

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 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 June 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

Some of the questions, that were similar to previous questions were not answered as well as they had been in previous papers. Section A did not perform as well as it had in previous exam sittings.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION A

Question 1

This was generally answered well with most candidates receiving maximum marks. Those that did not generally did not give two distinguishable suggestions.

Question 2

This was generally well answered but some candidates discussed alternative implied duties so it is important to read the question carefully.

Question 3 This was answered well.

Question 4 Candidates performed well with this question.

Question 5

Most candidates were able to identify some of the ways in which a dismissal can occur and some also identified the correct Act and section for the additional mark.

Question 6

Those that answered this question performed well by explaining the duty and giving examples of when it applies.

Question 7

This was answered reasonably well. Those that did not do well answered this particular question as the question was asking for list of what might be awarded in a claim for wrongful dismissal rather than how the factors used to calculate the basic award. It is important that candidates can distinguish between wrongful and unfair dismissal.

Question 8

This is a standard question which most candidates were able to identify the requirements.

Question 9

Some candidates were able to cite the relevant statute and explain the law well. Most candidates were able to give relevant examples of what could or could not be deducted.

Question 10 Most candidates answered this correctly.

Section B

Scenario 1

Question 1

It is important that candidates do not just list the factors from the scenario. Candidates are expected to clearly identify and apply the factors so they must clearly state whether the factors indicate whether or not someone could be an employee, worker or self-employed. The key test to consider is the multiple test and others that follow this.

Question 2(a)

Credit is given here in accordance with the six-month rule. Some candidates did not recognise the band that laurel would fall within.

2(b)

Most candidates answered this well. Some candidates also considered her holiday allowance and whether or not this was met.

Question 3 This was generally answered well.

Question 4 Overall this was answered reasonably well.

Question 5 Most candidates were able to gain full marks with this question.

Scenario 2

Question 1 This question was answered well.

Question 2(a)

Candidates generally did well with this question and identified capability and or conduct as a potential fair reason for dismissal. The explanations as to why it could be either were generally well explained. Most candidates explained the reason of conduct well.

(b)

Candidates needed to focus on the requirement of substantive fairness as this question is not asking about procedural fairness. Most candidates performed reasonably well.

Question 3

Most candidates recognised and explained the potential claims and applied them reasonably well.

Question 4(a)

Most candidates are able to recognise the criteria for victimisation and applied the law to the facts reasonably well.

(b)

Most candidates identified the correct remedies but there were some who identified the remedies for unfair dismissal.

Scenario 3

Question 1(a)

Most candidates answered this question well and cited the correct section within the Equality Act 2010.

1(b) Most candidates identified the relevant points here.

Question 2

Most candidates explained that it would not be discrimination to treat a disabled person more favourably than a non-disabled person. Where marks were missed it was usually where candidates did not say how the factors the tribunal would consider would apply here to ascertain what would or would not be a reasonable adjustment.

Question 3(a)

Most candidates recognised that race discrimination did not apply here. However, some candidates did not say so. It is important to apply the law to say why something does not apply. Most candidates also explained that this is more likely to fall under the characteristic of religion or belief.

(b)

This was well answered with most candidates gaining full marks.

Question 4(a)

This question was answered reasonably well with some candidates obtaining maximum marks.

(b) Most candidates applied the law well here.

SUGGESTED POINTS FOR RESPONSES 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 June 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	Max Marks
Q1	<ul style="list-style-type: none"> • Freedom of contract • Not protected from unfair dismissal 	2
Q2	<ul style="list-style-type: none"> • This requires the employee to be loyal to their employer <p>They must</p> <ul style="list-style-type: none"> • Not work for a rival • Respect trade secrets • And account for all profits • e.g Faccenda Chicken Ltd v Fowler 1986 	3
Q3	<ul style="list-style-type: none"> • Some rights are only available on the completion of a set period • e.g compensation for redundancy / unfair dismissal • Ss210-291 Employment Rights Act 1996 <p>note other specific sections should get credit in any discussion e.g. s.108 ERA 1996.</p>	2
Q4	<ul style="list-style-type: none"> • Unwanted conduct related to a protected characteristic • Unwanted conduct of a sexual nature • Or related to gender reassignment or sex • That violated dignity and creates a hostile, • Degrading or humiliating environment for B 	4
Q5	<ul style="list-style-type: none"> • S95(1) Employment Rights Act 1996 • Contract is terminated by the employer (e.g redundancy) • A limited term/ fixed term contracts comes to end • Constructive dismissal 	4
Q6	<ul style="list-style-type: none"> • Not providing work It would lead to a loss of publicity or reputation • e.g. media personality • Would lead to a reduction in actual / potential earnings • e.g commission work • It will affect the ability to obtain other work • e.g skilled workers 	4
Q7	<ul style="list-style-type: none"> • Basic pay is awarded in all cases, irrespective of loss <p>It takes into account</p> <ul style="list-style-type: none"> • The length of service • Which is capped at 20 years • The weekly pay • Also has a statutory cap of £538 • As well as the age ranges of the claimant 	4

Q8	<ul style="list-style-type: none"> • Must be an employee • Not an excluded category • Two years continuous employment • Was dismissed • Bring the claim within three months 	3
Q9	<ul style="list-style-type: none"> • Employment Rights Act 1996 (1) • Generally, employers are not permitted to make unlawful deductions unless authorised by (1) <p>Any one example</p> <ul style="list-style-type: none"> • statute • by contract • or with the employees express consent 	3
Q10	<ul style="list-style-type: none"> • The amount of damages awarded 	1
Total: 30 marks		

Section B - Scenario 1

Question Number	Suggested points for responses	Max Marks
Q1	<ul style="list-style-type: none"> • It is likely that laurel is an employee based on the following criteria; • Long service history • She is provided with company equipment • vest, bodycam and walkie talkie • Staff benefits such as staff discount and lunch vouchers • Subject to company disciplinary procedures • However, these factors could also indicate she is a worker • Also, she can select which days and hours she works • She has a certain freedom of contract in that she chose not to work during August • She also supplies her work uniform indicating she is self-employed • e.g Ready Mix Concrete (south East) Ltd v Minister of pensions 1968 • Reasoned conclusion 	9
Question 1 Total: 9 Marks		
Q2(a)	<ul style="list-style-type: none"> • Laurel is 24 so she falls within the 21-24 age range • National Minimum Wage Act 1998 • The correct wage for her age is £8.20 • She is therefore being paid above this <p>Or</p> <ul style="list-style-type: none"> • National Minimum Wage Act 1998 • Laurel is over 23 • The correct wage is £8.91 • She is therefore paid above 	4
Q2(b)	<ul style="list-style-type: none"> • The <u>Working Time Regulations 1998</u> • <u>Reg 4</u> • Employer must take all reasonable steps to ensure employee's working time does not exceed 48 hours over a seven- day period. • This is calculated/ averaged out over a 17 -week period • Laurel is working 13 hours per shift/ 52 hours per week • This exceeds the maximum working week for employees/ workers • In order to work these hours, she should have 'opted out' • Laurel is also entitled to a rest break of 20 minutes per shift as she works more than six hours • Weekly rest break entitlement is satisfied • Laurel is also entitled to 28 days holiday per year • Including bank holidays • It appears this is satisfied as she takes off the whole of August 	10
Question 2 Total: 14 Marks		
Q3	<ul style="list-style-type: none"> • A wrongful dismissal is a claim for a breach of contract 	8

	<ul style="list-style-type: none"> • Laurel will need to show that she has been dismissed with less than her contractual or statutory notice • Laurel is entitled to 3- weeks statutory notice • <u>S86 Employment Rights Act 1996</u> • Laurel has not received any PILON • Laurel will also need to show that she has not committed a fundamental / repudiatory breach • that would allow for a summary dismissal • Theft of produce is usually grounds for a summary dismissal • However, it appears that the broken biscuits have been regularly eaten by staff and is accepted within the store • This may not amount to gross misconduct • Therefore, unjustified dismissal 	
Question 3 Total: 8 Marks		
Q4	<p>Laurel would be entitled to:</p> <ul style="list-style-type: none"> • Arrears of wages earned before she was dismissed • Wages she would have earned during the notice period • After tax and NI is deducted • Monetary value of her contractual benefits • e.g the daily food vouchers • holiday earned but not yet taken before the date on which the employee would have left had they been given the correct notice 	6
Question 4 Total: 6 Marks		
Q5	<ul style="list-style-type: none"> • Laurel could claim direct discrimination s13 • Protected characteristic under s.4 EA 2010. • Under s11 sex • As she has been dismissed which is less favourable treatment • As the male security officer also ate the biscuits but was not dismissed 	3
Scenario 1 Total		40 Marks

Section B - Scenario 2

Question Number	Suggested points for responses	Max Marks
Q1	<ul style="list-style-type: none"> • Capability • Illegality • Redundancy • Some other substantive reason • Conduct • Statutory restriction 	3
Question 1 Total: 3 marks		
Q2(a)	<p>Potentially fair reason of Capability Eddie claims lacks the capability</p> <ul style="list-style-type: none"> • Eddie should assess Kevin’s capability • by taking into account his skills, ability, physical and mental health • S98(3) Employment Rights Act 1996 • The capability must relate to the work he is doing • Here it is as it relates to his capability to drive / is part of his job • Reasoned conclusion <p>Potentially fair reason of conduct</p> <ul style="list-style-type: none"> • S98(2) Employment Rights Act 1996 • This relates to misconduct • Usually the employer would have to show a pattern of misconduct or gross misconduct • e.g violence or theft • Dent to the van could amount to gross misconduct • If dangerously/ illegally parked • A single act of incompetence / misconduct rarely justifies dismissal • E.g. Taylor v Alidair Ltd 1978 • Kevin’s performance at work is usually a high standard • Numerous employee of the month awards / good work ethics • Likely unfair dismissal 	10
2(b)	<ul style="list-style-type: none"> • S98(4) Employment Rights Act 1996 • Eddie must act reasonably in treating the reason as sufficient when dismissing • Iceland Frozen Foods v Jones 1983 • Eddie must have acted within the band of reasonable responses • That a reasonable employer would have used • Not whether the ET would have dismissed • Midland Bank v Madden 2000 • Reasoned conclusion 	7
Question 2 Total: 17 Marks		
Q3	<ul style="list-style-type: none"> • Harassment • s26 • Unwanted conduct that 	10

	<ul style="list-style-type: none"> • creates a hostile and degrading workplace • It also appears that Eddie wanted to dismiss Kevin to bring in younger workers • Eddie, therefore, belongs to a particular age range • This is Direct discrimination • Under S13 Equality Act 2010 • age s5 • Where A is treated less favourable due to a protected characteristic • Kevin has been treated less fairly as he was dismissed • reasoned conclusion 	
	Question 3 Total 10 Marks	
Q4(a)	<ul style="list-style-type: none"> • Tia could claim for victimisation • This is where B is subjected to a detriment • because they have enforced or attempted to enforce • Tia has suffered a detriment as he shifts/ holidays changed • Theirs or someone else's legal right to be protected from discrimination • S 27 • Potentially applies to all protected characteristics • Here it is arguable that Tia has tried to protect Kevin's right not to be discriminated against • Based on age • E.g. St Helens Borough Council v Derbyshire and Others 2007 • Reasoned conclusion 	7
Q4b	<ul style="list-style-type: none"> • Declaration of the parties' rights • Recommendation of the actions the employer should take • Financial compensation 	3
	Question 4 Total: 10 Marks	
	Scenario 2 Total: 40 Marks	

Section B - Scenario 3

Question Number	Suggested points for responses	Max Marks
Q1(a)	<ul style="list-style-type: none"> • Under s20 Equality Act 2010 • there is a duty to make reasonable adjustments where a provision, practice or criterion would put a disabled person at a disadvantage • steps should be taken to avoid this • Where a physical feature would put a disabled person at a disadvantage • The feature should be removed • Or where a person would not be put at a substantial advantage if an auxiliary aid was provided • The aid should be provided • The employee should not be made responsible for the cost of the adjustments 	6
Q1(b)	<ul style="list-style-type: none"> • How effective the change will be • The practicality of the change • And the cost of the adjustment • Taking account of the employer's resources • Employment statutory Code of Conduct 	5
Question 1 Total: 11 marks		
2(a)	<ul style="list-style-type: none"> • Andy is incorrect/ He does not have to treat all the staff equally • There is duty to provide reasonable adjustments • Even if it means treating non-disabled staff less favourably • Archibald v Fife Council 2004 • Providing the adjustment is 'reasonable' • Jeff could have been reassigned to cleaning the offices • This would not cost anything • It is a practical solution as he would be able to sit down often • The change would be effective • it would lessen the chance of more clots 	7
2(b)	<ul style="list-style-type: none"> • Under s21 Equality Act 2021 • A failure to provide a reasonable adjustment could be classed as discrimination • Employer could be liable for a claim of discrimination 	2 marks
Question 2 Total: 9 Marks		
Q3(a)	<ul style="list-style-type: none"> • Mo cannot sue for race discrimination • As he does not meet the criteria for a racial group • Shared history and culture • Islam is a religion not a race 	6

	<ul style="list-style-type: none"> • Mo's protected characteristic would be religion or belief • S10 • He practices a traditional religion 	
3(b)	<ul style="list-style-type: none"> • Under s139 the burden of proof is that • Mo must establish that Andy has acted unlawfully • Andy then has to establish that he has not acted unlawfully 	3
Question 3 Total: 9 Marks		
Q4(a)	<ul style="list-style-type: none"> • This is where employer's conduct effectively forces the employee to resign • The employer must have committed a fundamental breach of the contract • Must go to the root • e.g Western Excavation Ltd v Sharp 1978 • It could include (any one example) • e.g unilaterally changing the terms of a contract • Demotion • Public humiliation • It can be a breach of an implied or express term 	5
4(b)	<ul style="list-style-type: none"> • Mo may be able to claim constructive dismissal • Andy has committed a fundamental breach • Andy has undermined the trust and confidence required for the working relationship to continue • Andy is effectively forcing Mo to resign • Breach of the implied duty of trust and confidence • e.g. Morrow v Safeway Stores 2002 • This can be a one-off incidence • or the 'last straw' • He has publicly humiliated Mo • and not allowed his holiday 	6
Question 4 Total: 11 Marks		
Scenario 3 Total: 40 Marks		