as a means</li></ul>	<b>20</b>

	<p>of facilitating the transfer is not an ETO reason, <i>Wheeler v Patel (1987)</i>.</p> <ul style="list-style-type: none"> <li>• Identify that, although there has been a breach of Reg 7, <i>Curlis and Sways, not Persons and Products Ltd</i>, has automatically unfairly dismissed <i>Eli Edmond</i>.</li> <li>• <i>Demi Donn</i></li> <li>• Identify that <i>Demi Donn</i> may have been dismissed for an ETO reason of loss of profits due to the bankruptcy of the main client of <i>Persons and Products Ltd</i>.</li> <li>• <i>Demi Donn</i> has over two years employment and is protected from unfair dismissal.</li> <li>• TUPE 2006 does not explicitly define an economic reason but the Department of Business, Innovation and Skills suggests 'economic' is likely to refer to 'profitability'.</li> <li>• This reason also appears to meet the requirement of 'entailing changes in the workforce' <i>Delabole Slate Co Ltd v Berriman (1985)</i>.</li> <li>• Identify that dismissal for an ETO reason falls under s98 ERA 1998 dismissal for 'some other substantial reason'.</li> <li>• <i>Persons and Products</i> is required to show procedural fairness in dismissal s98(4) Employment Rights Act 1996.</li> <li>• Identify that the dismissal was without warning so it is unlikely the dismissal was procedurally fair.</li> <li>• The ACAS Code does not appear to have been followed in the dismissal procedure.</li> <li>• Credit any reasoned arguments .</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Further examples of case law on service provision changes, <i>Seawell v Ceva (2012)</i> and procedural fairness, <i>British Homes Stores v Burchell (1978)</i></li> </ul>	
<b>1(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Explain that the agreement is a settlement agreement and must meet the requirements of s203 (3) Employment Rights Act 1996 and S111A of the ERA 1996.</li> <li>• Identify that the email exchange/agreement between <i>Aisha Bennett</i> and <i>Demi Donn</i> lacks the following formalities:</li> </ul>	<b>8</b>

	<ul style="list-style-type: none"> <li>• The agreement must be in writing and relating to a particular proceeding or complaint.</li> <li>• The employee must have received independent advice from a qualified professional completely independent of the employer.</li> <li>• This adviser must inform the employee on the terms and effect of the proposed agreement</li> <li>• 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.</li> <li>• The adviser must be identified in the agreement and the agreement must state that the above conditions are satisfied.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Explain that Persons and Products may be able to enter a settlement agreement with Demi Donn as her case relates to potentially unfair dismissal due to a lack procedural fairness.</li> <li>• The settlement agreement should 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.</li> </ul>	
<b>Question 1 Total:</b>		<b>28 marks</b>

Question Number	Suggested Points for Responses	Max Marks
<b>2(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Explain that under the Employment Rights Act 1996 s57A an employee is allowed paid time off to respond to emergencies involving a dependant or a child under the age of 18 years. Emergencies include when a dependant is injured.</li> <li>• Leela Laghari is the parent of a young child/ a dependant. A young child falling over and hitting their head is likely considered an emergency.</li> <li>• Her employer has breached her rights by not allowing her time off in an emergency.</li> <li>• Explain the right to request flexible working, including change of hours, S80F ERA 1996</li> </ul>	<b>13</b>

- Leela Laghari is a qualifying employee as she has worked for a minimum of three years, exceeding the length of service requirement of 26 weeks.
- One request may be made every 12 months, Leela Laghari has never made a request for change in the prior three years.
- Identify that the request made by Leela Laghari does not meet the statutory requirements under S80F ERA 1996 as it does not specify that it is an application for flexible working, the change applied for and date on which it should become effective, what effect, if any the employee thinks the change would have on the employer and how they think such effect might be dealt with. It is however in writing, as required.
- Explain that the reason given by Tommy Taylor for refusing the leave is not recognised under s80G ERA 1996 and he has not dealt with the application in a reasonable manner and suggests a breach of the ERA 1996. However, as Leela Laghari's application does not meet statutory requirements, this may not be a successful claim. Credit any reasoned argument.
- Identify that Leela Laghari has the right to attend antenatal appointments
- All employees have the right to time off for antenatal care, s55 ERA 1996
- Explain that the time off is paid s56 ERA 1996.
- Appointments with a midwife are recognised.
- However, Leela Laghari must provide a certificate of pregnancy and appointment card, if requested by Queens Clothing.
- The time off must not be unreasonably refused and must be paid. By not paying for leave, Queens Clothing has breached s57 ERA 1996.
- Identify that Queens Clothing may also be committing sex discrimination EA 2010 by not paying for ante natal leave .

Responses could include:

- Formal flexible working request can be submitted
- Good practice to allow employee to appeal decision on flexible working request.

	<ul style="list-style-type: none"> <li>• s80G ERA 1996 examples of prescribed statutory reasons for refusal of flexible working request; additional costs, detrimental effect on business quality or performance and insufficient work during periods employee proposes to work and planned structural change.</li> <li>• Any relevant case law</li> </ul>	
<b>2(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Explain that Leela Laghari’s request for time off in an emergency appears to have been unreasonably refused by her employer. She can bring a claim for compensation in the employment tribunal within 3 months under s57B ERA 1996.</li> <li>• Explain that if a request for flexible working is unreasonably refused, the employee can pursue a claim in the ET, s80H ERA 1996. The tribunal can issue a declaration, recommendation or re-consideration of the decision, and/or award compensation up to eight weeks gross pay. However, as Leela Laghari’s application did not meet statutory requirements, this claim may not be successful. Credit any reasoned arguments.</li> <li>• Identify that Leela Laghari has a right to time off for antenatal care. There is no qualifying service requirement, s55 ERA 1996 and the time of is paid s56 ERA 1996. Her employer has unreasonably refused to pay for time off.</li> <li>• She can complain to the ET under s57 ERA 1996. The ET can make a declaration under s57(3) ERA 1996 and order employer to pay the employee if leave unreasonably refused.</li> <li>• Identify that Leela Laghari may also have a claim for sex discrimination under s6 EA 2010. The ET may make an order of declaration of rights s124 (2) (a) EA 2010, a recommendation s124 (2) (c), compensation with no upper limit s124 (2).</li> </ul> <p>Responses could include:</p> <p>ET claim must be brought within three months</p>	<b>9</b>
<b>Question 2 Total:</b>		<b>22 marks</b>

Question Number	Suggested Points for Responses	Max Marks
<b>3(a)(i)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identify that Zoe Zayn has been discriminated against under the Equality Act 2010.</li> <li>• Explain the s4 EA 2010 definition of direct discrimination as occurring when a person is treated less favourably on the basis of a protected characteristic.</li> <li>• Explain that Zoe Zayn has been denied an opportunity for promotion due to Michael Madden not putting her forward to interview on the basis that the female members of the team ‘would struggle to cope with the position’, and his wanting to still see Zoe Zayn’s ‘pretty face’...</li> <li>• Zoe Zayn has therefore been directly discriminated against on the basis of the protected characteristic of sex s6, as she was treated less favourably than her male colleague.</li> <li>• Explain the s26 EA 2010 definition of harassment as unwanted conduct in relation to a protected characteristic or unwanted conduct of a sexual nature which has the purpose or effect of violating another’s dignity or creating an intimidating hostile degrading humiliating or offensive environment for another person.</li> <li>• The comments made to Zoe Zayn by Michael Madden are of a personal nature and arguably sexual nature.</li> <li>• The comments have made her ‘skin crawl’ and she avoids being alone with him.</li> <li>• This suggest that the definition of harassment has been met and the working environment has become hostile for Zoe Zayn on the basis of the comments made by Michael Madden.</li> <li>• Although a single act may be harassment, repeated acts reinforce a finding of harassment. Zoe Zayn has been subject to repeated comments for a two year period since she made the first complaint.</li> <li>• Identify that Zoe Zayn’s right to have her grievance investigated has been denied.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Equality Act 2010 as long as the recipient’s reaction is deemed a ‘reasonable’ response to the comments, then it will fall under</li> </ul>	<b>12</b>

	<p>the definition of harassment. Zoe Zayn’s reaction appears reasonable.</p> <ul style="list-style-type: none"> <li>• <u>Minto v Wernick Event Hire Ltd (2011)</u> comments take on a more harassing dynamic where the relationship is one where the employee feels they have to accept the comments or risk losing their job.</li> <li>• Any relevant case law</li> </ul>	
<b>3(a)(ii)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• The ET may make an order of declaration of rights s124 (2) (a) EA 2010, a recommendation s124 (2) (c), compensation with no upper limit s124 (2) (financial loss, loss of earnings and injury to feelings.</li> <li>• Explain that Zoe Zayn may seek recovery for injury to feelings and loss of promotion opportunity</li> <li>• Explain the new Vento bands from April 2020</li> <li>• <u>Vento v Chief Constable of West Yorkshire Police (No2) (2003)</u> lower band £900 to £9,000, middle band, £9,000 to £27,000, upper band, £27,000 to £45,000, exceptional cases exceeding £45,000.</li> <li>• Zoe Zayn is likely to be able to seek damages in the middle band due to the repeated nature of the discrimination ,as well as the potential loss of ‘professional standing’ in the promotion.</li> <li>• Identify that Zoe Zayn may make a claim against Michael Madden s110 EA 2010 and she may also claim against Vesses Ltd under vicarious liability</li> <li>• The discrimination occurred within the working environment and Vesses Ltd appear to have failed to take reasonable steps to protect against discrimination as the HR officer did not follow up on Zoe Zayn complaint</li> <li>• Therefore the s109 (4) EA 2010 defence would not likely apply to Vesses Ltd.</li> <li>• Identify the relevance of Vesses Ltd’ s failure to follow ACAS Code on grievance. The ACAS Code is not legally binding, however, failure to follow the code can result in 25% uplift of any award.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Michael Madden will be liable unless he can establish he did not commit the act of discrimination complained of, s136 EA 2010</li> </ul>	<b>8</b>

	<ul style="list-style-type: none"> <li>Any relevant case law</li> </ul>	
<b>3(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>S13 (5) EReA 1999 Vesses Ltd should have a grievance policy and procedure. If there is no such policy, ACAS Code of Conduct should be followed at a minimum.</li> <li>After Zoe Zayn raised a complaint with HR officer, there should have been a grievance meeting held with her and a manager who is not the subject of the complaint</li> <li>Zoe Zayn should have been allowed to be accompanied at meeting</li> <li>A decision should have been made and communicated to Zoe Zayn in writing without unreasonable delay</li> <li>She should have been informed of the right to appeal any decision</li> <li>Cross credit a ii, aii and b in relation to ACAS procedure</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>As the complaint is of a discriminatory and arguably sexual nature, an informal grievance would likely not be sufficient.</li> <li>Zoe Zayn could have been accompanied by a fellow worker, a trade union representative, an official employed by a trade union or her choice of companion.</li> </ul>	<b>6</b>
<b>Question 3 Total:</b>		<b>26 marks</b>

Question Number	Suggested Points for Responses	Max Marks
<b>4(a)(i)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>Identify that Industry Ignited has right to appeal the ET decision within the Employment Appeal Tribunal (EAT), Court of Appeal and Supreme Court</li> <li>Explain that appeals may only be on a question of law, not the tribunal's decision on facts</li> <li>The time limit for appeal is 42 days</li> <li>Industry Ignited must complete a Notice of Appeal Form and send to the tribunal within this time limit</li> <li>Explain that Industry Ignited may also seek a review of an employment tribunal decision but must do so within 14 days</li> </ul>	<b>6</b>

	<p>Responses could include:</p> <ul style="list-style-type: none"> <li>• If Industry Ignited Ltd wish to seek a review of the ET decision it will need to be prompt as one week has already elapsed since they found out the ET decision</li> </ul>	
<b>4(a)(ii)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Explain that implied contractual terms can protect Industry Ignited Ltd in the absence of express contractual terms.</li> <li>• Identify that Uri Opus appears to have breached the implied duty of confidentiality which states that the employee cannot disclose, either during or after the employment, confidential information.</li> <li>• Uri Opus has used, in his new role with a competitor, sensitive information he was privy to in his employment with Industry Ignited Ltd. This is likely to meet the definition of ‘confidential’ information and support a finding of a breach of this implied term.</li> <li>• Identify that Uri Opus was a long standing, senior employee, reinforcing a finding that he held confidential information and breached this implied term.</li> <li>• Identify that Uri Opus may have also breached the implied duty of employee loyalty and fidelity that includes a duty not to disclose confidential information.</li> <li>• However, this implied term applies during employment but not after, unless Industry Ignited can prove that the information disseminated was a ‘trade secret’, <u>Faccenda Chicken v Fowler (1986)</u>. As the information is ‘sensitive’ this may be argued.</li> <li>• Credit any reasoned conclusion.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• It is in the interest of Industry Ignited to define what it considers ‘confidential information’ in the contract of employment , <u>Bartholomews Agri Food Ltd v Thornton (2016)</u></li> <li>• Any relevant case law</li> </ul>	<b>9</b>
<b>4(b)</b>	<p>Responses should include:</p> <p><i>The clause should be drafted narrowly in terms of duration and geographical extent</i></p> <p>The definition of a ‘competitor’ should be clear</p>	<b>9</b>

	<p>The definition of 'work' should be clear. Including but not limited to 'work' is any competitive business activity, including the offering of freelance services that compete with the company and the setting up of a business in competition with the company.</p> <p>The duration should generally not exceed 6-12 months following termination of employment, depending on seniority.</p> <p>The extent should not exceed 10 miles from the location of prior employment, unless virtual services are referenced, where a UK wide restriction would be allowed.</p> <p>'Information' should also be defined, including but not limited to 'details of former and existing customers, clients and business contacts of the company'.</p> <p>Responses could include:</p> <p>Identify that non competition clauses require particularly narrow drafting as they are a restraint of trade</p>	
<b>Question 4 Total:</b>		<b>24 marks</b>