



CHIEF EXAMINER REPORT

June 2024

LEVEL 6 UNIT 19 – THE PRACTICE OF EMPLOYMENT LAW

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the June 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed.

Chief Examiner Overview

This is a practice paper and candidates have access to the pre-release case study. Candidates are required to give advice to clients with reference to the relevant law (knowledge) and taking into account the personal circumstances of each client as described (understanding).

The cohort was too small for general trends and valid overall feedback.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance may be limited.

Question 1a	15 marks
<p>There were several legal issues examined and only few stronger papers identified all relevant points, with supporting law and application. Most candidates noted some of the legal issues examined and cited basic statute. Application of law to all of the CS specifics was found only in stronger papers, with most papers providing brief application.</p>	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Identify that the National Minimum Wage Act 1998 has varying brackets based on age. • When Alisha Batia was employed by Cats Accountancy, she was paid the minimum wage for a 19 year old. This should have increased when she turned 21 years of age, and again increased when she turned 23 years of age. • Alisha Batia is now being paid the correct minimum wage for her age. However, she has been underpaid for 3 years. • Alisha Batia may bring a claim for breach of contract in the civil courts. This is the only option as a claim in tribunal is not possible as this must be brought within three months of the breach, whereas civil court claims can be made within 6 years. • Identify that the Equality Act 2010 s4 protects against discrimination on the basis of age s5, and race s9. • Explain that the EA 2010 protects against discrimination in the form of harassment. Define s26 harassment. • The comments Evie Chung made to Alisha Batia are likely discrimination. • The comment 'silly little girl' is likely age discrimination in the form of general harassment, and 'playing the race card' is likely harassment based on race. • This is reinforced by the power dynamic as Evie Chung is Alisha Batia's manager, although they did have an informal relationship. • Although this is the first such comment made to Alisha Batia by Evie Chung, the making of just one discriminatory verbal comment has been held to be harassment, particularly where a more senior employee makes a remark to a junior employee, <i>In Situ Cleaning Co Ltd v Heads (1995)</i>. • The comment made to Alisha Batia by Evie Chung about her love life being 'in need of resuscitation' is likely not harassment as it was a mutual exchange and there was no offence taken. However, credit arguments either way given the power imbalance. • Remedies for harassment: the ET may make an order of declaration of rights s124 (2), a recommendation s124 (2), compensation with no upper limit s124 (2) • Alisha Batia may be able to recover injury to feelings • Explain the Vento bands and that it is likely her award to Alisha Batia would be in the lower band as it is a one-off comment. Credit any reasoned argument. 	

Question 1b	7 marks
The question produced moderate to good responses overall. The citation of supporting law was found in most papers and application was generally well reasoned, with the exception of certain very low scoring papers.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Apply the EA 2010 s26 definition of harassment to the comment made by Alisha Batia to Evie Chung. • It is unlikely the comment will be considered harassment as the power imbalance lies in favour of Evie Chung, and there is a long-standing informal relationship where such exchanges are mutually made with no offence evidently being taken. • The fact that there was no complaint made by Evie Chung after the comment made, and there was continuation of the friendship, including socialising within homes, suggests no offence was taken. 	

Question 2a	10 marks
Most candidates identified the relevant points specific to both aspects of the question. However, while the ET1 content was generally sufficiently addressed, early conciliation could have been more thoroughly considered in certain lower scoring but passing papers.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Explain the need to engage with the ACAS early conciliation procedure as a requirement under the Employment Tribunals (Early Conciliation: Exemption and Rules of Procedure) Regulations 2014. • Identify that Lee Reid will be allocated a conciliation officer who will attempt to facilitate a settlement, although they cannot advise on the merits of the case. If conciliation is unsuccessful or the respondent cannot be reached or refuses to engage, a certificate will be issued to confirm that the claimant complied with the early conciliation process. • Lee Reid can then proceed to bring a claim to the ET. • As the claimant, Lee Reid will need to complete an ET1 form and submit this to the appropriate tribunal within the time limits applicable to the claim. • The ET 1 form should contain: 1. Personal details of the claimant, date of birth, any representation and correspondence address. 2. The respondent's identity and any representation, 3. The nature and details of the claim and remedies sought. This form must be submitted by the prescribed time limits, in this case three months from the date of the 'event' i.e. being dismissed from employment 	

Question 2b	6 marks
The area of ADR in general was considered, with very few papers providing information sufficiently specific to judicial mediation, as examined.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Judicial mediation is a form of Alternative Dispute Resolution where parties meet to negotiate and discuss their dispute with the aim of reaching a mutually satisfactory agreement. • Judicial mediation is carried out by a specially trained employment judge. • The parties will need to agree to the process at which time the regional mediation judge determines if mediation should be offered. • The process is private, confidential and without prejudice. The process aims to find a resolution, not arguing merits of the case. 	

Question 2c	6 marks
Most papers provided an overview of somewhat relevant, but slightly vague, points relating to costs. Credit was given where possible for overarching but accurate statements.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • The losing party in an employment tribunal is not generally ordered to pay the legal costs of the winning party, unlike in civil court proceedings. • Costs may be awarded if the tribunal determines that the party has, in bringing or conducting proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably or where the claim or response had no reasonable prospect of success r76 (1) Sch 1 ET(CRP)R 2013. • The tribunal may also make an award where the actions of a party have led to the hearing being postponed or adjourned r76(2) ET(CRP)R 2013. • It is highly unlikely Lee Reid would be liable for costs if he lost the case as his claim does not appear to fall within any of these definitions. 	

Question 3ai	5 marks
This relatively straightforward 5 mark question resulted in overall strong and accurate responses, with supporting statute citation.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • The Employment Rights Act 1989 s98 recognises conduct/ gross misconduct as a potential fair reason for dismissal under the statute. • Muse Ltd likely has statutory reason for dismissing Mr Garrett. 	

Question 3aii	7 marks
Answers tended to be relevant and clear with some reference to law in higher scoring papers. Certain responses were relevant but could have been more detailed given the relatively straightforward nature of the question.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • It is beneficial for employers to create their own company specific policies on internet use that complement statutory provisions and can be part of the employment agreement with employees. • Such policies will ensure employees are aware of the type of material that is restricted when in the workplace, thereby avoiding disputes. • This would further help avoid situations where the employee can defend the accessing of inappropriate material by claiming they were unaware that legal, 'adult' content was restricted • This will protect your company from malicious software and viruses that could infect your computer systems when employees access unacceptable material using company equipment. • Internet use policy may also protect your company against law suits which may arise due to viruses entering your computer systems and resulting in clients' private information being made public. • In such an instance, your company may be held vicariously liable for the actions of the employee that led to the material becoming public; particularly if the company has no specific policy in place prohibiting such activities in the workplace. 	

Question 3bi	12 marks
<p>Overall good responses were found in relation to the 'settlement agreement' aspect of the question. The 'full and final clause' aspect of the question was only sufficiently addressed in few higher scoring papers. Most paper passed the question by addressing the former aspect well, with the latter being more broadly and briefly noted.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • The formalities of settlement agreements are found in s203 (3) Employment Rights Act 1996 and S111A of the ERA 1996 and state that any such agreement must be in writing and relating to a particular proceeding or complaint. • The settlement agreement will set out the terms agreed in the negotiation and will include the names of parties, amount to be paid to the employee, details of the claims the employee agrees not to take against the employer and details of the employee's legal adviser along with the adviser's signature. • An agreement may include a 'full and final settlement' clause, however, even these do not preclude 'all future claims'. • Hinton v University of East London (2005), settlement agreements should be tailored to the particular circumstances even when including 'full and final settlements' clauses. • The court confirmed that the requirement of s203 ERA 1996 that an agreement to preclude the right to bring tribunal proceedings must relate to the particular proceedings, so the settlement agreement had to identify the particular or potential claims to be covered. 	

Question 3bii	6 marks
<p>The majority of papers considered the validity of clauses generally, with few answers adequately addressing the specifics of the question with regard to the validity of the clause.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • There are certain exceptions to the use of settlement agreements, including claims relating to dismissal for automatically unfair reasons, and asserting any statutory right. • Marisa Tolken appears to have been automatically unfairly dismissed as she has been made redundant during maternity leave. This contravenes s18 Equality Act 2010, and s98 ERA 1998 automatic unfair dismissal. • A settlement agreement cannot be used to prevent Marisa Tolken bringing a claim against Muse Ltd for her dismissal. 	

Question 4a	7 marks
There was a high level of relevant detail given in most papers, with higher scoring papers also providing supporting case law. Application was generally reasoned and CS specific.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Explain that Clause 8.8 is a garden leave clause • Garden leave clauses are a restraint of trade but can be enforced if there are legitimate interests for the employer to protect • Tamisha Jones has been employed for 6 years and had a 'senior' position at Inclusive 222 • She also had access to client contacts and could potentially gain further contacts during the notice period • The fact that she did not have access to other confidential information could suggest the clause would not be enforced • Clause 8.8 appears enforceable against Tamisha Jones, however, credit any reasoned arguments and conclusion 	

Question 4b	6 marks
The relevant statute was identified, and application was detailed and accurate per the CS specifics.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • The Parental Bereavement (Leave and Pay) Act 2018 gives day one right to leave, so the fact that Yusuf Khan had been employed for just 6 weeks will not affect his right to two weeks leave. • Yusuf Khan was not entitled to paid leave as he did not meet the required 26 weeks continuous service with the company. • His rights have been breached as he was offered just one week of leave. 	

Question 4c	13 marks
<p>The majority of candidates identified relevant points, but more detail could have been given, particularly with regard to the ETO aspect of the question. Nonetheless, most candidates provided strong responses, including identification of relevant areas of law examined, with statute, and a few brief points of reasoned application.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Identify that Regulation 4(3) transfers employment contracts of individuals who were employed by the transferor immediately prior to the transfer and assigned to the relevant grouping of employees that is transferred. All contractual rights and liabilities under or in connection with the employment relationship are transferred. • Under the Transfer of Undertakings Protection of Employment) Regulations 2006 ('TUPE 2006') Reg 4 (4) (5) variations to contract may be permissible if the sole or principal reason for the variation is an economic, technical or organisational (ETO) reason entailing changes in the workforce. • TUPE 2006 does not explicitly define an economic reason but the Department of Business, Innovation and Skills suggests 'economic' is likely to refer to 'profitability'. • This reason also appears to meet the requirement of 'entailing changes in the workforce' Delabole Slate Co Ltd v Berriman (1985). • Identify that BookBees may have had an ETO reason to dismiss Jackie Neate due to significantly decreased profits after the loss of valuable, uninsured stock • Identify that dismissal for an ETO reason falls under s98 ERA 1998 dismissal for 'some other substantial reason'. • Jackie Neate had been employed by Ulysses Reads for 2 years so had the required duration of employment for protection from unfair dismissal, ERA 1998 unfair dismissal. • BookBees is required to show procedural fairness in dismissal s98(4) Employment Rights Act 1996. • Jackie Neate states that she was not given time or opportunity to understand or argue against her dismissal, if so the ACAS Code does not appear to have been followed in the dismissal procedure. • Jackie Neate may have been unfairly dismissed, credit any reasoned arguments. • Remedies for unfair dismissal ss112 and 113 ERA: include reinstatement, reengagement, and financial compensation in the form of a basic and compensatory award. • An uplift of up to 25% may be awarded as proper procedure does not appear to have been followed 	