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# Answers

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Section B

- 1 (a) Both definite and indefinite contracts of employment may be terminated for a good and sufficient cause. Elizabeth has been working as a sales assistant for seven years and hence it is assumed that she was employed on an indefinite contract or, if she was employed on a definite contract, this was converted into an indefinite contract after the lapse of four years.

The Employment and Industrial Relations Act, 2002 does not define what shall constitute a good and sufficient cause for termination of employment. The Act merely provides for a list of cases which cannot be considered as a good and sufficient cause. These cases are listed as follows:

- (i) that the employee, at the time of the dismissal, was a member of a trade union, or seeking office as, or acting or has acted in the capacity of an employees' representative; or
- (ii) except in the case of a private domestic employee, that the employee no longer enjoys the confidence of the employer; or
- (iii) that the employee contracts marriage; or
- (iv) that a female is pregnant with child or absent during maternity leave; or
- (v) where an employee discloses information, whether confidential or not, to a designated public regulating body, regarding alleged illegal or corrupt activities committed by his employer or persons acting in interest or on behalf of the employer;
- (vi) where an employee has filed a complaint or is participating in proceedings against the employer involving alleged violation of laws or regulations or is having recourse to competent administrative authorities in this regard;
- (vii) that the business in which the employee is engaged has undergone a transfer of ownership unless the employer proves that the termination is necessary for economic, technical or organisational reasons entailing changes in the workforce.

One must mention, however, that national adjudicating institutions have delivered several decisions on the notion of good and sufficient cause and what is required for a contract of employment to be validly terminated on such grounds.

- (b) Elizabeth had been acting in an improper manner by acting rudely with customers. She had been reprimanded by her employer and had also been reprimanded in writing.

Maltese employment legislation does not stipulate the procedure to be adopted when disciplinary measures are to be taken against employees. Reference can, however, be made to practice adopted by other local entities as reflected in decisions of the Industrial Tribunal. Case law, which although not binding, provides that an employer observe a number of procedural requirements prior to dismissing an employee. These procedural requirements emanate mainly from procedural fairness which should be adopted prior to termination as well as adherence to principles of natural justice (*audi alteram in partem and nemo iudex in causa propria*).

With regards to the requirement to give warnings, it is pertinent to note though that every case is to be judged on its own merits, as no case is alike.

In a situation such as that detailed in the question, having written warnings shall clearly serve a further purpose, in that, if action be taken by Elizabeth against the company for unfair dismissal, the company must have adequate evidence of the reasons for which employment is being terminated. Primarily therefore, the company should be able to prove that Elizabeth's actions leading to her dismissal had nothing to do with her pregnancy but with her general behaviour in respect of which she had already received two written warnings.

- 2 (a) In terms of law, the capital may be increased or reduced. An increase in capital may be in cash or in kind. Article 85 of the Companies Act, 1995 provides that any increase in the issued share capital of a company shall be decided upon by an ordinary resolution of the company. The law provides for the issue of shares either in cash or for a consideration other than cash. The latter case is regulated by Articles 73 and 74 of the Act. In terms of Article 73, the consideration for the acquisition of shares in a company whether on the original subscription or a subsequent issue may only consist of assets capable of economic assessment, and furthermore, future personal services and in general any undertakings to perform work or supply services may not be given by way of consideration. Where shares are issued other than on original subscription for a consideration other than in cash, the full consideration shall be transferred within five years from the date of the decision to issue the shares.

- (b) In order to increase the share capital of Equity Limited for a consideration in kind, the shareholders, including Michael, would have to approve the increase by means of an extraordinary resolution. Furthermore, an expert's report would have to be drawn up. A report on any consideration other than in cash must be drawn up before the shares are issued by one or more experts who are independent of the company and approved by the Registrar. The expert's report shall contain at least a description of each of the assets comprising the consideration, in this case the shares which Michael holds in the other company, as well as the methods of valuation which have been used and shall state whether the values arrived at by the application of these methods correspond at least to the number and nominal value, and, where applicable, to the premium on the shares to be issued for them. The report must be delivered to the Registrar for registration before the shares are issued.

- (c) In terms of article 73, the assets must be capable of economic assessment and the provision specifically excludes the supply and provision of services. Hence John would not be able to participate in the subscription by way of provision of services.

- 3 (a) The Prevention of Money Laundering Act 1994 makes a clear distinction between the offence of money laundering and the underlying criminal activity in order to ensure that the offence of money laundering may subsist even in the absence of a judicial finding of guilt for the criminal activity from which the property or other proceeds are derived.

The material element of the offence must consist in any of the following actions and must be accompanied by the associated intentional element as indicated below:

- Converting or transferring property, with the knowledge that such property is derived from criminal activity or participation in such activity, for the purpose of concealing or disguising the origin of the property or assisting a person involved in criminal activity.
- Concealing or disguising the true nature, source, location, disposition, movement, right over or the ownership of property with the knowledge that such property is derived from criminal activity or any participation therein.
- Acquiring property with the knowledge that such property is derived from criminal activity or any participation therein.
- Retaining without reasonable excuse property with the knowledge that such property is derived from criminal activity or any participation therein.
- Any attempt at or complicity in any of the above matters or activities.

From the facts given, it is implied clear that Matthew could be held liable for money laundering, in receiving goods being fully aware that such were derived from a criminal activity (i.e. theft) and assisted in selling them and sharing in the proceeds thereof.

- (b) The Prevention of Money Laundering and Funding of Terrorism Regulations impose a number of duties on the subject person, namely identification and customer due diligence, internal record keeping, internal and external reporting and employee instruction and training. An auditor falls under the definition of a subject person in terms of the Prevention of Money Laundering and Funding of Terrorism Regulations and as such may need to file a suspicious transaction report.

Identification is necessary when a business relationship is going to be formed or every time a transaction is carried out, and must be made as soon as reasonably practical after contact is first made with the applicant for business. Satisfactory evidence of the applicant's identity, established on the basis of documents, data or information obtained from a reliable and independent source, must be produced and this must be verified to ensure that the applicant is indeed who they claim to be. If the applicant is acting on behalf of another person, both persons must be identified.

Similarly, the Regulations require the subject person to conduct enhanced customer due diligence based on a risk-sensitive basis and in situations which, by their nature, can present a higher risk of money laundering or the funding of terrorism, such as where the applicant for business is not physically present for identification purposes.

Subject persons are also required to pay special attention to any threat of money laundering or funding of terrorism which may arise from new or developing technologies or from products or transactions which might favour anonymity, and take such measures as shall be appropriate to prevent their use in money laundering or funding of terrorism.

The training of employees is required to ensure that there is awareness among staff about the importance of money laundering policies and regulations and to encourage cooperation with the authorities, namely the Financial Intelligence Analysis Unit, with regards to reporting suspicious transactions promptly.

- 4 (a) One of the most obvious examples of a situation which might be expected to give rise to a conflict between a director's interests and their duties is where they carry on or are associated with a business competing with that of the company as in the given facts. Article 143 of the Companies Act is precisely geared towards such an undesirable situation. Thus, a director may not, in competition with the company and without the approval of the same company given in general meeting, carry on business for their own account or on account of others, nor may they be a partner with unlimited liability in another partnership or a director of a company which is in competition with that company. Failure to comply with this provision, other than any remedy which the company may have against the director for breach of duty, vests the company with the right either to take action for damages and interest against the director or to demand payment of any profits made by them from such failure. Therefore, this provision does not totally prohibit directors from holding other directorships or from carrying on other business, but that when such shall be deemed to be in competition with their post of directorship, before so proceeding they are to acquire the approval of the company in the general meeting.

There is nothing at law which prohibited Patrick from continuing to hold the post of director of JMBH Limited and of the competing company. However, from the facts given it is clear that Patrick concealed this fact from the other directors and his position in JMBH Limited could have become untenable if it could be proven that his involvement in the other company could have been the cause of the downturn in business of JMBH Limited.

- (b) An important fiduciary duty which is statutorily imposed on directors is that they must not create conflict between the duties they owe to the company and their personal interests and those they owe to others. To avoid such situations arising, the law provides for measures of disclosure. Thus, in terms of Article 145 of the Companies Act, 1995 where a director is in any way

interested, whether directly or indirectly, in a contract or proposed contract with the company they are to declare the nature of their interest to the other directors, either at the meeting at which the question of entering into the contract is first taken into consideration, or, if the director was not at that date so interested in the said contract or proposed contract, at the next meeting of the directors held after they became so interested.

In a UK case, *Guinness v Saunders* (1990), the UK court went a step further and held that if a director fails to declare his interest, the transaction is voidable at the instance of the company and any benefits received by the director are recoverable by the company if it acts while it is still possible to restore both parties to their former positions.

Besides disclosure of interest, the articles of association of the company may also provide that a director shall not vote at a meeting of the directors in respect of any contract or arrangement in which they are interested, and if they shall do so their vote shall not be counted. This would also be relevant to the facts of the case if the articles of JMBH Limited do so provide.

- (c) Therefore, in terms of law Patrick was bound to disclose his interests and obtain approval. An action against Patrick could be taken both in terms of Article 143 and Article 145. Any director who fails to declare such interest shall be liable to a penalty of €2,329.40 payable to the Registry of Companies.

- 5 (a) A contract is deemed concluded once an offer is made and validly accepted by the other party. In order for an offer to produce juridical effects, it must also be: (i) externally manifested; (ii) made with the intention of binding the offeror; (iii) complete; and (iv) made to a particular individual, his agent or to the public. All internal and external requisites for a valid contract must also be in place.

- (b) Consent as an internal act must be serious (not a joke), definitive (not still being negotiated) and free (not given by mistake or fraud); and externally the consent must be manifest, whether express or implied. The defects of an act of volition, whether with reference to a contract or to any other voluntary act, are error, fraud and violence.

Error is the deformity between an idea and its object. In order that error may be deemed to vitiate consent, it must be determining and excusable. The error in the case under consideration can be said to be both determining and substantial, in that, had Mark known that the painting was not by a famous artist he would not have bought it.

Moreover, the error must be excusable, otherwise Mark would simply have to blame himself, and it should not be lawful for him to evade the execution of the contract and to deprive the other party of the advantages acquired by means of the contract.

The most important kind of error is error of fact. Error of fact is any error which does not refer to a provision of the law and includes errors with regard to the nature of the contract, with regard to the object of the contract, to the motives which induce a person to enter into a contract and to the person of the contracting party.

In the case under consideration, Mark could possibly claim that there was an error which referred to the object of the contract, in that, in his mind he agreed to purchase one particular thing while the supplier could claim he was under a different impression.

The error could, however, also have been an error which referred to the quality of the thing. In this regard, one can distinguish between substantial error and accidental error. This distinction is accepted under our law in terms of Article 976 of the Civil Code. This provision is particularly relevant to the case under consideration as the error was such that it affected the substance of the contract, in that, in view of such error Mark no longer wanted the painting.

- (c) Fraud is deemed to be that artifice, deceit or simulation which is made use of by one of the contracting parties in order to deceive the other and to induce them to enter into the contract. In order that it may be deemed to invalidate consent, the fraud (i) must consist in fraudulent artifices or machinations; (ii) must be grave and (iii) must be determining and practised by the other party.

Fraudulent artifices are all those means which are made use of with the knowledge that they are false and which are apt to make an individual mistake one thing for another.

*Dolus* is grave when the machinations are such as to operate on a reasonable person, and they must exceed that sort of simulation which is usual in commerce and which is therefore allowed. *Dolus* is determining when it has such an influence on the mind of the contracting party as to deceive them and induce them to consent, when, without these artifices they would not have consented.

However, what is essential is that as is provided under Article 981 of the Civil Code Cap 16, in order to bring forward such a claim, the fraud must be proved and not presumed. Therefore if Mark is to annul the sale on the basis of defect of consent, he would have to prove fraud on the part of the supplier.

**Section B**

- 1** (a) 2 marks depending on the explanation given on the nature of the contracts which can be terminated for a good and sufficient cause.

(b) 4 marks depending on the level of detail given to explain whether the candidate is of the opinion that Elizabeth's contract can be terminated for a good and sufficient cause.
- 2** (a) 2 marks depending on the level of detail given to explain whether the candidate is of the opinion that Michael can carry out a share for share exchange.

(b) 2 marks depending on the level of detail given to explain the procedure to have an increase in capital for a consideration in kind.

(c) 2 marks depending on level of detail given to explain whether John may subscribe to shares for a consideration taking the form of rendering of services.
- 3** (a) 3 marks depending on the level of detail given to explain who may be held responsible for money laundering.

(b) 3 marks depending on level of detail given to explain whether the auditor was bound to disclose his findings.
- 4** (a) 2 marks depending on level of explanation given as to whether the person identified may continue to hold the post of director of JMBH Limited.

(b) 2 marks depending on the level of detail to explain measures of disclosure to be followed by directors.

(c) 2 marks depending on the level of detail given on the action which may be taken against Patrick for breach of duty.
- 5** (a) 2 marks depending on level of detail given to explain demonstrate a good understanding of these requisites and apply the facts of the case to determine whether the contract may be deemed validly concluded.

(b) 2 marks depending on level of detail given to explain whether the contract can be annulled on the basis of error.

(c) 2 marks depending on level of detail given to explain whether the contract can be annulled on the basis of fraud.