LEVEL 6 - UNIT 19 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 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 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)

Marie Anne Hawn's flexibility to dismiss Zain will depend on whether he meets the qualifying requirements to bring a claim of unfair dismissal (section 95 of the Employment Rights Act 1996), that is, he is an employee, has been continuously employed for at least two years at the effective date of termination of his employment as per s108 (1) Employment Rights Act 1996 and that his employment has been terminated.

Marie Anne has already informed us that he is an employee and there is no confirmation of his length of service or whether there have been any breaks in his service. If he has been employed continuously for at least two years then Marie Anne will need to demonstrate potentially fair reasons for dismissal the potential grounds here could be misconduct (Section 98 (2) (b) Employment Rights Act 1996). If Zain's conduct amounted to gross misconduct, then this could potentially justify dismissal. If however the conduct is a minor issue then under the provisions of the ACA code of practice this should be deal with by way of a warning following a fair procedure. The ACAS code on disciplinary matters, whilst not legally binding, is used by the Tribunal to judge the issues of fairness in relation to any procedures adopted to dismiss an employee. So as to ensure a procedurally fair process, Marie Anne should follow the company rules in relation to disciplinary action there is an obligation under section 3 of the Employment Rights Act that Marie Anne should specify any disciplinary rules applicable to the employee. This is advisable to ensure that the acceptable levels of conduct are effectively communicated to Zain, so that he (along with other employees) understand the expected standards of behaviour and the implications of not complying with them. In the absence of having a disciplinary policy, it is advisable Marie Anne follows the ACAS code which states:

- Investigation to establish the facts. In addition to the ACAS code the case of BHS Ltd v Burchell (1978) states that the investigation should establish that

a) an honestly held belief b) that she had reasonable grounds to sustain that belief and c) she had carried out as much investigation as was reasonable in all the circumstances
- Inform the employee in writing of the issues, including the allegations against them, give Zain any evidence that Marie wishes to rely on in taking disciplinary action in advance of the disciplinary meeting and inform Zain that he has the right to be accompanied (a work colleague or an accredited Trade union representative, section 10 Employment Relations Act 1999) at the disciplinary meeting. Also the disciplinary invitation should specify the highest level of sanction that may be imposed, as a result of the disciplinary meeting.
- The decision should be given to Zain also offering him the right of appeal and details of who he should send any appeal to.

The dismissal should be within the band of reasonable responses open to an employer (Iceland Frozen Foods v Jones (1982) IRLR 439).

If an employer unreasonably fails to follow the ACAS code of practice a Tribunal may increase an award by up to a maximum of 25% (Trade Union and Labour Relations (Consolidation) Act 1992 s 207A).

If Zain has not been employed continuously for over two years then Marie Anne does not have to demonstrate potentially fair reasons to terminate employment. On the face of the information, if Zain does not have two years service (and in the absence of any of the automatically unfair grounds for termination of employment being applicable here) Marie Anne could dismiss Zain without having to establish potentially fair grounds under section 98 of the Employment Rights Act 1996.

In summary Marie Anne Hawn can dismiss relatively easily if Zain has not been continuously employed over two years i.e. she will not have to demonstrate that Zain's dismissal was within the band of reasonable responses open to her. However, if Zain has been employed continuously over two years then she will have to demonstrate substantive and procedural fairness in the whole of the disciplinary process.

Marie Ann may also be exposed to a claim wrongful dismissal here if she dismissed on without following a due process as per the companies procedure.

Question 1(b)

Currently Marie Anne has a lack of information, in the current policies, as to how speeding infringements in company vehicles will be treated. The case of Reid v Liberty Living Plc UKEATS/0039/10/BI, is a good example of why clear policies are important, here the companies alcohol policy was not clear nor was the employee aware of it, his dismissal on the basis of the details within the company policy was held to be unfair. The policies should be updated to include the expected standards of behaviour in relation to speeding in works vehicles. If she does not already have one, she should consider having a disciplinary policy setting out the types of behaviour that amount to gross misconduct if Marie Anne wishes to treat speeding as a potential gross misconduct offence then this should be specified within the policies.

Question 2(a)

Early conciliation was introduced on 6 May 2014, it is compulsory (subject to some exceptions) and it applies to 'relevant proceedings' in the Employment Tribunal, and which applies here in respect of unfair dismissal. It is compulsory

that a potential claimant first notifies ACAS of their complaint by phone or using an online form. At this stage the potential claimant does not need to specify what their claim is. ACAS attempt to contact the potential claimant and explore if a terms of settlement can be agreed with the employer at this stage. If the parties are not willing to enter into talks or settlement is not successful then an early conciliation certificate is issued so that the potential claimant can proceed to a Tribunal claim. The Early conciliation is required for the claimant to proceed to a claim in the Employment Tribunal and it must be submitted with the ET1 claim.

The benefit of early conciliation is that terms of agreement can potentially be reached in early course, thus avoiding the time and costs involved in defending Employment Tribunal proceedings.

Question 2(b)

The grounds of defence and ET3 to the Claimant's claim must be submitted to the Employment Tribunal within 28 days of the Notice of Claim (Sch 1 r16 (1) Employment Tribunal (Constitutional Rules of Procedure) Regulations 2013, ET(CRP)R 2013). The defence must be on the prescribed form and it must have the relevant compulsory information completed on the form.

If the ET3 form is not presented within the 28 day period an Employment Tribunal Judge can issue a judgment in respect of all or part of the claim, to the extent that they consider it is possible to do so after considering the available material, (Rule 21 ET(CRP)R 2013). If Ian's claim did not give enough detail for the Judge to make a finding and respective award, then the Judge can list the matter for hearing to determine the claim. With this in mind it is advisable that Westvey Ltd completes the ET3 form and submits it to the Employment Tribunal within the 28 day period. This is in order that they can resist the claim and explain why they consider the dismissal of Ian was a potentially fair one, as in the event that they did not submit their ET3 response, they may have a Judgment made against them and be debarred from taking any other part in the proceedings.

After the response has been accepted, as part of the initial considerations of the claim and response, an Employment Tribunal Judge will consider whether the claim or response have no reasonable prospects of success (Rules 27 (1) and 28 (1) ET(CRP)R 2013), this is known as the judicial sift. If the Tribunal considers that the claim had no reasonable prospects of success they will send a notice to the parties setting out the Judges views and reasons ordering that the claim (or part of it) is dismissed by a specified date unless the relevant party, before that date, presents written representations to the Tribunal explaining why it should not be dismissed.

It is open to the Westvey to make an application to the Employment Tribunal that the claim is listed for a Preliminary hearing to consider whether the claim is struck out, which means the Ian would no longer be able to proceed with the claim. A strike out application can be made where the Tribunal considers that the claim has no reasonable prospects of success.

Alternatively an application can be made that there is a Preliminary hearing to ask the Employment Tribunal to consider making an order that the claimant pay a deposit if their claim has 'little reasonable prospects' of success. If a deposit order is made (which is a maximum of £1,000) this is a condition of being permitted to continue to advance the claim (rule 39(1) ET(CRP)R 2013).

It is in the best interests of Westvey Ltd that they do submit an ET3 response to the claim and consider making an application that the claim is listed for a Preliminary hearing to consider whether the claim should be struck out or a deposit order made for Ian to continue to make his claim.

Question 2(c)

The Respondent contends that the Claimant was summarily dismissed for a potentially fair reason under section 98 (4) of the Employment Rights Act 1996, namely gross misconduct. The Claimant admitted he had been fraudulently claiming expenses during the disciplinary meeting held on the 13 May 2017.

The Claimant was dismissed on the grounds of gross misconduct, it was held that the Claimant had (following investigation) been fraudulently claiming expenses which is expressly prohibited under the company rules (company hand book states that this is a gross misconduct offence).

The Respondent contends that the dismissal was a reasonable one as it was within the band of reasonable responses open to them and had complied with the ACAS code of practice in relation to disciplinary and grievance procedures, specifically:

- The Respondent had investigated the matter.
- The Claimant had been advised in advance of the disciplinary meeting that he had the right to be accompanied, the details of the allegations against him and that the disciplinary meeting may result in the termination of his employment as the allegations were considered potential gross misconduct offences.
- The decision to dismiss the Claimant was given in writing on the 15 May 2017 and he was advised of his right of appeal.

The Claimant did not exercise his right of appeal against the disciplinary outcome for this reasons the Respondent asks that the tribunal considers any relevant deductions to any award as the Claimant has failed to comply with the ACAS code of practice in relation to disciplinary procedures.

The Respondent asks the Tribunal to also consider any relevant deductions under the principal of Polkey v AE Drayton Services (1987) IRLR 503

Question 3(a)

Introduction

All pregnant employees are entitled to reasonable time off to attend antenatal appointments and to maternity leave. Entitlement to statutory maternity pay depends upon the length of service and earnings of the individual employee. Please inform us as soon as possible that you are pregnant. This is important as there may be health and safety considerations.

Policy

This policy outlines the statutory rights and responsibilities of employees who are pregnant or have recently given birth.

Maternity leave

All employees are entitled to maternity leave regardless of their length of service. The maternity leave period comprises of 26 Ordinary Maternity Leave (OML) and 2 weeks of Additional Maternity Leave (AML). There is a period of compulsory maternity leave which must be taken this is 2 weeks' leave.

The entitlement to maternity leave is dependent on the employee giving the following notification of her intention to take maternity leave no later than the 15th week before her expected week of confinement (EWC):

- Her pregnancy;
- The expected week of child birth (EWC);
- The date she intends her OML to start. This cannot be earlier than the 11th week before the EWC.

The commencement of maternity leave can also be triggered early in the event that the employee is absent due to a pregnancy related sickness in the four weeks before the EWC or it will commence on the day after the child's birth if the child is born before the expected maternity leave period.

Employees should also specify the intended duration of maternity leave they wish to take.

Maternity Pay

To qualify for statutory maternity pay (SMP) an employee must:

- Have been continuously employed for at least 26 weeks into the 15th week before the EWC, employees.
- Have earned an average of at least the lower earrings limit for National Insurance purposes in the 8 weeks leading to the qualifying week.
- Employees should ensure that you give at least 28 days notice in writing of when they wish to take their SMP. SMP cannot be paid until you have stopped working entirely (excluding KIT days).

Antenatal appointments

All pregnant employees are entitled to reasonable paid time off to attend antenatal appointments'.

Keeping in Touch

Whilst on a period of maternity leave you are entitled to up to a maximum of 10 days keeping in touch (KIT) days. KIT days can be used for training, keeping up to date with work developments; you are not obligated to undertake KIT days. If you wish to use a KIT day please contact your line manager to make appropriate arrangements. KIT days cannot be used in the period of compulsory maternity leave.

Return to work following maternity leave

If an employee wishes to return to work before the end of their maternity leave they must give a minimum of 8 weeks' notice in writing to their line manager.

You are normally entitled to return to work in the position you held before starting maternity leave, and on the same terms of employment. However, if you have taken AML and it is not reasonably practicable for us to allow you to return

into the same position, we may give you another suitable and appropriate job on terms and conditions that are not less favourable.

Question 3(b)

TUPE 2006 provides that where there is a relevant transfer, the employees employed immediately before the transfer will automatically transfer.

The first thing that needs to be identified is the potential method of transfer and if it is a sale of the business as an ongoing concern the TUPE will apply. Regulation 3 (1) TUPE 2006 applies if there is a relevant business transfer and that an entity has transferred (Spijkers Gebroeders v Benedik Abbattoir CV and Alfred Benedik en Zonen BV (1986), the Spijkers case). The undertaking must be a stable economic entity and it must be transferred in a recognisable form (i.e. it retains its identity). The Spijkers case set out a number of points to be considered when determining whether there has been a relevant business transfer including:

- The type of business or undertaking concerned. Its size is irrelevant;
- Whether employees are taken over;
- Whether the business's tangible or intangible assets are transferred;
- Whether customers are transferred;
- The degree of similarity between activities carried out before and after the transfer.

The key factor in Spijkers is whether the business entity has 'retains its identity'. So if the business was bought as an ongoing concern then TUPE would apply. Regulation 4 (3) of TUPE 2006 transfers employment contracts of individuals who were employed immediately before the transferor prior to the transfer. It is likely that Regulation 4 (3) would apply here and therefore DC Hammer and Chisel Ltds employees are likely to be transferred. This will mean that the employees of DC Hammer and Chisel Ltd will be automatically transferred to Big DIY Ltd, meaning that all their terms and conditions of employment (as they stand with DC Hammer and Chisel Ltd) will be preserved.

As TUPE is likely to apply, even though matters are only at a formative stage, DC Hammer and Chisel Ltd need to be aware that there is an obligation to inform and consult under Regulation 13 TUPE 2006. Micro businesses can consult their employees directly in relation to a TUPE under Regulation 13A TUPE 2006. In the event that there was no consultation a protective award can be sought (Regulation 15 TUPE 2006) and this can be a maximum of 13 weeks pay per employee. Also DC Hammer and Chisel Ltd have a duty to provide employee liability information by no later than 28 days before the transfer, this information should contain the information required specified under Regulation 11 TUPE 2006.

However if the purchase is a share purchase TUPE would not apply.

Question 4(a)

Carolina may bring a claim of direct race discrimination under the Equality Act 2010. Carolina has a protected characteristic (s4 Equality Act 2010) namely race. Race includes colour, nationality and ethnic or national origins (s 9(1) of the Equality Act 2010). Direct discrimination is defined in s13 of the Equality Act 2010 as where A treats B less favourable than others because of a protected

characteristic. An employer is unable to argue that direct discrimination is justified.

The potential remedies for a successful claim of Race discrimination include a declaration of the employee's rights (s124 Equality Act 2010); recommendation that the employer takes action to alleviate the effect of discrimination or compensation. Discrimination claims awards in the Employment Tribunal are uncapped however guidance was issued in the case of Vento v Chief Constable of West Yorkshire Police (2003) this case gave bandings as to how injury to feelings awards should be awarded and were reviewed in line with inflation in the case of Simmons v Castle (2012) as follows:

- Lower band (least serious cases or one off acts of discrimination) up to £6,600

- Middle band (which is for serious cases that do not merit an award in the highest band) £6,601 to £19,800

- Top band (for the most serious cases, such as where there has been a campaign of discriminatory harassment) £19,801 to £33,000, this does suggest that although discrimination awards are uncapped it would have to be an exceptional case for it to exceed £33,000.

In addition, aggravated damages are available if the employer has acted in a high handed, malicious, insulting or oppressive manner. Loses can also include loss of earnings, interest, future earnings and other economic losses as a Carolina's has a claim for potential constructive unfair dismissal and this is quantified in the same way as an unfair dismissal claim.

There is a potential of an increase to an award for compensations for constructive dismissal on the basis that Tongar failed to comply with the ACAS code of practice in relation to Disciplinary and Grievance processes, an award can be uplifted to a maximum of 25% in respect of the same.

As the discrimination that Carolina has been suffering has lasted over 18 months it is likely that this would sit in the middle band of the Vento guidelines.

Question 4(b)

Clause 25.1.1 is a non-competition covenant and 25.1.2 is a non-solicitation covenant. Restrictive covenants are prima facie void as they are potentially in restraint of trade and contrary to public policy (and contrary to an individual's right to earn a living). In order that a restrictive covenant should be valid it must go no further than necessary to protect the legitimate interests of the employer (Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd (1984)).

In deciding whether a restrictive covenant is reasonable the court will consider the clauses scope, geographical location and duration, this will also be sensitive to the particular facts of the case. The cases of Fitch v Dewes (1921) and Fellows v Fisher demonstrate how the geographical limitations must be carefully considered. It is likely that the clause 25.1.1, in the circumstances that there is no geographical limitation in the clause, would be unenforceable and in restraint of trade.

In relation to clause 25.1.2 again this is arguably too widely drafted so as to ensure that this is only protecting the legitimate business interests of Tongar UK

Ltd. The case of Safetynet Security Ltd v Coppage (2013) concerned a high profile employee and was therefore held to be enforceable, however Carolina is a call centre operative and is not in a high profile role, also she may not have knowledge of all the customers she may be precluded from contacting, as per the terms of the clause, if she has never dealt with them whilst in her employment with Tongar UK Ltd.

Question 4 (c)

In the circumstances of Carolina's resignation Tongar UK Ltd is potentially in breach of contract specifically the implied duty of mutual trust and confidence. Under the implied duty of trust and confidence, an employer must not, without reasonable cause, conduct himself in a manner that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence (Woods v WM Car Services (Peterborough) (1982)). Where a breach of mutual trust and confidence is concerned this will always be a fundamental breach of contract entitling the employee to resign (Morrow v Safeway Stores Plc (2002) IRLR 9). Where a party (in this instance Tongar UK Ltd) is in breach of contract, that party cannot then seek to rely on the benefit of other clauses within the contract (General Billposting Co Ltd v Atkinson (1909)).

In conclusion it is unlikely that, as Tongar UK Ltd is likely in breach of contract, they will be successful in precluding Carolina from working for a competitor under the principals of the General Billpostings.