CHIEF EXAMINER REPORT

JANUARY 2024

LEVEL 6 UNIT 4 – EMPLOYMENT LAW

The purpose of the report 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' section 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

Section A was adequately addressed, with most candidates identifying relevant laws and supporting their explanations with statute and case law. While most answers were relevant but descriptive, a few higher-scoring papers included critical analysis. Weaker responses lacked detail or were minimally relevant.

Section B was similarly addressed, with most candidates recognising some legal issues and supporting their answers with basic law citations. Few higher-scoring papers addressed all issues with specific and reasoned application.

All questions in both sections were attempted, consistent with previous sessions.

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.

Section A

Question 1	25 marks
The AWR aspect was generally well addressed, while the FTW element was only briefly noted. Citations of supporting statutes were good overall, but there was a lack of critical assessment.	
Suggested Points for Response:	
• Regulation 3 of the Agency Worker Regulations (AWR) 2010 defines an agency worker as someone supplied by a temporary agency to work under a hirer's supervision. • The agency is responsible for ensuring equal treatment (Reg 14). An agency worker can request a statement within 28 days explaining differences in treatment (Reg 16(1)). • Agency workers can file a complaint with the Employment Tribunal (ET) within three months, with the ET able to issue declarations, compensation, or recommendations. • The Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations (2002) ensure fixed-term workers are not treated less favourably regarding contract terms or detriments (Reg 3). • Fixed-term workers can also file a complaint with the ET within three months, with similar outcomes. A critical assessment of these laws should be included throughout.	

Question 2	25 marks
Candidates generally identified the relevant statute and some case law, while stronger papers cited a more varied array of cases. Critical evaluation was found in a few high-scoring papers.	
Suggested Points for Response:	

- Explain the definition of harassment under Section 26 of the Equality Act 2010.
- Section 26(4) of the Equality Act 2010 requires consideration of the claimant's response, including (a) their perception, (b) the circumstances, and (c) whether the conduct was reasonably likely to have the alleged effect. This involves examining the nature of the parties' relationship and the work environment.

Critically evaluate relevant case law, such as:

- *Bracebridge Engineering Ltd v Darby* (1990): The nature of the work environment and dynamics can make an incident harassment.
- *Evans v Xactly* (2018): Discriminatory comments may not be harassment if such comments are common and accepted as "banter," although claims are highly context specific. Compare with *Minto v Wernick Event Hire Ltd* (2009), where the banter defence was rejected.
- *Harper v Housing 21* (2012): The motive behind alleged harassing statements is not decisive in determining harassment.

Question 3a	14 marks
Most candidates identified basic duties with some case law; few high scoring papers also provided some brief points of analysis. However, weaker answers did not address the specific type of duties examined and provided too broad an overview of general duties.	
Suggested Points for Response:	

- Define implied terms.
- Identify the common law duty to provide safe equipment, a safe system of work, and competent colleagues, as established in *Wilsons & Clyde Coal Co Ltd v English* (1937).
- Note that this duty extends to an employer's obligation to exercise reasonable care in protecting employees' health and safety.
- Employers must warn employees of specific dangers and ensure the use of protective gear in high-risk environments, *Pape v Cumbria County Council* (1991).
- There is also an implied duty to provide a safe working environment, including competent staff, as seen in *Hawkins v Ross Castings Ltd* (1970). This duty includes ensuring all staff are properly trained, especially in high-risk settings.
- Employers are required to protect both physical and mental health from work-related stress and injury, as established in *Northumberland CC* (1995), *Barber v Somerset County Council* (2004), and *Sutherland v Hatton* (2002).
- An implied term can override an express term if employee health is at risk, as shown in *Johnstone v Bloomsbury Health Authority* (1991).
- Critical analysis of these cases should be integrated throughout the response.

Question 3b	11 marks
Some points of critical analysis were found in higher scoring papers; however, a number of answers were relevant and detailed, but slightly descriptive.	
Suggested Points for Response:	

- Restrictive covenants are generally void as restraints of trade or for public policy reasons.
- Employers must demonstrate a legitimate interest to protect and ensure the clause is no broader than necessary in terms of time, area, and scope of information.
- Critically analyse case law on enforceability, such as:
    - *Fitch v Dewes* (1921);
    - *Safetynet Security v Copenhagen* (2013);
    - *Hanover Insurance v Schapiro* (1994);
    - *Towry Ltd v Barry Bennett* (2012);
    - *Systems Reliability Holdings v Smith* (1990);
    - *Emersub v Wheatley* (1998);
    - *Egon Zehnder v Tillman* (2017); and
    - *Richard Baker Harrison Ltd v Brooks* (2021).

Question 4	25 marks
Candidates identified relevant statutory provisions in most papers, and supporting case law was also used in higher scoring papers. Both consultation and selection processes were considered with relevant statute, and the latter was also supported with case law in stronger papers with nominal critical analysis.	
Suggested Points for Response:	

- Define redundancy definition (ERA 1996 s139): Dismissal due to business closure or reduced need for employees. Consultation required for 20+ dismissals within 90 days.
- Explain consultation requirements (TULRCA 1992 s188-194):
    - Liaise with representatives to avoid, reduce, or mitigate dismissals.
    - Consult recognised trade unions or elected representatives.
    - Representatives must understand the subject, express views, and have opinions genuinely considered (British Coal Corp ex parte Price, 1994).
- Note breach consequence: Tribunal may issue a protective award for failing to consult under s188.
- Explain fair selection process:
    - Request volunteers for redundancy.
    - Reasonable selection pool (Capita Hartshead v Byard, 2012).
    - Fair and objective criteria (Protective Services v Livingstone, 1992).
    - Criteria: work standard, skills, qualifications, experience, disciplinary record (Williams v Compair Maxam, 1982; Farthing v Midland House Stores, 1974).
    - Non-discriminatory process (Whiffen v Milham Ford Girls School, 2001; Equality Act 2010).
- Provide critical analysis throughout.

Section B

Question 1	25 marks
Most candidates successfully identified the relevant statutes concerning the deduction of wages and the National Minimum Wage. However, only the higher-scoring papers identified indirect discrimination and the Working Time Regulations. Overall, there was good citation of relevant laws.	
Suggested Points for Response:	
• Identify Amy's wage breach under the National Minimum Wage Act 1998: Her wage should have increased with her age, but it remained the same. • Identify the Working Time Regulations 1998: Night work is usually from 11pm to 6am (Reg 2). Night workers should not work more than 8 hours per 24-hour period, with limits for high strain jobs. Amy's 9-hour shifts from 11pm to 8am exceed this limit. • Explain wage deductions under ERA 1996 s13: Deductions are only allowed if required by law or with prior written consent. Amy's deductions for damaged items do not meet these criteria. • Identify the Equality Act 2010's relevance: Under s19, indirect discrimination may occur if a requirement disproportionately affects women. The employer may argue that the requirement is proportionate to a legitimate aim. • Provide a reasoned conclusion based on these points.	

Question 2a	5 marks
This was a popular and straightforward 5-mark question, resulting in good responses. Most candidates applied facts and supporting law effectively.	
Suggested Points for Response:	
• Define the TUPE 2006 categories of transfer: - Traditional or standard method: Reg 3(1) and Reg 3(2). - Extended transfer definition. • Transfer of Undertaking or Business: - Transfer of an economic entity retaining its identity immediately before the transfer in the UK to another person (Reg 3).	

Question 2b	11 marks
Overall, there was good performance from candidates on this question. Most identified relevant statutory provisions and applied them to the question. Slightly more detail could have been provided in the lower-scoring but passing-grade answers.	
Suggested Points for Response:	
• Under TUPE 2006 Regulation 4(2), the transferee acquires all rights, powers, duties, and liabilities related to the contract. • Ibrahim's contractual rights and liabilities have transferred from Debs Delights to Cakes Galore, and his contract is protected from changes by Cakes Galore under Regulation 4(4) and (5). • Exceptions allow for variations to contractual terms for economic, technical, or organisational (ETO) reasons related to the business, as noted in *Wheeler v Patel* (1987). ETO reasons can include changes in workforce structure, such as reducing numbers or altering functions (*Osborne v Capita Business Services Ltd* (2016)).	

- "Changes in the workforce" can involve changes in the place of work or redundancy (Reg 4(5)). However, dismissals by the transferor must relate to the workforce before the transfer to qualify as ETO reasons (*Hynd v Armstrong* (2007)).
- Harmonisation of terms post-transfer does not count as an ETO reason, and changes to Ibrahim's wages are not justified as an ETO reason and are therefore void.

Question 2c	9 marks
Overall, candidates produced good answers to this question containing a high level of detail, relevant supporting statutes, and appropriate application.	
Suggested Points for Response:	

- Under Reg 11 of TUPE 2006, the transferor must notify the transferee of any employee liability information, including disciplinary actions, in writing or in an accessible format. This notification must occur at least 28 days before the transfer, or as soon as reasonably practicable.
- Debs Delights failed to inform Cakes Galore about Ibrahim Khan's warnings and did not meet the 28-day notice requirement or provide the information in writing.
- Cakes Galore can file a complaint with an employment tribunal under Reg 12 for non-compliance. The complaint must be made within three months of the transfer or within a reasonable extended period.
- If the tribunal rules in favour of Cakes Galore, it can issue a declaration and award compensation from Debs Delights, usually not less than £500.

Question 3	25 marks
Many responses covered several legal issues and addressed basic points, but only a few high-scoring responses identified all relevant issues, including detailed application and law. While equal pay provisions were generally well covered, lower-scoring responses could have better addressed maternity issues within the context of the question.	
Suggested Points for Response:	
• Sook took 26 weeks of Ordinary Maternity Leave under the Maternity and Parental Leave Regulations 1999. Upon returning, she has the right to return to her previous job with the same terms and conditions. Moving her to a more junior role likely breaches her statutory rights, even if her pay remains the same. • Sook notified Lights Ltd in writing about her need for adjustments to accommodate breastfeeding. Lights Ltd failed to conduct a workplace risk assessment or make reasonable adjustments, breaching her rights. • Jalisa's statutory rights under s8 ERA 1996 have been breached as she has not received an itemised statement from her employer. • Sex is a protected characteristic under s4 EA 2010. Every employment contract includes an implied sex equality clause under s66 EA 2010. To claim a breach of s66, Jalisa must show she is doing like work or work of equal value compared to Siresh, her comparator (s65 EA 2010). Siresh, employed by the same company in the same role, meets the comparator criteria. • Lights Ltd might argue that pay differences are due to material factors, not gender (s69 EA 2010). Factors like educational qualifications and length of service, as in *Cadman v Health and Safety Executive* (2007), may apply. Siresh has a higher qualification and more years of service than Jalisa. • Provide a reasoned conclusion based on these points.	

Question 4a	11 marks
The question addressed two aspects, and most papers identified both, though candidates provided more relevant points on flexible working. Some candidates noted emergency leave provisions, but lower-scoring responses lacked effective application to the question.	
Suggested Points for Response:	
• Employees are entitled to unpaid time off for emergencies involving dependants under s57A ERA 1996. • Since Kiki's son, Jason, is 24 years old, he does not qualify as a dependant, and the situation was not deemed an emergency. Kiki was not entitled to emergency leave. • Kiki is eligible to request flexible working under s80F ERA 1996 due to her 26 weeks of continuous employment and having never made such a request before. She also specified the change in working hours she is requesting. • Kiki did not meet all requirements for a valid flexible working request, such as providing the request in writing, specifying the effective date, confirming it as a statutory request, and detailing its impact on the employer. • Kiki's request for flexible working is not valid.	

Question 4b	14 marks
Answers to this question tended to be somewhat brief given the nature of the issues examined. While candidates generally identified remedies, only a few higher-scoring responses addressed the issues with detailed legal analysis and application. Some weaker answers missed the automatic unfair dismissal claim, instead focusing on common law applications.	
Suggested Points for Response:	
• Uri may have a claim for automatic unfair dismissal under the Employment Rights Act 1996, which does not require a length of service, so he is eligible despite having worked for only 8 months. • Automatic unfair reasons for dismissal include whistleblowing under s103A ERA 1996. • Uri made a health and safety disclosure by informing his manager about expired alcohol, covered under s43B ERA 1996. • Although placing a sign may not be considered proper reporting, the issue relates to health and safety, and Uri's dismissal for this disclosure could be deemed automatically unfair. • Under s100(1)(e), if an employee reasonably believes there is serious and imminent danger and takes appropriate steps to protect themselves or others, dismissal may be automatically unfair. Uri's dismissal is likely automatically unfair. • Remedies include reinstatement, reengagement, or financial compensation under s112 and s113 ERA 1996. • Compensation may be reduced by 25% if the disclosure appears to be motivated by malice. • Uri's award might be reduced if the sign placement is seen as malicious, although it could also be viewed as a legitimate attempt to protect the public.	