LEVEL 6 - UNIT 4 – EMPLOYMENT LAW
SUGGESTED ANSWERS - JUNE 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 June 2011 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. 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

Once the employee has established that he/she has a prima facie case for unfair dismissal this obviously does not mean that he/she will automatically be successful in a claim for such. The employer may still have the opportunity to prove that the dismissal is fair under one of the six potentially fair reasons for dismissal contained in section 98 Employment Rights Act 1996.

Section 98(3) considers the capability or qualifications of the employee. The issue of qualifications is straightforward, if the employee has not gained the qualifications required then dismissal is likely to be classified as fair (Blackman v Post Office [1974]). There is a greater issue with regard to the capability of the employee.

Capability means capability assessed by reference to skill, aptitude, health or any other physical or mental quality (section 98(3)(a)). A major consideration in relation to this is ill health. Firstly it should be noted that there may be an overlap with disability discrimination if the illness is likely to last more than 12 months. It is vital that the employer takes all of the circumstances into account and ensure that he or she is fully aware of the medical condition of the employee (Eclipse Blinds v Wright [1992]).

In some circumstances provided the employer has acted reasonably then it is likely the dismissal will be classed as being fair. For example where there are a number of short term absences, the employee has been warned and there has been no improvement then it is likely that such a dismissal will classified as fair by the Employment Tribunal (International Sports Co Ltd v Thompson [1980], Lynock v Cereal Packaging Ltd [1988]).

The other aspect of this head of potentially fair reasons for dismissal is lack of skill or competence in undertaking the job. Provided an employer honestly believes that the individual is incompetent and they have reasonable grounds upon which to base this decision, then it is likely that such a dismissal will be fair
(Taylor v Alidair Ltd [1978]). It should however be noted that if the lack of skill/incompetence is due to a lack of training or support from the employer such a dismissal is unlikely to be classified as fair by a Tribunal.

The second criteria relating to the conduct of the employee, is a broad brush with a great deal of acts by employees being capable of falling into this category. The problem for the employer is deciding whether such action will amount to gross misconduct entitling the employer to dismiss the employee or whether such action falls short.

As well as express terms in the contract of employment being breached amounting to a potentially fair reason for dismissal, the breach of implied terms can as well, as illustrated by the case of Denco Ltd v Joinson [1991]. Matters such as disobedience, rudeness and criminal activity all fall under the criteria relating to conduct. The issue of whether or not dismissal for such action is fair again returns to whether or not the employer acted reasonably in dismissing the employee for the breach. In the majority of situations provided the employer is reasonable e.g. giving the employee the opportunity to explain or carrying out an investigation, then the dismissal is likely to be fair (Tesco v Hill [1977], British Home Stores v Burchell [1978]).

Redundancy is the third potentially fair reason for dismissal under section 98. The key here is to consider whether or not redundancy is the reason for the dismissal. Provided that there is a genuine redundancy situation then it will be a potentially fair reason for dismissal. Of course this is tempered by the requirements of consultation and a fair selection procedure being in place. These requirements will have the effect of tempering the prima facie fair dismissal (Attwood v William Hill [1974]).

Statutory restrictions obviously provide little room for manoeuvre as far as the employer is concerned. This is a particularly narrow ground upon which a dismissal can be classified as being fair. For example in the case of Mayor and Burgesses of the London Borough of Hounslow v Klusova [2006] is a good illustration of how statutory restrictions can put an employer in a position whereby they can no longer employee an individual and a dismissal can be classed as fair (though note the case of Sandhu v DES and Hillingdon London Borough Council [     ]).

Retirement has also been included as a potentially fair reason for dismissal however this is a very specific reason for the dismissal and is limited.

Of greater interest in considering the extent of the potentially fair reasons for dismissal is some other substantial reason. Unlike the other heads of potentially fair reasons for dismissal, this is perhaps the widest and has come in for criticism in that it creates an employer’s charter to dismiss employees. Though such a statement is perhaps a little strong, there is some truth behind this view. In particular unilateral changes in terms can be seen as providing employers with a degree of flexibility which ultimately may mean a dismissal is classed as being fair. Cases such as RS Components v Irwin [1973] and St John of God (Care Services) Ltd v Brooks [1992] clearly illustrate the willingness of Employment Tribunals to accept changes to contracts even if they are not in the employees best interests.

In conclusion the grounds for potentially fair dismissal are not particularly narrow and are merely the starting point for deciding whether or not a dismissal is fair. Once a potentially fair reason has been established then the test of reasonableness in respect of their actions comes into play (Iceland Frozen Foods
This band of reasonable responses provides sufficient latitude for an employer to dismiss individuals, the question to be asked is whether the employer has acted reasonably in dismissing the employee, not whether the Employment Tribunal would have done the same thing.

Question 2

Both unfair dismissal and wrongful dismissal are important rights provided to an employee who has been dismissed from their employment unjustly. Both of these provide the opportunity for the employee to receive compensation for the loss of their job, however there are some very important differences in why and in what circumstances compensation is provided.

Unfair dismissal is a statutory invention; it is governed by Acts of Parliament and is exclusively dealt with by Employment Tribunals rather than the courts. It is a relatively new concept only having been in existence for the last 40 years. To be able to claim unfair dismissal there are a number of criteria which must be met by the Claimant.

Under section 94(1) Employment Rights Act 1996 an employee has the right not to be unfairly dismissed. To be able to bring a claim the employee must be an employee and have at least one year’s continuous employment (section 108) and must be dismissed within the meaning of section 94, specifically, termination by the employer, a fixed term contract comes to an end or constructive dismissal. A claim for unfair dismissal is to be brought within 3 months of the dismissal.

Once it has been established that the employee is eligible to claim unfair dismissal, the reason for dismissal must be considered. Under section 92 the employee has the right to know the reason why he or she has been dismissed, note that under the common law that is not the case. The reason for dismissal can be automatically fair, automatically unfair or potentially fair (section 98). If a potentially fair reason is established then the next stage is to consider the reasonableness of the employers actions (section 98(4), Iceland Frozen Foods v Jones [1982]).

Fairness plays an important part in establishing whether or not a dismissal was fair under the statutory scheme. In particular the issue of procedural fairness is a vital aspect, this involves ensuring that an appropriate investigation has taken place and forming a view of the facts (for example Monie v Coral Racing [1980]). The other side of the coin involves adopting a reasonable procedure to dismiss the employee (see Polkey v A E Dayton Services Ltd [1988]).

If an unfair dismissal is established then the next stage is to consider the remedies that the employee will be able to claim. As well as monetary compensation in the form of the basic award and the compensatory award, the Tribunal are able to award re-instatement and re-engagement. These of course are not available for wrongful dismissal and this of course is due to these having been created by statute (section 114).

It can be seen that unfair dismissal is very much based upon a process with each stage having to be achieved before the next can be considered. This stepped approach is not present when it comes to wrongful dismissal, it being based upon common law breach of contract.

In relation to wrongful dismissal, the essence of the concept is a breach of contract which results in the termination of the contract of employment. This can be the actual dismissal of the employee by the employer or the constructive
dismissal of an employee. Wrongful dismissal is a common law concept traditionally dealt with by the courts, though it should be noted that through legislation Employment Tribunals have been given some power to deal with cases of wrongful dismissal, hence claims for both unfair and wrongful dismissal.

In many cases an unfair dismissal will also be a wrongful dismissal, though this is not always the case. The only remedy for unfair dismissal is to present a complaint to an Employment Tribunal (s.205 Employment Rights Act 1996), though as noted a claim for wrongful dismissal can be made to a court or subject to limitations on the amount (£25,000), to an Employment Tribunal. In the majority of cases wrongful dismissal will have little to do with employment disputes, however on occasion it can be more important than the claim for unfair dismissal. Also the lodging of a wrongful dismissal claim is not restricted to 3 months, normal breach of contract rules will apply.

Often a case of wrongful dismissal will be present when an employee is dismissed without having had the appropriate notice or having been paid adequate compensation in lieu. If there is a long period of notice then it will be more relevant to claim wrongful dismissal. This is because damages will be assessed by reference to the loss suffered, which means the value of lost salary and benefits (Manubens v Leon [1919]) for the period of notice.

It is not just the notice period which is an issue with wrongful dismissal however. Provided an employer is in breach of an important term of the contract the employee may resign and claim constructive dismissal. Depending upon the circumstances the employee can then claim wrongful constructive dismissal rather than compensation for constructive unfair dismissal.

Since the advent of unfair dismissal the distinction between unfair dismissal and wrongful dismissal has to a large extent become redundant. It is likely that in the majority of situations the employee is likely to obtain greater compensation through an unfair dismissal claim than wrongful dismissal. This is due to the large increase in the amount of compensation available through a claim for unfair dismissal. It should however be noted that there is still a limit on the amount that can be claimed for unfair dismissal then there will still be a place for wrongful dismissal. A claim for wrongful dismissal does not necessarily mean that a claim for unfair dismissal is made out.

Question 3

Most of the Equality Act 2010 came into force on the 1st October 2010 and has codified the various legislation relating to discrimination. Such changes have included dealing with disability discrimination. The Disability Discrimination Act 1995 first introduced the concept of disability discrimination and the Equality Act 2010 is a refinement on this landmark piece of legislation. The 2010 Act covers education, access to goods, services and facilities, buying or renting property, the functions of public bodies and most importantly here employment.

Under section 4 of the Act disability is classed as a protected characteristic, this list of characteristics is a departure from the disparate approach formerly adopted. Furthermore section 6 defines who will be classified as a disabled person and the definition used is to all intents and purposes the same as that under the old legislation, i.e. a physical or mental impairment which has a substantial and long-term adverse effect on their ability to perform normal day-to-day activities. Like the previous position, some conditions are specifically excluded. Also as before certain illnesses are automatically classed as being a disability, for example, cancer.
Under section 13 direct discrimination is defined as a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Under section 13(3) if the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B. This means it is now possible to bring a direct discrimination claim based on association or perception and the previous position is preserved in regard to treating a disabled individual more favourably than a person who is not disabled. For the first time through section 19 introduces the concept of indirect discrimination with regard to disability discrimination.

An important change is the repeal of disability related legislation (section 3A(1) DDA 1995) and its replacement with discrimination arising from a disability (section 13(3) above). This coupled with the introduction of indirect discrimination has the effect of reversing the case of London Borough of Lewisham v Malcolm [2008]. This major change is supposed to make it much easier for a claim to be made for disability discrimination.

If for example, an employee needs treatment this would under the new legislation amount to a disability. Under Malcolm, in assessing whether an individual has been dismissed due to their disability, they would be compared with an employee who was also absent from work repeatedly but who did not have disability. On the assumption that the employer would have treated both employees in the same way i.e. dismiss them then this would have been a defence to a claim for disability discrimination.

Under the new legislation the need for a comparator has been removed i.e. the original test was less favourable treatment, this has now been replaced by just unfavourable treatment. This then means that the employer will need to show an objective justification to defend against a claim by such an applicant for indirect and discrimination arising from a disability.

Other prohibited conduct includes harassment (section 26 EA 2010) and victimisation (section 27 EA 2010). There are changes generally to the issue of harassment, including disability discrimination. Firstly, an employee can complain to an Employment Tribunal about behaviour they find offensive even if it is not directed at them. Secondly, employers are potentially liable for harassment by third parties.

There is a limited right to ask pre-employment medical questions and by asking such questions the burden of proof in direct discrimination cases may be reversed. This is a sensible consideration allowing for employers to be informed about what potential adjustments may be necessary. The duty to make reasonable adjustments remains (section 20 EA 2010). The legislation does however make it clear that an employee cannot be required to pay towards making the necessary adjustment. As before a failure to make a reasonable adjustment cannot be objectively justified by an employer.

It can be seen that by changing the decision put forward in Malcolm that it should be much easier for an individual who is deemed to be disabled to make a claim for disability discrimination. It remains to be seen whether or not this is the case and it will only be through individuals relying upon the Equality Act 2010 that such will be shown to be the situation. The onus is on the employer to objectively justify any discriminatory conduct rather than previously the material and substantial defence. It remains to be seen whether this change in language will make a practical difference in employers being able to successfully defend cases of disability discrimination.
Question 4

(a) Since joining the European Community (Union), the United Kingdom has been subject to legislation and decisions created in this European context. In particular the European Union have taken a particular interest in matters specifically relevant to workers. As a consequence the European approach to interpretation and application of employment law has been reflected in the United Kingdom. This involvement has led directly to vertical and horizontal direct and indirect effect.

Vertical Direct Effect is a legal doctrine which has been developed by the European Court of Justice. The doctrine allows private individuals to rely directly on Treaty provisions and directives before national courts when claims are made against the state (Van Gend en Loos (1962)). At the time of its creation there were limited provisions in the Treaty in relation to employment and so the doctrine was originally considered to be generally unimportant. However, where there were employment provisions such as in relation to equal pay (Art.141), the impact was significant. This was built on in the case of Van Duyn v Home Office (1974), where it was decided that the doctrine would also apply to directives as well as the Treaty. This of course has widened the scope of the rights of individuals as the Union have increased over the last 15 years the number of directives issued concerning employment issues.

It should also be noted that the development of the doctrine of direct effect in relation to emanations of the state has been given a fairly wide interpretation. It includes privatised industries or services which were previously provided by public services (Foster v British Gas (1989)). It means that those employed by these industries or services can rely directly on provisions in directives. An example can be seen in Marshall v Southampton HA (1986).

Art.8 Treaty on the Functioning of the European Union (TFEU), requires all member states to try to eliminate inequalities, and to promote equality, between men and women and in particular Art.157 concerns the issue of equal pay between men and women. The landmark case of Defrenne v Sabena (No.2) (1976), illustrates how far the ECJ are prepared to go to ensure that individuals can rely upon direct effect. In particular by stating that the provision was sufficiently precise protection could be invoked in national courts. Other relevant cases include Levez v T H Jennings (Harlow Pools) Ltd [1996], Preston and others v Wolverhampton Healthcare NHS Trust and others [1996].

Horizontal direct effect again developed by the ECJ, allows individuals to rely upon the direct effect provisions of the Treaties, provided they confer individual rights, to make a claim against other individuals (employers) before national courts. The creation of this doctrine was as a consequence of member states failure to comply with their Treaty obligations. Again Defrenne v Sabena (No.2) illustrates that some Treaty articles are capable of having both vertical and horizontal direct effect. An example of horizontal direct effect can be seen in the case of Macarthys v Smith (1979).

In Francovich v Italy (1993) it was held that a member state can be required to make good any losses which are due to that state failing to implement a directive. This is dependent upon the directive giving specific rights to individuals. Horizontal direct effect has been very effective in the enforcement of equal pay rights granted by Arts 119, 141 EC and now Art 157 TFEU. However its effect has been much more limited in other areas of employment law. It should be noted however that since the Charter of Fundamental Rights of the European Union has been incorporated the inclusion of rights concerning employment it
could lead to the ECJ considering vertical and horizontal direct effect to provisions of the Charter.

(b) The doctrine of indirect effect requires national courts to interpret domestic law consistently with EU law. The case of *Von Colson v Land Nordrhein-Westfalen* (1984) raised the principle of indirect effect. The approach seeks to achieve indirectly through the judicial interpretation of domestic law the direct effect of directives. In the cases where provision of directives having direct effect, national courts must disregard domestic law where there is conflict. Where a directive lacks direct effect, the national courts should make every effort to interpret domestic law with the directive.

The doctrine is vital in regard to the enforcement of European Union rights against individuals (horizontal direct effect). Due to directives only having vertical direct effect in claims based on directives against private individuals, domestic law may be the only basis for a claim. In such circumstances the obligations placed on the domestic court mean that the decisions they make are more likely to be consistent with community law. Examples of cases which were affected by this doctrine are *Enderby v Frenchay Health Authority* (1994) and *Pickstone v Freemans Plc* (1989).

It can be seen then that the European doctrines which have been created over the past decades have had a profound impact on the way in which courts interpret legislation with a European Union dimension generally. It is however clear that the concepts have largely been built upon through laws relating to employment.

**SECTION B**

Question 1

The first problem question concerns a number of different situations that the employer has sought advice on. The initial part of the question concerns advising Roger and Jenny Kensington of ultimately whether Joan Ward will be able to bring a claim for unfair dismissal. This is dependent upon whether she is classified as an employee or independent contractor.

The first traditional test is the control test and how closely the work of the individual is controlled, as illustrated by cases such as *Narich Ltd v Commissioner of Payroll Taxes* [1984]. In the present case the employer controls the work that Joan undertakes.

The next test is the integration test (*Cassidy v Minister of Health* [1951] and *Stevenson Jordan & Harrison Ltd v MacDonald and Evans* [1952]). In this test the permanence of the ‘employee’ is tested, is the employee’s work an integral part of the business. Joan is not an ancillary member of staff she is integral to the running of the hotel.

The most important test to be used is the composite test. The important case of *Ready Mixed Concrete v Minister of Pensions* [1968], stressed that no one element of a contract is conclusive. Consideration needs to be made of her own work and skill, that there is sufficient degree of control and no inconsistencies which point against an employment relationship. Joan does not risk her own capital and has no opportunity to make a profit. Tax is deducted at source which points towards her being an employee.

In regards to the contractual ‘label’ given to the employee by the contract (*Massey v Crown Life Insurance* [1978], *Young & Woods Ltd v West* [1980]), the
label provided to Joan is not an overriding consideration in deciding whether or not she is an employee.

The modern approach to deciding whether or not an individual is an employee is considering the issue of mutuality of obligation as illustrated by cases such as *Carmichael v National Power plc* [1999], *Montgomery v Johnson Underwood Ltd* [2001]). Other relevant cases include *Dacas v Brook Street Bureau* [2004], *James v LB Greenwich* [2008] and *Muschett v HM Prison Service* [2010]. There is a requirement on the hotel to provide work of sixteen hours per week, therefore she is likely to be classed as an employee and claim unfair dismissal.

Ramona Davies has raised the issue of the amount of pay she receives compared with another employee, Conor Johnson. Section 65 Equality Act 2010 inserts into employment contracts an equality clause.

It is up to Ramona to decide who her comparator is, as decided in *Pickstone v Freemans plc* [1988]. In this case her comparator will be Conor. In the present situation the work undertaken is work of equal value in terms of the demands made of her to that of a man in the same employment. If Ramona and Conor are classified as doing work of equal value then she will be entitled to the same remuneration as him.

Section 69 Equality Act 2010 provides that the burden of proof is on the employer to show that there is a Genuine Material Factor as to why she should not be paid the same. Whether the employer can show that the difference in terms is due to a material factor which is relevant and significant and does not directly or indirectly discriminate against the worker because of her sex.

From the facts provided it is unclear whether or not there is a genuine material factor as to why the two individuals should not receive the same remuneration. Clearly the matter needs to be considered but it is likely that Ramona will receive the same salary as Conor if no such factor is present.

The final aspect of this question concerned redundancy and unfair dismissal. Redundancy under section 139(1)(b) Employment Rights Act 1996 requires cessation or diminution in the requirements of the business to carry out work of a particular kind. There needs to be a causal link between diminishing business needs and the dismissal.

Under section 98(2)(c) Employment Rights Act 1996 provided this criteria is met then there will be a potentially fair reason for dismissal (*Murray and Another v Foyle Meats Ltd* [1999]). Prima facie Jun has been made redundant.

On the assumption that appropriate consultation has taken place, the issue here is whether or not an appropriate selection procedure has been adopted. A redundancy matrix system is acceptable provided the criteria used are fair. The criteria used must be objective.

If it would have been more appropriate to select one of the other porters then he will have a claim for unfair dismissal – *Lionel Leventhal Ltd v North* [2004].

Question 2

(a) This question is concerned with a possible constructive dismissal. A constructive dismissal according to sections 95(1)(c) and 136(1)(c) Employment Rights Act 1996 is where an employee resigns "in circumstances such that he is entitled to terminate without notice by reason
of the employer's conduct”. In such circumstances the employee is treated as having been dismissed. If therefore the conduct of the supervisor is treated as qualifying as circumstances that apply in the above sections, then Padma will be treated as being dismissed by her employer.

It should be noted that such a dismissal will normally also be considered to be wrongful dismissal. The main issue as far as Padma is concerned is likely to be the ability to apply for unfair dismissal. It appears that she will be able to claim unfair dismissal provided that the actions of the supervisor are treated as a breach due to her having the requisite one year continuous employment.

The actions of the supervisor need to be considered as being a repudiatory breach of the contract of employment resulting in the resignation of the employee. The employee is said to have accepted the repudiatory breach of the employer.

Provided that Padma has not taken too long to leave and the breach is sufficiently serious to justify resigning then she may claim unfair dismissal. This is of course dependent upon the employer not having a fair reason for the dismissal. It appears from the scenario that there is no such fair reason for dismissal. The key question is whether the language used by the supervisor are such as to be considered of such a serious nature as to amount to a repudiation.

On their own they are unlikely to be so, however coupled with the comments being made in front of other staff this may well be the case. Note for the example the case of *Kwik-Fit (GB) Ltd v Lineham* [1992], whereby a member of staff was treated unfairly in front of other staff.

Hilton International Hotels (UK) Ltd v Protopapa [1990] is similar to Padma’s situation. In that particular case the employer found that there was a dismissal by the employer. The question to be considered is whether the supervisor was doing what she did in the course of employment. If she was the employer will be bound by the actions of the employee. In the present case the supervisor is likely to be considered to be acting on behalf of her employer.

In the present case provided that Padma applies to the employment tribunal within 3 months she is most likely to be successful in her claim.

(b) The starting point of considering whether or not Mabel is entitled to a reference will be her contract of employment. It is unusual for there to be express contractual clauses upon which the employee can rely upon and in Mabel’s case it will largely depend upon what role she undertakes. Senior staff may have such a clause but other staff are unlikely to.

On the assumption that there is no such clause in her contract, there is no general duty placed on an employer to provide a reference. If a reference is provided it must be true (*Spring v Guardian Assurance plc* [1994]).

The only way Mable will be able to ensure that she receives a reference is if the reason why one has not been provided is due to discrimination or trade union membership. In such circumstances *Coote v Granada Hospitality Ltd* [1999] states that the individual could apply to the Tribunal. This unfortunately is the only way in which Mabel will be able to get a reference or compensation for lack of one.
(c) The employer is looking to recover £11,000 from Arthur, the most likely way being deductions from his salary. The general rule under section 13 Employment Rights Act 1996 is that no deductions can be made by the employer from wages.

There are two exceptions to this rule, firstly by virtue of statutory provisions for example tax and national insurance and secondly where the employee has previously signed in writing agreeing for the deduction to be made. Section 14 Employment Rights Act 1996 states that section 13 will not cover situations such as check-offs or an overpayment of wages and salary.

The situation as it stands clearly illustrates that Arthur was aware of the rules relating to the deduction as he signed the policy document a year ago. Cases such as *Pename v Paterson* [1989] and *Delaney v Staples* [1992] clearly illustrate that in the present case such deductions would be permissible by the employer.

Despite the deduction being authorised, Arthur having signed the policy document, such a deduction must still be considered to be fair. In the present situation it is unlikely that Arthur is on a particularly large salary due to the nature of his work. The case of *Fairfield v Skinner* illustrates that the Employment Tribunal can decide whether the amount of the particular deduction is fair.

Clearly here Arthur has made a mistake which according to his contractual requirements he will need to pay for. It would however be unfair if the company were to deduct the full amount of his salary until the money was paid back. The sum to be repaid must be made in instalments which are fair.

**Question 3**

Like question one, there were three distinct parts to this particular problem question. The first part concerns the Working Time Regulations 1998 and the Minimum Wage Act 1998, specifically issues concerning the amount of time Lin works at the care home, the amount she is paid and the lack of holiday provided.

Taking first the issue of the amount of time she has worked over the past 14 weeks. Clearly Lin is a worker as required by the Regulations (*Redrow Homes (Yorkshire) Ltd v Wright and Others* [2004]) and as such she should be working a 48 hour week (Reg. 4.1). The normal period over which the average is 48 hours is calculated at 17 weeks (Reg. 4.3).

Lin has at present worked only 14 weeks and is therefore not yet in breach of the Regulations, it could be assumed however that she is likely to work the same hours over the next three weeks. If that is the case then there will be a breach of the Regulations. Under Reg. 5 it is possible for the worker to opt out of the Regulations. Provided Lin has agreed in writing to opt out of the 48 hour restriction then she would be able to work as many hours as she wished.

It is appropriate at this stage to do with the issue of her holiday entitlement as this too is regulated by the Working Time Regulations 1998. All workers are entitled to 28 days annual leave per leave year (Reg. 13). Under Reg. 15A Lin will be entitled to holiday once it has been accrued. Leave will accrue at the rate of 1/12th. On that basis she will be entitled to a proportion of her leave on the basis that she has worked at the home for the last 14 weeks.
Under the National Minimum Wage Act 1998 minimum hourly rates have been set for wages, set for those over the age of 22, between 18-21 and those who are 16-17. As Lin is 24 she will fall in the ‘adult’ category. Currently she will be entitled to £5.93. As she is currently being paid the rate of £4.90 per hour there is a breach.

Where an individual is not paid the minimum wage then a claim for underpayment can be made to an Employment Tribunal or to court. Such an underpayment will mean that Lin is entitled to be compensated for the period of time she has been underpaid.

In relation to David Frobisher the issue is one of whether he can claim unfair dismissal. Firstly, David must qualify to bring a claim for unfair dismissal. He has been employed for a continuous period of more than one year (five years) before the effective date of termination (section 108 Employment Rights Act 1996). He is clearly an employee of the company and under section 95(1) ERA 1996 has been dismissed without notice by the employer. Provided he brings his claim within 3 months he will be able to bring a claim for unfair dismissal.

Once it is established that he is capable of bringing a claim for unfair dismissal the next stage is to see whether or not the employer has a potentially fair reason for the dismissal (section 98 ERA 1996). In the present case, the potentially fair reason will be conduct. Clearly stealing from a resident will amount to sufficient reason to dismiss.

Having established that the employer has a potentially fair reason for dismissing David, the next stage is to consider whether the employer has acted within the band of reasonable responses. In this case it may be reasonable to dismiss him (Iceland Frozen Foods v Jones [1982]), as there is no need to provide warnings, it is serious enough to dismiss.

What is an issue is the failure of the employer to carry out an investigation. This failure has obviously had an effect on the validity of the findings. It is unlikely that an honest opinion could be taken from the lack of investigation, after all it would have been fairly straightforward to enquire with the elderly client at least. In such circumstances it is likely that there is an unfair dismissal. As the employer failed to carry out an appropriate disciplinary procedure will mean that the Tribunal will be able to increase the amount of compensation by up to 25%.

The last aspect of this question concerning Samuel Kingston was about discrimination, specifically the issue of sexual orientation. Section 4 of the Equality Act 2010 lists those characteristics which are protected; sexual orientation is included in the list. Under section 12 sexual orientation means a person’s sexual orientation towards persons of the same sex which covers Samuel’s situation.

As Samuel is covered by the legislation the next stage is to consider the type of discrimination which may be applicable. The suspicion that the reason for not offering him employment is directly due to his sexual orientation is due to him being gay will mean relying upon direct discrimination under section 13 of the Act. Under subsection 1 a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. In the present situation Samuel has not been offered the position due to his sexuality, he has therefore been treated less favourably due to this characteristic.
Under section 136 the burden of proof is on the employer, under section 136(2) if there are facts from which the court decide, in the absence of any other explanation, that the employer has contravened the legislation the court must hold that the contravention has occurred. Note that under subsection 3 of the section, if the employer can show that no contravention took place. It will be irrelevant that the business is run along Christian values. Under section 24 it makes no difference if the perpetrator of the discrimination has one or more of the protected characteristics, in this case making the decision on religious grounds. Prima facie Samuel will have a successful claim against Trust Us Ltd.

Question 4

(a) In the circumstances clearly Henry is uncomfortable with the way in which the female employees are treating him and he has informed his employer of this. Despite telling the employer the female employees are still acting in the same way. Under section 4 of the Equality Act 2010 sex is one of the protected characteristics. Under section 11(a) a reference to a person who has a particular protected characteristic is a reference to a man or to a woman, therefore Henry will be protected by the legislation.

The next stage is to consider under what type of discrimination a claim will be made. In the present circumstances the basis of the claim is likely to be based upon harassment under section 26. Harassment takes place where a person engages in unwanted conduct of a sexual nature and the conduct has the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. In deciding in whether the conduct has such an effect the tribunal should take into account the perception of the complainant, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Taking these factors into account the actions of the female staff are obviously upsetting Henry otherwise he would not have told his supervisor. The actions of the female employees is such that it is reasonable for the conduct to have that effect on him. Under section 136 the burden of proof is on the employer to prove otherwise, however in the circumstances it is most unlikely that they will be able to do so.

(b) This part of the question involves a possible disability discrimination claim. Anne believes that the reason she did not get the promotion is because of her disability. Disability discrimination is a protected characteristic under section 4 Equality Act 2010. Under the Act there are various forms of discrimination including direct, indirect, harassment and victimisation and on the assumption she is disabled under s.6 she can prima facie apply to an Employment Tribunal.

Under section 13(1) Equality Act 2010 direct discrimination will take place where A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. The relevance of this to the current situation is that prima facie the reason why Anne has not been offered the promotion is because she is disabled. Clearly then it is going to be difficult for the employer to show that the decision is not based on disability.

In the present circumstances there is no evidence to suggest that the reason why she did not get the job is due to anything but her disability. The burden of proof is on the employer to show that there is some other reason which is not connected to disability as to why she did not get the job.
The first issue to note about this situation is that Kala has not worked for the company for a continuous period of a year. In such circumstances she is not prima facie able to bring a claim for unfair dismissal without some form of statutory intervention.

That intervention comes in the form of section 57A Employment Rights Act 1996. This section states that an individual is entitled to take a time off when a dependant falls ill. A dependant will include her children in such circumstances.

An employee is required to inform the employer of the reason for the absence as soon as is reasonably practicable and it appears from the information provided that the company has been kept up to date regarding the reasons for her absences. She is also required to inform the employer how long they expect to be absent from work (Qua v John Ford Morrison Solicitors [2003]).

Provided Kala informed her employer she will claim automatically unfair dismissal under s.99 ERA 1996. In such circumstances there is no need for a minimum qualifying period of employment where the claim is based upon an automatically unfair reason.