LEVEL 3 - UNIT 6 - EMPLOYMENT LAW
SUGGESTED ANSWERS - JANUARY 2011

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 January 2011 examinations. 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.

SECTION A

Question 1

• right not to be unfairly dismissed
• Right to a redundancy payment after 2 years service
• Maternity/paternity rights

Question 2

• Employees have greater job security and protection against being unfairly dismissed.
• They do not have any business risk; their employer does which makes it safer and more secure.
• Employees are entitled to a notice period, especially when they have worked for some time; self employed contractors are not.

Question 3

The unfair dismissal claim can only be heard in the employment tribunal. There are two choices for a wrongful dismissal claim. The wrongful dismissal claim may be heard in either employment tribunal or civil courts. Any claim of wrongful dismissal in the employment tribunal is limited to £25,000. With a claim worth £50,000 I would issue in the county court for wrongful dismissal so that I am not limited to £25,000.

Question 4

What Alan is doing is similar to the facts of eg London Underground v Edwards. It is indirect sex discrimination. Indirect discrimination involves the imposition of a criterion or practice which disproportionately affect one group, in this case, women. The new shift system is a new practice. Alan's proposed changes will indirectly affects women more than men because of their childcare responsibilities. This means that it is sex discrimination contrary to Sex Discrimination Act 1975. It could also be seen as changing a fundamental term of
their contract and entitling them to resign and claim constructive unfair dismissal.

**Question 5**

One common law duty is the duty of confidentiality. Employees cannot disclose confidential information about their employer. Employees also have a duty to act with reasonable care and skill. This means you cannot deliberately do a bad job.

**Question 6**

Employers should provide a s 1 statement to new employees within 2 months of starting their employment.

**Question 7**

The remedies available to an employee who has been unfairly dismissed are; reinstatement, which is the same job with same employer. Re-engagement, which is with the same employer but a different job. The final remedy and most often requested is compensation which is in two parts. The basic award based on length of service and salary and the compensatory award which is based on loss of earnings and future loss of earnings.

**Question 8**

A garden leave clause gives employer the right to stop an employee attending their place of work. The employee is still employed so cannot start their new job. It is useful to protect confidential information which the employee may gain access to if they were still able to attend their place of work.

**Question 9**

Sue is entitled to 1 weeks notice for each completed year of service so as she has only been there 18 months she is entitled to just one week. Danielle may pay Sue instead if her contract of employment gives her the option of doing so.

**SECTION B**

**SCENARIO 1**

**Question 1**

Factors indicating that Parmjit is an employee. She was disciplined which indicates she is part of the company-integration test. Also she is subject to control by her employer as she is left specific instructions every day-control test.

She is provided with a uniform-integration and or control test. Her employers provide her materials-economic reality test.

The arrangements for her holidays show limited powers of delegation which indicates she is required to provide personal service essential for an employee.

Factors indicating Parmjit is self employed. She pays her own tax and national insurance which is a factor inconsistent with being an employee under the multiple test. Not clear that mutuality of obligation is required as she only works 3 hours a day. Required for employees - Carmichael v National Power.
Credit for sensible conclusion, for example. Given the level of control and the way in which Parmjit has been integrated into the company by them disciplining her I think she is an employee. You wouldn't bother disciplining a contractor, you would just terminate their contract.

**Question 2**

Parmjit is entitled to her holiday pay under the Working Time Regulations 1998. She is as an employee also entitled to her notice period of 6 weeks as she has been employed for 6 years. She can claim wrongful dismissal if she is not paid her notice period.

If Parmjit is an employee under question 1, she is entitled to protection from unfair dismissal. She satisfies the eligibility criteria for unfair dismissal so the burden of proof moves to employer to show they have a fair reason to dismiss. She has only received one warning and then nothing from the week when she did not clean the toilet. The guidelines within the ACAS Code of Practice should have been used for disciplinary proceedings. Nothing Parmjit has done is gross misconduct. She should have been given another warning. She can claim both wrongful and unfair dismissal.

**Question 3**

Parmjit's employer will claim she is not an employee so cannot claim unfair dismissal as she does not satisfy the qualifying criteria. If she is found to be an employee then they will argue they had a potentially fair reason to dismiss, Parmjit's conduct as she wrote a rude note. She also refused to clean the toilets which is refusal to obey a lawful order. She was warned but ignored the warning. However they are unlikely to successfully defend it and 28 days to file.

**Question 4**

Rob is being asked to work excessive hours in breach of the working time regulations. He should complain to his employer by raising a formal grievance. He could complain to the department of Business Innovation and Skills.

**Question 5**

Rob may find a gross misconduct clause which enables the employer to demonstrate what is gross misconduct and it deters employees from carrying out such acts. There may be a confidentiality clause which expressly places restrictions on what employees may disclose during and after their employment. He may also find a restrictive covenant which restricts where he may work if he leaves his current employment.

**SCENARIO 2**

**Question 1**

To claim unfair dismissal Mandy must show that she is an employee, who has 1 years continuity of employment, is not from an excluded category and who has been dismissed. Mandy satisfies this as she is an employee with 10 years continuity of employment who was clearly dismissed. She is not from an excluded category.
Question 2

Mandy may claim direct sex discrimination contrary to s 1 Sex Discrimination Act 1975. She was dismissed because she is pregnant. She is treated less favourably than a man would have been as men cannot be pregnant. Dismissal is less favourable treatment. A leading case is James v Eastleigh Borough Council.

Question 3(a)

Mandy must issue her claim within 3 months from the date of her dismissal. For a discrimination claim it must be within 3 months of the discriminatory act which is also the dismissal.

Question 3(b)

Mandy’s has to prove a prima facie case of discrimination and then the burden of proof moves to her employer to prove their actions were not discriminatory. Mandy can prove the prima facie case quite easily.

Question 4

Jane may claim victimisation contrary to s4 Sex Discrimination Act 1975 as she is being discriminated against by virtue of supporting Mandy in her claim of sex discrimination. This is like Chief Constable of West Yorkshire Police v Khan. She may also claim unfair dismissal as she satisfies the eligibility criteria and her employer has no fair reason for dismissing her.

Question 5(a)

Both Mandy and Jane may ask for remedies from unfair dismissal, reinstatement and re-engagement. Reinstatement is the same job with the same employer. Re-engagement is the same employer but a different job. They may claim compensation for discrimination which is potentially unlimited.

Question 5(b)

The best remedy is compensation as neither Mandy nor Jane will want to work with Barry again so financial compensation would be best. This is divided between the basic award and compensatory award.

SCENARIO 3

Question 1

The disciplinary procedure must be based upon the ACAS Code of Practice given authority by the Employment Act 2008. Tim must first investigate the complaint against Sarah. He should consider suspending Sarah on full pay. Sarah should be informed of the allegations. She then needs to be notified of the disciplinary hearing and her right to be accompanied. Sarah has the opportunity to respond to the allegations. He must then inform her of their conclusion ad her right to appeal if appropriate.

Question 2(a)

Tim must show he has a fair reason to dismiss Sarah under s 98 ERA 1996. He can then show he had a genuine belief in Sarah’s guilt, based upon reasonable grounds following a proper investigation which complies with the requirements of
BHS v Burchell. Tim then needs to show that dismissing Sarah was within the range of reasonable responses (Iceland Frozen Foods v Jones). Given the allegations of her actions against Emily and the children it would appear to be appropriate. Tim should be able to defend Sarah’s claim.

**Question 2(b)**

Sarah has 3 options, reinstatement, re-engagement and compensation. Sarah is unlikely to want to return to work so will probably prefer the compensation.

**Question 3**

If Tim ignores Emily’s complaint then she could initiate the grievance procedure against Tim. Alternatively she could ignore it. Her final option is to see his inaction as a fundamental breach of contract and resign and complain his actions effectively dismissed her. Ignoring the seriousness of her complaint and her role as manager could be a fundamental breach of contract sufficient to be constructive unfair dismissal. Her compensation can be increased by 25% for failure to follow ACAS Code of Practice.

**Question 4(a)**

Employees only have to provide 1 weeks notice regardless of the duration of their employment.

**Question 4(b)**

She may have restrictive covenants which state where she cannot work, for example within 5 miles of her current place of work. There may be a gardening leave clause allowing Tim to compel her to work at home rather than come into work. There may be a confidentiality clause telling Emily her duties in relation to her employer’s confidential information.