**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. The potentially fair reasons to dismiss under the Employment Rights Act 1996 are far too broad and enable an employer to dismiss an employee very easily. They should be narrowed and the test of reasonableness of an employer’s action made more robust if the legislation is to have any impact on the abusive exercise of managerial prerogative.

Discuss.

**Indicative content outline answer:**

* Having established that the employee qualifies for protection under the Act, s. 98 ERA 1996 outlines the reasons in which it may be acceptable, if reasonable on the facts, for the employer to dismiss the employee. The employer may explain the decision for dismissal as being potentially fair if the reason or, on the basis of there being more than one reason, the principal reason is due to:
* The capability or qualifications of the employee (s. 98(2)(a)).
* The conduct of the employee (s. 98(2)(b)).
* That the employee was made redundant (s. 98(2)(c)).
* That to continue the employment would amount to a contravention of a statute (s. 98(2)(d)).
* Some other substantial reason of a kind to justify dismissal (s. 98(1)(b)).
* The employer may select as many of the reasons under s. 98 as he/she wishes, however, the more that are chosen, the more evidence that will have to be provided to ensure the dismissal is fair. In *Smith v City of Glasgow Council*, the employer offered three reasons for the employee’s dismissal due to incapability, but as one of them could not be proven, the House of Lords held that the employee was unfairly dismissed. It was not possible for the court to distinguish if this reason was any less or more serious than the other two submitted.

###### *Capability / Qualifications*

* The ERA 1996 identifies that the issue of capability should have regard to ‘skill, aptitude health or any other physical or mental quality’ (s. 98(3)), and qualifications are ‘…any degree, diploma or other academic, technical or professional qualification relevant to the position held.’
* It is necessary to look to the contract of employment and to what tasks the employee actually performed at work, and then consider the general standard of performance required, whether that standard was being met, and if not, how were similar employees treated.
* This reason for dismissal generally focuses on whether the employee becomes ill and cannot perform his/her tasks, or if the employee is incompetent (*Alidair v Taylor* [1978]) (or ‘becomes’ incompetent - perhaps by being promoted to a management position and not having the skills to perform the job adequately).

###### *Conduct*

* Here the issue is the misconduct of the employee and it can pose many problems for an employer in determining the facts surrounding the incident, and deciding how to react to it.
* Typical examples of misconduct include fighting, stealing, misuse of company property (examples of *gross* misconduct), and poor timekeeping, unauthorized absences from work, or general disregard for instructions given fairly and lawfully by the employer (misconduct).
* Gross misconduct generally refers to a one-off serious offence that may of itself justify a dismissal, whereas as misconduct may be a ‘lesser’ offence when considered in isolation, but when this culminates over a period of time it becomes sufficiently serious to (potentially) justify a termination of the contract.
* Under the common law, a gross misconduct entitles a summary dismissal, but under the statutory route, the investigation should be followed, the procedures applied, and then the decision reached.
* Cases have demonstrated how an employer may dismiss an employee merely on suspicion of a misconduct such as theft (*Monie v Coral Racing Ltd and British Home Stores v Burchell*). Hence, actual proof of an offence is required – if the employer can demonstrate a reasonable suspicion, that will prove sufficient.
* There may also exist situations where a group of employees may be considered to have been involved in misconduct. In cases where it is reasonable for the employer to assume that all or one of them were involved, yet following an investigation identification of the actual perpetrator(s) cannot be achieved, all of the group may be dismissed (see *Parr v Whitbread*).
* Note that potential problems may exist where an employer cannot identify which of the employees has committed an offence, but decides to dismiss members of the group selectively. When one or more of the employees in the group are retained or re-hired despite the investigation not identifying the employee(s) responsible, there must exist solid and sensible grounds for the retention or re-hiring of certain members.

###### *Redundancy*

* Redundancy is included in s. 98 as another form of dismissal. It enables a claim under unfair dismissal legislation where the employee considers that they have been unfairly selected for redundancy; where no warning or consultation had taken place; or where redeployment had not been considered. Unfair selection may occur where one or more employees have been selected for redundancy in breach of a customary or agreed procedure (for example an agreement between an employer and trade union to use a selection process such as ‘last in, first out’; voluntary agreements and so on); or if the employee was selected in connection with trade union membership.

**Contravention of a Statute**

* A further potentially fair reason to dismiss is where to continue to employ the employee would be to break the law. In such a situation, the contract could be frustrated due to a subsequent law (such as the enactment of legislation prohibiting the employment of foreign nationals) or a change in the employee’s situation that makes continued employment in the same capacity contrary to legislation (*Four Seasons Healthcare Ltd v Maughan* [2005]).

**Some Other Substantial Reason**

* In the absence of a reason fitting into one of the previous categories, s. 98 provides for ‘some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held’ (SOSR) to be forwarded as a reason for the dismissal.
* There has been a very wide interpretation of the concept of what would amount to SOSR. In the past tribunals have held that an employee whose spouse was an employee of one of the employer’s competitors permitted a dismissal; a homosexual man was dismissed from his job at a residential holiday camp due to a potentially negative reaction from parents on discovering his sexuality (*Saunders v Scottish National Camps Association* [1980]); and an employee’s refusal to agree to the inclusion of a restraint of trade clause in his employment contract was deemed SOSR (*RS Components v Irwin* [1973]). In *Scott v Richardson* the EAT held that the tribunal did not have to be satisfied that the commercial decision of the employer was sound, but rather the test was whether the employer believed it to be so.
* SOSR may also amount to a situation where an employee is dismissed because their attitude at work is sufficiently unpleasant and disruptive that it breaches the implied duty of trust and confidence (*Perkin v St George’s Healthcare NHS Trust* [2005]).

1. The statutory dismissal procedures, intended to resolve employment disputes ‘in-house’ without recourse to tribunal, were replaced in April 2009 with a system based on Alternative forms of Dispute Resolution. Why did these statutory procedures fail and what is the likely success of the ACAS code reducing such action? What lessons can be learned from the Gibbons review?

**Indicative content outline answer**

* In an attempt to avoid so many cases proceeding to tribunals, the Government, in part through the findings outlined in the ‘Routes to Resolution’ paper prepared by the Department for Trade and Industry (2001), established procedures for a series of steps to be taken before the claim can be made to the tribunal.
* The Government, as of April 2009, abolished the grievance procedures provided through the Employment Act 2002 (Dispute Resolution) Regulations 2004.
* A new system was introduced with greater use of ACAS (the ACAS Code) and ADR procedures – especially Arbitration and Conciliation.
* The Code followed the findings of the Gibbons review of workplace dispute resolution by repealing the grievance procedures in their present form, and replacing them with an alternative package.
* The rationale for the Code’s introduction was the prescriptive nature of the grievance procedures, and the draconian penalties imposed for a failure to adhere to them. They did not succeed in reducing claims through resolving disputes internally, but actually increased the numbers of unfair dismissal claims on procedural, rather than substantive, grounds.
* The statutory procedures applied to situations where the employee had a grievance with the employer that related to a statutory right (such as claims under the minimum wage, equal pay, discrimination and so on). The procedures were to be used before the employee could take their claim further and a failure to follow the procedures by an employee would have prevented their claim at a tribunal until the grievance had been raised in writing with the employer.
* The statutory procedures involved a three-stage process involving:
* **Stage One**: The employer setting out in writing (typically in the form of a letter) the matter(s) that may lead to disciplinary / dismissal action, and invites the employee to discuss this matter.
* **Stage Two**: This involves the meeting, which takes place before any action is taken (except where the action involves a suspension).
* **Stage Three**: It was the responsibility for the employer to inform the employee of their right to appeal against the decision under Stage Two. If the employee wished to appeal the decision following the previous stages, they were obliged to inform their employer of this decision and then a further meeting would be convened.
* Where an employer has failed to follow the procedures, the dismissal will be held, automatically, to be unfair (ERA 1996 s. 98A(1)). The tribunal possessed the ability to increase any award made be between 10-50% (sch. 3 Employment Act 2002).
* The grievance and dismissal procedures were abolished because they simply did not assist in reducing cases proceeding to tribunal.
* The ACAS Code removed this requirement of attempting to settle dispute in-house, however, a movement to greater use of ADR may also have their drawbacks. Conciliation and mediation may simply be used by the employer to gather information to be used against the employee and there is evidence that once an employer has decided to take a case to a tribunal, he/she is unlikely to settle the case. Only time will determine the potential success of the new system, but previous experience does not inspire confidence.
* The Early Conciliation Scheme also requires parties to engage with this model of ADR prior to any tribunal claim. The success rates are inconclusive at the time of writing, but it is another attempt by the government, along with the introduction of the fees regime in employment cases, to make progression to Employment tribunals more onerous.

**PROBLEM QUESTIONS**

1. Kate runs a clothing manufacturing firm employing several workers. One day Kate comes into work and sees what she thinks is a fight between John and Tom. Therefore Kate sacks both of them on the spot. What has really happened is that Tom has been attacked by John because John has never liked Tom due to his exemplary service and being a ‘goody two shoes’.

Tom was actually working on a fixed-term contract, which he had worked for 1 year out of a 3-year contract. Tom’s contract does not state anything about early termination and he earns £20,000 per year.

Kate later appoints Sarah on maternity leave cover for an 8-month contract. Once appointed, Sarah announces that she is pregnant, and Kate is disgusted by this revelation and immediately dismisses Sarah due to her pregnant status.

Advise the parties of the legal issues and their rights.

Visit the Online Resource Centre where there are completed claim (ET1) and answer (ET3) forms relating to this question, and a completed employment contract to demonstrate the reality of this dismissal scenario.)

**Indicative content outline answer:**

* Dismissal without notice will fall victim of the statutory dismissal procedures. The introduction of the procedures was to attempt to reduce ‘knee-jerk’ reactions such as happened in the problem question.

### *Reasonableness of a Dismissal*

* The employer may offer a potentially fair reason, as outlined in s. 98 ERA 1996, to justify the dismissal. However, it is necessary for the employer to demonstrate that they acted fairly in deciding to dismiss the employee.
* This burden of demonstrating reasonableness is neutral between the parties and, under s. 98(4) ERA 1996, the tribunal will hear the evidence and determine, taking into account all relevant circumstances, the issue of reasonableness.
* It is absolutely essential to remember that in determining reasonableness, the tribunal must not consider what action it would have taken, and if the employer’s action fell outside of this, subsequently to hold it as unreasonable (*Iceland Frozen Foods Ltd v Jones* [1982]). Hence the tribunal will assess the evidence forwarded by the employer and consider the employer’s response to this and whether his/her action fell into the band of reasonable responses.
* The EAT considered that in cases where following the procedure would have made no material difference to the decision of the employer in dismissing an employee, a failure to follow the procedure would not necessarily render the dismissal unfair. However, this has been affected following the House of Lord’s judgment in the seminal case of *Polkey v AE Dayton Services*.

***Potentially Fair Reason to Dismiss***

* Fighting would normally be considered a gross misconduct that would justify a dismissal however it would still require an investigation.
* Tom’s contract is for a fixed term of 3 years. When you see a fixed-term contract being mentioned it should lead to consider the possibility of a wrongful dismissal claim.
* In a wrongful dismissal claim there is no limitation to the compensation payable and he may be entitled to the balance of his contract – including all the pay and other contractual benefits. This may prove to be more lucrative than an unfair dismissal claim.
* In relation to Sarah, she has been dismissed due to her pregnancy. This is an automatically unfair dismissal which means that the need for the period of continuous employment is dispensed with.
* There is no justification for direct sex discrimination, and the employer’s motives are irrelevant.

1. Calvin is a designer working for a large fashion house. Calvin is an employee at the firm and has worked there for 4 years. His employer Donna arrives at work on Monday morning and finds Calvin acting suspiciously. Donna checks the petty cash box and discovers that £100 is missing. Despite the fact that four other employees were in the vicinity at the time Donna came into the room she dismisses Calvin without any notice saying she ‘would not have a thief like Calvin working there any more’.

Advise Calvin of any rights under unfair dismissal and wrongful dismissal protections.

**Indicative content outline answer:**

* Calvin is an employee and has worked for the same employer for longer than one year. As such, insofar as a claim is lodged within the time limits, he may choose to seek a remedy under unfair or wrongful dismissal.
* This problem scenario involves a dismissal for theft. As such it is a potentially fair reason to dismiss.
* Typical examples of misconduct include fighting, stealing, misuse of company property (examples of *gross* misconduct), and poor timekeeping, unauthorized absences from work, or general disregard for instructions given fairly and lawfully by the employer (misconduct).
* Gross misconduct generally refers to a one-off serious offence that may of itself justify a dismissal, whereas as misconduct may be a ‘lesser’ offence when considered in isolation, but when this culminates over a period of time it becomes sufficiently serious to (potentially) justify a termination of the contract.
* Under the common law, a gross misconduct entitles a summary dismissal, but under the statutory route, the investigation should be followed, the procedures applied, and then the decision reached.
* This process ensures that all available evidence is gathered and the relevant investigation is conducted. Further, it ensures that the employer has proof of their reasonable belief that led to the action against an employee. This is a particularly important aspect of misconduct. The employer need not *prove* that the employee is guilty of the alleged misconduct, but rather the employer need only demonstrate that they had reasonable grounds on which to hold / maintain this belief.
* In *British Home Stores v Burchell* an employee had been dismissed on the employer’s suspicion that theft from the store had been taken place, although there was a lack of firm evidence. The case required that an employer can demonstrate they hold reasonable suspicions for believing the employee was guilty of the offence.
* This requires a reasonable investigation to be conducted.
* In *Monie v Coral Racing Ltd* a manager and his assistant were both dismissed when money was stolen from a safe that only the two men involved had access to. They were both interviewed and when the employer could not identify which of the two committed the theft, the two employees were dismissed. This was held to be fair.
* Where a group of employees could have committed a theft, and following a reasonable investigation the perpetrator cannot be identified, the employer may dismiss all of them (*Parr v Whitbread*).
* Where a group of employees could have a committed a particular offence, the tribunal will find the dismissal of all the group fair where:

1. A dismissal for that offence would have been justified;
2. The employer conducted a reasonable investigation and held a proper procedure;
3. The employer reasonably believed the offence could have been committed by more than one person;
4. The employer has reasonably identified those who could have committed the act; and
5. The employer cannot reasonably identify the perpetrator.

* What will amount to a reasonable investigation will depend on the individual circumstances of the case, but factors such as the interviewing of any identifiable witnesses; the collation of documents and their assessment; and providing the employee with an opportunity to answer any charges put to them, and to genuinely consider their responses before any decision are made, will point towards a reasonable investigation. Of course, in situations involving theft or other activities with a criminal element, the tribunals have held that the employer may treat a guilty verdict in a court as proof that the employee did commit the offence (*P v Nottinghamshire CC* [1992]).
* As such, Calvin would have a claim for unfair and wrongful dismissal. It would be dependent on the remedy that he was seeking and his adherence with the appropriate time-limits that may influence his decision. On the basis of the information provided, Calvin may obtain a better remedy through unfair dismissal and obtain the statutory remedy of re-instatement or re-engagement.