Chartered Institute of Personnel and Development

Professional Development Scheme

Specialist Personnel and Development

Employment Law

November 2007

5 November 2007 09:50-12:00 hrs

Time allowed - Two hours and ten minutes
(including ten minutes' reading time).

Answer Section A and SEVEN of the ten questions in Section B.

Please write clearly and legibly.

Questions may be answered in any order.

Equal marks are allocated to each section of the paper.
Within Section B equal marks are allocated to each question.

If a question includes reference to 'your organisation', this may be interpreted as covering any organisation with which you are familiar.

The case study is not based on an actual company. Any similarities to known organisations are accidental.

You will fail the examination if:

- **you fail to answer seven questions in Section B and/or**
- **you achieve less than 40 per cent in any section.**

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SECTION A – Case Study

Note: It is permissible to make assumptions by adding to the case study details given below provided the essence of the case study is neither changed nor undermined in any way by what is added.

Ed, Fran and Gilly all work for Springbridge County Council under various terms and conditions. The Council has a disciplinary procedure that complies with statutory requirements.

Ed, a housing officer, is gay and has worked for the Council for eighteen months. He has recently announced to his colleagues that following the registration of his partnership with Malcolm they hope to adopt a child in a few months time. He discovers a few weeks later that his working times have been altered so that he seems to be working more unsocial hours than others in his section.

Fran, who is 19, is an administrative assistant who has worked for the Council for two years and earns £200 a week. She is dyslexic and has devised a working system that means that she requires extra time to check her work so that she is not able to deal with such a large workload as others who work in the office with similar experience. One day she makes a serious transcription error in a proposal which is not discovered for several weeks.

Gilly is a computer technician and is employed by Springbridge Computer Services who supply the Council with their computer personnel. She has been based at the Council for three years. She works a standard 40 hour week and is on emergency standby one weekend a month when she can be called in if required between 5.00 pm on Friday and 8.00 am on Monday.

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Assume you are a personnel officer working for Springbridge Council. You are required to give appropriate advice to those who contact you identifying the specific legal issues which should be addressed in each of the following cases. Prepare a memo setting out your recommendations and advice, drawing as appropriate on case law, relevant published research and wider organisational practice.

1. Ed asks his manager Wendy for a meeting to discuss the change in working hours but she says "you are paranoid – everyone occasionally has to work those hours". He says he is not paranoid – he has been receiving nasty e—mails which he believes have come from work colleagues. Wendy brushes aside his allegations and tells him to "be a man". He is so upset he becomes ill and has taken five days off. Wendy contacts him and he says he is seriously contemplating not returning at all. Advise Wendy.

2. Fran's manager, Roland, discovers that her error has resulted in a loss of £750,000 which is unlikely to be recoverable. He wishes to know how to deal with the situation and the likely financial consequences if it is mishandled.

3. The Council has decided to bring the computing services in-house and an appropriate agreement is drawn up with Springbridge Computer Services to take effect in one months time. Interviews are held with all affected workers which are organised by the Council's Technical Services Manager, Sheena. At her interview Gilly states that her mother, who is sixty, has been diagnosed with a terminal illness. Gilly wishes to continue working for the present but no longer wants to work at the weekends. Advise Sheena.

In answering these questions you should allocate roughly equal amounts of time to each.

PLEASE TURN OVER

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SECTION B

Answer SEVEN of the ten questions in this section. To communicate your answers more clearly you may use whatever methods you wish, for example diagrams, flowcharts, bullet points, so long as you provide an explanation of each.

1. How does the law impact on the terms relating to notice in a contract of employment? Why are such terms significant?

2. A colleague asks you to explain the difference between (a) genuine occupational qualifications and (b) positive discrimination. Outline your response giving some examples.

3. To what extent has case law resulted in an improvement of the working conditions of pregnant women?

4. In what circumstances is an employer entitled to refuse time off to an employee who wants to take it (a) to discuss his forthcoming age discrimination case against his employer with his solicitor **OR** (b) to attend a meeting at the school where he is a governor?

5. What changes were made to how redundancy payments are calculated as a result of the age discrimination legislation?

6. Recently, a Chief Executive Officer was overheard saying, "There is no such thing as effective industrial action. Changes in the law have meant that it has no impact whatsoever". Using examples, critically assess this statement.

7. Outline an employer's liability for minor injuries incurred to a visitor to his premises caused by (a) water escaping from a burst pipe and (b) an employee dropping a heavy object he is carrying on the visitor's foot.

8. Explain, with examples, how women have succeeded in claiming equal pay even though their job is completely different from that of their male comparator.

9. Why is it important for an employer to give the true reason for dismissal even though the employee may find this upsetting? In what circumstances can an employee insist on written reasons for dismissal if these are not provided?

10. When, if at all, is an employer obliged to provide work for an employee to undertake? Must an employee always carry out work which they are requested to undertake?

END OF EXAMINATION

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Introduction

One hundred and thirty three candidates sat the employment law examination this November. The level of knowledge and understanding that they demonstrated varied considerably, but overall eighty nine were judged to have passed, of whom sixteen passed with merit and a further six with distinction. This gives a pre-moderated pass rate of 67% which is higher than has been achieved by most recent cohorts.

As with all CIPD examinations the key criterion for passing is the ability to give a full, well-informed, direct and accurate answer to the question that has been asked – and in the case of multi-part questions to each different element. Marks were lost where candidates were unable to do this and, as frequently, when they either demonstrated a clear misunderstanding about a legal principle or apparent confusion about it. Omission of key points was the other major cause of low marks.

This was my first cohort as employment law examiner. The paper was set by Alison Bone and then marked by myself, Sue Speakman and Andrew Hambler. The overall statistical breakdown was as follows:

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Grade	**Number**	**Percentage of total**
Distinction	3	2%
Merit	29	19%
Pass	74	48%
Marginal Fail	10	6%
Fail	39	25%
Total	**155**	**100**

The figures shown are simply calculations based on the number of candidates sitting the examination in November 2007, whether for the first or a subsequent time, and are for interest only. They are not to be confused with the statistics produced by CIPD headquarters, which are based on the performance of candidates sitting the examination for the first time. It is from these figures that the national average pass rates are calculated.

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Section A

First it is important to note that candidates were clearly asked to set out 'recommendations and advice' in the task brief. Specific requests for advice were also made in tasks 1 and 3. Task 2 also clearly asks for practical guidance on how to handle the situation within the law, while also specifically asking for information about possible financial consequences if the matter is mishandled. Most candidates approached their answers in this way and gave advice. However, in a substantial number of cases this requirement was either ignored altogether or only partially complied with. In some cases a very good legal analysis was provided, but no actual practical advice was given. A lot of marks were thus unnecessarily lost by apparently able candidates simply because they did not answer the question asked. It is important that tutors always remind students before sitting the employment law exam that they will be called upon to do more than provide a simple legal analysis. The practical consequences for managers are just as significant as the underpinning analysis. It must not be assumed that one simply follows from the other and that consequently there is no need to spell out the advice.

Ed's case touches significantly on three areas of law:

i) The requirement not to discriminate against employees on grounds of their sexual orientation. In this case the potential for a harassment claim is of particular significance, employers being vicariously liable for the actions of employees in this respect when they are at work.

ii) The implied term of contract which puts all employers under a general duty to deal with legitimate grievances in a proper and timely manner. A failure to do so may be a breach of contract and can thus provide the basis for a successful constructive dismissal claim.

iii) The right of adoptive parents to claim adoptive leave, one claiming rights equivalent to maternity rights and the other to those equivalent to paternity rights. Importantly there is a general right not to suffer a detriment for having claimed these or stating an intention to do so.

The correct advice is therefore for Wendy to arrange a meeting, to treat Ed's concerns seriously (if necessary by carrying out a formal investigation) and to ensure that in no way can he be said to have suffered a detriment on grounds of his sexual orientation or his intention to adopt a child.

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Fran's case touches significantly on two distinct areas of law, there being a specific additional requirement to say something about financial consequences if the matter is handled badly:

i) Unfair dismissal law permits employers summarily to dismiss employees who have more than one year's service and who are guilty of an act of gross misconduct. What constitutes gross misconduct will vary from workplace to workplace, but an act of carelessness which leads to a loss of £750,000 might well qualify. In any event some form of disciplinary action, be it based on misconduct or on incapability, is called for here and must be handled according to the law. If there is no gross misconduct then summary dismissal is not lawful. A formal warning must be issued instead.

ii) Fran's dyslexia potentially means that she is disabled for the purposes of the Disability Discrimination Act. This complicates matters because means that the employer must make sure that all reasonable adjustments are considered and acted upon before treating her at all less favourably for a reason that could be related to her disability. In this case that may well mean treating her error as a capability issue rather than a conduct issue, and hence issuing a formal warning rather than dismissing her. The financial consequences of a breach of the DDA are potentially far more considerable than would be the case with an unfair dismissal, including unlimited compensation for loss of earnings/future earnings and a further award for injury to feelings.

The advice should therefore be to commence an investigation into the negligent act, but to take care to make adjustments to procedures if Fran's disability is found to be a contributing factor.

Gilly's case also touches significantly on two areas of employment law:

i) The transfer of her contract from Springbridge Computer Services to the Council may well be a relevant transfer under the TUPE regulations. Furthermore it is at least a possibility that she is currently an employee of the agency (or even of the council) and not a worker, although the case law in this area leaves her precise position somewhat unclear. It is thus likely that her contract must transfer across with her and that no amendments can be made which cause her a detriment.

ii) Since April 2007 all employees with caring responsibilities for relatives and some other adults have a right to request a one off change in their terms and conditions of employment in order to allow them to work flexibly. The employer is under a duty to consider the request and can only lawfully turn it down for one of eight given reasons. In any event there may well be a case here to grant a request for a variation on compassionate grounds.

The advice is therefore to treat Gilly as an employee of the Council and to give full consideration to her request to alter her terms and conditions.

There were many good answers to the questions which correctly identified most if not all of the above points and discussed them fully. The best candidates covered all issues comprehensively, quoting relevant statute and case law, before providing sound advice. Marks were lost where insufficient advice was given and where there were inaccuracies or apparent confusion about the legal principles. In some cases a key area of law such as TUPE or disability discrimination was left out altogether.

As a general rule, candidates appeared to have rather more difficulty with Fran's case than the other two, particularly when it came to giving advice. In particular, too often candidates stated that it would be fair to dismiss summarily on grounds of capability, demonstrating a fundamental misunderstanding of 'reasonableness' in unfair dismissal law. They could state what the statute says about potentially fair reasons for dismissal, but could not state how this is interpreted in practice by tribunals who are obliged to judge cases in line with the expectations set out by ACAS in 'Discipline At Work'. Some candidates took far too cautious a line in arguing wrongly that Fran's dyslexia meant that no disciplinary action of any kind could be taken in this case.

Section B

Question 1

Statute sets out minimum notice periods starting at one week for employees who have completed a month's continuous service and rising in successive years by one week for each year of service completed. This escalation stops at twelve weeks after twelve years of service have been completed. The requirement to give this amount of notice apples equally to employers and employees, although in practice it is rare for an employee to be sued for failing to comply. In addition there will usually be a period of notice stipulated in the contract of employment (one month, three months etc.). It is important to appreciate that this supersedes the statutory entitlement where it is longer. Hence where a contract requires a month's notice, that must be honoured even where an employee is dismissed or made redundant after just two year's service. The major significance lies in the potential for a wrongful dismissal claim where an employee is dismissed (for a reason other than gross misconduct) without the full entitlement to notice stipulated in the contract.

This was generally answered well, most candidates dealing adequately with the statutory and contractual angles and explaining how they interact. The weaker answers missed one element or the other, or contained serious inaccuracies. Some did not answer the second part of the question at all and lost some marks in consequence.

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Question 2

General occupational qualifications (GOQs) apply to jobs for which an employer can lawfully advertise either for a man or for a woman without breaching sex discrimination law. Examples are acting jobs, modelling jobs and jobs which need to be reserved for members of one sex or the other for decency reasons. Positive discrimination involves actively discriminating in favour of an under-represented group such as women or members of ethnic minorities – usually at the recruitment stage. Except in the case of positive discrimination in favour of disabled persons, and in the case of the selection of parliamentary candidates, this is unlawful under UK law because it involves discriminating against a group who are protected under discrimination law.

Most candidates had little problem explaining what a GOQ was. Technically this particular term now only applies in sex discrimination, the term 'genuine occupational requirement' now having been adopted elsewhere in discrimination law. But we took a flexible approach in this respect when marking answers which gave examples from race or age discrimination provided it was clear that the principle was articulated properly. Candidates had more problems with the positive discrimination part of the question. There was a pronounced tendency here to confuse it with 'positive action' (which is lawful) or to state quite wrongly that it is itself lawful. It is of course not always easy to distinguish between positive action and positive discrimination, but the difference is crucial in legal terms. We therefore reduced marks where examples given were very clearly situations properly classed as 'positive action' rather than 'positive discrimination'.

Question 3

A challenging question, but one which a fair proportion of candidates attempted. There were one or two outstanding candidates who managed to answer it at some length while quoting several specific cases and explaining their precise significance. Such answers were awarded very high marks. Because of the challenging nature of the question we took a flexible approach when marking it, passing candidates who could articulate principles without quoting case law directly, and who made a solid case for or against the proposition that case law had had a positive impact.

A model answer would have quoted significant leading cases such as

- Alabaster v Barclays Bank (CA - 2005) which concerns the factoring in to maternity pay of pay rises
- Land Brandenburg v Sass (ECJ – 2006) which extended the scope of the Pregnant Workers Directive to all maternity leave including AML
- Iske v P&O Ferries (EAT – 1997) which requires employers to offer alternative work to pregnant employees where it is unsafe to remain in their jobs
- Webb v EMO Air Cargo (ECJ – 1994) which abolished the earlier comparative approach to pregnancy discrimination

- New South Railway Limited v Quinn (EAT – 2006) which requires employers to consult before redeploying a pregnant woman on health and safety grounds.

Question 4

Another fairly detailed question about a quite specific area of employment law. The question gave candidates a choice about which of the two parts to answer, but in practice many answered both. We did not penalise those who did this.

In the case of part A we were looking for an appreciation of the possibility that unreasonable refusal could potentially constitute victimisation under age discrimination law. The lack of a specific statutory right could nonetheless be interpreted as unlawful in some circumstances, particularly if an employer deliberately made it difficult for an employee to seek legal advice by refusing unpaid time off in circumstances where it would normally be given. Part B was more straightforward because statute specifically protects employees from refusal of the right to take reasonable unpaid time off to perform public duties – including being a member of a 'relevant education body'.

Question 5

As a result of the age discrimination legislation, there were three changes made to how redundancy payments are calculated:

i) Removal of the lower age limit, so that service before the age of 18 counts towards the calculation.

ii) Removal of the upper age limit, so that service over the age of 65 counts towards the calculation.

iii) The removal of the tapering rule whereby the redundancy payment of a 64 year old could be reduced by a twelfth following each month he / she advanced towards the 65th birthday.

In practice most candidates failed to mention the third of these, but instead wrote about the continuation of age discrimination in redundancy payments legislation, and the right of employer schemes that mirror the statutory scheme to continue the practice too. We were happy to pass such answers.

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Question 6

This was a question attempted by relatively few candidates, but one that was done very well by most who wrote answers. It is not difficult to critique the quotation and to demonstrate how ill-informed it is. While it is true that changes in the law have made it harder for trade unions, and particularly for those not working through unions, to organise effective industrial action, it is far from the case that lawful industrial action can no longer be taken. It frequently is, and candidates had little difficulty giving examples to show that this is the case. Injunctions which effectively stop action in its tracks can be applied for by employers when balloting arrangements fall short of legal expectations, or where the 'golden formula' does not apply, or where certain torts are breached, but provided these criteria are met, official industrial action can and does proceed quite lawfully. It can also have an impact.

Question 7

The need to address both parts of this question, and hence to make a distinction between the two situations, appeared to confuse some candidates. In practice this is a straightforward question inviting the demonstration of basic knowledge about health and safety law. There is a criminal side covered by the Health and Safety at Work Act, which requires employers to carry out risk assessments and to act on them, as well as a need to record accidents in a book. In circumstances such as this it is possible that a complaint could be made to the relevant inspectorate leading to the issue of a prohibition or improvement notice. More significant here, however, is civil liability and the possibility of a personal injury claim being brought under the law of negligence. In both cases the case would be brought against the employer, because in Case B, the principle of vicarious liability probably applies. The extent of liability is likely to be determined with reference to reasonable forseeability and possibly contributory fault on the part of the injured person.

Question 8

Another straightforward question that most candidates attempted and, for the most part, answered well. Essentially all that is required is an appreciation that two of the three headings under which an equal pay claim can be brought cover situations in which jobs are completely different from those of the chosen comparator – work rated as equivalent and work of equal value. The way in which these operate in practice then needs to be explained with some examples to illustrate the principles. Some quoted case law (Haywood, Enderby, Cadman etc.), others simply made up examples to illustrate how a case could be successfully mounted in these situations. Weaker candidates tended not to address the question directly, instead simply setting out everything they knew about equal pay law. For example, by including like work in their answers (despite its irrelevance to this question) or by writing extensively about the genuine material factor defence.

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Question 9

It is important for an employer to give the true reason for dismissal because:

a) There is a right for non-pregnant employees with more than a year's service to be given a written statement of the reasons.

b) Failure to give the true reason may well result later in a finding of unfair dismissal should such a case come to tribunal.

and

c) Because giving the true reason may well deter an employee from pursuing the case in the tribunal in the first place.

The answer to part 2 also relates to the statutory right to receive a written statement of the reasons for dismissal.

Candidates tended to be stronger on part 2 than on part 1, but most managed to attempt both parts with reasonable clarity and to make a reasonable case to justify the points that they made.

Question 10

This question relates in the main to implied duties under the contract of employment, although there is a statutory right offering protection from dismissal to those who refuse to work in unsafe conditions, and also a more general contractual issue over flexibility clauses that can be relevant here. Principally we were simply looking for an appreciation of the fact that there are situations in which employers do not provide work and can end up being sued for breach of contract or constructive dismissal (for example, where pay is affected, where skills obsolescence is an issue, or where reputation is damaged), and that employees are under a duty to obey lawful and reasonable instructions made by their employers. This limits how far employees can refuse to undertake work following a request by their employers.

In some cases students took the question to refer to the concept of mutuality of obligation used in tests to establish employment status. While this was not the intended subject of the question we decided that it was a reasonable interpretation and rewarded these answers with marks.

Stephen Taylor
Examiner