**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. ‘Employment law is one jurisdiction of law that, whilst dominated by statutory intervention, continues to be underpinned by ordinary contractual principles. This is particularly true in relation to the doctrine of implied terms.’

Assess the role played by implied terms in employment relationships and how they have been developed by the judiciary.

**Indicative content outline answer:**

* The most significant contractual terms are often expressed by the parties. However, it would be unrealistic to expect each term of the contract to be expressed or reduced in writing. Hence, many terms are implied by the courts, statute, customs and/or the conduct of the parties.
* Note that the nature of implied terms results in the parties not having expressed the terms contained. As such, the terms must be fundamental to the contract.
* Courts imply terms into a contract as a matter of fact or a matter of law. This is undertaken to help make sense of the agreement between the parties, or to make the contract work.
* Courts have also allowed terms not expressed in the contract to be implied because of the custom in a particular industry or market. However, whilst the courts may be willing to imply terms they will not re-write a poorly drafted contract.
* The two main reasons for the courts implying terms as a matter of fact has been due to business efficacy; and secondly, because the term was so obvious each party must have assumed it would be included.
* *The Moorcock* concerned the owners of a wharf on the River Thames entered into a contract to allow the owner of a steamship (named the Moorcock) to moor the vessel in the jetty for the purpose of discharging the cargo. Whilst the Moorcock was discharging her cargo the tide ebbed and she hit the bottom of the riverbed and sustained damage. The owners of the Moorcock claimed damages, but in its defence the owner of the wharf stated the agreement had not provided assurances with regards the safety of the vessel or the suitability of the wharf. The Court of Appeal considered that the ship could not be used in the manner envisaged without it resting on the riverbed, and hence this must have been implied as the intentions of the parties. Esher LJ considered that an implied term existed (on the basis of business efficacy) and therefore the damages action would succeed.
* The second scenario where a court may be willing to imply a term is where it is so obvious that the parties clearly intended it to be included (*Shirlaw v Southern Foundries*). Southern Foundries entered into an agreement with Mr. Shirlaw employing him as managing director for a term of ten years. Two years later a company called Federated Foundries Ltd acquired Southern Foundries and it was decided that Shirlaw should be removed from the board of Southern Foundries and this in effect resulted in Shirlaw’s employment being terminated. Shirlaw, in response, brought an action for wrongful dismissal. The Court of Appeal held that Mr. Shirlaw should not have been dismissed. Mackinnon LJ used what has become known as the ‘officious bystander’ test when considering the parties’ negotiations and held that they must have agreed, implicitly, to ensure that Mr. Shirlaw was bound to complete the term of the contract for ten years, and Southern Foundries were bound not to remove or replace him in the same period.
* When considering implied terms in contract, the courts can adopt the ‘business efficacy’ route as established in the *Moorcock*. The alternative route was created in *Shirlaw* that established that if the term is so obvious that it ‘goes without saying’ then the term will be implied into the agreement.
* The officious bystander test is very important as it considers what a hypothetical officious bystander would have thought should be included in a contract. If the bystander was to make an observation of a clause to be inserted and the parties were to respond that ‘of course the term was included in the agreement’ (essentially that it was so obvious that it need not be stated) then this would amount to a term implied into the contract.
* Terms may be implied by the courts where the practice is notorious and reasonable (Sagar v Ridehalgh).
* Many terms have been created by the judiciary and applied in favour of the employer against an employee.

***Implied Terms Imposed on Employees***

* Mutual trust and confidence (Donovan v Invicta Airways Ltd [1970] and Mahmud v Bank of Credit and Commerce International SA [1998]) - whereby the employee may not breach the duty to maintain the respect between him/herself and the employer. This embodies respect between the parties, but that does not prevent criticism of either.
* Fidelity (faithful service) (Hivac Ltd v Park Royal Scientific Instruments Co [1946]) - where the employee must not work in competition with the employer and he/she must give his/her faithfulness to the employer. This restricts the employee from taking on other employment, without express permission, if it may interfere with his/her employment with the first employer.
* The duty to disclose the misdeeds of others (Sybrom Corporation v Rochem Ltd [1983]) - which places an obligation on the employee to inform the employer if he/she is aware or has knowledge of wrongful actions by colleagues.
* The duty of cooperation (Secretary of State for Employment v ASLEF (No. 2) [1972]) – the employee must work with his/her employer in the best interests of the business. Even if the employee dogmatically adhere to the textual reading of the contract of employment, if this is used to cause harm to the employer, the employee will breach his/her obligation to cooperate.
* Employees must exercise reasonable skill and judgement in his/her employment so as not to endanger colleagues and clients (Janata Bank v Ahmed [1981]).
* Duty to obey lawful orders (Pepper v Webb [1969]) from the employer, even if this extends beyond his/her job description.
* Duty to adapt to new working conditions (Cresswell v Board of Inland Revenue [1984]) - which enables the employer to introduce new working systems and the use of technology.

*Implied terms on the employer*

* Duty to pay wages (Devonald v Rosser & Sons [1906]) - this is often where the amount in wages or the frequency of the payments has not been agreed between the employee and employer. If no express agreement is made the employee should be paid a reasonable wage and within a reasonable time.
* Duty to pay a fair proportion of wages if industrial action is accepted (Miles v Wakefield MDC [1987]).
* There is generally no obligation on the employer to provide work for the employee. Exceptions do exist in certain occupations such as in acting where a public presence is a requirement to obtain future employment (Clayton & Waller v Oliver [1930]).
* The employer has an obligation to maintain the health and safety of his/her workers and this means the appropriate training of all staff, and safe systems of work to be put in place (MacWilliams v Sir William Arrol & Co Ltd [1962]).
* An implied term applied to both employers and employees is that of the duty to maintain mutual trust and confidence. Cases such as Isle of Wight Tourist Board v Coombes [1976] and Malik v Bank of Credit and Commerce International provide examples of the duties imposed on the parties to treat one another with respect and in respect of the employer, not ‘without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee’.

2. How have the statutory developments regulating the use of exclusion clauses altered and restricted their use? Compare how the cases pre-1977 would be decided in the courts today.

**Indicative content outline answer:**

* The function of the Unfair Contract Terms Act (UCTA) 1977 is to ensure that certain terms that may be unfair (under this Act, namely exclusion clauses) are removed or held invalid by the courts.
* UCTA 1977 also regulates the use of non-contractual notices attempting to restrict liability for negligence. Certain exclusion clauses will automatically be considered void under the Act (such as excluding liability for death or personal injury due to negligence) and those remaining have to satisfy the test of ‘reasonableness.’
* UCTA 1977 provides protection when exclusion clauses are included in standard form contracts. These are typically used by businesses and the consumer is in a weak position in attempting to decline their use – it is often a ‘take it or leave it’ scenario.
* If it is the case that the party deals as a consumer on the other party’s written standard terms, the other party cannot exclude or restrict any liability in respect of a breach of contract; or claim to be able to perform or fulfil a contract in a substantially different way than would reasonably be expected; or claim to be able to render no performance at all under his/her contractual obligations.

### *Reasonableness of the Exclusion Clause*

* UCTA 1977 contains provision for how the reasonableness or otherwise of an exclusion clause will be determined.
* In the case of *SAM Business Systems v Hedley and Co.* a software supplier was entitled to rely on an exclusion clause that enabled it to supply an inadequate product, and this term was considered ‘reasonable.’ (Note that this case was between two businesses).
* Schedule 2 outlines the tests that the courts will use in determining the reasonableness of an exclusion clause:

1. the strength of the bargaining positions of the parties relative to each other (the most important statutory consideration);

* Where the parties are of equal bargaining strength, the courts are more likely to accept exclusion clauses than if the contract was between a consumer and a business (*Watford Electronic Ltd v Sanderson CFL Ltd*).

1. whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
2. whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties - *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*);
3. where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would by practicable; and
4. whether the goods were manufactured, processed or adapted to the special order of the customer.

* Smith v Eric S Bush: The Lords identified factors that would be used in determining the reasonableness of an exclusion clause:

1. Whether the parties were of equal bargaining power;
2. In situations involving advice, was it practicable (in costs and time) to obtain alternative advice;
3. The level of complexity and difficulty in the task which was subject to the exclusion of liability; and
4. Which of the parties was better able to bear any losses and should insurance have been sought.

***Cases Subject to Change***

* L'Estrange v Graucob – the small print excluded all implied terms (included those provided by statute). This was permitted as the woman signed the contract – such exclusion clauses would not be permitted under UCTA.
* Thornton v Shoe Lane Parking Ltd – exclusion clause at a car park (sign inside sought to exclude liability for death and personal injury). The clause would have been effective had it been included at the entrance before the contract established. This is made void through UCTA s.2.
* Chapelton v Barry UDC – exclusion of liability for personal injury would be prohibited under UCTA.

**PROBLEM QUESTIONS**

1. A Ltd and Z Ltd are negotiating for the charter of a ship on an 18-month contract. A Ltd is concerned that the goods to be shipped in the vessel reach the customers on time or it will face penalties and may also lose business. Therefore, A Ltd has inserted the following clause in the contract:

‘It is a condition of this contract that the ship is seaworthy in all respects.’

Following the signing of the charter, when the ship is at sea there are continued problems with its maintenance as the crew supplied by Z Ltd are very inexperienced and the chief engineer has an alcohol problem. In part due to this, the ship is in the dock with engine problems for the first three months in the initial eight months of the charter.

A Ltd fears for the probable negative consequences of the ship and now wishes to end the contract and claim damages from Z Ltd.

Advise A Ltd accordingly.

**Indicative content outline answer:**

* The question is very similar to that of *Hongkong Fir v Kawasaki*. If you know the facts of the case, the judgment and the principle established from the ruling, it will certainly help you answering such questions.
* The question requires you to consider whether the term breached is a condition or warranty. This is significant as to the remedy available to the injured party. A breach of a warranty is a lesser term. It will entitle the injured party to seek damages to compensate for any loss associated with the breach (insofar as this loss is not too remote). However, they must continue with the contract.
* A condition of a contract is a term that goes to the heart of the contract (it is of great importance). Breach of this will entitle the injured party to damage as would a breach of a warranty. The major difference is that a breach of a condition allows the injured party also to end (repudiate) the contract. If the injured party wishes to take this action then they must act quickly.
* To attempt to avoid court action and a level of uncertainty as to the significance placed on the terms, the parties may attempt to identify in advance those terms which are warranties and those which are conditions. This is a ‘term based’ approach. However, it may be the case that in reality, the parties have to wait for the consequences of the breach before attributing the title ‘condition’ or ‘warranty’ to the breached term. This is known as the a ‘breach based’ approach as was used in *Hongkong Fir*. This created what became known as ‘innominate / intermediate’ terms. This is not to say that a third tier of term has been established. Rather it means that some terms cannot be identified in advance.
* The main problem with this question is the definition of the term ‘the ship is seaworthy’ as a condition. This is not possible to identify as either warranty or condition in advance of any breach.
* For example, if the ship had a hole in the hull. If such a ship was put to sea it would sink (assuming the hole is sufficiently large). This would be a condition as a ship being able to sail goes to the heart of such a contract of charter.
* However, what if the ship lacked the appropriate number of life-jackets? Technically it may not be seaworthy but this would be relatively simple and inexpensive to remedy and such a breach would be a warranty.
* If we follow the precedent established in *Hongkong fir*, this breach would probably be held as a warranty. The injured party has the balance of the contract and any losses sustained as a result of this breach would be compensatable.
* Remember, a breach of contract will always allow the injured party to be compensated for his/her loss, and the purpose in damages in such cases is to place the injured party in the position he/she would be had the contract been adhered to.

2. Sarah works for a local school and travels to work each day by car. She usually parks on a nearby piece of waste ground, but was unable to do so last week because of flooding. Instead, she parked her car in the multi-storey car park. A notice just inside the entrance to the car park states:

‘The company will not be responsible for death, personal injury, damage to vehicles or theft from them, due to any act or default of its employees or any other cause whatsoever.’

Reference to this notice is also contained on a ticket which Sarah received when entering the car park. On her return to collect the car, Sarah discovers that it has been stolen. She goes to report this to the attendant and is injured when he negligently allows the barrier to fall on her head.

Advise Sarah.

**Indicative content outline answer:**

* A definition of an exclusion clause is a term of the contract whereby one party seeks to exclude or restrict a liability or legal duty that would otherwise arise.
* Rules have been developed through the common law and through statutes to regulate how exclusion clauses may be fairly used in contracts. Typically, the exclusion clause will be made known to the other party through a notice, written in the contract itself, or expressed in the negotiations between the parties.
* An exclusion clause can be a non-contractual notice. The clause has to be incorporated into the contract at the offer and acceptance stage (i.e. when it is created); it must be reasonable; it must be specific as to what liability it purports to exclude; there must be a reasonable opportunity for the other party to be aware of the existence of the term (although it is not the responsibility of the party who is relying on the exclusion clause to ensure the other party has read the clause); and it cannot exclude liability where Parliament has provided specific rights.
* *Thornton v Shoe Lane Parking Ltd:* Mr. Thornton was attending an engagement at the BBC. He drove to the city and went to park his car in a multi-storey, automatic-entry, car park where he had never been before. At the entrance to the car park was a notice that read ‘All Cars Parked at Owner’s Risk.’ Thornton approached the entrance, took the ticket dispensed by the machine, and parked the car. The ticket included, in small print, a term that it was issued subject to ‘the conditions of issue as displayed on the premises.’ This included a notice displayed within the car park excluding liability for any injuries sustained by persons using the car park. Thornton returned to the car park three hours later and was severely injured in an accident, the responsibility for which was shared between the parties. Thornton claimed for his injuries and Shoe Lane Parking considered the exclusion clause protected it from liability. It was held that the ticket was nothing more than a receipt and once issued, further terms could not be incorporated into the contract. Only those terms included at the entrance were effective (excluding liability from theft or damage to the vehicle) and not those within Shoe Lane’s premises.
* *Thornton* established that for an exclusion clause to be valid there must be a reasonable opportunity for those affected by it to be aware of the existence and extent of the term. An important element was that Mr. Thornton had not been to the car park before. If he had, and would have had an opportunity to have seen the exclusion clause, he would have been bound by it (as per the previous dealings between the parties).
* Following *Thornton*, Sarah would be able to claim for her injuries. The exclusion was not incorporated into the contract but clearly it would also fall victim to UCTA 1977 s.2 (in the cases of business to business contracts – i.e. if Sarah is acting in the capacity of an agent for a business), or fairness in relation to the Consumer Rights Act (if Sarah is a consumer).
* Certain exclusion clauses will automatically be considered void under UCTA (such as excluding liability for death or personal injury due to negligence).