**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. ‘The statutory action for unfair dismissal is far superior to a common law action for wrongful dismissal. As such, wrongful dismissal can safely be ignored for all practical purposes.’

Critically assess the above statement.

**Indicative content outline answer:**

* To qualify for the right of unfair dismissal, the following are necessary:

1. The worker must have ‘employee’ status;
2. They must have been continuously employed by the same employer for at least two years;
3. They must have been dismissed; and
4. The claim must be submitted to a tribunal within three months of the Effective Date of Termination.

* In relation to a claim of wrongful dismissal, as this is an action for breach of contract, any worker can claim for wrongful dismissal. Therefore, unlike the statutory route of unfair dismissal, the status of employee is not required and this opens up the route for claimants who might otherwise not qualify under unfair dismissal. Further, there is no requirement for a period of continuous employment.
* Unfair dismissal offers a far greater range of protection than wrongful dismissal. As wrongful dismissal is simply a breach of contract claim, insofar as the employer follows the contractual / statutory notice periods (as applicable), the worker’s claim is limited.
* In answering the question, comparing the two rights in relation to, for example, the remedies involved, the issue of costs, protection afforded etc will enable an effective comparison and appropriate conclusions as to whether wrongful dismissal can be ignored.
* The main differences between the rights are included in the following table.

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|  | Unfair Dismissal | Wrongful Dismissal |
| Source of the right | Statutory (ERA 1996). | Common Law (Contract). |
| Who may claim | Only available to employees. | Anyone with a contract. |
| Minimum period of continuous employment required to access the right | Two years. | Immediate from the commencement of the contract. |
| Time limit within which a claim must be lodged | Three months. | Six years. |
| Where the claim is heard | Employment Tribunal. | County Court; High Court. A claim may be heard at an Employment Tribunal where the claim does not exceed £25,000. |
| Basis of the award | Compensation includes a basic award and a compensatory award to reflect ongoing and future losses. | Only covers the loss incurred for breach of the relevant notice period, or the balance of a fixed-term contract with no early termination clause. |
| Reasons for dismissal | s. 98 ERA 1996 outlines potentially fair reasons for dismissal. The statute also identifies reasons for dismissal that will be automatically unfair. | The employer can choose any reason for dismissal. The stipulation is adherence to the notice period required under the contract. |
| Costs | Legal costs incurred in the action are rarely awarded to the successful party. | Costs are more readily awarded in the County Court and High Court. |
| Remedies available | Reinstatement; re-engagement or compensation. | Damages (although injunctions may also be available). |
| Discipline/dismissal procedures | The ACAS Code must be complied with or the tribunal may uplift the award by up to 25%. | Any procedures provided by the employer in the contract must be adhered to. |
| After discovered reasons | Cannot make an unfair dismissal fair, but it may reduce any compensation awarded to a successful employee. | These may justify a dismissal, and if accepted by the court, will make a wrongful dismissal a fair dismissal. |
| Damages awarded | This is capped to the relevant statutory maximum. | As this is a breach of contract claim there is no ceiling to the award of damages. It depends on the breach and the value of the contract. |

* Unfair dismissal does provide against discrimination-based dismissals, requires procedural and substantive issues to be considered, and limits the use of reasons discovered after a dismissal to be used by an employer in an attempt at justification.
* However, if the worker does not qualify, unfair dismissal is inaccessible so a remedy can be sought through wrongful dismissal.
* Wrongful dismissal is not subject to a maximum ceiling of awards. It is based on the contract and the breach. In claims of unfair dismissal, the ceiling is approximately £87,000. However, it should be noted that the average award for unfair dismissal is approximately £5-6,000.
* Wrongful dismissal may be more applicable for higher earners and for those workers employed on fixed-term contracts. In this latter example, where the contract does not contain a provision for early termination of the contract, upon a wrongful dismissal, the worker may claim for the balance of the contract (which could potentially be substantial).
* A claim for unfair dismissal must be lodged at the tribunal within three months of the effective date of termination. For wrongful dismissal this period is six years. Therefore effective advice and preparation of the case may be much more complete.
* ‘Legal Aid’ is more readily available to vulnerable claimants in wrongful dismissal claims than for (the preparation of) unfair dismissal claims in a tribunal.
* Overall, it would be very short sighted of an employer or worker to ignore wrongful dismissal as an effective remedy. Whilst it may not be as readily available, nor is the protection as broad as unfair dismissal, it offers a powerful protection and significant remedy in appropriate claims.

1. In the case of *Allen v Flood* (1898) Lord Davey pronounced ‘an employer may refuse to employ from the most mistaken, capricious, malicious or morally reprehensible motives imaginable, yet a worker has no right of action.... no right to be employed by any particular employer.’

To what extent does this statement continue to represent the law?

**Indicative content outline answer**

* Employers are not obliged to employ anyone. The primary remedy available in successful claims of unfair dismissal (reinstatement) is awarded in very few instances. This is because whilst an employer unreasonably refusing to re-employ a successful claimant, the result will simply be an award of additional damages, NOT a requirement for the employer to re-hire the employee.
* The question is phrased to get you to consider the reasons by which an employer can dismiss an employee, and/or the evidence needed to successfully dismiss without, necessarily, breaching the unfair dismissal laws.
* The Employment Rights Act 1996 s. 98 outlines five potentially far reasons to dismiss.
* These potentially fair reasons are very broad and include the capability / qualifications of the employee; (mis)conduct; redundancy; contravention of a statute; and some other substantial reason.
* The employer does not require proof of misconduct. All that is required is a ‘reasonable belief’ as per the *BHS v Burchell* case.
* Employers may be able to dismiss a group of employees where a gross misconduct has taken place and the perpetrator cannot reasonably be identified (*Parr v Whitbread* and *Monie v Coral Racing* etc).
* Cases such as *Saunders v Scottish National Camps*, *Scott v Richardson* etc can be used to show some rather unfair reasons to dismiss an employee.
* You may also consider the limited remedies available in claims for wrongful and unfair dismissal and assess whether they act as a disincentive for an employer not to dismiss a worker. At best, the remedies provide a little compensation / protection for the claimant and make the employer contribute some monetary compensation for an affected worker.

**PROBLEM QUESTIONS**

1. Redmount Borough Council (RBC) has an Adult Education Department which has had rising costs over the past few years. Given the budgetary restraints imposed by central government in 2010 RBC has decided to take measures to reduce its overheads. Part of these measures has resulted in the catering and cleaning functions being transferred to an outside company - 'Cleaneasiest Ltd'. There were ten existing members of the catering and cleaning division of the Adult Education Department and these were transferred to the employment of Cleaneasiest Ltd, although the employees were transferred on a lower hourly rate of pay than enjoyed with RBC.

Two months into the transfer, RBC were very unhappy with the quality of the service provided by Cleaneasiest Ltd and as such invoked an early termination clause in the contract (which they were entitled to do) and cancelled the contract. The Adult Education Department now wishes to replace Cleaneasiest Ltd with another company Clean-You-Out Ltd. However, Clean-You-Out Ltd is unwilling to take on any of the ten original employees.

Advise the employees, their trade union of any rights they may have in relation to the Transfer of Undertakings (Protection of Employment) Regulations 2006.

**Indicative content outline answer:**

* When an employer decides to sell part or all of their business, the business (or ‘undertaking’) and its workforce transfer to the new purchaser.
* The Regulations were transposed from the Acquired Rights Directive that sought to preserve employees’ rights and continuity of employment when a business was transferred to a new owner.
* When the business is transferred to a new owner, and TUPE 2006 is applicable, those workers who were employed ‘immediately prior to the transfer’ automatically become the employees of the new owner, and they are employed on the same terms and conditions as they held before the transfer (*Litster v Forth Dry Dock and Engineering* [1989]). The new employer takes on the obligations and rights of these workers and any of the collective agreements that had been agreed with the previous employer.
* Not only are the rights and conditions of the contracts of employment preserved, but any dismissal of an employee (regardless of whether this occurs before or following the transfer) for a reason connected with the transfer is automatically unfair. The exception to this rule is if there is a ‘economic, technical or organisational’ reason that may make the dismissal fair, insofar as the decision is reasonable.

## *A Relevant Transfer*

* TUPE 2006 preserves the rights of workers, and continuity of employment, where a relevant transfer has taken place. A relevant transfer consists of two broad categories. The first being of a transfer of an economic entity that retains its identity (an ‘economic entity’ is defined as an ‘organised grouping of resources’ that has the objective of pursuing an economic activity).
* The second form of transfer was added through TUPE 2006 reg. 3, and provides for changes of service provider (including organizations such as firms of accountants, lawyers and so on). The new Regulations consolidate the case law of the ECJ to widen the concept of relevant transfer and which take the form of:

1. Contracting-out / out-sourcing (such as where a service previously undertaken by the client is awarded to a new contractor);
2. Re-tendering (such as where a contract for a service is awarded to a new contractor); and
3. Contracting-in / In-sourcing (such as where a contract with the previous contractor is performed ‘in-house’).

* This situation has led to potential problems where an employer may now have to accept the transfer of a worker in rather unexpected circumstances – *see Hunt v Storm Communications, Wild Card Public Relations and Brown Brothers Wines*.

## *The Effect of the Transfer on Contracts of Employment*

* Upon a relevant transfer, the employees take their contractual rights and continuity of service with them when the transfer is completed. Whilst the transferee has to provide the same rights and continuity to the workers, he/she is also responsible for any liabilities or claims against the previous employer.
* The transfer of the business also includes the transfer of collective bargaining agreements that had existed before the transfer and any trade union that had been recognized by the employer before the transfer must also be recognized by the incoming employer.

***An Economic, Technical or Organizational Reason***

Under reg. 7(3), an otherwise unfair dismissal connected to the transfer may be justified by the new employer if it is due to an economic, technical or organizational (ETO) reason. Many transfers occur because the business that is the subject of the transfer is not performing as well as it could, or is in financial difficulties. Even if this is not the case, a new employer may have ideas regarding streamlining the business and improving its profitability. As such, there is some scope for him/her making changes to the organizational structure.

***The Obligation to Consult regarding the Transfer***

* Due to the nature of the transfer of a business to a new owner, and the possibility of redundancies, there is an obligation on employers to consult with the workers and/or their representatives as to planned redundancies and transfer (*EC Commission v UK* [1994]).
* There exists a defence for the employer who does not consult due to ‘special circumstances’ that makes consultation not reasonably practicable. It should be noted that special circumstances may involve, for example, a sudden or unforeseen reason for the employer’s insolvency, but would not be accepted as a reason simply because the employer attempted (unsuccessfully) to trade out of the financial difficulties before going into insolvency (*Clarks of Hove Ltd v Bakers’ Union*).

1. Joshua has been working at (the fictitious) Greenfingers Garden Centres Ltd for eight months. Without any warning he is called into the manager’s office and told he is being dismissed immediately for misconduct due to his poor timekeeping. Joshua had been late to work for the two previous mornings but had made the time up during his lunch break and he had not been informed by anyone that his employer was unhappy with his work or his conduct.

Unknown to the employer, Joshua had been stealing shrubs from Greenfingers and selling these to his friends.

Advise the parties as to their legal position.

**Indicative content outline answer:**

* Joshua has been dismissed without notice.
* The ERA establishes who is entitled to protection under the Employment Rights Act 1996. These qualifications have to be strictly adhered to and are only removed in situations involving ‘automatically’ unfair reasons. If the worker does not qualify then there is no point in pursuing a claim under unfair dismissal:
* The worker must have ‘employee’ status;
* They must have been continuously employed by the same employer for at least two years;
* They must have been dismissed; and
* The claim must be submitted to a tribunal within three months of the Effective Date of Termination (unless the statutory procedure is being used in which the period is extended).
* Joshua has only been working for 8 months and as such he does not have the required two years’ continuous service to gain protection through unfair dismissal and the dismissal is not automatically unfair.
* As such his claim may lay in a wrongful dismissal claim. The claim must be brought within six years following the notice of the contract being ended.
* As he was dismissed for being late on two mornings but was not warned about this and as he made the time up in his lunch hour the tribunal would probably hold this to be a wrongful dismissal.
* Further consideration must be made to the after discovered reason that Joshua had been stealing from his employer. This would be considered a gross misconduct that could justify a summary dismissal.
* Whilst in situations of unfair dismissal these will not subsequently make an unfair dismissal fair, they will be allowed to enable the employer to mount a defence against a wrongful dismissal claim. As such, it was wise for an employer to continue his/her investigation, even following a dismissal, to gather whatever evidence is available to defeat a possible wrongful dismissal claim by the worker (*Boston Deep Sea Fishing and Ice Co v Ansell* (1888)).
* Because of this after discovered reason the wrongful dismissal would in fact be a fair dismissal (as long as the employer provides the necessary evidence).