LEVEL 3 - UNIT 13 – THE PRACTICE OF EMPLOYMENT LAW
SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

Question 1

(a) s.139 Employment Rights Act 1996 (ERA 1996) provides that there is a genuine redundancy situation if there is a business closure, which is when the employer has ceased or intends to cease to carry on the business with which the employee was employed. Secondly, there is a genuine redundancy situation in the event of workplace closure. This is where the employer has ceased or intends to cease to carry on that business in the place where the employee was employed. Finally, there is a genuine redundancy situation if there is a reduced requirement for employees. This is where the requirements of the business for the employee to carry out work of a particular kind have ceased or diminished. Here, there is a reduced requirement for employees.

(b) (i) Objective selection criteria would include qualifications, skills and disciplinary record.

(b) (ii) The method of selection proposed by Mark is 'last in, first out'. This has traditionally been used as a selection criterion. However, it risks being indirectly discriminatory on the grounds of age or sex. It may indirectly affect a larger number of younger employees and women/part-time workers. Its use should, therefore, be approached with caution.

(c) The Basic Award for redundancy is calculated based on age, for redundancy each complete years' work carried out between the ages of 22 – 40, is paid at one week's pay per complete year (Daisy is aged 35); length of service (Daisy has worked for Watts Engineering Limited for 5 years); and weekly pay. Although Daisy's weekly pay is £600.00 per week the statutory cap is fixed at £479.00. Daisy will therefore be paid 5 x £479.00 = £2395.00.

(d) There is no obligation on an employer to provide a reference. However, if an employer provides a reference, the employer should be aware of the need to take due care and skill in providing that reference. The employer should consider the possibility of a claim by an employee for defamation, discrimination (and be aware that referring to sickness absence may give rise to disability discrimination issues), negligent misstatement and breach of contract (the duty of good faith). Watts Engineering Limited should not refer to the 'rumours' of theft here unless there has been an investigation and reasons are given.

Question 2

(a) The question asking the applicants' age may suggest age discrimination. The question in respect of sickness absence may suggest disability discrimination. The question regarding ability to work hours/childcare arrangements may suggest sex discrimination, in particular in view of the fact that the question is not asked of the male member of staff. Ellie's failure to be appointed to the role may show direct discrimination on the grounds of her sex which is where A is treated less favourably than B on the grounds of a protected characteristic.

(b) An employer can require an employee to undertake aptitude tests provided they are relevant to the job role. If they are not relevant, there is a risk that they may be indirectly discriminatory. Here, they appear to be relevant as the job description makes numerous references to the need for computer skills.

(c) Form ET1 will be used to start the claim at the Employment Tribunal.

(d) The Tribunal can make an order that the hearing is conducted in private; that the witnesses and other parties are not disclosed; or an order for measures preventing witness identification. The starting point is that cases should be heard in public and can be freely reported and there appears to be no particular reason for any order to be made here.

Question 3

(a) 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. Tim appears to have good contacts with local businesses and the 6 months/5 miles conditions may not be unreasonable.

(b) The employer must show a potentially fair reason to dismiss and Kempston Kiddies could use Kimberley's conduct as the potentially fair reason. BHS v Burchell (1978) states that when misconduct is suspected the employer must have reasonable grounds to believe in the guilt of the employee and must have carried out an investigation. That does not appear to have happened here. In addition, the decision of Kempston Kiddies to dismiss must fall within the band of reasonable responses Iceland Frozen Foods v Jones (1993). It is arguable that a written warning is a more appropriate reaction here. The employer must also comply with the requirement for procedural fairness which would include inviting Kimberley to a meeting,

allowing her to be accompanied. As this has not happened the dismissal is procedurally unfair. Kimberley appears to have been unfairly dismissed.

(c) An employment lawyer could draft a grievance procedure or a disciplinary procedure.

(d) (i) The employer is under an obligation to provide Patricia with a Section 1 (ERA 1996) written statement of terms and conditions.

(d) (ii) Patricia is entitled to 52 weeks statutory maternity leave; 26 weeks of OML (Ordinary Maternity Leave) and 26 weeks of AML (Additional Maternity Leave). In respect of statutory maternity pay, Patricia must have been continuously employed for at least 26 weeks up to the 'qualifying week' – the 15th week before the EWC (Expected Week of Childbirth). We do not know whether this is the case here. If she has been, and has also been paid at least the lower limit for National Insurance contributions, she will be entitled to Statutory Maternity Pay (SMP). SMP is paid at 90% of the woman's normal weekly earnings for 6 weeks and then 33 weeks at £139.58 (or 90% of earnings, if lower).