LEVEL 6 - UNIT 19 – THE PRACTICE OF EMPLOYMENT LAW
SUGGESTED ANSWERS – JANUARY 2018

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key point's candidates should have included in their answers to the January 2018 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers 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 by the suggested answers.

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

Question 1(a)

There are a number of legal protections that are implied by common law in to the contract of employment. These implied duties are duties which do not need to be explicitly set out in the written contract of employment are the duty of confidentiality, duty to protect trade secrets of the company, protection of intellectual property rights and the implied duty of good faith and fidelity.

The implied duty of confidentially means that the employee cannot disclose, either during or after the employment, confidential information. In order to achieve clarity and certainty, it may be appropriate to include an express confidentiality clause in the contract of employment. In this case, what constitutes confidential information should be clearly defined in the contract of employment otherwise there is a risk that it will be unenforceable as demonstrated in the case of Bartholomews Agri Food Ltd v Thornton (2016), where there was no attempt to define what would amount to confidential information in the employees' contracts. The commercially confidential information held by Shrewsbury Micro Technologies Ltd (SMT) would fall within the definition.

There is an implied duty on employees that they cannot disclose trade secrets. A trade secret is something which the outside world does not or could not ascertain, for example a process or a chemical formula, as demonstrated in Faccenda Chicken v Fowler (1986). The know-how accumulated by SMT will fall within this definition.

Intellectual property rights are covered by the Patents Act 1977 and the Copyright, Designs and Patents act 1988. Generally speaking any invention made by an employee shall, as between him and his employer, be taken to belong to his employer if it was made in the course of the normal duties of his

employment. However patents and copy right laws are a specialist area and the client should seek advice from a lawyer specialising in the same.

Employees have an implied duty of good faith and fidelity towards their employer. This implied term applies during employment but crucially not after, FC Gardiner Ltd v Beresford (1978) the. Any action by an employee which damages the business of SMT will be in breach of this term: Boston Deep Sea Fishing and Ice v Ansell (1888), e.g. carrying on a business in competition with SMT: Hivac Ltd v Park Royal Scientific Instruments (1946).

The implied contractual terms will afford Shrewsbury Micro Technologies protection in the contexts above, but would not prevent the employee from working for a competitor on the ending of their employment. It would be advisable that SMT consider implementing restrictive covenants where relevant.

Question 1(b)

The types of restrictive covenants that can protect employers are:

Non-solicitation

A non-solicitation clause prevents former employees from soliciting the business of clients or customers of the former employer.

Non-competition

These are used to prevent an employee from working for a competitor for a specified period of time. Shrewsbury Micro Technologies would only need to show that the particular employee's employment was such that the employee would be exposed to trade secrets or other confidential information. This would protect Shrewsbury Micro Technologies by preventing a former employee form going to work for a competitor.

Non-dealing

A non-dealing clause prevents an employee from working with clients or customers, whether the client made contact with the employee or the former employee wished to make contact with the customer or client.

Non-poaching

A non-poaching clause prohibits former employees from seeking to employ their former colleagues.

A restrictive covenant is *prima facie* void for public policy reasons. In order to ensure that a restrictive covenant is legally enforceable an employer must show that there is a legitimate business interest to protect and that the scope of the clause does not go beyond protecting the business interest. If a restrictive covenant is drafted too widely then it will render the clause legally void and therefore unenforceable. It must be reasonable in its scope, location and duration e.g. Thomas v Farr (2007). Any restrictive covenant must therefore be drafted carefully to ensure it is enforceable. On the given facts a non-solicitation and non-poaching clause of say six months duration and a non-compete and non-dealing clause of similar duration but limited to the United Kingdom appear justifiable.

Question 1(c)

Post termination obligations

Under the terms of this contract of employment you agree to the following restrictions on termination of your employment, however so arising.

Non-solicitation

During your employment and for a period of six months following the termination of your employment, you shall not solicit, induce or undertake any act likely or intended to induce any customer or client of the company for whom you have provided professional services during the course of the last 12 months of your employment to transfer their business to any third party associated with you, nor will you otherwise deal with or endeavour to take away such customers or clients. This includes but is not limited to informing the company's clients or customers that you have taken up any new employment or that you are setting up a business on your own account.

Non-competition

During your employment and for a period of six months following the termination of your employment you shall not (save without express written consent of the company) in any capacity, carry out for payment or reward within the United Kingdom the role or function of a software engineer in the field of digital control systems for machine tools.

Non-dealing

You shall not without the prior express written approval of the company, whether by yourself or on behalf of another person or company or employer directly or indirectly during your employment and the period of six months after the termination of your employment, have any professional or business dealings with any person or organisation which, during the 12 months preceding the termination of your employment was a customer of the company or engaged in contractual negotiations with the company. This clause shall apply to dealings instigated by the third party as it applies to dealings instigated by you.

Non-poaching

During your employment and for a period of six months following the termination of your employment, you shall not solicit or induce persons employed or engaged by the company with whom you worked during the 12 months prior to the termination of your employment to terminate their employment or engagement.

Question 2(a)

The first potential claim that Richard Evans can bring against Latte King Ltd is for automatically unfair dismissal having asserted his statutory right to the national minimum wage (section 104A of the Employment Rights Act 1996). This type of dismissal is not subject to the test of reasonableness and there is no qualifying service requirement (s108 (3) (g) Employment Rights Act 1996).

As long as the employee's allegation is made in good faith it does not matter whether the employee actually had the right in question.

There is also a potential claim that it was an automatically unfair dismissal on the basis that Richard Evans had made a relevant protected disclosure (whistle blowing) to HMRC regarding the failure to pay the national minimum wage (section 103A Employment Rights Act 1996). The relevant protected disclosure being Latte King's failure to comply with the legal obligation to pay national minimum wage.

For clarity the requirement to pay national minimum wage cannot be opted out of on the basis that someone is in a trial or probationary period. Therefore Richard would also be entitled to recover the difference between the amounts actually paid, and the amount which he was entitled by way of national minimum wage.

In light of the dismissal being on the grounds that Richard had asserted statutory rights and alternatively on the basis that he has made a relevant protected disclosure Latte King's dismissal of him in those circumstances is an automatically unfair dismissal.

Question 2(b)

The early conciliation (EC) procedure applies to all claims unless an exemption applies. A prospective claimant for unfair dismissal must notify ACAS of an intention to apply to the Employment Tribunal either by phone or using an on line form or by posting a hard copy of the form to ACAS. There is no requirement that the prospective claimant gives details of the potential claim.

ACAS acknowledge the notice given by the prospective claimant. An ACAS officer will attempt to contact the prospective claimant within two working days. If the prospective claimant agrees to EC then the claim is passed to a conciliator to see if an agreement can be reached between the parties. The conciliator has one calendar month from the original notification to see if terms can be agreed. A single extension is possible, if both parties agree, of up to two weeks if there is a reasonable prospect that settlement will be reached. If EC is refused then ACAS will issue a certificate enabling the prospective claimant to pursue their claim in the ET.

If terms of settlement are reached then ACAS will record that on a COT3 form. If terms are not reached by the end of the EC period then the EC certificate will be issued, authorising the issue of proceedings in the Employment Tribunal.

Terms of agreement can also be reached if the parties enter into a settlement agreement. A settlement agreement is a legally binding document which allows an individual to contract out of their rights. A settlement agreement must meet certain formalities (s203(3) Employment Rights Act 1996). In order to be legally binding the settlement agreement must:

- Be in writing
- Relate to particular proceedings or complaint
- State that the complainant (former/employee) has received independent legal advice from a qualified lawyer (solicitor, Barrister or Chartered Legal Executive) advice centre worker or trade union representative and who has relevant indemnity insurance in place and the name of the relevant adviser.
- State the conditions of the settlement agreement are satisfied.

It is usual practice that an employer will pay the legal fees of the employee to receive that independent legal advice.

A claim in the Employment Tribunal may be brought if EC fails to produce an agreement. It must be brought within 3 months (less one day) of the effective date of termination of the employee's employment.

Question 2(c)

The basic principles of conducting disciplinary action and procedures to deal with grievances are set out in the ACAS code of practice. Whilst compliance with the code is not compulsory, when deciding the fairness of a dismissal an Employment Tribunal will take into account any failure to follow the ACAS Code. There may be additional good practice steps set out in a company's disciplinary and grievance procedure. If there is a failure to follow the ACAS Code an Employment Tribunal can uplift an award by up to 25%.

Latte King is under a duty to provide their employees with details of any disciplinary or grievance procedures in place (section 3 of the Employment Right Act 1996). It is good practice to set out the procedures and provide a clear frame work to deal with problems in the work place. Having clear policies also ensures that consistent treatment occurs and issues are dealt with fairly and reasonably. The rules set out what amount to unacceptable behaviour but obviously cannot specify every possible scenario that could arise.

An effective disciplinary procedure will:

- Ensure that all employees are treated consistently and fairly when there are disciplinary issues;
- Communicate to employees acceptable standards of behaviour.
- Set the processes and parameters where employees break the rules within the work place;
- Set the expectations concerning underperformance and how those issues will be managed.

The disciplinary policy is, in effect, an advanced warning to employees of activity which is considered unacceptable and the potential levels of disciplinary sanction that could be applied.

Any disciplinary action should take into account all the circumstances, such as the employee's length of service, work record, nature of the job, their level of seniority and any mitigating factors.

The disciplinary policy is useful also to specify the types of conduct that might amount to gross misconduct. This is conduct that is so serious that the employee could be dismissed for a first offence and which can also lead to a dismissal without notice (summary dismissal).

The disciplinary policy should also detail the employees' right of appeal.

The disciplinary policy is particularly relevant to employees who have been continuously employed for two years, as these employees have the statutory right not to be unfairly dismissed. Accordingly dismissal of an employee who has been employed over two years continuously must be substantively and procedurally fair.

The benefit of a grievance policy is to give employees a way to raise issues with the management about their issues in work. In practice employees may raise these issues informally.

If the employee did want to raise a formal grievance, the grievance policy is there to tell them who they should be raising the grievance with and the process that would then be followed by the company in dealing with the grievance.

Question 3(a)

Erin has a number of potential claims:

Indirect sex discrimination

There have been a number of cases where the courts have accepted that women are adversely affected due to child care responsibilities when only full time work is available, and this can be unlawful indirect sex discrimination. On the basis of Erin (as a woman) having had her request for flexible working refused this could amount to a PCP which puts women at a disadvantage and therefore amount to indirect sex discrimination. It is unlikely on the basis of the employer's flat refusal that they would be able to evidence that their refusal was a proportionate means of achieving a legitimate aim.

Maternity related discrimination

It is automatically unfair to dismiss an employee for a number of reasons related to the fact that she has taken maternity leave. It is also unlawful to subject an employee to a detriment on the grounds she was intending to take maternity leave. As Erin was explicitly dismissed on these grounds she would have a claim for maternity related discrimination.

Where an employee has been unfairly dismissed the Tribunal may order reinstatement, re-engagement or compensation comprising a basic and compensatory award. In relation to discrimination the Tribunal can make a declaration or recommendation or award compensation including an award for injury to feelings.

Flexible working

An employee is entitled to request flexible working: s 80F ERA 1996. The request must indicate what impact the employee considers the request will have on the employer, and how this can be dealt with. The information given in respect of Erin's request suggests that she has complied with this requirement. The employer is not obliged to grant the request, but can only reject it on specified grounds: s 80G ERA 1996. From the facts, Samuel Lopez rejected the request without proper consideration. An application can be made to the Employment Tribunal and if it is held to be well founded the Tribunal may order that the application be reconsidered and/or award compensation up to eight weeks pay.

A claim in the Employment Tribunal must be brought within three months (less one day) of the act of discrimination, the rejection of the request for flexible working, or in the case of dismissal, of the effective date of termination of the employee's employment.

Question 3(b)

ET1 details of claim are as follows:

1. The Respondent operates a clinical laboratory based in Clapham. The Claimant was employed as a Laboratory Technician, from May 2013 until the termination of her employment on 14 December 2017.
2. The Claimant commenced maternity leave on 10 April 2017, gave birth on 30 May 2017 and was on additional maternity leave at the time of the event below.
3. On 1 December 2017 the Claimant made a flexible working request in writing to the Respondent giving her written request to her line manager, Samuel Lopez. The Claimant's flexible working request was made to enable the Claimant to better meet her son's care needs on her expected return to work.
4. During the conversation between the Claimant and Samuel Lopez on 1 December 2017, Samuel Lopez refused the Claimant's flexible working request. Further Samuel Lopez was very negative to the Claimant's request and commented that the Claimant 'would be having time off left right and centre' and that the Claimant's 'work obligation came before any personal problems'.
5. On 14 December the Claimant attended work for a further keeping in touch day. The Claimant was asked to attend the office of Samuel Lopez without any written warning or having been given the right to be accompanied at the meeting. Samuel Lopez dismissed the Claimant telling the Claimant it was because the Claimant intended to take the full 52 weeks maternity leave and 'they could not afford to keep waiting for her return to work'.
6. The Claimant claims her dismissal was automatically unfair as she was dismissed for having asserted her right to take maternity leave, Section 99 ERA 1996 and/or the Claimant claims that her dismissal was unfair as the Respondent failed to follow any potentially fair process in dismissing her from her employment and failed to establish a potentially fair reason to terminate her employment under the principles of Section 98 of the Employment Rights Act 1996.
7. Furthermore the Claimant claims she was indirectly discriminated against on the grounds of her sex contrary to section 19 of the Equality Act 2010, having made a request for flexible working, on the basis that the Respondent refused to allow her to change her hours.

8. The Claimant claims the Respondent has failed to give her flexible working request proper consideration in breach of the requirements of section 80G of the Employment Rights Act 1996.
9. The Claimant claims that she has been subjected to unlawful detriment on the grounds she was intending to take her full maternity leave.

Question 4(a)

(i) Consultation with employees

The proposed transaction falls within Regulation 13(6) of the Transfer of Undertakings Regulations 2006 (as amended) (TUPE). There is therefore a legal duty to inform and consult in relation to the transfer with affected employees. This duty is imposed primarily on the transferor, but the transferee must provide relevant information as to the position of the affected employees. In this case because there is a recognised trade union consultation will be with the trade union as representative of the employees. Consultation must:

a) Cover the fact that a relevant transfer is to take place, when it is to take place and the reasons for the transfer
b) Cover the legal, economic and social implications of the transfer of the affected employees.
c) Inform the affected employees of any proposed measures that it is envisaged the transferee will take.

If consultation does not take place the affected employees may make a complaint to an Employment Tribunal which may make a declaration of non-compliance and award appropriate compensation, up to a maximum of 13 weeks' pay.

(ii) Employee Liability Information

This is information as to the terms and conditions of employment of the transferring employees, together with details of any disciplinary proceedings against them, grievances raised by them or legal action taken or proposed by them against the transferor. It must be provided in an accessible form at least 28 days before the transfer unless this is impracticable (Regulation 11 of TUPE).

As it has not been provided, Angus Trucking Ltd may make a complaint to the Employment Tribunal. If the claim succeeds the tribunal can make a declaration and award compensation. This is a minimum of £500 per employee unless the Tribunal consider it just and equitable to award less.

Question 4(b)

Where an employee is dismissed, whether before or after the transfer, and the principal reason for dismissal is the transfer, that employee is deemed to be unfairly dismissed, unless it is demonstrated that the dismissal was for an economic, technical or organisational reason (ETO) entailing changes in the work force. The TUPE regulations do not define ETO reasons. To establish an ETO reason it must be to change the overall function or number in the work force (Delabole Slate Ltd v Berriman (1985)). Where the transferor dismisses an employee prior to the transfer because it is anticipated that the transferee will

require fewer employees this will not amount to an ETO reason (Hynd v Armstrong and Ors (2007)). However, where the transferee has a reduced requirement for employees, this will amount to an ETO, and falls to be dealt with as a dismissal for redundancy, which is a potentially fair reason for dismissal. It will still be necessary to demonstrate that a fair procedure has been adopted, so Angus Trucking Ltd will need to be able to demonstrate inter-alia, fair selection and that there was no alternative position for the manager.

Question 4(c)

Under TUPE, a harmonisation of terms will be void unless it is for an ETO reason. Where collective agreements are concerned it is acceptable to vary a collective agreement as long as the variation takes effect on a date more than one year from the date of the transfer and following that variation, the rights and obligations in the employee's contracts, when considered together, are on no less favourable terms than which applied immediately before the transfer.

Here, the object is to harmonise terms and conditions on the less favourable basis applicable to current Angus Trucking Ltd employees, so it is unlikely that the provision on variation of collective agreements can be utilised.