

FRU EMPLOYMENT TEST - SPRING 2023

1. The employment tribunal is a statutory tribunal, and its jurisdiction to decide employment disputes comes from primary and secondary legislation. Which statutory provision does the jurisdiction of the employment tribunal to hear the following types of employment claim come from? You only need to give one statutory provision per claim type.

The question referenced the jurisdiction and so answers that referenced the jurisdiction received 2 points as that was the question asked. However, we have awarded 1 point to those that cited the source of the right received.

a) Unfair dismissal

s94 ERA 1996 (1 point)

s111 ERA 1996 (2 points)

b) Direct discrimination

s13 EQA 2010 (1 point)

s120 EQA 2010 (2 points)

c) Unauthorised deduction from wages

s13 ERA 1996 (1 point)

s23 ERA 1996 (2 points)

d) Failure to pay annual leave in lieu on termination

reg 14 WTR 1998 (1 point)

reg 30 WTR 1998 (2 points)

e) Failure to provide a statement of initial terms and conditions

s1 ERA 1996 (1 point)

s11 ERA 1996 (2 points)

Total – 10 points

2. Who has the burden of proof in establishing (i) the reason for dismissal and (ii) the fairness of dismissal in an ordinary unfair dismissal claim for an employee with two years' qualifying service? (100 words)

Example Model answer

- (i) **In unfair dismissal, the burden of proof to establish the reason for dismissal lies with the employer. Under Section 98(1) of the ERA 1996, the employer must demonstrate that they had a potentially fair reason for dismissal (2 points)**
- (ii) **Once the employer has shown a potentially fair reason, the burden of establishing that they acted reasonably in treating that reason as sufficient for dismissal, is neutral. Fairness is assessed based on whether the employer acted reasonably, which is evaluated in accordance with Section 98(4) of the ERA 1996, taking into account equity and the substantial merits of the case (2 points)**

Clarity of explanation demonstrating ability to explain the position to a client (2 points)

Total – 6 points

3. The minimum statutory notice to which an employee is entitled is set out in s.86 Employment Rights Act 1996. Read the section and answer the following questions:

a) Jacinta worked continuously for her employer between October 2009 and May 2023. What is her minimum statutory notice period entitlement?

12 weeks (1 point)

b) Jeremiah worked continuously for his employer between January 2023 and May 2023. What is his minimum statutory notice period entitlement?

One week (1 point)

c) Mercy worked continuously for her employer between September 2021 and May 2023. What is her minimum statutory notice period entitlement?

One week (1 point)

Total – 3 points

4. The employment tribunal's procedure rules are set out in Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Identify the rule number which corresponds with the following aspects and principles of employment tribunal procedure:

- a) The “overriding objective” - Rule 2 (1 point)
- b) The need to copy other parties into Tribunal correspondence - Rule 92 (1 point)
- c) The tribunal's power to amend claims - Rule 29 (1 point)
- d) The tribunal's power to strike out claims - Rule 37 (1 point)
- e) The tribunal's power to award costs - Rule 76 (1 point)

Total - 5 points

5. What is the maximum amount of money which an employment tribunal may order to be paid in respect of a contract claim?

£25,000 (1 point)

6. John is 55 years old. His gross salary is £45,000 per year. The factory that he has worked at continuously for 25 years is closing, and John is due a redundancy payment. How much will he receive by way of a redundancy payment? You must show your working.

$45,000 / 52 = £865.38$ gross weekly pay capped at £643 (2 points)

1.5 week's pay 41 or older for 14 years

$1.5 \times £643 = £964.50$

$£643 \times 14 = £13,503$ (2 points)

1 weeks pay under 41 for 5 years

$1 \times £643 \times 6$ (because capped at 20 years) = £3,858 (2 points)

Total = £17,361 (2 points)

Total - 8 points

7. Karima is dyslexic. She wrongly assumed that starting early conciliation with ACAS would be enough to start her unfair dismissal claim in the employment tribunal. She only realised her mistake yesterday after a conversation with a friend. The three-month time limit has now expired, even when allowing for the ACAS extension for early conciliation. She presented her claim to the employment tribunal 3 days out of time. What arguments might you make to say that she should be granted an extension of time? If her claim were for disability discrimination, how would your answer differ? (200 words)

Example model answer

Karima can make an application for an extension of time under s.111(2) ERA 1996, to show that it was not 'reasonably practicable' for the claim to be presented in time. Karima's inability to correctly record the time limits would likely be deemed unreasonable by the tribunal, as such ignorance is viewed stringently which therefore, would not satisfy the test.

The second limb of the test, to present the case in a reasonable time as soon as it is deemed reasonably practicable, would be satisfied, albeit irrelevant.

If Karima was applying for an extension of time in a case of disability discrimination, the applicable test under s.123(1) EA 2010 would be less stringent, to prove that the reason is "just and equitable". The tribunal would likely consider Karina's dyslexia, especially if this forms the subject of her discrimination claim. Furthermore, the fact the delay is 3 days would aid the likelihood of success. The reason is debateable since it could be attributable to her dyslexia, but noting the tribunal's displeasure for incorrect time recording. The short delay will unlikely affect the procedure, and go to the cogency of the evidence, therefore it's likely the Tribunal will likely agree to grant the extension.

Total - 9 points

8. As of 6 April 2023, what is the current statutory limit on the amount of the compensatory award in an ordinary unfair dismissal claim?

£105,707 (1 point)

9. What are the four basic elements required for a constructive dismissal to occur? In your own words, explain what each element entails (100 words)

Example model answer

The employer must have breached the employment contract. That breach must be fundamental: it must be sufficiently serious to be capable of being repudiatory, a small or trivial breach will not be enough though the last straw doctrine may apply.

The employee must resign in response to the breach.

The employee must not have affirmed the contract or waived the breach. They must accept the employer's breach by resigning, accepting the breach might be construed as evidence that you have accepted the employer's conduct and are treating the contract as alive.

Total - 10 points

10. Which of the following diagnoses automatically counts as a disability for the purposes of the Equality Act 2010?

- Alcohol dependence – no (1 point)
- Seasonal allergic rhinitis – no (1 point)
- Partial sightedness – yes (1 point)
- MS – yes

Total – 4 points

11. You are due to represent Mohammed in his tribunal case in December 2023. Following your initial conference, he wants some advice from you on the strength of his unfair dismissal claim.

Mohammed was dismissed from his job on 16 October 2022 for gross misconduct. He had worked for 10 years as a forklift operator in a widget factory run by GenCorp, an American multinational with over 1,000 employees in the UK.

The factory has a zero-tolerance policy on employees using their phones while operating heavy machinery after a nasty accident in the factory in 2018.

Mohammed was called into his manager Keith's office on 14 October and shown time-stamped CCTV footage from the factory cameras, which Keith says shows Mohammed using his phone while operating his forklift the week before. Mohammed is not clearly identifiable by the footage. Mohammed says that this is a case of mistaken identity, as he was on his break at that time. Mohammed was on a final written warning for persistent breaches of health and safety on the site.

Keith sends Mohammed a text telling him that he needs to come to a meeting with him the next day (15 October), in which he will decide what disciplinary action to take against him. Mohammed is not given any written information in advance about the allegations against him or given the opportunity to bring someone along to that meeting.

In 2021, Keith was accused of watching football on his phone while operating an overhead crane in the factory, but GenCorp decided to take no further action against him.

In the disciplinary meeting, Mohammed tells Keith that he was in the staff break room at the time and has a witness, Dave, who was with him. He asks that the meeting be adjourned so that he can get Dave to attest to this. Keith refuses Mohammed's request to adjourn the meeting. Mohammed is aggrieved and storms out, hurling abuse at Keith. Keith sends Mohammed an email the next day informing him of the decision to dismiss him summarily for gross misconduct. The email informs Mohammed of the reasons for the decision to dismiss. That email informs Mohammed of his right to appeal the decision, which Mohammed exercises.

Rickie, an HR manager at GenCorp, conducts the appeal meeting, which takes place four weeks later. Rickie was not involved in the disciplinary process. He gives Mohammed detailed information about the allegations against him and the evidence relied upon. Mohammed is accompanied to the appeal meeting by his trade union rep, Tony. Rickie allows Mohammed to call Dave, who attests that Mohammed was in the break room at the time. Rickie cross-examines

Dave. Nevertheless, Rickie decides to uphold the original decision to dismiss Mohammed.

Evaluate the strength of Mohammed's unfair dismissal claim. What arguments do you think GenCorp are likely to make at tribunal? (750 words)

Example Model answer (taken from responses)

Qualification: A claimant must be an employee, have been employed for the minimum qualifying period (two years), in a role which is not one of the relevant exemptions. Mohammed is dismissed for breaching a policy which relates to 'employees', and nothing in the evidence suggests that he is a worker. He has been employed for more than two years (10), and none of the exemptions apply.

Dismissal: The facts provided unambiguously state that Mohammed was sent an email 'informing him of the decision to dismiss him'.

Reason: The reason given for dismissal is the conduct of the employee. This is one of the potentially fair reasons for dismissal set out in s98 ERA 1996 (98(2)(b)).

Fairness

Procedural unfairness:

GenCorp will argue that it complied with the ACAS Code. It found evidence of misconduct then undertook an initial investigatory meeting with the employee (paragraph 5 of the code); provided Mohammed with written notice that he had a disciplinary case to answer (para 9) with details of the time of the disciplinary meeting (para 10); held a disciplinary meeting without unreasonable delay the following day (11) and provided Mohammed with a chance to explain his case (12). Mohammed was then informed of the outcome in writing (18). The appeal was then conducted by an individual who was not previously involved in the case (27), Mohammed was accompanied by a representative (28) and allowed to test the case against him.

However, there is a strong case that several sections of the code were breached. The notice to Mohammed ahead of the disciplinary meeting did not provide detail of the case against him (9), and he was not notified of his right to representation (10). Further, he was not provided with an opportunity to bring witnesses (12). GenCorp may argue that he failed to give 'advance notice' of his intention to call a witness (12), but this would not have been feasible given he had 1 day to prepare and insufficient information. Mohammed may also have been treated inconsistently to Keith for a similar breach (4).

While GenCorp complied with sections of the code, the series of apparent breaches suggest Mohammed has a strong case. Non-compliance with the Code does not automatically mean that the case was procedurally unfair but the Tribunal will assess the steps taken by the employer according to its size and resources (para 3). In addition each of these points were rectified on appeal thereby, arguably, rectifying the errors.

Substantive unfairness:

The Tribunal will use the Burchell test:

1. (Honest belief of misconduct) There is nothing in the evidence to suggest that the employers' belief is not honestly held.
2. (Reasonable grounds) The video evidence can be seen to provide reasonable grounds. However, the fact that the evidence does not 'clearly identify' him, and the fact that there is a witness available supporting the view that he was not present in video, may suggest that insufficient regard is given to alternative evidence or possibly an indication of bias on the grounds of race or religion and belief.
3. (Grounds based on reasonable investigation) GenCorp will argue that it consulted evidence and interviewed Mohammed. However, it's apparent failure to speak to Dave, that they haven't appeared to properly consider the CCTV evidence or consider the Claimant's defence could be seen to show that a reasonable investigation was not completed.
4. (Dismissal within the range of reasonable responses) GenCorp will argue that this was within the 'range of reasonable response' because there is a 'zero-tolerance policy' which had been long established for safety reasons, Mohammed is on his final written warning for persistent breaches, and he was verbally abusive in the meeting. Against this is Mohammed's lengthy service (10 years) and the fact that, for what may have been a breach of the same rule, GenCorp took no action against Keith.

On balance, I think it is likely that the Tribunal will take the view that the dismissal is unfair, though the above is arguable and the documentary and witness evidence could strengthen the Claimant's case.

Total - 20 points