

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021  
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 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

There were overall no problems regarding the identification of legal issues nor the recognition of relevant supporting laws throughout the paper. The majority of candidates also included general application of the relevant law to the specifics of the case study. However, overall performance would be improved with more meticulous consideration of the finer details of the case study. This would ensure that, not only are the more obvious legal breaches addressed, but also the finer points of legal interference. This more careful approach would allow candidates to better demonstrate knowledge of how each of the relevant factors within the case study shapes the final legal conclusions reached.

Furthermore, while the drafting of the ET1 content was overall good, several candidates appear to have run out of time when reaching this final question. When reaching this question, several papers contain outlines of what would have been a good answer, but obviously do not achieve high grades due to presenting an incomplete response. Therefore, strict time management is suggested to ensure that adequate opportunity remains to address the latter parts of the paper. This was particularly important in this series as the final question was a high mark drafting exercise. Candidates should also be reminded to thoroughly read through the paper before beginning the exam. By doing so, they will be aware of the level of difficulty and mark value of each question and should allow an appropriate amount to sufficiently address each question.

Overall, there are no issues per knowledge and law. Application is also overall well-reasoned but could be slightly more detailed and specific to the case study. Time management needs to be addressed, per above suggestions.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Question 1(a)

The majority of candidates performed very well, with many scoring their highest marks overall with their response to this question. These high scoring papers identified the need to discuss both restrictive covenants and garden leave clauses and cited a range of relevant case law to support knowledge. There was also application of precedent to the specifics of the case study to produce overall detailed and reasoned conclusions. A few papers failed to note the relevance of garden leave clauses, but well addressed restrictive covenants; these papers either marginally failed or marginally passed, depending on the quality of the discussion. The few papers that did not pass this question did so by failing to recognise legal principles and provide detailed and supported application, per the case study. Most papers passed this question with a high grade.

### (b)

The majority of candidates recognised the relevance of both injunctions and damages, with few also citing relevant case law. The application of damages however tended to not sufficiently consider the specifics of the case study, with few notable exceptions. Most papers passed this question with a low to moderate grade.

### Question 2(a)

The majority of candidates performed moderately well to very well in this question. There was overall relevant explanation of principles and higher scoring papers made good use of statute to reinforce the arguments presented. The few papers that failed the question did so marginally and due to providing insufficient detail to this broad scope question.

### (b)

Both equal pay and harassment issues were identified within the majority of papers; few candidates addressed either one of the topics only, these papers clearly to marginally failed, depending on the quality of the content per the one area addressed. Most papers cited statute relevant to both legal areas examined, with higher scoring papers also noting appropriate case law. The application of law was overall relevant and credible. While a few more of the case study specifics could have been more consistently applied, the vast majority of candidates correctly recognised and applied relevant law to reach logical conclusions.

### **Question 3(a)**

A relatively straight forward question that produced a variety of answers, most of which being clear passes. Higher scoring papers noted specific points reinforced with law. Moderately scoring papers cited broad points of discussion that also overall sufficiently covered the examined 'independent advice requirements'. The few papers that failed this question either provided insufficient information or failed to adequately address independent advice requirements within broad discussions on settlement agreements.

#### **(b)**

A relatively straight forward question with a high pass rate. The majority of candidates recognised and cited relevant statutory governance underpinning the issues examined. While certain responses could have considered a few more case study details when applying these laws, the vast majority of answers were well reasoned and specific to the question.

#### **(c)**

The majority of candidates answered this relatively straight forward question with recognition of correct statutory provisions, appropriate consideration of case study details and application of relevant remedies. The specifics of the case study were overall well addressed in applying these principles to the question with accurate conclusions. The few papers that failed this question did recognise the relevant statute but provided insufficient levels of detail and application of that law to the case study.

### **Question 4(a)**

A simple, low mark question which produced high scores, as expected. The majority of candidates recognised the relevant statute, and some also cited cases. Application of law was overall specific and detailed per the case study.

#### **(b)**

The majority of candidates passed this question by recognising some of the relevant types of discrimination arising within the case study, with supporting statute and some brief, reasoned application. However, only higher scoring papers recognised all the relevant breaches, with supporting legislation and case law. Application tended to be overall logical but at times could have considered case study factors in slightly more detail when applying the laws correctly cited. Conclusions were generally well reasoned and accurate.

#### **(c)**

The contents of the ET1 form were overall specific to the case study and accurately detailed within the vast majority of papers. This aspect of the paper performed better than expected as drafting exercises are often not well received. This exercise however resulted in strong answers scoring moderately high to high grades overall. The few candidates that failed this question appeared to do so due to running out of time. This is apparent as outlines of

what would have been good answers were sometimes provided, while other candidates had started well and then abruptly stopped, apparently running low on time.

**SUGGESTED POINTS FOR RESPONSES**  
**LEVEL 6 – UNIT 19 - THE PRACTICE OF 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.

Question Number	Suggested points for responses	Max Marks
Q1(a)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identify that Clause 9.2 contains a restrictive covenant and a garden leave clause.</li> <li>• Restrictive covenants are prima facie void for public policy reasons/ prevention of restraint of trade</li> <li>• Clause 9.2 will be enforceable if it protects a legitimate business interest and is reasonable in terms of scope, duration, nature of information protected and appropriate to the seniority of the employee.</li> <li>• Case by case interpretation of legitimate interests, scope and duration, <u>Fellows v Fisher</u> (1976), <u>Printers and Finishers Ltd v Holloway</u> (1965).</li> <li>• The restrictive covenant should be appropriate for the level of job involved, <u>Patsystems Holdings Ltd v Neilly</u> (2012).</li> <li>• Application: Farah Glenn is the head of marketing , had access to confidential information and clients and is a senior employee.</li> <li>• She has been with the company in this senior role for a significant time- 6 years</li> </ul>	12

	<ul style="list-style-type: none"> <li>• Higher Readings Ltd is likely a competitor of Brianne’s Bookstore, for purpose of the restrictive covenant, as the businesses operate in the same field, their locations are very proximate and the specific roles involved are the same (head/director of marketing)</li> <li>• The ‘clientele’ calibre argument against ‘competitor’ status is unlikely relevant as they both sell a ‘wide range of books’.</li> <li>• 12 months and 20 miles appear reasonable restrictions given Farah Glenn’s position within Brianne’s Bookstore.</li> <li>• The fact that Higher Reading Ltd is less than 10 miles from Brianne’s Bookstore further reinforces likelihood of breach of restrictive covenant.</li>   <li>• Clause 9.2 also contains a garden leave clause requiring Farah Glenn to stay at home during her notice period.</li>   <li>• This is likely binding as she is privy to confidential information and this would prevent her gaining more such knowledge during her notice period.</li>   <li>• Clause 9.2 appears enforceable against Farah Glenn</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Further case law examples including, but not limited to non-competition covenants in <i>Fitch v Dewes (1921)</i>, non-dealing covenants, <i>Towry Ltd v Barry Bennett (2012)</i>.</li> <li>• The courts may utilise the ‘blue pencil test’ to sever any part of a restrictive covenant that is deemed too wide on the tests above.</li> </ul>	
Q1(b)	<p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Garden leave clause breached. Company may seek an interim injunction preventing Farah Glenn from working for Higher Readings Ltd during her notice period, <i>Crystal Palace FC (2000) Ltd v Bruce (2001)</i>.</li>   <li>• However, over one week of her notice period has already passed so damages for breach of contract may be more suitable. Credit any reasoned conclusion.</li>   <li>• Restrictive covenant breached. Interim injunction may be sought to prevent her working for the rival.</li> </ul>	8

	<ul style="list-style-type: none"> <li>• However, as she has already begun working with Higher Readings Ltd, an injunction may not available/ appropriate.</li> <li>• Brianne’s Bookstore can also seek damages for breach of restrictive covenant, pursued in the civil courts; High Court or County Court depending on value and complexity of case.</li> <li>• County Court most appropriate.</li> <li>• Brianne’s Bookstore will need to show damages caused by the breach.</li> <li>• If this is not ascertainable, the courts will consider probabilities and calculate losses accordingly.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Farah Glenn has worked for a competitor for less than one week, likely nominal losses at that point. Credit any reasoned conclusion.</li> <li>• However, if confidential information has been divulged/utilised, more significant damage may already be recoverable.</li> </ul>	
<b>Total 20 marks</b>		
<b>Question Number</b>	<b>Suggested points for responses</b>	<b>Max Marks</b>
Q2(a)	<p>An explanation which clarifies the situation with a detailed account of how and why it has occurred. It should make complex procedures or sequences of events easy to understand and define key terms where appropriate.</p> <p>Responses should include:</p> <p>Explanation that a company policy;</p> <ul style="list-style-type: none"> <li>• Allows employees to be aware of acceptable and unacceptable behaviour within their specific workplace</li> <li>• Allows employees to be aware of what constitutes bullying including a broad definition of words, actions and gestures</li> <li>• Encourages recruitment and raises the reputation of the company</li> <li>• Can be used as a standard in disciplinary and grievance procedures, particularly where they reflect the ACAS Code of Conduct</li> </ul>	10

	<ul style="list-style-type: none"> <li>• Identify the relationship between workplace bullying and a claim for harassment under the Equality Act 2010 if the bullying is related to a protected characteristic or of a sexual nature</li> <li>• Protects the employer against vicarious liability for the actions of the employee as the policy can evidence 'reasonable steps' taken to prevent harassment/discrimination in the course of employment</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• The mere existence of company policies is insufficient, they must also be enforced by the employer, <i>Martin v Parkam Foods Ltd</i> (2006).</li> <li>• Policies can protect the employer against employee absenteeism caused by the bullying</li> <li>• Such policies can be incorporated into the contract and become binding on all employees, so enforcement is simplified</li> </ul>	
Q2(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• S66 Equality Act 2010, a sex equality clause is incorporated into every contract of employment.</li> <li>• S66 applies to overtime rates.</li> <li>• Imogen is the only female employee and is paid less than her male colleague, Lance.</li> <li>• Lance is a comparator as he works at the same establishment, s64, s79 and the work he and Imogen perform is equal/of equal value, s65.</li> <li>• While some bonuses may be discretionary, overtime payment is not discretionary and must adhere to equal pay rules, s71</li> <li>• No material factor defence applicable as Imogen and Lance have comparable experience and length of service, s69.</li> <li>• Imogen has been discriminated against on the basis of her sex.</li> </ul>	15

	<ul style="list-style-type: none"> <li>• Imogen may also have a claim under s26 Equality Act 2010 , harassment due to unwanted conduct related to the protected characteristic of sex.</li> <li>• The ‘hormonal/time of the month’ comment is derogatory and offensive, and the ‘banter’ defence will not be successful. Furthermore, offensive banter can constitute harassment, <u>Harper v Housing 21</u> (2012).</li> <li>• s26 (4) considers the ‘reasonableness’ of the claimants response. The intentions of the statement maker are not central to the case.</li> <li>• Nabil’s ‘lighten the mood’ intention is irrelevant, particularly as Imogen is not ‘a willing participant’ in any informal exchanges, is ‘embarrassed’ and subsequently avoids Nabil, <u>Minto v Wernick Event Hire Ltd</u> (2009).</li> <li>• A single comment may be harassment, particularly as Nabil is Imogen’s manager, <u>Insitu Cleaning Co Ltd v Heads</u> (1995)</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Nabil Otterton is liable under s109.</li> <li>• Kelly’s Plumbing may also be vicariously liable for the actions of Nabil Otterton, s110.,</li> <li>• The company does not appear to have taken steps to address the discrimination, nor do they have an anti-harassment policy, <u>Enterprise Glass v Miles</u> (1990).</li> </ul>	
<b>Total 25 marks</b>		

Question Number	Suggested points for responses	Max Marks
Q3(a)	<p>A description which provides an account and how things are linked.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Settlement agreements must comply with the independent advice requirements in s203 (3) Employment Rights Act 1996, as below:</li> <li>• The employee must have received independent advice from a qualified professional, completely independent of the employer.</li> <li>• The adviser must be a relevant independent adviser under the Employment Rights Act 1996 s203 (3A), Employment Rights (Dispute Resolution) Act 1998</li> <li>• The adviser must be covered by professional indemnity insurance in respect of the advice given.</li> <li>• The adviser must inform the employee on the terms and effect of the proposed agreement and its effect on his ability to pursue his rights before an Employment Tribunal</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>• Any examples of insufficient independence of the adviser</li> </ul>	8
Q3(b)	<p>An answer which offers advice based on evidence.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Ss80A-E ERA 1996, Paternity and Adoption Leave Regulations 2002, to be eligible for ordinary paternity leave (OPL), the employee must:</li> <li>• have 26 continuous weeks service with the same employer by the end of the 15<sup>th</sup> weeks before the child is due to be born,</li> <li>• have a relationship with the new-born and the mother and expect to be parenting the new born child.</li> <li>• at least 15 weeks before the EWC, inform their employer of the baby's due date, when they want their leave to start, and how much leave they want to take.</li> </ul>	8

	<ul style="list-style-type: none"> <li>• Peter Styles meets all these requirements and meets the qualifying criteria for OPL. He has a non-romantic relationship with the mother and intends to co-parent the child.</li> <li>• Peter Styles also earns more than the lower limit for national insurance as he is paid £35,085.</li> <li>• He is entitled to paid paternity leave/ statutory paternity pay at the lower statutory rate per week and 90 per cent of his average weekly earnings during his paternity leave.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Peter Styles can choose to take either one or two weeks leave taken consecutively within 56 days of the birth.</li> </ul>	
Qu. 3(c)	<p>An answer which offers advice based on evidence.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Dismissal of a male employee will be automatically unfair dismissal if he is dismissed because he took or sought to take paternity leave, Paternity and Adoption Leave Regulations 2002.</li> <li>• Peter Styles has been automatically unfairly dismissed.</li> <li>• Remedies for automatic unfair dismissal, s112 and 113 ERA 1996 - reinstatement, reengagement and financial compensation.</li> <li>• Peter Styles basic award will be calculated under s118 ERA 1996 by adding together one and a half weeks pay for each complete year of employment where an employee was aged 41 or over. Peter Styles is 46 years of age. The maximum number of weeks' pay that can be awarded is 30.</li> <li>• Peter Styles compensatory award will be limited to the maximum statutory amount as of June 2021; this will be greater than his 52 weeks' pay at £35,085.</li> <li>• The courts may consider loss of earnings from date of dismissal to date of hearing, future loss and loss of statutory rights accrued.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Reinstatement and reengagement unlikely due to breakdown of working relationship.</li> <li>• There is obligation on the employee to mitigate his losses and this will be considered in any compensatory award.</li> </ul>	9
<b>Total 25 marks</b>		

Question Number	Suggested points for responses	Max Marks
Q4(a)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Equality Act 2010 prohibits discrimination on the basis of disability.</li> <li>• S6 EA 2010 defines disability as a physical or mental impairment having a substantial and long-term adverse effect on an individual's ability to carry out their normal day-to-day activities.</li> <li>• Substantial means more than minor by reference to what the individual could do with or without the impairment, <u>Paterson v Metropolitan Police Commissioner (2007)</u>.</li> <li>• Long term impairment means at least 12 months, or likely to last the rest of the person's life.</li> <li>• Application- the anxiety affects Yin Egbert's day-to-day activities and is substantial in that he takes daily medication, attends therapy and actively chose a job that required nominal interaction.</li> <li>• Yin Egbert has suffered from the anxiety condition since he was a teenager; he is now 39 years old as per his date of birth. This condition is therefore long term and potentially life long.</li> <li>• Yin Egbert's anxiety disorder is a disability.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Further relevant case law, including <u>Sadeghi v TJX UK (2017)</u></li> </ul>	6
Q4(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• The Equality Act 2010, once employer is aware of the employee's disability, legal obligations apply.</li> </ul>	9

	<ul style="list-style-type: none"> <li>• Yin Egbert has written to Quays LLP explaining his condition. The employer has actual knowledge of his disability, <u>Baldeo v Churches Housing Association (2019)</u>.</li> <li>• Quays LLP continued to enforce the requirement to attend team building events. This may be indirect discrimination, s 19 EA 2010.</li> <li>• The requirement to attend team building events puts Yin Egbert at a disadvantage when compared to a colleague not having the disability of an anxiety disorder.</li> <li>• Quays LLP claims the ‘proportionate means of a legitimate aim defence’ as the team building is ‘essential to company success’.</li> <li>• This defence is unlikely successful; particularly as Yin Egbert works alone.</li> <li>• EA 2010 s20 employer requirement to make reasonable adjustments for disabled employees once they are aware of the disability.</li> <li>• Yin Egbert has suggested the adjustments in his letter, these appear unduly rejected despite Quays Ltd being aware of his disability at that point.</li> <li>• Quays LLP has indirectly discriminated against Yin Egbert and failed to make reasonable adjustments.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Relevant case law, including <u>Perratt v City of Cardiff Council (2016)</u></li> </ul>	
Q4(c)	<p><b>Describe</b> A description which provides an account and how things are linked.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Complaint initially heard in the employment tribunal.</li> <li>• Within three months less one day of the act complained of, unless not reasonably practicable, s111 ERA 1996, s120</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• The time limit can be extended by the courts in interests of equity</li> </ul> <p><b>Drafting exercise</b></p> <ul style="list-style-type: none"> <li>• The ET1 Form should contain the following points, all information available in the Case Study.</li> </ul>	15

	<ul style="list-style-type: none"> <li>• The name, age and address of claimant</li> <li>• The name and address of respondent</li> <li>• The name and address of the claimants representative</li> <li>• The dates of employment, salary and the role</li> <li>• Explanation of how Yin Egbert meets the definition of disability under s6 EA 2010: <i>e.g. his symptoms, the substantial effect on his life, the long-term nature of the problem, treatment undertaken.</i></li> <li>• Identify that the employer, Quays LLP, becomes aware of the disability on 15<sup>th</sup> May 21.</li> <li>• Explanation of the nature of the claim and the cause of action: <i>e.g. new requirement to attend team building events, unable to meet requirement due to disability, 'this PCP puts me at substantial disadvantage and is indirect discrimination'.</i></li> <li>• Explain the 'proportionate means and legitimate aim' defence offered by the employer and any counter-argument.</li> <li>• Explain that a s20 reasonable adjustment request was made to Helene Harper/ line manager on 15 May 21.</li> <li>• Quays Ltd were aware of the disability and under a duty to make reasonable adjustment. Yin Egbert further suggested an acceptable example of an adjustment. This request was denied, and no grievance procedure suggested.</li> <li>• Confirmation of claim <i>e.g. I believe I have been indirectly discriminated against on the grounds of disability</i></li> <li>• Explanation of remedies sought <i>e.g. I seek a declaration of my rights and compensation.</i></li> <li>• ET1 form must be signed and dated.</li> </ul>	
<b>Total 30 Marks</b>		