LEVEL 3 - UNIT 13 – THE PRACTICE OF EMPLOYMENT LAW
SUGGESTED ANSWERS – JUNE 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 June 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) The clause is a restrictive covenant/restraint of trade clause. The starting point is that this clause is unlikely to be enforceable as it is in restraint of trade. However, it may be enforceable if the employer has a legitimate business interest to protect and the clause is reasonable in terms of duration and geographical extent. Helen is a senior management accountant and there is likely to be a legitimate business interest to protect. While the covenant may (arguably) be of reasonable duration the extent is entirely unreasonable and the covenant will not, therefore, be enforceable.

(b) The clauses are a non-solicitation clause and a non-dealing clause.

(c) The clause is a garden leave clause.

(d) A garden leave clause is useful if an employee has client knowledge, knows strategic information about the business and/or customer contacts. The clause will allow the employer to pay an employee for their notice period. The employee can be required to remain at home and be available for work. If Helen seeks to work for a competitor during the notice period she will be in breach of contract and the employer can seek an injunction. An employee must observe the implied duty of fidelity whilst on garden leave.

Question 2

(a) The Paternity and Adoption Leave Regulations 2002 (as amended) provide that an employee who is the adoptive parent of a child placed for adoption is entitled to 52 weeks adoption leave. This consists of 26 weeks Ordinary Adoption Leave (OAL) and 26 weeks Additional Adoption Leave (AAL). The adoption leave will start no later than 14 days before the date on which the

child is placed for adoption. The employee has the right to return to the same job at the end of the adoption leave. Statutory Adoption Pay will also be available if the adopter has been continuously employed for at least 26 weeks and the employee earns at least the lower limit for National Insurance contributions. The employee is also entitled to time off to attend adoption meetings.

(b) Michaela does not have the right to work flexibly, but does potentially have the right to request to work flexibly. An employee needs to have 26 weeks continuous employment at the date the application is made and Michaela has worked for her employer for three years. The employee must not have made any other request in the last 12 months. There are a number of grounds for rejecting the request which could include the detrimental effect on the ability to meet customer demand or the inability to recruit additional staff. Credit was given for other relevant statutory grounds for rejecting a request.

Question 3

(a) S.1 Employment Rights Act 1996 requires an employer to provide a Section 1 written statement of terms of employment.

(b) For example, a particular that must be contained in the Section 1 statement is the employer's name. Any other correct particular required by Section 1 Employment Rights Act 1996 will be credited.

(c) Mario can make a complaint to an Employment Tribunal. As Mario also has a substantive claim he is entitled to receive compensation of between 2 - 4 weeks' pay pursuant to Section 38 Employment Act 2002. The maximum amount of compensation is capped at £464 per week.

(d) An employment lawyer could be asked to draft a grievance procedure or a disciplinary procedure. All sensible suggestions will be credited.

Question 4

(a) The common law claim that Mario could pursue is a claim for wrongful dismissal, which is when an employee is dismissed with no notice or less notice that the employee is entitled to, or if the employee has not received payment in lieu of notice (PILON). The employee will succeed in their claim for wrongful dismissal unless summary dismissal is justified. In the case study, Mario was dismissed without notice or PILON and it is unlikely that his actions justified summary dismissal. Mario would be likely to succeed in a claim for wrongful dismissal. The onus is on the employer to show, on the balance of probabilities, that the employee was guilty of the alleged misconduct.

(b) An example of a draft Statement of Claim is:

I was employed by Raj Sidhu from 20 May 2014 to 29 May 2017.
The Respondent is a coach business/operator.
I was employed as a coach driver.

On 24 May 2017 I got into a fight out of work. I was acting in self-defence and the police are taking no further action. However, a picture of me in the fight wearing a work t-shirt was seen by my employer on Facebook.
On 29 May 2017 the Respondent called me into his office and I was summarily dismissed without notice or pay in lieu of notice.
The Respondent did not carry out any investigation.
I was not given any particulars of the allegations against me and so was unable to give any explanation.
I was not offered the right to attend a disciplinary hearing.
I was not offered any right to appeal.
The Respondent failed to follow the ACAS Code of Practice.
Prior to my dismissal I had received a previous formal warning in relation to my conduct but that warning expired in January 2017.
The Respondent's decision to dismiss me was not fair and reasonable in all the circumstances.
The Respondent failed to carry out a fair or thorough investigation.
The dismissal was unfair.

(c) The Respondent will use Form ET3.

(d) The Respondent has 28 days in which to file Form ET3 with the Employment Tribunal unless an extension of time is granted.

Question 5

(a) S.139 Employment Rights Act 1996 states that the three situations when there is a genuine redundancy are if there is a business closure, a workplace closure or a reduced requirement for the number of employees. In respect of Eddie, business closure appears to be relevant and this would appear to be a genuine redundancy situation.

b) The refusal to employ Brenda could be indirect discrimination. Indirect discrimination is defined in Section 18 Equality Act 2010 and the employer must apply a provision, criteria or practice (PCP) which must be discriminatory in respect of a protected characteristic. The PCP must be applied to all, but needs to have the effect of putting people with the protected characteristic at a disadvantage. It must also put the applicant at a disadvantage and must not be a proportionate means of achieving a legitimate aim.

(c) The requirement to work shifts is a PCP which is applied to all applicants. The PCP is likely to put people with certain protected characteristics at a disadvantage. It is likely to put women (sex discrimination) at a disadvantage. It has put Brenda at a disadvantage as she wasn't offered the job and will be indirect discrimination, unless it is a proportionate means of achieving a legitimate aim. Further information is needed as to whether this is a proportionate means of achieving a legitimate aim and so credit was given for reasoned arguments either way.