INSTRUCTIONS

1. Students are requested, in their own interests, to write legibly.

2. This paper consists of FOUR (4) pages. Please ensure that you have all of the pages.

3. This paper consists of TWO (2) sections. Section A and Section B. Please note that you are required to answer TWO (2) questions from Section A and TWO (2) questions from Section B.

4. Please answer Section A and Section B in separate answer booklets.
Consider the facts below and indicate how you would determine if Mr Mweli is an employee or an independent contractor.

Mr Eric Mweli works as a taxi driver. The taxi is owned by Mr Mo. Mr Mweli is required to collect the taxi from Mr Mo’s home before 7:30 am each day, as Mr Mo locks up his premises at 7:30, when he goes to work at his accounting firm. Mr Mweli is required to pay Mr Mo 60% of the income derived from transporting passengers in the taxi at the end of each week. Mr Mweli keeps the remaining 40% of the income for himself. At the weekly meetings during which the weekly income is shared out, Mr Mweli is also required to give a report on the vehicle’s condition. Mr Mo then inspects the vehicle. Routine maintenance of the vehicle is paid for in full by Mr Mo.

Mr Mo has a Petrocard which he allows Mr Mweli to use to fuel the vehicle. However, when the bill for petrol comes each month, Mr Mweli is required to pay it in full. The vehicle is fully insured, and Mr Mo pays the insurance premiums each month. On one occasion the vehicle was involved in a minor accident which was the fault of Mr Mweli. Although Mr Mo claimed from the insurance, Mr Mweli was required to pay the excess which the insurance company would not pay. This he did with no complaint.

Mr Mo does not contribute to the Unemployment Insurance Fund for Mr Mweli, and no mention has ever been made of any tax implications of their arrangements. Once Mr Mweli asked to take leave for a week, and Mr Mo said this would be OK so long as Mr Mweli ensured there was a substitute driver to fulfil his functions, saying that it would be a waste for the taxi to park all day. Mr Mweli got his brother to do the driving, and nothing further was said.
One day at their weekly meeting Mr Mo told Mr Mweli that he had bad news for him. He said his brother needed a job and that he had offered his brother the job of taxi driver in Mr Mweli’s place. He told Mr Mweli that he need not report for work at the beginning of the next week, because his brother would take over with immediate effect.

[Total Q:1: 25 marks]

Question 2

Cheadle AJ reasoned as follows in the Labour Court Judgment of Kylie v CCMA & Others [2008] 9 BLLR 870 (LC) (at para 70):

“There is no reason that sex workers are a vulnerable group and subject to exploitation but so are those illegally employed as foreign workers and child workers. It is a consequence of illegality that they are exploited. The difference is that the prohibition in respect of foreign workers and child workers is a prohibition aimed at who does the job rather than the job itself. This means that illegally employed foreign workers and child workers compete with workers in legal employment for jobs. The withdrawal of labour rights in these instances will create an incentive to employ illegal workers in place of legal ones. The ability to pay less than the established rates of pay in respect of foreign and child workers doing the same work as those in legal employment without the risk of having to be held to the established rate of pay undermines the established rate, threatens the employment and pay security of those in legal employment and encourages the employment of illegal workers – the very thing that the Immigration Act and the prohibitions on the employments of children seek to prevent.”

Critically analyse the above statement, with particular emphasis on the scope of the employment relationship in the case of illegal workers in the sex industry and illegal foreign workers. Your answer should include a discussion of the statutory definition of ‘employee’. Motivate your answer with reference to relevant statutory and constitutional provisions and case law.

[Total Q:2: 25 marks]
Question 3

Set out the time limit applicable to lodging an unfair dismissal claim. If an employee wishes to bring an unfair dismissal case but is outside of the time limit (ie: late) what should he do? Explain how the CCMA will decide whether to condone his late application or not, with reference to case law.

[Total Q:3: 25 marks]
Question 1

Mary Jane was employed as a supervisor at the Delicious Delight Supermarket. She was dismissed after having been found guilty of breach of company procedure and consuming the company's product without proper authority. She was captured on video on three separate occasions (between September and December 2013) eating slices of bread inside the Supermarket with the door closed. The bread in question was left on the outer counter, to be disposed of later as it was broken or damaged and could not be sold to customers. It was often given away for free to local farmers.

It is the company's policy that no employee may consume food whilst in the Supermarket. All staff are required to only eat in the staff canteen. In mitigation, she had argued that she had 15 years' service, and had never been found guilty of an offence previously. She therefore pleaded with the employer to give her a final warning as the bread had no value to the company. Delicious Delight Supermarket dismissed her despite her plea in mitigation. She wishes to challenge the dismissal on the basis that the sanction of dismissal is too harsh in the circumstances.

Give full advice, with reference to case law.

[Total Q1: 25 marks]

Question 2

The 400 employees (teachers, minders, and cleaners) at Peter Pan School for the Handicapped have entered into wage negotiations with the school. They are represented
by the People's Trade Union who generally enjoys a very good relationship with management of the school. After three wage negotiation meetings, the parties are nowhere near reaching settlement. This is largely due to the fact that the school is facing a financial crisis because of mismanagement of funds, and has very limited finances available for the employees annual wage increase. The school has dismissed those who were responsible for the mismanagement of funds and are discussing retrenching another 100 employees. The employees demand is for a 200% wage increase, and the inflation rate is accepted by all parties to be at 4.5%. The employees wages are all higher than most employees employed in comparable institutions.

One day, the employees wait until the parents of the children have dropped their children off at the school, and left. Then they announce that they are striking. They leave the children unattended, and gather at the school gates where they sit in the shade, stating that they will not return to work unless they are given at least a 100% wage increase.

The School principal phones you in a panic — wanting to know what he can /should do to deal with the conduct of the employees. Provide him with detailed advice.

[Total Q2: 25 marks]

**Question 3**

John Smith was employed for 25 years as a security guard for Diamonds South Africa. On at least 10 occasions he failed to search the bags of his friends as they left the premises. Diamonds South Africa has discovered that on each of these occasions there were diamonds missing from the premises. John Smith is called to a disciplinary inquiry and charged with gross negligence.

He seeks advice on whether he can be dismissed for this offence, in view of his length of service and the fact that 5 other employees who were found guilty of this offence were given a final written warning. No employee has been dismissed for failing to search employees. He is also concerned that none of his friends are being disciplined.

[Total Q3: 25 marks]
TOTAL SECTION B: 50 MARKS

TOTAL FOR PAPER: 100 MARKS