CILEx CHARTERED INSTITUTE OF LEGAL EXECUTIVES

LEVEL 6 - UNIT 19 – 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 set out a response that a very good (merit/distinction) candidate would have provided. 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)

Sexual harassment, s.26(2) EA 2010

This is unwanted conduct of a sexual nature which has the purpose or the effect of, violating a person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.

Raj asking Simone out is likely to be verbal conduct of a sexual nature, but it never had the purpose of being anything other than positive. Even if Simone was humiliated by this, s.26(4) and its requirement (in determining whether conduct had such an effect) to take not only the perception of the complainant, the circumstances and whether it is reasonable for the conduct to have that effect will mean it wasn't sexual harassment.

However, Raj's retort (when she declined his advances) was both verbal conduct of a sexual nature and clearly had the purpose of being violating her dignity and being hostile. This would amount to sexual harassment.

Question 1(b)

Vicarious liability, s.109 EA 2010

Consume 24 is liable for acts of its employees committed in the "course of employment" - Jones v Tower Boot Co [1997] - unless it took all reasonably practicable steps to stop/avoid the discrimination, s.109(4) EA 2010.

The incident occurred at a Christmas party. It was not a chance meeting and was closely connected to work in its partial funding and organising, Chief Constable of the Lincolnshire Police v Stubbs [1999]. The vast majority of attendees were employees, so there cannot be any argument that the party wasn't in the course of employment, Sidhu v Aerospace Composite Technology Ltd [2000].

Consume 24 could try and argue that it had a reasonable steps defence - that it took all reasonable steps to prevent Raj from doing what he did.

However, to be successful, Consume 24 must take preventative action. Having a written equal opportunities policy will not succeed unless it is actively implemented. The facts strongly suggest this was not the case since staff did not know whom to complain to, nor could they easily locate the document (lack of staff training?) and Bill Franklin's initial response suggests responsibilities within the company were not clear (flawed policy and/or lack of management training?)

Question 1(c)

The tribunal may (a) make a declaration as to Simone's rights (that she has been sexually harassed), (b) order that the Respondent(s) pay her compensation and (c) make an appropriate recommendation (typically ensure a proper harassment policy is effectively implemented).

As regards compensation, for discrimination claims there is no cap. The tribunal may also apportion it between Respondents.

Simone would receive pecuniary loss arising directly from the act of harassment: sick leave (7 hours x £9.60 gross for 1 day =£67.20) and the cost of a replacement blouse (£40).

Injury to feelings would also be relevant. As it was an isolated incident, Simone would be awarded between £500-£6,600 (probably the lower part), Vento v Chief Constable of West Yorkshire Police [2003] and Da'Bell v NSPCC [2009].

Besides any successful award that would be payable by Consume 24, there is also the added legal costs of defending the claim, lost work hours taking statements from staff and for staff to attend the tribunal. There is also the potential damage to reputation from both a customer and recruitment perspective to take into account.

Simone would also be able to recover any fees incurred by having to lodge the claim in the employment tribunal.

Question 2(a)

Candidates were expected to provide their answer within the style of a conventional business letter i.e. date, reference, correct recipient & address, appropriate salutation, main heading & appropriate opening sentence.

Your legal position

This should have covered possible claims of (constructive) Wrongful Dismissal, (automatic) UFD and Sex Discrimination

Your Options

From what the client had said, there were (at least) 5 options which Candidates should have covered:

1. Leave Dodsons and find a new job. Although this would remove Carina from the current working environment, she would be out of work and receiving no income.

2. Remain working for Dodsons. No further action needed and no further legal costs. However, delay would mean waiving breach/out of time for claims.

3. Remain and use Dodsons' internal grievance procedure to make a complaint about Ms Leung. Carina still has a job and may improve/resolve situation. Could go to another branch rather than leave. Following this, Ms Leung's attitude and behaviour towards may improve and the situation is resolved. Disadvantage is that behaviour does not change and Carina still in the same position. However, nothing to lose by pursuing this course of action and if it is not successful can move on to Options 4 or 5.

4. Remain and bring a claim of sex discrimination against Dodsons. This claim could also be brought alongside the claims under Option 5.

5. Leave Dodsons and bring Wrongful Dismissal and/or Unfair Dismissal claims at an employment tribunal. Must leave within a reasonable period after this last incident to ensure that not seen to have waived this breach.

What might you recover if you win these claims?

Candidates should have covered the following:

- Wrongful Dismissal: (6 x £332) £1,992.

- Unfair Dismissal: Basic Award of (6 x 1 x £416) £2,496 and a compensatory award (including heads of loss). Cap is annual salary of £21,632.

- Sex Discrimination: compensation for loss of earnings & injury to feelings (no cap).

- Failure to provide a written statement of your terms: 2-4 weeks of £416.

- Litigation risk.

- Overlapping claims principle.

Question 2 (b)

As the claim has been presented and Carina wishes to withdraw it in compliance with a settlement agreement, she must file COT4 with or write a letter to the employment tribunal.

A Chartered Legal Executive is unable to sign and/or advise on settlement agreements unless they are employed by a SRA or CILEX Regulation regulated practice.

Question 3(a)

Reg 3(1)(a) provides that a relevant transfer includes a business transfer, namely:

"A transfer of an undertaking, business (or a part of one) situated immediately before the transfer in the UK to another person where there is a transfer of an economic entity which retains its identity"

According to the EAT in Cheesman v R Brewer Contracts [2001], the entity in question must be sufficiently structured & autonomous but need not own significant assets. On the facts, TC is to be sold as a going concern, would appear to be autonomous within the Apollo structure and so would clearly be deemed an economic entity.

The next question is whether it retained its identity post-transfer?

According to the CJEU in Spijkers v Gebroeders Benedik Abattoir CV [1986], there are seven factors which employment tribunals must take into account. None can be examined independently of each other. Applying the facts to these:

1. the type of undertaking or business – Apollo and Roadhog are both involved in logistics. More information is required to determine whether Roadhog already carried out coding.
2. the transfer of tangible assets – the purchase included only 2 specially designed chairs. The remainder and majority of the equipment currently used is staying with Apollo.
3. the value of intangible assets – the purchase price of £157,000 presumably includes an amount for goodwill.
4. whether the majority of staff are being taken over by the new employer - only 5/10 of the current TC team are being taken, but of those, it is arguable that the majority of staff in terms of skills are being taken over (as per the CJEU in Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice [1997]) as the majority of coders who are core to the business (as opposed to managers) are to be transferred over.
5. transfer of customers – Roadhog is acquiring 7 customer contracts as part of the deal. On the facts, these will be all of the customers at the time of transfer.
6. the degree of similarity between activities before and after the transfer – it is likely that TC will continue as before.
7. the duration of any interruption in those activities – there is only a 10-day interruption, which is a very brief period when it comes to business transfers and would not be viewed negatively.

When taken as a whole, it is clear that the economic entity which was TC has transferred over and retained its identity. There has been a relevant transfer according to TUPE.

Question 3(b)

1. Paragraphs 1 to 4 of Section 8.2 of the Claimant's ET1 is admitted save that the Respondent is a small business employing 87 staff.
2. Paragraph 5 refers to what the Respondent considers a private matter between the Claimant and Miss King.
3. Paragraph 6 is denied save that Miss King did attend meetings at the Respondent's offices in her capacity as the IT Director as would be expected when companies are negotiating the sale of part of a business.

The issuing of a final written warning to the Claimant on 6 December 2016 was the result of his arriving late to work. The Claimant had received oral warning on 23 July 2016 and a written warning on 13 November 2016 for the same reason.

4. Paragraph 7 is admitted in part. The Claimant was 1 hour and 20 minutes late for work and told his Team Leader, Brad Hunter, this was due to signalling problems on the Thameslink train line.
5. As regards Paragraph 8, Brad Hunter was informed by Thameslink that there had been no signalling problems as stated by the Claimant. He informed Ash Khan, one of the Respondent' HR officers, who went to discuss this discrepancy in events with the Claimant. However, Ash Khan was verbally and physically assaulted by the Claimant in the presence of witnesses.
6. Paragraph 9 is admitted so far as after careful consideration of events, the Respondent's Deputy HR Director, Celia Doherty asked the Claimant to attend her office. There, the Claimant confirmed that he had carried out the assaults and he was told he was being summarily dismissed. He was then escorted by security and, as had previously been agreed, his personal belongings were posted to him later the same day.
7. As regards Paragraph 10, no notice pay is owed due to the Claimant's gross misconduct in both fabricating a reason for his lateness and the physical assault of Ash Khan.
8. As regards Paragraph 11, the Claimant admitted he lied about the signalling problems and admitted he had physically assaulted a colleague to Celia Doherty. In the circumstances, no disciplinary meeting was required and the Respondent was within its rights to summarily dismiss the Claimant.
9. Paragraph 12 is denied. As previously stated, the reason for the dismissal had nothing whatsoever to do with Miss King nor the business sale as alleged by the Clamant. The dismissal was caused by the Claimant's gross misconduct. Furthermore, the Claimant is not entitled to bring a claim for unfair dismissal as does not have the requisite period of continuous service.

Question 3(c)

As Nic is in a long term relationship with her girlfriend, she is entitled to take unpaid time off work to accompany her for up to 2 of her ante-natal appointments. Right applies whether the child is conceived naturally or through donor insemination.

Employees accompanying the expectant mother to her ante-natal appointments are entitled to unpaid leave for 1 or 2 appointments.

Apollo is not entitled to ask for any evidence of the ante-natal appointments, such as an appointment card, as this is the property of the expectant mother attending the appointment.

However, Apollo is entitled to ask Nic for a declaration stating the date and time of the appointment, that Nic qualifies for the unpaid time off through her relationship with the expectant mother. The declaration should also state that the time off is for the purpose of attending an ante-natal appointment with the expectant mother that has been made on the advice of a registered medical practitioner, nurse or midwife.

Nic can take the leave needed to cover travelling time, waiting time and attendance at the appointment. Apollo is, of course free to offer more time. Alternatively, Nic could take extra time from her annual leave.

If Apollo unreasonably refuses Nic's request, she can make a claim to an employment tribunal within 3 months less one day of the ante-natal appointment in question.

Question 4(a)

Alka should consider making a protected disclosure.

The Public Interest Disclosure Act 1998 (PIDA) provides protection to workers making disclosures that are in the public interest.

Alma only protected if she makes the disclosure to the appropriate person/prescribed body in respect of the NHS and/or Pharmacists.

She must reasonably believe that any information disclosed or allegation made is substantially true and that the disclosure is being made in the public interest.

Paragraph 9 of her Statement of Terms will not be breached by a protected disclosure as any provision in an agreement is void in so far as it purports to preclude the worker from making a protected disclosure.

Question 4(b)

As Alka has been dismissed for making a protected disclosure, she would have the following claims:

Wrongful Dismissal

Paragraph 10.2 of her s.1 statement = (8 x £465) = £3,720.

Unfair Dismissal

She has worked for 6 months (below the standard 2 years' continuous service that is required), but as her dismissal is for making a protected disclosure, she is still eligible to bring a claim. Alka satisfies the other eligibility criteria - she is an employee and not an excluded class of worker. She would also be able to bring a claim within 3 months less one day of her dismissal on the facts.

Another consequence of Alka's dismissal being due to her making a protected disclosure is that it renders her dismissal automatically unfair. This means there is no need for the employment tribunal to consider whether it was unfair.

Section 123(1) ERA 1996 provides that the compensatory award must be a just and equitable amount in all the circumstances. There is normally a maximum compensatory award which is capped at the lower of a year's annual salary (£34,200) or £78,962. However, because Alka's dismissal was due to her making a protected disclosure, the limit does not apply.

Heads of losses would include:

- Loss of net earnings from the date of dismissal to the date of the employment tribunal hearing
- Loss of net earnings from the date of the employment tribunal hearing to when it considers Alka will be able to obtain work with an equivalent salary

- Loss of statutory rights
- Benefits – did she have and utilise staff discount?
- Loss of pension (no facts but worth investigating)
- Injury to feelings
- Interest

There may also be possible deductions, including:
- Mitigation of loss
- Accelerated receipt

As there was an unreasonable failure on the part of Healglow to follow the ACAS Code of Practice, it is possible that the employment tribunal would increase Alka's award by up to 25%.

Question 4(c)

The original time limit is 3rd April (3 months less 1 day from the EDT). The conciliation period starts on 6th January (the day after Alka completes the form online). The end of the conciliation period is 13th January (when the certificate is emailed). The 8 days of conciliation is added to the original time limit making a new time limit of 11th April.

The general rule is that final hearings should be in public (ET Rules 56 & 59), but there are special rules allowing an employment tribunal, because, for example, it is necessary in the interests of justice or for reasons of confidentiality to order that:
- some or all of a hearing that would otherwise have been public should be held in private
- the identity of a party or witness be kept secret
- there should be restrictions on reporting proceedings
- a person should be excluded from some or all of the proceedings
- certain documents should be kept secret

Similarly, an employment tribunal has power to make an order with a view to preventing or restricting the public disclosure of any aspect of employment tribunal proceedings so far as it considers it necessary (ET rule 50(1)):
- in the interests of justice, or
- in order to protect the human rights of any person, or
- in order to avoid contravention of a statutory requirement, or
- to protect information that has been communicated in confidence, or
- to protect information which might cause substantial injury to an undertaking owned by a witness or at which he works

With the above in mind, since the request is only for part of the final hearing to be private, it is likely that an employment tribunal will deem this proportionate and grant the application.

Question 4(d)

The Results Determination Panel identified significant issues with Question 4(d). This Question was removed and the candidates' marks were adjusted accordingly to ensure that candidates attempting this Question were not disadvantaged.