**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. Is it appropriate to have a national minimum wage? Given the differences in the cost of living throughout the country, and obliging the employer to pay an amount set by the State for employment when market forces may have been better able to regulate pay, evaluate the necessity for, and impact of, the National Minimum Wage Act 1998.

**Indicative content outline answer:**

* Workers have the right to be paid, and their pay must be at least at the level established in the National Minimum Wage Act 1998 (NMW). This is regardless of the size of the employer, and regardless of whether the worker is employed full or part-time, paid on commission, or are casual or agency workers.
* Employees are also entitled to an individual, written pay statement that identifies the gross pay, the deductions made, and the net pay provided to the worker. There are strict rules on the deductions that an employer may make to an employee’s pay.
* The NMW 1998 provided most workers over compulsory school age with the right to be paid the minimum wage established by that legislation and the subsequent increases as established under the Act. The Government takes recommendations from the Low Pay Commission with regards to the increases in the rate of the minimum wage.
* The Government established a penalty notice policy that is designed to ‘encourage’ recalcitrant employers to fulfil their obligations. This provides HMRC the authority to enforce the NMW 1998 on the behalf of the Government, and as such a compliance officer may serve an enforcement notice on an employer which specifies the amount of money owed to the worker(s); the time limit in which the employer has to pay this sum; and the time limit in which payment has to be provided. A fine of up to £5,000 may be imposed on an employer guilty of breaching the Regulations.
* Clearly, cost of living arguments will suggest that there should not be a ‘national’ minimum wage. However, to implement a regional policy would be a bureaucratic problem, there would clearly be boundary issues that would have to be resolved, and it would lead to complaints (as is ever present) from organisations such as the Confederation of British Industry about the unfair ‘taxing’ of employers based in certain regions – with the possibility of relocating to areas of ‘cheaper’ workforces.
* Markets do regulate prices in many instances, but pay level prior to the NMW in some areas / industries were so low as to be meaningless and a disincentive to seek work. The NMW will continue to rise and enable those at the lower ends of the employment spectrum to be paid an amount that, whilst not particularly high, is at a level that encourages work to be sought. For example, prior to the enactment of the NMW, security guards for some industrial areas were being paid as little as £1 per hour. This essentially was because the company’s insurance premiums were cheaper by having a security guard present than without. Such low pay does work as a disincentive to most workers and interesting comparisons may be seen by comparing workers paid a ‘good’ level of pay in relation to productivity and absenteeism with those who are paid very poorly.

1. An employer is entitled to have their confidential information protected against unauthorized use by a rival. How have the courts determined what may be regarded as ‘reasonable’ in the award of this protection?

**Indicative content outline answer**

* Employers will often allow employees to have access to valuable company information with regards to the trade secrets, products sold, the suppliers and customers, and the workforce. When this person leaves to take up an offer of alternative employment or to start their own business, such information is invaluable and could be used to compete (unfairly) with the previous employer.
* Employers are therefore entitled to seek protection against an employee from unfairly using information to which they have been privy.
* An employee is restricted from certain activities, either through implied terms or those expressed in their contract of employment, such as working in competition with the employer (the implied duty of fidelity). Once the employee has left the employment, they are, generally, free to work for whomever they wish, or to establish a business and work in competition against the former employer.
* In order to protect the employer from having an employee use information or knowledge of the employer’s business against them, a restraint of trade clause may be included in the contract.
* A restraint of trade clause is a post-contractual agreement that restricts the employee from working in competition with their previous employer for a certain duration and within a defined geographical / industrial distance.
* The case that established when a restraint of trade clause would be enforceable was established in *Herbert Morris v Saxelby*. A clause will only be applicable if:

1. It sought to protect the employer’s legitimate proprietary interests (such as trade secrets and customer information); and
2. It is reasonable between the parties and is in the public interest.

* An employer may legitimately claim protection where an employee has acquired specialist knowledge such as the customers of the employer’s business or confidential information. This is often referred to a ‘proprietary interest’ rather than general know-how, which the courts would not allow to be included in a restraint of trade clause.
* Examples of clauses restricting ex-employees from soliciting customers and clients have been demonstrated in *Allied Dunbar v Frank Weisinger* and in *AM Schoeder v Maccaulay*. It is also contrary to a restraint of trade clause to copy an index of customer’s names when the ex-employee enters into competition with the employer (*Roger Bullivant Ltd v Ellis* [1987]).
* In order for the employer to be successful in arguing for the clause to be upheld, they must satisfy the court that the restrictions included are no greater than are ‘reasonably’ necessary for the protection of the employer’s business.
* In assessing reasonableness, the court will consider the duration of the restraint, the geographical distance covered, the business of the employer’s firm, and whether allowing a restraint is fair in public policy. A clause may fail the reasonableness test if its terms are not sufficiently precise (*Commercial Plastics v Vincent*), or where it is against public policy (*Bull v Pitney Bowes*). As a ‘rule of thumb,’ the duration of the restriction and the area of its application are inversely proportional. The wider the area of the restriction, the shorter should be the duration; the smaller the area, a longer duration will be considered reasonable (*Fitch v Dewes*).
* It should also be noted that the clause will only continue to have effect (as a post-contractual agreement) whilst the parties behaved reasonably with each other. If the employer repudiates the contract, for example by wrongfully dismissing the employee, then any restraint of trade clause becomes unenforceable (*General Billposting Co. Ltd v Atkinson*).
* The courts have the option when faced with a restraint of trade clause that goes beyond the necessary aims of protecting the employer’s business to invoke a process known as ‘blue pencilling.’ It enables the court to remove an offending passage or term of the clause, and if it still leaves the remainder making grammatical sense, and it is supported by consideration, then it may be held to be valid and enforceable (*Sadler v Imperial Life Assurance of Canada*).
* Due to potential problems of the courts refusing to uphold a restraint of trade clause, or if the employer has to terminate the employee’s contract in advance of any agreed date, the employer may obtain the protection required if they are prepared to pay the employee’s salary. This is known as a garden leave arrangement.
* This may be a more expensive proposition than relying on a restraint of trade clause, but it provides greater certainty of protection, and ensures that an employee cannot take important secrets or knowledge of the employer’s business and use it in competition. Note that the courts will not allow an unusually long garden leave clause, and in *GFI Group Inc. v Eaglestone* a notice period of 20 weeks was reduced to 13 weeks as this was considered sufficient in order to protect the employer’s proprietary interests.

**PROBLEM QUESTIONS**

* + - 1. Clive works for Trusthouse Fifty, a chain of hotel and dining establishments. He was promoted to manager of the restaurant and bar department. He had not opted-out of the Working Time Regulations, his contract provided that he was contracted to serve the employer for 42 hours per week, and he should endeavour to complete his work within this time.

Despite this contract, Clive was told by the general manager at the establishment that he had responsibility for all aspects of the department. He hired the staff for the functions held there, he ensured the food was prepared to a sufficiently high standard, and he also had sales targets to meet regarding the quantity and price of wine that was sold. As a result, Clive was under great pressure and started to work 80 hours per week to complete his work.

Clive did not complain to the general manager about this, but it was evident he was suffering health problems due to working excessive hours. After just six months in this job he had become very irritable, had been rude to employees, criticized their work, and had started drinking alcohol to excess. Clive exhibited none of these symptoms when first hired.

When a concerned colleague (Zoe) informed the general manager of her concerns for Clive's health, she was told that Clive must complete his tasks, and the manager did not care how long it took him to achieve this. Further, it transpires that the general manager has not maintained any records of the time staff work at the establishment.

Clive has now suffered a breakdown and cannot work. Advise him on any claim he may have against the employer based on his statutory rights.

**Indicative content outline answer:**

* The employer has an obligation under the Working Time Regulations to maintain records as part of the employees’ health and safety.
* The Regulations apply to ‘workers’ rather than just ‘employees’.
* To qualify as a worker the individual has to perform their work or provide services personally.
* The Regulations provide that in a seven-day-week period, the worker should not exceed 48 working hours, assessed over a 17-week period.
* A breach of the Working Time Regulations may lead to liability under these Regulations, but it may also result in an employee's stress and mental illness which could also lead to tortious liability.
* Insofar as these are reasonably foreseeable, an employer could face liability on each count. What will be 'reasonably foreseeable' will depend on the circumstances of the case, but in *Hone v Six Continents Retail*, an employee who worked 90 per week and suffered deteriorating health and then a psychiatric injury, was successful in holding the employer liable. It was held the employer was required to take all reasonable steps to ensure the employee did not work more than 48 hours per week (which it did not).
* Further, there were sufficiently clear indicators that the employee's health was being negatively affected and the employer had a duty to protect the health and safety of the workforce.
* This case may be compared with *Sayers v Cambridgeshire County Council* involving an employee working 50-60 hours per week. Whilst there was a failure to adhere to the Regulations, the employee's illness was not reasonably foreseeable.
* If an employer refuses to allow a worker to gain access to these rights, or does not take reasonable steps to ensure compliance with the Regulations, they are guilty of a criminal offence.
* It should be further noted that whilst there are limited obligations on the employer to hold anything other than ‘general’ records regarding workers’ hours of work and written documentation, the Court of Justice provided a strong recommendation that it may be in the employers’ interest for employers to hold sufficient records to demonstrate that the opt-out was expressed, rather than implied, and was, along with any other contractual term, entered into freely (Pfeiffer v Deutsches Rotes Kreuz Kreisverband Waldshut eV and Barber v RJB Mining).
  + - 1. Devon is employed by All Bright Consumables (ABC) Ltd in the factory where it makes tablet computers. Devon is a senior manager and has responsibility for the production of the components and their assembly. He is also involved in senior planning meetings where strategies, including plans for patents, are discussed.

Devon's contract provides for a restraint of trade where Devon will not compete with ABC Ltd either through establishing his own business or working for a competitor, in the technology field, in the UK, Germany, the USA, China, The Middle East and Africa, for 1 years after ceasing to work there. A further clause restricts Devon from 'employing ABC Ltd staff, or poaching customers'.

Sometime later, Devon decides to leave ABC Ltd and establish his own company. It specializes in touch screen computers and he wishes to hire the chief designer and operations manager of ABC Ltd to help him in this new venture. Devon approaches both people with an offer to triple their current salary if they leave ABC Ltd with immediate effect. Devon is planning on developing and then marketing a new computer which uses 'gesture-based input' on both the front and back of the device. He was privy to this idea whilst working at ABC Ltd and he knows that ABC Ltd has not yet applied for a patent.

Advise ABC Ltd on their likely arguments and success in preventing Devon competing with ABC Ltd, hiring the staff, and developing this new computer. How would your answer be developed if Devon said it was the company he established that had taken the actions when he left ABC Ltd?

**Indicative content outline answer:**

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