
THE CONTRACT OF EMPLOYMENT

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OXFORD

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FOREWORD

The Rt Hon Lord Justice Underhill

This is an important and very welcome book. As the introductory chapter points out, English law continues to treat the individual contract of employment as being at the very centre of the employment relationship. Yet the developments of the last decades have raised a plethora of questions both about the characteristics of the contract itself and about its relationship with the multifarious rights created by recent legislation (both domestic and EU-derived). These developments include such crucial decisions in the substantive law as the recognition by the House of Lords in *Malik* of the “trust and confidence term”; the tortuous attempts in *Johnson v Unisys*, *Eastwood v Magnox*, and *Edwards v Chesterfield* to identify the boundary between claims for the breach of that term and claims that could only be brought under the statutory unfair dismissal regime; and the decision in *Société Générale v Geys*, finally resolving one long-standing conundrum but raising new uncertainties. However, they also include such important changes in the workplace as the increasing individualization of the employment relationship and the growing role of the ‘human resources’ function, with its process-driven outlook, in the management of relations between employers and employees. There is a clear need for a comprehensive analysis of the state of the law relating to the contract of employment in the light of these developments, and one which goes beyond the merely descriptive and addresses normative questions also.

It is that need which this work authoritatively fills. A team consisting of most of the leading academics in this field has come together to produce it. It would be invidious for me to single out particular names, but I would draw attention to the fact that the younger generation is as well represented as the older. It is important to appreciate that this is not simply a collection of essays on related themes. As explained in the Editors’ Preface, the shape of the work, the issues to be addressed, and the methodology to be followed have been the subject of discussion and agreement by a core group over a lengthy period of careful planning. The result is a work which comes as close as is likely to be possible to a definitive treatment of the multitude of issues surrounding the modern contract of employment. It will be of immense value not only to students and academics, but also to practitioners and judges seeking principled answers to the difficult questions which repeatedly arise in this field.

Nicholas Underhill
6 March 2016

EDITORS' PREFACE

Among those pursuing the vocation, study, or practice of labour law or employment law, there is a considerable consensus, albeit sometimes a reluctant one, that the contract of employment is at the core of their subject or discipline—as much the ‘cornerstone of the edifice’ as when Sir Otto Kahn-Freund so characterized it in 1954, though now for rather different reasons which will emerge in the ensuing chapters of this work. In the course of 2013, a group of labour law scholars working in Oxford conceived of a new project of writing about this ever-foundational topic, and began to gather together the consortium of authors who have written and edited this work. Our subject matter has been loosely formulated as the English law of the contract of employment, by which we mean more precisely the law of the contract of employment in the law of England and Wales, but with quite frequent reference to Scots law and occasional reference to the law in Northern Ireland. This necessarily and appropriately includes some reference to European Union law and European human rights law; and some comparative reflections are included, specifically in the shape of chapters making comparison with the evolution, from common or closely related origins, of the law of the contract of employment in Australia and Canada. This should not, however, be regarded as a project of writing about ‘the common law of the contract of employment’ alone: much of our attention has been devoted to understanding and analysing the relationship in this particular juridical context between ‘common law’ and ‘statute law’, which we see as a central feature, one might almost say the central mystery, of the modern law of the contract of employment.

In its treatment of that subject matter, this project of work has aimed to achieve and combine two goals. On the one hand, we have sought the benefit of having many expert authors speaking in their own individual voices on topics of special interest to them within this field. On the other hand, we have tried to insist upon a sufficient comprehensiveness and coherence of treatment of those topics to endow the finished work with the character of a treatise, albeit a multi-authored one. The reconciliation of those objectives was the subject of a careful programme of work: two workshops were held in Oxford during 2014, at which the authors gathered to discuss plans for and preliminary drafts of chapters, followed during 2015 by completion of the chapters by their respective authors and a process of comment and co-ordination by a sub-group of the authors who have also acted as editors. As a result, a real sense of general responsibility for the work as a whole is shared between the editors and the authors as a group, but which we hope has not been at

the cost of the intellectual autonomy of the chapters, the author(s) of each one of which is or are respectively identified.

In the course of this project, many debts of gratitude have been incurred, both to individuals and to institutions, which are now very sincerely acknowledged. First, there are debts of gratitude for the comment upon and criticism of ideas and drafts, and the general provision of inspiration, which is crucial to the success of any such project. Normally, one would expect to find at this point a long roll of honour of those providing such comment, criticism, and inspiration. In the case of this project, the authors themselves have largely provided those crucial ingredients by way of mutual interaction; but where appropriate special thanks to external commentators are recorded at the beginning of the chapters in question. Moreover, we should like to acknowledge the friendly support of the late Sir Bob Hepple to the project especially as it was initially taking shape; and we also appreciate Sir Nicholas Underhill's generosity in agreeing to read our manuscript and write the Foreword to our book. In the closing stages of our work, significant contributions to the quality of the manuscript were made, and the apparatus of tables of cases and legislation was provided, by the team of graduate researchers who assisted in the process of technical editing—Kalina Abjadieva, Philippa Collins, Ioannis Katsaroumpas, and Cian O'Concubhair from Oxford and Claire Brown from Edinburgh. We are very grateful to them for their enthusiastic and fruitful efforts.

As to the institutional support which our project has received, we wish to thank the Law Faculties of the Universities of Oxford and Edinburgh and St John's College and Hertford College Oxford for their provision of research funding to our two workshops and to the technical editing work of our team of researchers. Oxford University Press has been an accommodating publisher, and we especially thank Natasha Flemming, Alex Flach, Elinor Shields, Franziska Bröckl, Bryony Matthews, Caroline Quinnell, Kim Harris, and Sophie Butchers for their diligent work in their various different editorial capacities. The usual burden of support for the authors and sacrifice of their leisure time has been nobly borne by their spouses, partners, and families.

Finally, our timeline—the law is stated as at the time of submission of the manuscript in October 2015, but brief reference to subsequent developments down to the date of this Preface in 2016 has been incorporated where possible. A small programme of governmental legislation concerning 'zero hours contracts', and in particular their 'exclusivity', was completed in the closing weeks of 2015 by the enactment of the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015, SI 2015/2021, which complemented the provisions of section 153 of the Small Businesses, Enterprise and Employment Act 2015 inserting new sections 27A and 27B into the Employment Rights Act 1996. This came too late for treatment in the present work; in any case, we regard this legislation as largely

irrelevant to, and unlikely to be in any way remedial of, the concerns about the rapid and unchecked growth of the practice of 'zero hours contracts' which are expressed at various points in the work, in particular in Chapters 3, 10, and 11.

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Oxford, Edinburgh, London, and Cambridge
1 March 2016

CONTENTS

<i>Table of Cases</i>	xxv
<i>Tables of Legislation</i>	xlvi
<i>List of Abbreviations</i>	liii

I THE GENERAL PART—STRUCTURES AND THEMES

1. General Introduction—Aims, Rationale, and Methodology	3
<i>Mark Freedland</i>	
Introduction	3
1. The Problematic Centrality of the Contract of Employment	4
2. The Institutional Basis of the Law of the Contract of Employment	6
3. The Contract of Employment between Agreement and Regulation	11
4. A Normative Reconstruction of the Law of the Contract of Employment	18
5. Doctrinal Analysis of the Law of the Contract of Employment	22
2. The Legal Structure of the Contract of Employment	28
<i>Mark Freedland</i>	
Introduction—Structure and Variety in the Law of the Contract of Employment	28
1. A Theory of Structural Principles	29
2. The Three Central Principles of Exchange, Integration, and Reciprocity	39
3. Variety and Evolution in the Structure of the Contract of Employment	45
Conclusion—Principle, Normativity, and Practice in the Evolving Structure of Contracts of Employment	49
3. The Exchange Principle and the Wage-Work Bargain	52
<i>Mark Freedland and Simon Deakin</i>	
Introduction—The Wage-Work Bargain, Fair Exchange, and Stability	52
1. ‘Fair Exchange’ in the Law of the Contract of Employment	55

A. Conditionalities	57
B. Parities	61
C. Minimum Standards	62
2. ‘Stability’ in the Regulation of the Wage-Work Bargain	63
3. Exchange, Integration and Reciprocity, and the Changing Structures of the Wage-Work Bargain	64
4. The Wage-Work Bargain and the Adequacy of the Contract of Employment	68
4. The Relationship between the Contract of Employment and Statute	73
<i>ACL Davies</i>	
Introduction	73
1. The Primacy of the Contract of Employment	75
2. The Primacy of Statute	81
A. Statute as ‘Permissive’ of Common-Law Development	82
B. Statute as ‘Restrictive’ of Common-Law Development	86
Conclusion	95
5. The Contract of Employment and Collective Labour Law	96
<i>Alan Bogg and Ruth Dukes</i>	
Introduction	96
1. The Contract of Employment—From Atrophy to Formalization	98
A. Collective Bargaining and the Atrophy of the Employment Contract: 1850–1950	99
B. The Donovan Commission: The End of ‘Atrophy’?	101
C. The Individualization of the Employment Contract: From Atrophy to Formalization	103
2. The Unitary Contract of Employment	105
A. Towards a Unitary Model of the Contract of Employment	106
B. Open-ended Employment as Standard	107
C. A Standard Employment Relationship?	109
D. Flexibility and Employment	112
3. The Wage-Work Bargain and Industrial Action	112
A. Strike Action: Breach, Suspension, and Fundamental Human Rights	116
B. Industrial Action and the Wage-Work Bargain: A Principle of Fair Exchange?	119
Conclusion	122
6. The Autonomy of the Common Law of the Contract of Employment from the General Law of Contract	124
<i>Douglas Brodie</i>	
Introduction	124
1. The Pluralism of Contract Law	125

2. Modifying the General Framework	128
3. Modification and Cross-fertilization	130
4. The Opportunities for and Perils of Further Cross-fertilization	131
5. Changes in the External Environment	134
6. The Role of Policy	135
7. The Role of Third Parties	137
8. Construction	138
9. Further Developments	141
Conclusion	144
 7. Relational Contracts	 145
<i>Douglas Brodie</i>	
Introduction	145
1. Long-Term or Relational?	146
2. Arriving at a Judicial Conception of a Relational Contract	149
3. Determining the Norms of the Relationship	151
4. The Significance of Judicial Recognition	152
5. Future Developments?	153
A. Reciprocity	153
B. The Norms of the Relationship	155
C. Relational Contracting and Non-Contractual Relationships	156
D. Multiple Relationships	159
E. Preservation of the Relationship	160
F. Maintenance of the Relationship and Self-help	164
 8. The Contract of Employment and the Remedial Dimension	 167
<i>Lizzie Barmes</i>	
Introduction	167
1. Remedying Contractual Wrongdoing in Empirical Perspective	168
A. Forming Work Relations	168
B. Conducting and Ending Work Relationships	170
C. Empirical Conclusions	178
D. Uncovering the Normativity of the Common Law of the Contract of Employment	179
2. Remedying Contractual Wrongdoing in Doctrinal Perspective	180
 9. Human Rights and the Contract of Employment	 188
<i>Hugh Collins and Virginia Mantouvalou</i>	
1. The Common Law and Human Rights	188
2. Human Rights in the Construction of the Contract of Service	190
A. Right to Work	190
B. Right to Strike	191

C. Right to Peaceful Enjoyment of Property	192
D. Right to Liberty and the Contrast with Slavery and Forced Labour	192
3. Human Rights as a Foundational Perspective for Employment Law	195
A. Areas of Concern	196
B. Potential Benefits of a Human Rights Orientation	198
4. The Challenge of Civil Liberties to the Relation of Subordination	202
A. Unfair Dismissal and the Test of Reasonableness	203
B. Implied Term of Mutual Trust and Confidence	205
C. Wrongful Dismissal and Human Rights	206
Conclusion	207
 10. Fragmenting Work, Fragmented Regulation: The Contract of Employment as a Driver of Social Exclusion	 209
<i>Einat Albin and Jeremias Prassl</i>	
Introduction	209
1. Fragmenting Work, Fragmented Regulation, and Social Exclusion	213
A. Fragmented Work and Fragmented Regulation	213
B. The Three Meanings of Social Exclusion	216
2. The Standard Contract of Employment as a Driver of Social Exclusion	218
A. Fragmenting Work	219
B. Fragmented Regulation	224
Conclusion	230
 11. The Contract of Employment and Gendered Work	 231
<i>Sandra Fredman and Judy Fudge</i>	
Introduction	231
1. Women's Work—A Historical Perspective	232
2. Paid Domestic Work	236
3. The Exclusionary Role of the Contract of Employment in Modern Labour Law	238
4. Atypical Contracts, Precarious Work, and Gender—Home Care Workers	241
A. Zero-Hours Contracts and Home Care Work	241
B. Mutuality of Obligation and Employment Status	242
C. Work Organization and the Minimum Wage	243
D. The Conundrum of Paid Home Care	247
5. The Way Forward? Moving Beyond Contract	247
Conclusion	252
 12. The Contract of Employment, Corporate Law, and Labour Income	 253
<i>Wanjiru Njoya</i>	
Introduction	253
1. The Corporation as a Nexus of Contracts	258

2. The Melding of Contract and Status	260
3. Shareholder Value and Human Capital	263
4. Property, Trust, and Legitimate Expectations	266
5. Claims upon Termination of Employment	269
Conclusion	271
13. Developments in Contract of Employment Jurisprudence in Other Common-Law Jurisdictions: A Study of Australia	273
<i>Joellen Riley</i>	
Introduction	273
1. Collective Industrial Relations in Australia	275
A. Relationship between Industrial Awards and Contract	277
B. Influence of Tribunals	279
2. Commercial and Social Influences on the Development of Employment Contract Law	283
3. Australian Recognition of English Developments	286
A. <i>Johnson v Unisys</i> and Coherence in the Law	287
B. Damages for Mental Distress	289
C. Mere Distress	289
D. Damage to Reputation	290
E. Autonomous Development of Employment from General Commercial Contract Law	291
Conclusion	293
14. A Comparative Reflection from Canada—A Good Faith Perspective	295
<i>Claire Mummé</i>	
Introduction	295
1. Good Faith in England and Canada: Normative Convergence Amidst Structural Difference	296
2. The Structure of the Chapter	297
3. The History— <i>Addis</i> in Canada	300
4. The Doctrine	302
A. The Limits of Wrongful Dismissal Damages	302
B. Constructive Dismissal and the Implied Duty of Civility	309
C. Limitation on Negligence Claims in Employment	311
D. The New Duty of Honest Contractual Performance	314
Conclusion	317

II. THE SPECIFIC PART—AREAS AND DOCTRINES

15. The Definition of the Contract of Employment and its Differentiation from Other Contracts and Other Work Relations	321
<i>Joellen Riley</i>	
Introduction	321
1. The Problem of Definition	322
2. ‘Of Service’ or ‘For Services’	324
3. Common-Law Tests for Identifying Employment	326
A. Control	326
B. Organizational Integration	327
C. Economic Reality	328
D. Mutuality of Obligation	328
E. Multi-indicia or Multifactorial Test	329
4. Manipulation of Tests	331
5. Triangular Relationships	333
6. Responses to the Boundary Problem	335
A. Legislative Solutions	336
B. Sham Contracting Provisions	338
Conclusion	339
16. Employees, Employers, and Beyond: Identifying the Parties to the Contract of Employment	341
<i>Jeremias Prassl and Einat Albin</i>	
Introduction	341
1. The Central Role of the Contract of Employment in Shaping the Definition of Employee and Employer	343
A. The Role of Contract as the ‘Fundamental Legal Institution’	343
B. The Received Understanding of the Contract of Employment as a Bilateral Relationship	345
C. The Resulting ‘Third-Party Problem’	346
2. Identifying the Parties to the Contract of Employment: The Employee	348
A. Mutuality of Obligation	348
B. Workers under Zero-Hours Contract Arrangements	349
C. Partnerships and Limited Liability Partnerships	351
3. Identifying the Parties to the Contract of Employment: The Employer	352
A. Agency Work and Outsourced Labour	353
B. Corporate Groups	357
C. Customers	358
Conclusion	361

17. The Contract of Employment as an Expression of Continuing Obligations	362
<i>Nicola Countouris</i>	
Introduction	362
1. Continuity in Employment in a Historical Perspective—From the Annual Hiring Model to the Contract of Employment of Indefinite Duration	365
2. The Three Dimensions of Continuity: Length of Service, Regularity, and Nature of the Obligations	369
3. Continuity and Length of Service	371
A. Establishing Length of Service—Commencement and Ending	373
B. Length of Service across Different Employers	374
C. Continuity, Length of Service, and Equal-treatment Legislation	374
4. Continuity and Regularity	375
A. Regularity, Statute, and Contract	376
B. Regularity Within the Contract of Employment	376
C. Regularity Between Separate Contracts of Employment	377
5. Continuity, Mutuality, and the Nature of Contracts	379
Conclusion	382
18. Formation of the Contract of Employment	383
<i>Simon Deakin</i>	
Introduction	383
1. Contract, Statement, and Sources of Labour Law	385
2. Effects of the Decline of Collective Bargaining and the Rise of Standard-form Employment Contracts	391
3. Reform of the Written Statement Law	394
Conclusion	396
19. Illegality, Public Policy, and the Contract of Employment	397
<i>Alan Bogg</i>	
Introduction—Illegality and the Institutional Nature of the Contract of Employment	397
1. The Normative Structure of Illegality	401
A. General Principles	401
B. The Future of Illegality: Public Policy and Fundamental Rights	404
2. The Legal Structure of the Illegality Enquiry in Employment Claims	408
A. Characterizing the Nature of the Employment Claim: Contract or Tort?	409
B. Contractual Illegality	411
C. Statutory Illegality	412
D. Illegality in Performance of Employment Contracts: Employment Rights and the Revenue Regime	415

3. The Legal Effects of Illegality on Contractual Rights	422
A. The Distinction between Culpable and Innocent Parties	422
B. The Doctrine of Severance	423
C. Restricting Recoverable Damages While Leaving the Legal Right Unimpaired	424
D. Restitutionary Claims for <i>Quantum Meruit</i>	424
Conclusion	425
 20. Terms Inserted into the Contract of Employment by Legislation	427
<i>ACL Davies</i>	
Introduction	427
1. Terms Imposed by Statute	428
A. Notice	429
B. Equal Pay for Men and Women	431
C. National Minimum Wage Arrears	433
D. Choice of Enforcement Option	435
E. Conclusion	441
2. Statutory Rights given Contractual Effect by the Courts	441
Conclusion	447
 21. The Content of Contracts of Employment—Terms Incorporated from Collective Agreements or from Other Sources	449
<i>Astrid Sanders</i>	
Introduction	449
1. The General Approach to Incorporation of Terms from Other Sources	451
2. Collective Agreements	460
3. Company Handbooks	464
4. Disciplinary and Grievance Procedures	465
5. Differential Treatment of Collective Agreements	468
Conclusion	470
 22. Implied Terms in the Contract of Employment	471
<i>Hugh Collins</i>	
1. The Types of Implied Terms in Employment	471
2. Test for Terms Implied in Fact	474
3. Test for Terms Implied by Law	477
4. Confusion in the Use of Implied Terms	480
A. Metamorphosis from Fact to Law	480
B. Instrumental Misclassification	482
5. Exclusion of Implied Terms	483
6. Implied Terms in the Era of Written Contracts of Employment	490

23. Variation and Suspension of the Contract of Employment and its Terms	492
<i>Nicola Countouris and Astrid Sanders</i>	
Introduction	492
1. Variation—Key Principles	492
2. Sources of the <i>Ius Variandi</i> — <i>Ex Ante</i> Clauses and <i>Ex Post</i> Agreement	495
A. Contractual Variation Clauses	496
B. Variation by Subsequent Agreement	499
3. Limitations upon Variation	502
A. Mutual Trust and Confidence	502
B. Collective Agreement	503
4. Suspension—Key Principles	503
5. Sources and Possible Effects	507
6. Limitations upon Suspension	511
Conclusion	513
24. Duration, Lawful Termination, and Frustration of the Employment Contract	515
<i>David Cabrelli</i>	
Introduction—Policy, Context, and Doctrine	515
1. Duration	517
A. Basic Sketch	517
B. Reform	520
2. Termination by Lawful Dismissal	521
A. Dismissal by Reasonable Notice or Payment in Lieu of Notice	521
B. Reform	523
C. Summary Dismissal	527
3. Termination by Resignation or Retirement	530
A. Resignation	530
B. Retirement	531
4. Termination by Expiry and Non-renewal of a Fixed-term Employment Contract	532
5. Non-lateral Termination: Frustration	534
Conclusion	535
25. The Wrongful Termination of the Contract of Employment	537
<i>Alan Bogg and Mark Freedland</i>	
Introduction	537
1. The Enduring Legacy of <i>Addis v Gramophone Company Ltd</i>	540
2. From <i>Addis</i> to <i>Johnson</i> : The Rise and Fall of Mutual Trust and Confidence in the Sphere of Wrongful Dismissal	545

3. The Restrictiveness of <i>Johnson v Unisys</i>	549
4. The Constitutional Basis to <i>Johnson</i>	550
5. The Resilience of <i>Addis in Johnson</i>	553
6. Conclusion: The Culmination in <i>Edwards v Chesterfield</i>	556
26. The Effect of Termination upon Post-Employment Obligations	561
<i>David Cabrelli</i>	
Introduction	561
1. Repudiatory Breach, Wrongful Termination, and Post-Employment Primary Obligations	562
A. Introduction	562
B. Primary and Non-primary Obligations	562
C. Nature and Content of Obligations Imposed Post-Employment when Employer is in Repudiatory Breach	565
D. Nature and Content of Obligations Imposed Post-Employment when Employee is in Repudiatory Breach	569
E. Post-Employment Obligations: Some Analytical Reflections	571
2. Restrictive Covenants and Garden Leave	576
Conclusion	580
27. Intellectual Property and the Contract of Employment	582
<i>Jeremias Prassl</i>	
1. Introduction	582
A. Intellectual Property in the Context of the Employment Relationship	583
B. The Common-Law Position	584
C. Statutory Regimes	585
2. Limitations Inherent in the Contract of Employment	586
A. Unclear Scope of the Statutory Provisions	586
B. Inability to Deal with Complex Situations	588
3. Limitations Arising from Express Terms	590
A. The Common Law	591
B. The Patents Act 1977	592
4. Limitations Arising from the Implied Term of Confidentiality	594
Conclusion	597
28. Remedies for Breach and for Wrongful Dismissal	599
<i>Lizzie Barmes</i>	
Introduction	599
1. Recovering Employment Contract Debts and Enforcing Obligations in Ongoing Contracts of Employment	600
A. Debt versus Damages Claims	600
B. Enforcing Contractual Obligations in Ongoing Contracts	602
2. Recovering Damages for Breach Unconnected to Termination	605
A. Personal Injury Claims	606

B. Valuable Money Claims	608
3. Recovering Damages for Breaches Connected to Termination	609
A. Contractual Termination Entitlements on Solid Ground	613
B. Contractual Termination Entitlements on Shifting Sands	615
4. Injunctive Relief from Breaches of Contract	616
Conclusion	619
29. The Contract of Employment in its International and European Law Setting	621
<i>Louise Merrett</i>	
Introduction	621
1. The Private International Law Setting	622
2. The Territoriality of UK Employment Law	624
3. Application of UK Employment Law in International Cases	627
A. The Law Applicable to the Contract of Employment	627
B. Preventing the Employer from Contracting Out of Employment Protection: Non-excludable Rules	629
C. Overriding Mandatory Rules	633
4. A Re-examination of the Territoriality Principle?	638
Conclusion	641
<i>Index</i>	643

TABLE OF CASES

UNITED KINGDOM

A Dakri & Co v Tiffen [1981] IRLR 57 (EAT)	512
ABC News Intercontinental Inc v Mr R Gizbert [2006] UKEAT/0160/06	377
Abdulla v Birmingham City Council [2011] EWCA Civ 1412, [2012] ICR 20	433
Abdulla v Birmingham City Council [2012] UKSC 47, [2012] ICR 1419	436, 440, 441
Adamas Ltd v Cheung [2011] UKPC 32, [2011] IRLR 1014	182, 502
Addis v Gramophone Co Ltd [1909] AC 488 (HL)	87, 103, 104, 131, 132, 163, 184, 206, 207, 290, 296, 300, 301, 302, 303, 304, 305, 308, 317, 318, 526, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 553, 554, 555, 556, 557, 558, 608
Adin v Sedco Forex International Resources Ltd [1997] IRLR 280 (CSOH)	616
AG Securities v Vaughan [1990] 1 AC 417 (HL)	131
Ajar-Tec v Stack [2014] UKEAT 0293/13/DA	133
Albion Automotive v Walker [2001] UKEAT/415/00	454
Albion Automotive v Walker [2002] EWCA Civ 946	135, 144, 450, 454, 455, 458, 464, 474
Alexander v Standard Telephones; Wall v Standard Telephones and Cables [1990] IRLR 55, [1990] ICR 291 (ChD)	163, 450, 458, 617
Alexander v Standard Telephones (No 2) [1991] IRLR 286 (Ch)	160, 450, 451, 452, 453, 456, 457, 458
Ali v London Borough of Southwark [1988] ICR 567 (ChD)	617
Allen v Gold Reefs of West Africa [1900] 1 Ch 656 (CA)	269
Allen v TRW Systems [2013] IRLR 699	449, 453, 454, 458, 464, 470
Allen v TRW Systems [2013] EWCA Civ 1388	454
Amey v Peter Symonds College [2013] EWHC 2788 (QB), [2014] IRLR 206	58
Anderson v London and Fire Emergency Planning Authority [2013] EWCA Civ 321, [2013] IRLR 459	462, 604
Anderson v Pringle of Scotland [1998] IRLR 64 (CS)	162, 458
Antaios Cia Naviera SA v Salen Rederierna AB, The Antios [1985] AC 191 (HL)	471
Aramis, The [1989] 1 Lloyd's Rep 213 (CA)	36, 132, 133, 355, 356
Armstrong v The South London Tramways Co Ltd (1891) 64 LT 96	192
Ashworth v Royal National Theatre [2014] EWHC 1176 (QB), [2014] 4 All ER 238	162, 574, 617
Aspden v Webbs Poultry and Meat Group [1996] IRLR 521 (QB)	140, 510, 615, 616
Atkinson v Community Gateway Association [2014] IRLR 834 (EAT)	564, 568, 570
Attorney-General of Belize v Belize Telecom [2009] UKPC 10, [2009] 1 WLR 1988	140, 471
Attorney-General of the Commonwealth of Australia v R [1957] AC 288 (PC)	276
Attrill v Dresdner Kleinwort Ltd [2012] EWHC 1190, [2012] IRLR 553 (QB)	501
Autoclenz Ltd v Belcher [2011] UKSC 41, [2011] 4 All ER 745	9, 18, 66, 69, 74, 80, 82, 84, 85, 86, 95, 105, 127, 131, 134, 242, 243, 283, 323, 325, 328, 331, 332, 338, 376, 392, 453, 465, 484, 534
AXA Sun Life Services plc v Campbell Martin Ltd, Brendon Partington, Gary Tibor Hosznayk [2011] EWCA Civ 133, [2011] 2 Lloyd's Rep 1	486
Bailey, Re (1854) 118 ER 1269 (KB)	366, 368

Table of Cases

Baird Textile Holdings Ltd v Marks and Spencer [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737.....	133
Bakersfield Entertainment Ltd v Church and Stuart [2005] WL 3464379	403, 421
Bank voor Handel en Scheepvaart NV v Slatford (No 2) [1953] 1 QB 248 (CA).....	598
Barber v RJB Mining [1999] ICR 679.....	39, 74, 82, 83, 92, 95, 428, 441, 443, 444, 445, 446
Barber v Somerset County Council [2004] UKHL 13, [2005] 1 WLR 1089.....	607
Barros d'Sa v University Hospital of Coventry and Warwickshire NHS Trust [2001] EWCA Civ 983, [2001] IRLR 691	618
Bass Leisure Ltd v Thomas [1994] IRLR 104 (EAT).....	77, 78
Bateman v Asda Stores Ltd [2010] IRLR 370 (EAT).....	393, 495, 496, 503, 602, 603, 609
Bates van Winkelhof v Clyde & Co LLP— <i>See</i> Clyde & Co LLP v Bates van Winkelhof	
BCCI SA v Ali [2002] EWCA Civ 82, [2002] ICR 1258	290
Bear Scotland Ltd v Fulton [2015] IRLR 15 (EAT).....	439
Bear Scotland Ltd v Fulton [2015] 1 CMLR 40, [2015] ICR 221.....	170
Beeston v Collier (1827) 4 Bing 309	262
Benatti v WPP Holdings Italy Srl [2007] EWCA Civ 263, [2007] 1 WLR 2316	632
Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya [2015] EWCA Civ 33, [2015] 3 WLR 301	199, 202
Benson, Pease & Co Ltd v AV Dawson Ltd [1973] 1 WLR 828 (CA).....	419
Birch v Liverpool University [1985] ICR 470 (CA)	530, 531
Bird v British Celanese [1945] KB 336 (CA)	506, 511, 520
Blackford Farms Ltd v Mulqueeney [2007] UKEATS/0032/08/MT.....	434, 436, 437
Bliss v South East Thames Regional Health Authority [1987] ICR 700.....	287
Bloxsome v Williams (1824) 3 B & C 232.....	404
Blue Chip Trading Ltd v Helbawi [2009] IRLR 128 (EAT)	423, 424, 425
Bolwell v Redcliffe Homes Ltd [1999] IRLR 485 (CA).....	361
Bond v CAV Ltd [1983] IRLR 360	499
Booth v USA [1999] IRLR 16 (EAT).....	376
Boss Projects LLP v Bragg [2013] WL 6536645.....	328
Bosworth v Angus Jowett & Co Ltd [1977] IRLR 374 (IT)	62
Bournemouth & Boscombe AFC v Manchester United FC [1980] The Times, 22 May (CA)	141
Bournemouth University Higher Education Corporation v Buckland— <i>See</i> Buckland v Bournemouth University Higher Education Corporation	
Braganza v BP Shipping Ltd [2015] UKSC 17, [2015] 1 WLR 1661.....	104, 129, 150, 160, 564, 565, 583
Brandt v Liverpool, Brazil and River Plate Steam Navigation Co [1924] 1 KB 54 (CA)	132
Breach v Epsilon Industries Ltd [1976] ICR 316 (EAT)	62
Brimnes, The; Tenax Steamship Co Ltd v Brumnes (owners) [1975] QB 929 (CA)	563
Briscoe v Lubrizol (No 2) [2002] EWCA Civ 508, [2002] IRLR 607	138, 140, 449, 451, 464, 468, 469, 616
Bristol City Council v Deadman [2007] EWCA Civ 822, [2007] IRLR 888.....	390, 467
Bristol Groundschool Ltd v Intelligent Data Capture Ltd [2014] EWHC 2145 (Ch)	152
British Airways plc v Williams (No 2) [2012] UKSC 43, [2012] ICR 1375.....	170
British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd [1975] QB 303 (CA).....	473
British Nursing Association v Inland Revenue [2002] EWCA Civ 494, [2002] IRLR 480....	245
British Telecommunications plc v Ticehurst [1992] ICR 383 (CA).....	60, 114, 473, 478, 508
Brogden v Metropolitan Railway Co (1877) 2 App Cas 666 (HL).....	135
Brompton v AOC International Ltd [1997] IRLR 639 (CA).....	616
Brook Street Bureau (UK) Ltd v Dacas [2004] EWCA Civ 217, [2004] ICR 1437	333, 334, 346, 355
Brooks v Olyslager Oms (UK) Ltd [1998] IRLR 590 (CA)	595
Brown v Knowsley Borough Council [1986] IRLR 102 (EAT).....	530
Browning v Crumlin Valley Collieries [1926] 1 KB 522 (HC)	508

Table of Cases

Buckingham v Surrey & Hants Canal (1882) 46 LT 885 (QB)	367
Buckland v Bournemouth University Higher Education Corporation [2010]	
EWCA Civ 121, [2010] ICR 908	11, 40, 76, 77, 83, 128, 166, 546
Bull v Nottinghamshire and City of Nottingham Fire and Rescue Authority [2007]	
EWCA Civ 240, [2007] ICR 1631	604
Bunce v Postworth Ltd Trading as Skyblue [2005] EWCA Civ 490, [2005] IRLR 557	381
Burdett-Coutts v Hertfordshire County Council [1984] IRLR 91 (QB)	602, 603
Burke v Royal Liverpool University Hospitals NHS Trust [1997] ICR 730 (EAT)	461
Burns v Santander UK plc [2011] IRLR 639 (EAT)	534
Burton Group v Smith [1977] IRLR 351 (EAT)	460
Byrne Brothers v Baird and Others [2002] IRLR 96 (EAT).....	138, 224, 225, 278, 279, 344
Cabinet Office v Beavan [2014] IRLR 434 (EAT)	462, 604
Cable & Wireless plc v Muscat [2006] EWCA Civ 220, [2006] ICR 975	354, 355
Caparo Industries v Dickman [1990] 2 AC 605 (HL).....	126, 135
Capper Pass Ltd v Lawton [1977] 2 All ER 11 (EAT).....	61
Carlill v Carbolic Smoke Ball Co [1893] 1 QB 256 (CA).....	133
Carmichael v National Power plc 11 September 1995 (ET).....	587
Carmichael v National Power plc [1998] ICR 1167 (CA)	31, 45, 481
Carmichael v National Power plc [1999] UKHL 47, [1999] 1 WLR 2042.....	31, 134, 139, 144, 221, 329, 349, 350, 394, 449, 519, 520
Cassidy v Minister of Health [1951] 2 KB 343	107
Catamaran Cruisers Ltd v Williams [1994] IRLR 386.....	331, 332
Cerberus Software Ltd v Rowley [2001] EWCA Civ 78, [2001] ICR 376	141
Chadwick v Pioneer Private Telephone Co Ltd [1941] 1 All ER 522	368
Chakrabarty v Ipswich Hospital NHS Trust [2014] EWHC 2735 (QB).....	450, 458, 463
Chappell v Times Newspapers Ltd [1975] 2 All ER 233 (CA)	617
Cheng Yuen v Royal Hong Kong Golf Club [1997] 3 LRC 414 (PC)	222, 223
Chhabra v West London Mental Health NHS Trust [2013] UKSC 80, [2014]	
ICR 194	92, 93, 466, 467, 524, 528, 618, 619
Chilton v HM Prison Service [1999] WL 1865314	410
Christie v Johnston Carmichael [2010] IRLR 1016 (EAT)	511, 570
CJ O'Shea Construction Ltd v Bassi [1998] ICR 1130 (EAT)	225
Clark v BET plc [1997] IRLR 348 (HC)	613, 614
Clark v Nomura International plc [2000] IRLR 766 (QB).....	61, 88, 261, 614
Clark v Oceanic Contractors Inc [1983] 2 AC 130 (HL)	640
Clark v Oxfordshire Health Authority [1997] EWCA Civ 3035, [1998]	
IRLR 125 (CA)	69, 377
Cleeve Link Ltd v Bryla [2014] ICR 264 (EAT).....	183
Clouston & Co Ltd v Corry [1906] AC 122 (PC)	528
Clyde & Co LLP v Bates van Winkelhof [2014] UKSC 32, [2014]	
1 WLR 2047	337, 351, 352, 363, 428, 621
Colen v Cebrian (UK) Ltd [2003] EWCA Civ 1676, [2004] ICR 568	403
Collag Corporation v Merck & Co Inc [2003] FSR 16 (PC).....	591
Collier v Sunday Referee Publishing Co [1940] 2 KB 647 (QB)	191, 368, 481, 520
Collison v British Broadcasting Corporation [1998] ICR 669.....	376
Commercial Plastics Ltd v Vincent [1965] 1 QB 623 (CA).....	591, 592
Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust [2012]	
EWHC 781 (QB).....	483
Connolly v Whitestone Solicitors [2011] WL 2748298	417
Consistent Group Ltd v Kalwak [2007] IRLR 560 (EAT)	85, 329, 331
Consistent Group Ltd v Kalwak and Others [2008] EWCA Civ 430, [2008]	
IRLR 505	79, 105, 242, 281, 323
Cooper and Others v Isle of Wight College [2007] EWHC 2831 (QB), [2008]	
IRLR 124	58, 120, 121
Copsey v WBB Devon Clays Ltd [2005] EWCA Civ 932, [2005] ICR 1789	204

Table of Cases

Corby v Morrison [1980] ICR 564.....	416
Cornwall County Council v Prater [2006] EWCA Civ 102, [2006] ICR 731	143, 378
Cotswolds Developments Construction Ltd v Williams [2006] IRLR 181 (EAT).....	350, 368
Courtaulds Northern Spinning Ltd v Sibson [1988] ICR 451 (CA)	475
Courtaulds Northern Textiles v Andrew [1979] IRLR 84 (EAT)	83, 84, 547
Cox v Ministry of Justice [2014] EWCA Civ 132, [2015] QB 107.....	157
Cox v Philips [1976] 1 WLR 638 (QB).....	302
Crawford v Suffolk Mental Health Partnership NHS Trust [2012] EWCA Civ 138, [2012] IRLR 402	512
Creditsights Ltd v Dhunna [2014] EWCA Civ 1238	621, 626
Cresswell v Board of Inland Revenue [1984] ICR 508 (QB)	119, 480
Cross v Kirkby [2000] EWCA 426	403
Crossley v Faithful and Gould Holdings Ltd [2004] EWCA Civ 293, [2004] ICR 1615	125, 478, 483
CSC Computer Sciences Ltd v McAlinden [2013] EWCA Civ 1435	474
Cuckston v Stones (1858) 1 E & E 248 (QB).....	59
Cummings v Charles Connell [1969] SLTR 25 (CS).....	508
Cunliffe-Owen v Teather & Greenwood [1967] 1 WLR 1421.....	473
Curr v Marks and Spencer plc [2002] EWCA Civ 1852, [2003] ICR 443	376, 377, 378, 379
Cutler v Turner (1874) 9 LR 502	194
Cutter v Powell (1795) 6 TR 320 (KB).....	57, 262
Cyprotex Discovery Ltd v University of Sheffield [2004] EWCA Civ 380, [2004] Info TLR 135	591
Dacas v Brook Street Bureau (UK) Ltd— <i>See</i> Brook Street Bureau (UK) Ltd v Dacas	
Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696 (HL).....	534
Daymond v Enterprise South Devon [2007] WL 1685234	416
De Francesco v Barnum (1890) 45 Ch D 430.....	194
De Stempel v Dunkels [1938] 1 All ER 238 (CA)	368, 517
Delaney v Staples [1992] 1 AC 687 (HL).....	60, 254, 522
Denmark Productions Ltd v Boscobel Productions Ltd [1969] 1 QB 699 (CA)	141, 181, 600, 601
Department for Work and Pensions v Webley [2004] EWCA Civ 1745, [2005] ICR 577	533
Devonald v Rosser & Sons [1906] 2 KB 728 (CA)	62, 108, 454, 476, 477, 481, 508, 518, 543
Dimskal Shipping Co SA v International Transport Workers Federation (“The Evia Luck”) (No 2)— <i>See</i> Evia Luck, The	
Dixon v BBC [1979] ICR 281 (CA).....	533
Do-Buy 925 v National Westminster Bank [2010] EWHC 2862 (QB).....	469
Docherty v SW Global Resourcing Ltd [2013] CSIH 72, [2013] IRLR 874	514
Doe v Bridges (1831) 1 B & Ad 847	442
Dresdner Kleinwort Ltd v Attrill [2013] EWCA Civ 394, [2013] 3 All ER 607	608
Driver v Air India Ltd [2007] EWCA Civ 240, [2007] ICR 1631.....	605
Duke v Reliance Systems [1982] IRLR 347 (EAT).....	454, 455
Duncombe v Secretary of State for Children Schools and Families (No 2) [2011] UKSC 14, [2011] 4 All ER 1021.....	624
Dunnachie v Kingston upon Hull City Council [2004] EWCA Civ 84, [2004] 2 All ER 501	165
Eagland v British Telecommunications plc [1992] IRLR 323 (CA).....	386, 387
Eastwood v Magnox Electric plc; McCabe v Cornwall County Council [2004] UKHL 35, [2005] 1 AC 503	25, 88, 174, 185, 288, 478, 512, 523, 526, 527, 551, 572, 606, 607, 608, 609, 610, 611, 616, 618
Ebrahimi v Westbourne Galleries [1973] AC 360 (HL)	261, 270
Edgington v Fitzmaurice (1885) 29 Ch D 459	417
Edinburgh City Council v Lauder [2012] UKEATS/0048/11/BI.....	245

Table of Cases

Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2010] EWCA Civ 571, [2010] IRLR 702	466
Edwards v Chesterfield Royal Hospital NHS Foundation Trust; Botham v Ministry of Defence [2011] UKSC 58, [2012] 2 AC 22	25, 74, 82, 86, 88, 89, 90, 91, 92, 93, 94, 95, 161, 174, 175, 183, 184, 185, 186, 207, 280, 281, 386, 387, 390, 446, 450, 451, 453, 466, 467, 469, 523, 526, 527, 544, 556, 557, 558, 559, 608, 609, 610, 613, 618, 619
Electrolux v Hudson [1977] FSR 312 (HC).....	592
Ellis v Joseph Ellis & Co [1905] 1 KB 324 (CA)	352
Elliston v Glencore Services (UK) Ltd [2014] EWHC 3431 (QB)	271
Elsevier Ltd v Munro [2014] EWHC 2648, [2014] IRLR 766.....	570, 571
Emmens v Elderton (1853) 13 CB 495.....	484
Enfield Technical Services Ltd v Payne; Grace v BF Components Ltd [2008] ICR 30 (EAT)	411, 417, 425
Enfield Technical Services Ltd v Payne; Grace v BF Components Ltd [2008] EWCA Civ 393, [2008] ICR 1423	410, 416, 418, 419, 425
Enston's Application BL O/206/04.....	590
Equitable Life Assurance Society v Hyman [2000] UKHL 39, [2002] 1 AC 408	473, 477
Esparon v Slavikowska [2014] ICR 1037 (EAT)	245
Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] AC 269 (HL)	578
Evening Standard v Henderson [1987] ICR 588 (CA)	164
Evia Luck, The (No 2) [1992] 2 AC 152 (HL).....	160
Express & Echo Publications v Tanton [1999] ICR 693 (CA)	32, 69, 484
Faccenda Chicken Ltd v Fowler [1987] Ch 117 (CA).....	26, 32, 564, 567, 595
Farley v Skinner [2001] UKHL 49, [2002] 2 AC 732.....	131, 132
Fawcett v Cash (1834) 110 ER 1026 (KB)	366
Fechter v Montgomery [1863] 33 Beav 22.....	481
Fish v Dresdner Kleinwort Bank [2009] EWHC 2246 (QB), [2009] IRLR 1035.....	128, 148, 388, 389
Ford v Warwickshire County Council [1983] 2 AC 71 (HL)	378
Ford Motor Co v AUEW [1969] 2 QB 303.....	136
Framptons Ltd v Badger and Others [2006] All ER (D) 127.....	497, 498
Franks v Reuters [2003] EWCA Civ 417, [2003] ICR 1166.....	157
French v Barclays Bank plc [1998] IRLR 646 (CA)	488
Fuller v United Healthcare Services Inc [2014] UKEAT/0464/13/BA	624, 625, 640
FW Farnsworth Ltd v Lacy [2012] EWHC 2830 (Ch), [2013] IRLR 198	501
GAB Robins (UK) Ltd v Triggs [2008] EWCA Civ 17, [2008] ICR 529.....	606
Gan Insurance Co Ltd v Tai Pig Insurance Co Ltd (No 2) [2002] EWCA Civ 248, [2001] 2 All ER (Comm) 299.....	129
Garratt v Mirror Group Newspapers [2011] EWCA Civ 425, [2011] IRLR 591	454, 455, 458, 474, 615
Gascol Conversions Ltd v Mercer [1974] ICR 420 (CA)	390
General Billposting Co Ltd v Atkinson [1909] AC 118 (HL)	566, 567, 569, 580
General of the Salvation Army v Dewsbury [1984] ICR 498.....	373
George v Ministry of Justice [2013] EWCA Civ 324.....	450, 451, 457, 465, 468
Geys v Société Générale— <i>See</i> Société Générale v Geys	
Gisda Cyf v Barratt [2010] UKSC 41, [2010] 4 All ER 851, [2010] ICR 1475	25, 373, 563
Glendale Managed Services v Graham [2003] EWCA Civ 773, [2003] IRLR 465	390, 453, 497
GMB Trade Union v Brown Appeal [2007] UKEAT/0621/06	606
Gogay v Hertfordshire County Council [2000] IRLR 703 (CA)	288, 512, 556, 579, 607
Goold (WA) (Pearmak) Ltd v McConnell— <i>See</i> WA Goold (Pearmak) Ltd v McConnell	
Gorse v Durham County Council [1971] 2 All ER 666 (HC)	505
Great Northern Railway Co v Witham (1873) LR 9 CP 16	135
Greater Glasgow Health Board's Application, Re [1996] RPC 207 (PC).....	584

Table of Cases

Green v DB Group Services (UK) Ltd [2006] EWHC 1898 (QB), [2006] IRLR 764	606
Griffiths v Salisbury DC [2004] EWCA Civ 162	450
Gryf-Lowczowski v Hinchingsbrooke Healthcare NHS Trust [2005] EWHC 2407 (Admin), [2006] ICR 425	617
Gunton v Richmond-upon-Thames London Borough Council [1981] Ch 448 (CA)	91, 92, 143, 374, 601, 612, 613
GX Networks Ltd v Greenland [2010] EWCA Civ 784, [2010] IRLR 991	609
Hadley v Baxendale [1854] EWHC Exch J70, (1854) 9 Exch 341	132, 305, 309, 542
Halawi v WDFG UK Ltd t/a World Duty Free [2014] EWCA Civ 1387, [2015] IRLR 50	250, 251, 357, 633
Hall v Woolston Hall Leisure [2000] IRLR 578 (CA).....	399, 400, 403, 409, 410, 418, 419, 420, 421, 423, 424, 425
Hameed v Central Manchester Universities Hospitals NHS Foundation Trust [2010] EWHC 2009 (QB)	467
Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) v Boots UK Ltd [2013] EWHC 3251	156, 157
Hancock v BSA Tools Ltd [1939] 4 All ER 538	481
Hanley v Pease & Partners [1915] 1 KB 698 (HC)	508, 518, 520
Hardy v Polk Ltd [2005] ICR 557 (EAT).....	436
Harlow v Artemis International [2008] IRLR 269 (QB).....	454, 458, 464
Harper v Virgin Net Ltd [2005] ICR 921 (CA)	374
Harris' Patent [1985] RPC 19	585
Hartley v King Edward VI College [2015] EWCA Civ 455, [2015] IRLR 650.....	58, 121, 122
Hasan v Shell International Shipping Services (PTE) Ltd [2014] UKEAT/0242/13/SM.....	621
Hashwani v Jivraj— <i>See</i> Jivraj v Hashwani	
Hawley v Luminar Leisure [2006] EWCA Civ 18, [2006] IRLR 817.....	158
Hayes v Willoughby [2013] UKSC 17, [2013] 1 WLR 935	131
Hayward v Cammell Laird Shipbuilders Ltd (No 2) [1988] AC 894 (HL)	431
Hellyer Brothers Ltd v McLeod [1987] 1 WLR 728 (CA).....	377, 380
Hendy v Ministry of Justice [2014] EWHC 2535 (Ch)	465, 467, 619
Henry v London General Transport Services [2001] IRLR 132 (EAT).....	454
Henry v London General Transport Services [2002] EWCA Civ 488, [2002] IRLR 472	473, 498, 499
Henthorn and Taylor v Central Electricity Generating Board [1980] ICR 361 (CA).....	60
Herbert Clayton and Jack Waller Ltd v Oliver [1930] AC 209 (HL)	481
Herbert Morris Ltd v Saxelby [1916] 1 AC 688 (HL).....	577, 592
Hershaw and Others v Sheffield City Council [2014] IRLR 919 (EAT)	500
Hewcastle Catering Ltd v Ahmed [1992] ICR 626 (CA)	421
Hewison v Meridian Shipping PTE and Others [2003] ICR 766 (CA)	424
Heyman v Darwins Ltd [1942] AC 356 (HL)	563, 572
Hickey v Secretary of State for Communities and Local Government [2013] EWHC 3163 (QB), [2014] IRLR 22	604
High Table v Horst [1997] EWCA Civ 2000, [1998] ICR 409 (CA)	77, 78
Hill v CA Parsons & Co Ltd [1972] Ch 305 (CA).....	191, 521, 617
Hill v General Accident Fire and Life Assurance Corporation plc [1999] SLT 1157	616
Hivac v Park Royal Scientific Instruments [1946] Ch 169 (CA).....	32
Horkulak v Cantor Fitzgerald International [2003] EWHC 1918, [2004] ICR 697.....	285
Horkulak v Cantor Fitzgerald International [2004] EWCA Civ 1287, [2005] ICR 402	61, 154, 264, 477, 614, 616
Hospital Medical Group Ltd v Westwood [2012] EWCA Civ 1005, [2013] ICR 415	337
Hounga v Allen and Another [2014] UKSC 47, [2014] 1 WLR 2889.....	25, 199, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 413, 415, 422, 424, 425
Howard v Pickford Truck Co Ltd [1951] 1 KB 417	602
HSBC v Madden— <i>See</i> Post Office v Foley	
Hughes v Jones (t/a Graylins Residential Home) [2008] UKEAT/0159/08/MAA.....	245

Table of Cases

Humphreys v Norilsk Nickel International (UK) Ltd [2010] EWHC 1867 (QB), [2010] IRLR 976	61
Hunt v United Airlines [2008] ICR 934	621
Hussain v Surrey and Sussex Healthcare NHS Trust [2011] EWHC 1670 (QB)	450, 457, 458, 459, 463, 467
Hussman Manufacturing Ltd v Weir [1998] IRLR 288 (EAT).....	263, 393
Hyland v JH Barker (North-West) Ltd [1985] IRLR 403 (EAT).....	416
IBM v Dalgleish [2014] EWHC 980 (Ch), [2014] Pens LR 335.....	127
Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT)	76
Igbo v Johnson Matthey Chemicals Ltd [1986] IRLR 215 (CA)	530
Imam-Sadeque v Bluebay Asset Management (Services) Ltd [2012] EWHC 3511 (QB), [2013] IRLR 344.....	570
Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] IRLR 66 (Ch)	393, 488, 565, 573
Inland Revenue Commissioners v Ainsworth [2005] EWCA Civ 441, [2005] ICR 1149	445
Inland Revenue Commissioners v Ainsworth [2009] UKHL 31, [2009] ICR 985	445, 446
Intersec UK Ltd v Time Computers Ltd [2003] EWHC 2988, [2004] ECDR	590
Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1) [1997] UKHL 28, [1998] 1 WLR 896	85, 138, 465
Irani v Southampton and South West Hampshire Health Authority [1985] ICR 590 (ChD).....	92, 617
JA Mont v Mills [1993] IRLR 172 (CA).....	158, 159
JM Finn & Co Ltd v Holliday [2013] EWHC 3450 (QB), [2014] IRLR 102	577, 578
Jacobs v Batavia and General Plantations Trust Ltd [1924] 1 Ch 287	79
James v Greenwich London Borough Council [2008] EWCA Civ 35, [2008] ICR 545	36, 334, 346, 354, 381
James v Redcats (Brands) Ltd [2007] ICR 1006 (EAT)	576
Janciuik v Winerite [1998] IRLR 63 (EAT).....	613, 614
Jarvis v Swan [1972] EWCA Civ 8, [1973] 1 QB 233	302
Jenvey v Australian Broadcasting Corporation [2002] EWHC 927, [2003] ICR 79.....	616
Jervis v Skinner [2011] UKPC 2	528, 565
Jetivia SA and Another v Biltal (UK) Ltd (in liquidation) and Others [2015] UKSC 23	397, 403, 406, 407, 408, 422, 425
Jivraj v Hashwani [2011] UKSC 40, [2011] WLR 1872	200, 250, 337, 344, 363, 410, 428, 431, 633
Johnson v Cross [1977] ICR 872 (EAT).....	504
Johnson v Gore Wood [2002] 2 AC 1 (HL)	163
Johnson v Unisys Ltd [1999] ICR 809 (CA)	549
Johnson v Unisys Ltd [2001] UKHL 13, [2003] 1 AC 518.....	25, 34, 43, 71, 74, 81, 86, 87, 88, 90, 92, 94, 95, 104, 125, 140, 142, 150, 151, 161, 174, 180, 182, 183, 185, 187, 207, 287, 288, 297, 304, 389, 446, 451, 466, 487, 523, 526, 527, 539, 540, 544, 545, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 572, 605, 607, 609, 610, 611, 613, 615, 616, 617, 618, 619
Johnstone v Bloomsbury Health Authority [1991] 2 All ER 293 (CA).....	62, 127, 393, 488, 606
Jones v Associated Tunnelling [1981] IRLR 477 (EAT)	148, 390, 391, 471, 472, 475
Jones v Gwent County Council [1992] IRLR 521 (ChD)	93, 617
Jose v Julio (National Minimum Wage) [2012] IRLR 180 (EAT)	237
Jowitt v Pioneer Technology [2002] IRLR 790 (EAT)	469
Julio v Jose [2012] IRLR 180 (EAT)	237
K v Raschen (1878) 38 LT 38 (DC).....	59
Karsales (Harrow) Ltd v Wallis [1956] 1 WLR 936 (CA).....	486
Kaur v MG Rover [2004] EWCA Civ 1507, [2005] IRLR 40	450, 457, 458, 468
Keegan v Newcastle United Football Co Ltd [2010] IRLR 94	614

Table of Cases

Keeley v Fosroc International [2006] EWCA Civ 1277, [2006] IRLR 961	450, 452, 457, 458, 459, 464, 465, 468, 614
Keen v Commerzbank AG [2006] EWCA Civ 1536, [2007] ICR 623	61
Kenneth McRae v Dawson [1984] IRLR 5 (EAT)	512
Khatri v Cooperatieve Centrale Raiffeisen-Boerenleenbank [2010] EWCA Civ 397, [2010] IRLR 715	261, 262, 501, 608
Koenig v The Mind Gym Ltd [2013] UKEAT/0201/12/RN	373
Lakshmi v Mid Cheshire Hospitals NHS Trust [2008] IRLR 956 (QB)	458
Lancaster v Greaves (1829) 109 ER 233 (KB)	366
Langston v Amalgamated Union of Engineering Workers [1974] ICR 180 (CA)	191
Langston v Amalgamated Union of Engineering Workers (No 2) [1974] ICR 510	191, 481
Lauffer v Barking, Havering and Redbridge University Hospitals NHS Trust [2009] EWHC 2360 (QB)	617
Lavarack v Woods of Colchester Ltd [1967] 1 QB 278 (CA)	610
Lawrence v Todd (1863) 143 ER 562	366, 367
Lawson v Serco [2000] UKHL 3, [2000] ICR 250	624
Lee v GEC Plessey Telecommunications [1993] IRLR 383 (QB)	460, 498, 500, 503
Lee v Lee's Air Farming Ltd [1961] AC 12 (PC)	345, 590
Lennon v Commissioner of Police of the Metropolis [2004] EWCA Civ 130, [2004] IRLR 385	483
Lep Air Services v Rolloswin Investments Ltd [1973] AC 331 (HL)	563
Les Laboratoires Servier v Apotex Inc [2014] UKSC 55, [2015] AC 430	402, 404, 407, 409
L'Estrange v F Graucob Ltd [1934] 2 KB 394	79
Levison v Patent Steam Carpet Cleaning Co Ltd [1978] QB 69 (CA)	486
Lew v Board of Trustees on behalf of United Synagogue [2011] EWHC 1265 (QB), [2011] IRLR 664	618
LIFFE Administration & Management v Pinkava [2007] EWCA Civ 217, [2007] Bus LR 1369	585, 590, 595, 596
Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555 (HL)	472, 473
Liverpool City Council v Irwin [1977] AC 239 (HL)	125, 126
Lloyd v BCQ [2012] UKEAT/0148/12/KN	510, 616
Lloyds Bank v Bundy [1975] QB 326 (CA)	128
Locke v Candy & Candy [2010] EWCA Civ 1350, [2011] IRLR 163	262, 615
Logan Salton v Durham County Council [1989] IRLR 99 (EAT)	530
Lomas & Others v JFB Firth Rixson Inc & Others [2012] EWCA Civ 419, [2012] 2 All ER (Comm) 1076	475
London NHS Trust v Verma [2013] UKSC 20, [2013] IRLR 567	604
London Probation Board v Kirkpatrick [2005] ICR 965 (EAT)	379
Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173 (HL)	442
Lord Napier and Ettrick v RF Kershaw Ltd [1999] 1 WLR 756 (HL)	471
Lowe v Peers (1768) 4 Burr 2225	542
Lumley v Gye (1853) 2 E & B 216	195
Lymington Marina Ltd v MacNamara [2006] EWHC Ch 704, [2006] 2 All ER (Comm) 200	129
Macari v Celtic Football and Athletic Club Co Ltd [1999] IRLR 787 (CS)	527
MacCartney v Oversley House Management [2006] IRLR 514	227
Mackay v Dick (1881) 6 App Cas 251 (HL)	142, 283
MacLea v Essex Line Ltd (1933) 45 Ll L Rep 254	391
Mahmoud and Ispahani, Re [1921] 2 KB 716 (CA)	404, 412
Malik v Bank of Credit and Commerce International SA [1997] UKHL 23, [1998] AC 20	66, 84, 87, 88, 126, 128, 185, 286, 287, 290, 297, 393, 473, 478, 486, 539, 550, 558, 608
Malloch v Aberdeen Corporation [1971] 1 WLR 1578 (HL)	66, 521
Mallone v BPB Industries Ltd [2002] EWCA Civ 126, [2002] ICR 1045	61, 269

Table of Cases

Malone v British Airways plc [2010] EWCA Civ 1225, [2010] IRLR 431	393, 450, 456, 458, 459, 462, 463, 464, 468, 494, 495
Manifest Shipping Co Ltd v Uni-Polaris Insurance Co Ltd (The Star Sea) [2001] UKHL 1, [2003] 1 AC 469	419
Marbe v George Edwardes (Daly's Theatre) Ltd [1928] 1 KB 269 (CA)	481
Market Investigations Ltd v Minister for Social Security [1969] 2 QB 173	107, 327, 371
Marley v Forward Trust Group [1986] IRLR 369 (CA)	457, 458
Marrison v Bell [1939] 2 KB 187 (CA)	38, 59, 481, 505, 513
Marsh v National Autistic Society [1993] ICR 453 (Ch)	181, 601
Marshall v The English Electric Co Ltd [1945] 1 All ER 653 (CA)	429
Massey v Crown Life Insurance [1977] EWCA Civ 12, [1978] 2 All ER 576	323, 332
Matthews v Kent & Medway Towns Fire Authority [2006] UKHL 8, [2006] ICR 365 (HL)	61
Maw v Jones (1890) 25 QBD 107	543
McCarthy & Others v Blue Sword Construction Ltd [2003] All ER (D) 226 (EAT)	369
McClelland v Northern Ireland General Health Services Board [1957] 1 WLR 594 (HL)	87, 369, 429, 517, 520, 521
McClory v The Post Office [1993] IRLR 159 (Ch)	128, 512
McCormack v Hamilton Academical Football Club Ltd [2011] CSIH 68, 2011 GWD 39	528, 529
McCulloch v Moore [1968] 1 QB 360	77
McDermid v Nash Dredging & Reclamation Co Ltd [1987] AC 906 (HL)	361
McMeechan v Secretary of State for Employment [1996] EWCA Civ 1166, [1997] IRLR 353	355, 381
McMillan v Airedale NHS Foundation Trust [2014] EWCA Civ 1031, [2015] ICR 747	151, 152, 467, 618
McNeill v Aberdeen City Council (No 2) [2013] CSIH 102, [2014] IRLR 113	164, 563, 564, 568, 569, 570
Mears v Safecar Security Ltd [1983] QB 54 (CA)	278, 505
Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc, The Reborn [2009] EWCA Civ 531, [2009] 2 Lloyd's Rep 639	475
Mercury Publicity Ltd v Wolfgang Loerke [1993] ILPr 142	632
Methodist Conference v Parfitt [1984] QB 368 (CA)	136
Methodist Conference v Preston (Rev 1) [2013] UKSC 29, [2013] IRLR 646	325
Metrobus Ltd v Unite the Union [2009] EWCA Civ 829, [2010] ICR 173	192
Mezey v South West London and St George's Mental Health NHS Trust [2006] EWHC 3473 (QB), [2007] IRLR 237, [2007] EWHC 62 (QB), [2007] IRLR 237, [2007] EWCA Civ 106, [2007] IRLR 244, [2010] EWCA Civ 293, [2010] IRLR 512	618
Michael Kircher v Hillingdon Primary Care Trust [2006] EWHC 21 (QB)	617
Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd [2013] EWCA Civ 200, [2013] BLR 265	130, 489
Migrant Advisory Service v Chaudri Appeal No EAT/1400/97 (28 July 1998), unreported	43
Miles v Wakefield MDC [1987] ICR 368 (HL)	60, 119, 121
Miller v Hamworthy Engineering Ltd [1986] ICR 846 (CA)	600
Miller v Karlinski (1945) 62 TLR 85	416
Milne v Link Asset and Security Company Ltd [2005] All ER (D) 143 (EAT)	579
Mitchell (George) Chesterhall Ltd v Finney Lock Seeds Ltd [1983] 2 AC 803 (HL)	487
Monk v Cann Hall Primary School [2013] EWCA Civ 826, [2013] IRLR 732	607, 609
Montgomery v Johnson Underwood [2001] EWCA Civ 318, [2001] ICR 819	355, 587
Moorcock, The (1889) 14 PD 64 (CA)	471, 474, 475
Morgan v Fry [1968] 2 QB 710 (CA)	116, 117, 118, 191, 508
Morgan v London General Omnibus Company (1884) LR 13 QBD 832	107
Morley v Heritage plc [1993] IRLR 400 (CA)	387

Table of Cases

Morris v Walsh Western UK Ltd [1997] IRLR 562.....	379
Morrish v NTL Group Ltd [2007] CSIH 56, 2007 SC 805	522
Morrow v Safeway Stores plc [2002] IRLR 9 (EAT)	529
Murphy v A Birrell & Sons Ltd [1978] IRLR 458	379
Muschett v HM Prison Service [2010] EWCA Civ 25, [2010] IRLR 451.....	354, 356
Nagle v Feilden [1966] 2 QB 633 (CA)	191
Nambalat v Taher [2011] UKEAT 0596/10	237
Nambalat v Taher & Udin v Chamsi-Pasha [2012] EWCA Civ 1249, [2012] IRLR 1004 ...	237
Napier v National Business Agency Ltd [1951] 2 All ER 264 (CA).....	416, 423, 424
National Coal Board v Galley [1958] 1 WLR 16 (CA)	120
National Coal Board v NUM [1986] ICR 736 (Ch)	164, 450, 457, 458, 460
National Grid Electricity v Wood [2007] UKEAT/0432/07	355
National Union of Rail, Maritime and Transport Workers v Serco Ltd— <i>See</i> RMT v Serco Ltd	
National Westminster Bank v Morgan [1985] AC 686 (HL)	128, 154
Nerva and Others v R L & G Ltd [1996] IRLR 461 (CA).....	359
Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612 (CA)	328, 348, 350, 366, 368, 380
New Zealand Shipping v AM Satterthwaite [1974] UKPC 1, [1975] AC 154 (PC).....	132
NHS Leeds v Larner [2012] EWCA Civ 1034, [2012] ICR 1389.....	170
Nokes v Doncaster Amalgamated Collieries Ltd [1940] AC 1014 (HL).....	195, 571
Nora Beloff v Pressdram Ltd [1973] 1 All ER 241 (HC)	598
Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535	592
Norman v National Audit Office [2015] IRLR 634 (EAT)	497, 604
Norton Tool Co Ltd v Tewson [1972] ICR 501 (NIRC).....	437
O'Brien v Associated Fire Alarms [1968] 1 WLR 1916 (CA)	78, 472
O'Flynn v Airlinks The Airport Coach Co Ltd [2002] EmpLR 1217	501
O'Grady v M Saper Ltd [1940] 2 KB 469 (CA)	38, 59, 481, 505
O'Kelly and Others v Trusthouse Forte plc [1984] QB 90 (CA)	220, 221, 349, 350, 365, 371, 380, 381, 519
Olsen v Gearbulk Services Ltd [2015] UKEAT/0345/14/RN.....	624, 641
O'Neill v Phillips [1999] UKHL 24, [1999] 1 WLR 1092	269
Orman v Saville Sportswear Ltd [1960] 1 WLR 1055 (QB)	38, 59, 481, 505
Park Cakes v Shumba [2012] UKEAT/0219/11/RN.....	454
Park Cakes v Shumba [2013] EWCA Civ 974, [2013] IRLR 800.....	134, 450, 454, 455, 456, 474
Parkingeye Ltd v Somerfield Stores Ltd [2012] EWCA Civ 1338	401
Patel v Mirza [2014] EWCA Civ 1047, [2015] 2 WLR 405	408
Patterson v Castlereagh BC [2015] NICA 47, [2015] IRLR 721	170
Peace v Edinburgh City Council [1999] SLR 712 (CSOH).....	617
Pegg v London Borough of Camden [2012] UKEAT/0590/11/LA	356
Peninsula Business Services v Sweeney [2004] IRLR 49	469
Pepper v Webb [1969] 1 WLR 514 (CA)	522
Percy v Church of Scotland [2001] SC 757	136
Percy v Church of Scotland [2005] UKHL 73, [2006] 2 AC 28	136, 137
Performing Rights Society Ltd v Mitchell & Brooker Ltd (Palais de Danse) [1924] 1 KB 762.....	326
Petrie v MacFisheries Ltd [1940] 1 KB 258 (CA).....	481, 505
Pfaffinger v City of Liverpool Community College [1997] ICR 142 (EAT)	378
Phillips v Stevens (1899) 15 TLR 325	108
Photo Production v Securicor [1980] AC 827 (HL).....	142, 563, 572
Pickard v Lynn Hughes t/a the Tanning and Beauty Kabin [2011] WL 719551.....	417, 421
Post Office v Foley; HSBC v Madden [2000] ICR 1283 (CA).....	204
Powell v Brent London Borough Council [1988] ICR 176 (CA).....	574, 617
Proactive Sports Management Ltd v Rooney [2011] EWCA Civ 1444, [2012] IRLR 241	578
Product Star, The [1993] 1 Lloyd's Rep 397	129

Table of Cases

Protectacoat Firthgflow Ltd v Szilagyi [2009] EWCA Civ 98,	
[2009] IRLR 365	323, 325, 327, 331, 332, 352, 376
Pulse Healthcare Ltd v Carewatch Care Services [2012] UKEAT/0123/12/BA	242, 351
Qantas Cabin Crew (UK) Ltd v Lopez [2013] IRLR 4 (EAT)	392, 454
Quashie v Stringfellow Restaurants Ltd [2012] EWCA Civ 1735,	
[2013] IRLR 99	86, 223, 325, 327, 360, 365, 381
Quinn v Calder Industrial Materials [1996] IRLR 126 (EAT)	450, 454, 455
R v Lyons [2002] UKHL 44, [2003] 1 AC 976	406
R v Secretary of State for Employment, ex p Equal Opportunities Commission	
[1995] 1 AC 1 (HL)	376
R v Secretary of State for Employment, ex p Seymour-Smith and Another (No 2)	
[2000] UKHL 12, [2000] ICR 244	375
R v Secretary of State for the Home Department ex p Simms [1999] UKHL 33,	
[2000] 2 AC 115	415
R v Stoke-upon-Trent (1843) 5 QB 303	499
R v Welch (1853) 118 ER 800 (KB)	366
R (on the Application of Best) v Chief Land Registrar [2015] EWCA Civ 17	407
R (on the Application of Hughes) v Deputy Chief Constable of the North Wales Police	
Department [1991] ICR 180 (CA)	506
R (on the Application of Shoemith) v OFSTED [2011] IRLR 679 (CA)	553
R (on the Application of Unison (No 2)) v Lord Chancellor [2014] EWHC 4198	
(Admin), [2015] ICR 390	536
Rabess v London Fire and Emergency Planning Authority [2014] All ER (D) 188 (EAT)	522
Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900	471
Ravat v Halliburton [2012] UKSC 1, [2012] 2 All ER 905	621, 624
Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance	
[1968] 2 QB 497 (HC)	32, 143, 222, 329, 330, 331, 370, 587
Reardon Smith Line v Yngvar Hansen-Tangen [1976] 1 WLR 989 (HL)	138
Reborn, The— <i>See</i> Mediterranean Salvage & Towage Ltd v Seamar Trading &	
Commerce Inc, The Reborn	
Reda v Flag Ltd [2002] UKPC 38, [2002] IRLR 747	128, 129, 140, 258, 264, 267,
	270, 521, 526, 527, 616
Redrow Homes (Yorkshire) Ltd v Wright [2004] EWCA Civ 469, [2004]	
ICR 1126	224, 344
Reid v Rush & Tompkins Group plc [1990] 1 WLR 212 (CA)	483
Rice (t/a Garden Garage) v Great Yarmouth Borough Council (2001) 3 LGLR 4 (CA)	161
Richardson and Another v Koefod [1969] 1 WLR 1812 (CA)	87, 366, 368, 369, 429,
	517, 520, 521
Ridge v Baldwin [1964] AC 40 (HL)	66, 521, 539, 558
Rigby v Ferodo [1988] ICR 29, [1987] IRLR 516 (HL)	182, 501, 562, 601, 602, 603, 608
RMT v Serco Ltd; ASLEF v London and Birmingham Railway Ltd [2011]	
EWCA Civ 226, [2011] ICR 848	115, 192, 536
Robb v Green (1895) 2 QB 315 (CA)	32
Robb v London Borough of Hammersmith and Fulham [1991] ICR 514	93, 617
Robertson v British Gas Corporation [1983] ICR 351 (CA)	91, 390, 391, 453, 498, 503
Robinson v Harman (1848) 1 Exch 850	300
Robinson v Tescom Corporation [2008] IRLR 408 (EAT)	502
Robinson & Co v Heuer [1898] 2 Ch 451 (CA)	195
Rock Refrigeration Ltd v Jones [1997] ICR 938 (CA)	566, 567
Rookes v Barnard [1964] AC 1129 (HL)	117
RTS Flexible Systems Ltd v Molkerei Alois Muller [2010] UKSC 14, [2010]	
1 WLR 753	133
Rutherford v Seymour Pierce Ltd [2010] EWHC 375 (QB), [2010] IRLR 606	262, 614
S (Identity: Restriction on Publication), Re [2004] UKHL 47, [2005] 1 AC 593	197
Sagar v Ridehalgh & Son Ltd [1931] 1 Ch 310 (CA)	60, 134, 137, 454, 473

Table of Cases

St Ives Plymouth Ltd v Haggerty [2008] All ER (D) 317.....	222, 350
St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267	401, 411, 414
Salim Unden v Chamsi-Pasha UKEAT/0071/11.....	237
Salomon v Salomon & Co Ltd [1897] AC 22 (HL).....	345
Salvesen v Simons [1994] ICR 409 (EAT)	416, 419
Sanders v Neale [1974] ICR 565 (NIRC).....	142
Sandhu v Jan de Rijk Transport Ltd [2007] EWCA Civ 430, [2007] ICR 1137.....	530
Saunders v Edwards [1987] 1 WLR 1116 (CA).....	402, 405
Sayers v Cambridgeshire County Council [2006] EWHC 2029 (QB), [2007] IRLR 29.....	445
Scally v Southern Health Board [1992] 1 AC 194 (HL).....	127, 442, 482
Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 WLR 1308 (HL)	190, 578, 579
Scottbridge Construction v Wright [2003] IRLR 21 (EAT).....	245
Seadrill Management Services Ltd v OAO Gazprom [2010] EWCA Civ 691, [2011] 1 All ER (Comm) 1077	486
Secretary of State for Business Innovation & Skills v McDonagh [2013] ICR 1177 (EAT).....	170
Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen and Others (ASLEF) (No 2) [1972] ICR 19 (CA)	60, 113, 114, 388, 389, 478
Securities and Facilities Division v Hayes and Others [2001] IRLR 81 (CA)	495
Sehmi and Sandhu v Gate Gourmet London [2009] IRLR 807 (EAT)	510
Seldon v Clarkson, Wright & Jakes [2012] UKSC 16, [2012] ICR 716	531
Sendo Holdings plc (In Administration) v Brogan [2005] EWHC 2040 (QB)	577
Shanks v Unilever plc [2010] EWCA Civ 1283, (2011) 177 BMLR 176	589
Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 (CA)	475
Shumba v Park Cakes— <i>See</i> Park Cakes v Shumba	
Sim v Rotherham Metropolitan Borough Council [1986] ICR 897 (Ch).....	58, 114, 115, 119, 120, 127, 388, 389
Simmons v Hoover [1977] ICR 61 (EAT)	116, 117, 118, 460, 506, 508
Simpson v Ebbw Vale Steel, Iron & Coal Co [1905] 1 KB 453.....	107
Sinclair v Neighbour [1967] 2 QB 279 (CA).....	569
Small v Boots Co plc [2009] IRLR 328 (EAT)	256, 264
Smith v Carillion [2014] IRLR 344 (EAT).....	157
Smith v London Metropolitan University [2011] IRLR 884 (EAT)	388, 389
Snook v London and West Riding Investments Ltd [1967] 2 QB 786 (CA)	80, 85, 130
Société Générale v Geys [2010] EWHC 648 (Ch), [2011] IRLR 482	271
Société Générale, London Branch v Geys [2012] UKSC 63, [2013] 1 AC 523	114, 125, 130, 141, 161, 162, 180, 182, 255, 256, 270, 271, 279, 292, 374, 466, 475, 478, 522, 562, 565, 574, 575, 600, 614, 615, 619
Socimer International Bank Ltd v Standard Bank London Ltd [2008] EWCA Civ 116, [2008] 1 Lloyd's LR 558	477
Solectron Scotland v Roper [2004] IRLR 4 (EAT).....	182, 454, 458, 501
Sood Enterprises Ltd v Healy [2013] ICR 1361 (EAT).....	170
South Manchester Abbeyfield Society Ltd v Hopkins [2011] ICR 254, [2011] IRLR 300 (EAT)	245
Southern Foundries v Shirlaw [1940] AC 701 (HL)	141
Spain v Arnott (1817) 2 Starkie 256.....	262
Sparks v Department for Transport [2015] EWHC 181, [2015] IRLR 641	459, 468, 469, 497, 604
Spring v Guardian Assurance plc [1995] 2 AC 296 (HL).....	291, 479, 564
Staffordshire Sentinel Newspapers Ltd v Potter [2004] IRLR 752 (EAT)	32
Stagecraft v Minister of National Insurance [1952] SC 288 (IH).....	368
Standard Life Health Care v Gorman [2009] EWCA Civ 1292, [2010] IRLR 233	164
Stella v The Regard Partnership [2007] UKEAT/0614/06	373
Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471 (EAT)	346, 355, 381

Table of Cases

Sterling Engineering v Patchett [1955] AC 534 (HL)	585
Stevedoring & Haulage Services Ltd v Fuller and Others [2001] EWCA Civ 651, [2001] IRLR 627 (CA)	221, 368
Stevenson, Jordan and Harrison Ltd v MacDonald & Evans [1952] 1 TLR 101 (CA)	158, 327, 584, 590, 598
Stilk v Myrick (1809) 2 Camp 317	500
Stirling v Maitland (1864) 5 B & S 840 (QB)	141
Stocznia Gdanska SA v Latvian Shipping Co [1998] 1 WLR 574 (HL)	563
Stone and Rolls Ltd v Moore Stephens [2009] UKHL 39, [2009] 1 AC 1391	402
Stuart Peters Ltd v Bell [2009] EWCA Civ 938, [2009] ICR 1556	437
Stringfellow Restaurants Ltd v Quashie— <i>See</i> Quashie v Stringfellow Restaurants Ltd	
Suhail v Herts Urgent Care [2012] UKEAT/0416/11/RN, [2012] All ER (D) 334 (EAT)	18
Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale NV [1967] 1 AC 361 (HL)	486
Sunrise Brokers LLP v Rodgers [2014] EWCA Civ 1373, [2015] ICR 272	164, 522, 568, 569, 575, 577
Sutcliffe v Hawker Siddeley Aviation [1973] ICR 560	77
Sweeney v J&S Henderson (Concessions) Ltd (1999) IRLR 306 (EAT)	376
Symbian Ltd v Christensen [2001] IRLR 77 (CA)	158
System Floors (UK) Ltd v Daniel [1982] ICR 54 (EAT)	91, 390, 391, 453
Takacs v Barclays Services Jersey [2006] IRLR 877 (HC)	510
TFS Derivatives Ltd v Morgan [2004] EWHC 3181 (QB), [2005] IRLR 246	579
The Case of the Tailors of Habits &c of Ipswich (1614) Michaelmas Term, 12 James 1, Coke's Reports, vol 11, 53a (KB)	191
The Water Meadows Hotel v AS Wigmore [2005] WL 1801226 (EAT)	227
Thorne v House of Commons Commission [2014] EWHC 93 (QB), [2014] IRLR 260	462, 604
Tiffin v Aldridge LLP [2012] EWCA 35, [2012] ICR 647	351
Tilson v Alstom Transport [2010] EWCA Civ 1308, [2011] IRLR 169	36, 133
Tinsley v Milligan [1994] 1 AC 340 (HL)	402, 403, 404, 421
Tomlinson v Congleton [2003] UKHL 4, [2004] 1 AC 46	138
Tomlinson v Dick Evans 'U' Drive Ltd [1978] ICR 639 (EAT)	416
Treganowan v Robert Knee & Co Ltd [1975] IRLR 247 (QB)	546
Tullett Prebon v BGC Brokers [2011] EWCA Civ 131, [2011] IRLR 420	156, 158, 164, 565, 570
Turiff Construction Ltd v Bryant (1967) 2 KIR 659	390
Turner v Commonwealth [2000] IRLR 114 (CA)	158
Turner v East Midland Trains Ltd [2012] EWCA Civ 1470, [2013] ICR 505	205, 532
Turner v London Transport Executive [1977] ICR 952 (CA)	546
Turner v Mason (1845) 14 M & W 112	193
Turner v Robinson (1833) 110 ER 982 (KB)	366
Turner v Sawdon & Co [1901] 2 KB 653 (CA)	481, 519
UK Atomic Energy Authority v Claydon [1974] ICR 128	77
Ultraframe UK Ltd v Fielding [2003] EWCA Civ 1805, [2004] RPC 24	584, 587, 590
Unilever v Shanks— <i>See</i> Shanks v Unilever	
United Bank v Akhtar [1989] IRLR 507 (EAT)	128, 488, 502
Universal Tankships v International Transport Workers Federation [1983] 1 AC 366 (HL)	160
University of Nottingham v Fishel [2002] IRLR 120 (CA)	595
University of Stirling v University College Union [2015] UKSC 26, [2015] ICR 567	533
Uttley v St John's Ambulance Appeal No EAT/635/98 (18 September 1998), unreported.	43
Vakante v Addey & Stanhope School [2004] EWCA Civ 1065, [2004] 4 All ER 1056	410
Vellino v Chief Constable of the Greater Manchester Police [2001] EWCA Civ 1249, [2002] 1 WLR 218	404
Viasystems v Thermal Transfer [2005] EWCA Civ 1151, [2006] QB 510	141

Table of Cases

Villella v MFI Furniture Centres Ltd [1999] IRLR 468 (QB).....	469, 616
WA Goold (Pearmak) Ltd v McConnell [1995] IRLR 516 (EAT).....	386, 552
Wadcock v London Borough of Brent [1990] IRLR 223 (ChD)	617
Wallwork v Fielding [1922] 2 KB 66 (CA).....	506, 511
Walter's Applications BL O/272/05	590
Walton v Independent Living Organisation Ltd [2003] EWCA Civ 199, [2003] ICR 688	246
Wandsworth v D'Silva [1998] IRLR 193 (CA)	155, 450, 467, 469, 495, 496
Warren v Whittingham (1902) 18 TLR 508 (KB)	59
WE Cox Toner (International) Ltd v Crook [1981] IRLR 443 (EAT)	566
Welton v Deluxe Retail Ltd [2013] ICR 428 (EAT)	379
Wess v Science Museum Group [2014] UKEAT/0120/14/DM	501
West London Mental Health NHS Trust v Chhabra— <i>See</i> Chhabra v West London Mental Health NHS Trust	
Western Excavating (ECC) Ltd v Sharp [1978] QB 761 (CA)	76, 83, 84, 87, 544, 547, 548, 549, 555, 556
Wheeler v Quality Deep Ltd (t/a Thai Royale Restaurant) [2004] EWCA Civ 1085, [2005] ICR 265	419
Whetstone v MPS [2014] EWHC 1024 (QB).....	158
White v Troutbeck SA [2013] EWCA Civ 1171, [2013] IRLR 949.....	32
White and Carter (Councils) Ltd v McGregor [1962] AC 413 (HL)	562
Whitney v Monster Worldwide Ltd [2009] EWHC 2993 (Ch).....	500
Whitlstone v BJP Homesupport [2014] ICR 275 (EAT)	244
Whitworth Street Estate v James Miller [1970] AC 583 (HL).....	139
WHPT Housing Association v Secretary of State for Social Services [1981] ICR 737 (HC).....	586
Wickens v Champion Employment [1984] ICR 365 (EAT)	355
William Charles Anderson v Jarvis Hotels plc [2006] WL 2248839 (EAT Scotland)	227
William Hill Organisation Ltd v Tucker [1999] ICR 291 (CA).....	62, 155, 191, 481, 505, 570, 577
Williams v Leeds United Football Club [2015] EWHC 376, [2015] IRLR 383	168
Williams v Roffey Bros and Nicholls (Contractors) Ltd [1990] 1 All ER 512 (CA)	500
Williams v Watsons Luxury Coaches Ltd [1990] ICR 536 (EAT)	534
Wilson v Anthony 1958 SLT (Sh Ct) 13	521
Wilson v Racher [1974] ICR 428 (CA)	528
Wood v York City Council [1978] IRLR 228 (CA).....	375, 377
Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (EAT)	84
Woods v WM Car Services (Peterborough) Ltd [1982] ICR 693 (CA)	84, 565
X v Y [2004] EWCA Civ 662, [2004] ICR 1634	203, 204
Yam Seng v ITC [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321	130, 150, 156
Yapp v Foreign & Commonwealth Office [2013] EWHC 1098 (QB), [2013] IRLR 616	467, 512
Yapp v Foreign & Commonwealth Office [2014] EWCA Civ 1512, [2015] IRLR 112	104, 136, 183, 289, 524, 556, 579, 606, 607
Yewens v Noakes (1880–81) LR 6 QBD 530	588
Young v Canadian Northern Railway Co [1931] AC 83 (PC).....	391
Young and Woods Ltd v West [1980] IRLR 201 (CA).....	332
Zarkasi v Anindita [2012] ICR 788 (EAT).....	413, 414, 415

COURT OF JUSTICE OF THE EUROPEAN UNION

C-66/85 Lawrie-Blum v Land Baden-Wurtemberg [1986] ECR 2121	631, 632, 633
C-266/85 Shenavai v Kreischer [1987] ECR 239	632
C-125/92 Mulox IBC v Geels [1993] ECR I-4075	628, 632
C-383/95 Rutten v Cross [1997] ECR I-57	628

Table of Cases

C-246/96 Magorrian v Eastern Health and Social Services Board [1997] ECR I-7153	440
C-253/96 C-258/96 Kampelmann v Landschaftsverband Westfalen-Lippe [1997] ECR I-6907	395
C-369/96 Criminal Proceedings against Arblade [1999] ECR I-8453, [2001] ICR 434	637
C-167/97 R v Secretary of State for Employment, ex p Seymour-Smith and Perez [1999] ECR I-00623	375
C-78/98 Preston v Wolverhampton Healthcare NHS Trust [2000] ECR I-3201	440
C-303/98 Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de La Generalidad Valenciana [2000] ECR I-7963, [2001] ICR 1116 (ECJ)	62, 227
C-350/99 Lange v Georg Schünemann GmbH [2001] ECR I-1061	395
C-453/99 Crehan v Courage Ltd [2001] ECR I-6297	408
C-37/00 Weber v Universal Ogden Service Ltd [2002] ECR I-2013	628
C-256/01 Allonby v Accrington & Rossendale College [2004] ECR I-873, [2004] ICR 1328	631, 633
C-151/02 Landshauptstadt Kiel v Jaeger [2003] ECR I-8389, [2004] ICR 1528	62, 198, 227
C-313/02 Wippel v Peek & Cloppenburg GmbH & Co KG [2004] ECR I-9483	61
C-131/04 and C-257/04 CD Robinson-Steele v RD Retail Services Ltd [2006] ECR I-2531	198
C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet [2007] ECR I-11767	636
C-438/05 International Transport Workers' Federation v Viking Line ABP [2007] ECR I-10779	636
C-319/06 Commission v Luxembourg [2008] ECR I-4323	636, 637
C-346/06 Rüffert v Land Niedersachsen [2008] ECR I-1989	636
C-555/07 Küçükdeveci v Swedex [2010] ECR I-365	197
C-32/08 Fundación Española para la Innovación de la Artesanía (FEIA) v Cul de Sac Espacio Creativo SL and Acierta Product & Position SA [2009] ECR I-5611	584
C-44/08 Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy [2009] ECR I-8163	357
C-29/10 Koelzsch v Luxembourg [2011] ECR I-1595	621, 623, 626, 627, 628, 629
C-155/10 British Airways plc v Williams [2011] ECR I-8409, [2012] ICR 847	62
C-384/10 Voogsgeerd v Navimer SA [2011] ERC I-13275	621, 629
C-426/11 Alemo-Herron v Parkwood Leisure Ltd [2013] ICR 1116	498
C-64/12 Schlecker v Boedeker [2013] ICR 1274	622, 626, 627, 638, 640
C-176/12 Association de Mediation Sociale (AMS) v Union locale des syndicats CGT [2014] ICR 411 (CJEU)	197
C-184/12 United Antwerp Maritime Agencies (Unamar) NV v Navigation Maritime Bulgare [2014] 1 All ER (Comm) 625	637
C-539/12 Lock v British Gas Trading Ltd [2014] ICR 813	62, 170
C-47/14 Holterman Ferho Exploitatie BV v Friedrich Leopold Freiherr Spies von Büllesheim [2015] IL Pr 44	630, 632, 633
C-266/14 Federación de Servicios Privados del sindicato Comisiones Obreras v Tyco Integrated Security (11 June 2015)	245

EUROPEAN COURT OF HUMAN RIGHTS

CN v United Kingdom (2013) 56 EHRR 24	200
Demir and Baykara v Turkey [2008] ECHR 1345, (2009) 48 EHRR 54	196
Eweida and Others v United Kingdom (2013) 57 EHRR 8, [2013] ECHR 37	201
Halford v United Kingdom (1997) 24 EHRR 523	204
Hirst v United Kingdom (No 2) (2006) 42 EHRR 41, [2005] ECHR 681	200
Madsen v Denmark (2003) 36 EHRR CD61, [2002] ECHR 855	204

Table of Cases

National Union of Rail, Maritime and Transport Workers v Serco Ltd (t/a Serco Docklands)— <i>See</i> RMT v Serco Ltd; ASLEF v London and Birmingham Railway Ltd	Nerva and Others v United Kingdom (2003) 36 EHRR 4.....	192, 359, 360
National Union of Rail, Maritime and Transport Workers (RMT) v United Kingdom [2014] ECHR 366, [2014] IRLR 467 (ECtHR).....		115, 196
Obst v Germany App No 425/03 (ECtHR, 23 September 2010)		201
Pay v United Kingdom (2009) 48 EHRR SE2, [2009] IRLR 139.....		204
Redfearn v United Kingdom (2013) 57 EHRR 2, [2012] ECHR 1878.....		200
RMT v United Kingdom— <i>See</i> National Union of Rail, Maritime and Transport Workers (RMT) v United Kingdom		
Schuth v Germany (2011) 52 EHRR 32.....		201
Siliadin v France (2006) 43 EHRR 16.....		238
Stedman v United Kingdom (1997) 23 EHRR CD 168.....		201
Vogt v Germany (1996) 21 EHRR 205.....		201
Von Hannover v Germany (No 2) [2012] ECHR 228, (2012) 55 EHRR 15		197
Young, James and Webster v United Kingdom (1983) 5 EHRR 201, [1981] IRLR 408 (ECtHR).....		188

EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Defence for Children International (DCI) v Netherlands (2005) 51 EHRR SE14	199
International Federation of Human Rights Leagues (FIDH) v France [2005] EHRR SE25 ...	199

UNITED NATIONS HUMAN RIGHTS COMMITTEE

Manuel Wackenheim v France (2003) 10 IHRR 16	200
--	-----

INTERNATIONAL JURISDICTIONS

Australia

ACE Insurance Ltd v Trifunovski (2013) 209 FCR 146	283
ACTEW Corporation Ltd v Pangallo [2002] FCAFC 325.....	278
Amalgamated Collieries of WA v True (1938) 59 CLR 417	277
AMIEU v AICA and Sunnybrand Chickens [2004] NSWIR Comm 238	334
Application by DJ Porter for an Inquiry into an Election in the Transport Workers' Union of Australia (1989) 34 IR 179	323
Attorney-General of the Commonwealth of Australia v R [1957] AC 288 (PC)	276
Automatic Firesprinklers Pty Ltd v Watson (1946) 72 CLR 435	291, 292
Barker v Commonwealth Bank of Australia (2012) 229 IR 249.....	282
Barker v Commonwealth Bank [2014] HCA Trans 73.....	145
Bostik (Australia) Pty Ltd v Gorgevski (No 1) (1992) 36 FCR 20.....	277
Building Workers' Industrial Union of Australia v Odco Pty Ltd (Troubleshooters) (1991) 99 ALR 735	334
Burazin v Blacktown City Guardian Pty Ltd (1996) 142 ALR 144.....	290
Burger King Corporation v Hungry Jack's Pty Ltd [2001] NSWCA 187.....	285
Byrne v Australian Airlines Ltd (1995) 185 CLR 410	126
Cam & Sons Pty Ltd v Sargent (1940) 14 ALJ 162	323
Canizales v Microsoft Corporation (2000) 99 IR 426	284
Commonwealth Bank of Australia v Barker (2013) 214 FCR 450, [2013] FCAFC 83	281, 282
Commonwealth Bank of Australia v Barker [2014] HCA 32	126, 145, 146, 281, 282, 283, 285, 286, 287, 288, 289
Costello v Allstaff Industrial Personnel (SA) Pty Ltd and Bridgestone TG Australian Pty Ltd [2004] SAIRComm 13	334

Table of Cases

Country Metropolitan Agency Contracting Services Pty Ltd v Slater (2003) 124 IR 293	283, 328
Damevski v Giudice (2003) 133 FCR 438	328, 334
Dare v Hurley [2005] FMCA 844	281
Drake Personnel Ltd v Commissioner of State Revenue [2002] 2 VR 635	334
Eshuys v St Barbara Ltd (2011) 205 IR 302	286
Fair Work Ombudsman v Happy Cabby Pty Ltd & Another [2013] FCCA 397	339
Fair Work Ombudsman v Metro Enterprises [2013] FCCA 216	339
Far Horizons Pty Ltd v McDonald's Australia Ltd [2000] VSC 310	285
Forstaff Pty Ltd v Chief Commissioner of State Revenue (2004) 144 IR 1	334
Gambotto v WCP (1995) 182 CLR 432, 13 ACLC 342	267
Garry Rogers Motors (Aust) Pty Ltd v Subaru (Aust) Pty Ltd [2000] NSWSC 433	285
GEC Marconi Systems v BHP Information Technology [2003] FCA 50	149, 150
Goldman Sachs JB Were Services Pty Ltd v Nikolich [2007] FCAFC 120	281
Gregory v Phillip Morris Ltd (1988) 80 ALR 455	277, 279
Guthrie v News Ltd [2010] VSC 196	281
Heptonstall v Gaskin (No 2) (2005) 138 IR 103	289
Hollis v Vabu Pty Ltd (2001) 207 CLR 21	283, 326, 330, 334
Hungry Jack's Pty Ltd v Burger King Corporation [1999] NSWSC 1029	285
Integrated Computer Services Pty Ltd v Digital Equipment Corporation (Aust) Pty Ltd (1988) 5 BPR 11 (CA, NSW)	140, 148, 155
Josephson v Walker (1914) 18 CLR 691	277
Jumbunna Coal Mine (NL) v Victorian Coal Miners' Association (1908) 6 CLR 309	276
Keldote Pty Ltd v Riteway Transport Pty Ltd (2008) 176 IR 316; (2009) 185 IR 155; (2005) 222 CLR 44	331
Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44	282
Mallinson v Scottish Australian Investment Co Ltd (1920) 28 CLR 66	277
Mason & Cox Pty Ltd v McCann (1999) 74 SASR 438	334
McAlee v University of Western Australia [2007] FCA 52	278
McCormick v Riverwood International (Australia) Pty Ltd (1999) 167 ALR 68	281
McMahon Services Pty Ltd v Cox (2001) 78 SASR 540	334
Murray Irrigation v Balsdon [2006] NSWCA 253	281
New South Wales v Paige (2002) 60 NSWLR 371	288
Nikolich v Goldman Sachs JB Were Services Pty Ltd [2006] FCA 784	281
Oanh Nguyen and A-N-T Contract Packers Pty Ltd t/as A-N-T Personnel v Theiss Services Pty Ltd t/as Thiess Services (2003) 128 IR 241	334
Patrick Stevedores (No 1) Pty Ltd v Vaughan [2002] NSWCA 275	289
Purcell v Tullett Prebon (Australia) Pty Ltd [2010] NSWCA 150	293
R v Coldham; ex p The Australian Social Welfare Union (1983) 153 CLR 297, 47 ALR 225	276
R v Kirby; ex p Boilermakers' Society of Australia (1956) 94 CLR 254	276
Re Loty and Holloway v Australian Workers' Union [1971] AR (NSW) 95	280
Re Player and Kacy [1971] AR 125	284
Reynolds v Southcorp Wines Pty Ltd (2002) 122 FCR 301	290
Rogan-Gardiner v Woolworths Ltd [2012] WASCA 31	288
Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (2007) 69 NSWLR 19	288
Russell v Trustees of the Roman Catholic Church for the Archdiocese of Sydney (2008) 72 NSWLR 559	289
Ryan v Textile Clothing & Footwear Union Australia [1996] 2 VR 235	279
Scott v Davis (2000) 204 CLR 333	324
Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357	285
Sneddon v Speaker of the Legislative Assembly (2011) 208 IR 255	289
Staff Aid Services v Bianchi (2004) 133 IR 29	334
State of South Australia v McDonald (2009) 104 SASR 344	287

Table of Cases

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 13	324, 326
Stevenson v Barham (1977) 136 CLR 190	284
Sullivan v Moody (2001) 207 CLR 562	291
Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161	324
Swift Placements Pty Ltd v Workcover Authority of New South Wales (Inspector May) (2000) 96 IR 69	334
Termination Change and Redundancy Case (1984) 8 IR 34, 9 IR 115	277
Thomson v Orica Australia Ltd (2002) 116 IR 186	281, 282
Tullett Prebon (Australia) Pty Ltd v Purcell [2008] NSWSC 852	293
Tullett Prebon (Australia) Pty Ltd v Purcell [2009] NSWSC 1079	293
University of Western Australia v Gray [2009] FCAFC 116	127, 590
Vabu Pty Ltd v Federal Commissioner of Taxation (1996) 33 ATR 537	325, 330
Visscher v Giudice (2009) 239 CLR 361	279, 292
Wade v Victoria [1999] 1 VR 121	291
Walker v Citigroup Global Markets Australia Pty Ltd (formerly known as Salomon Smith Barney Australia Securities Pty Ltd) [2006] FCAFC 101	281
Zuijs v Wirth Bros Pty Ltd (1955) 83 CLR 561	327

Canada

Bagley v British Columbia Southern Railway Co (1917) 37 DLR 733	301
Bardal v Globe and Mail Ltd (1960) 24 DLR (2d) 140 (SC HCJ)	307
Berg v Cowie (1918) 40 DLR 250 (Sask CA)	309, 310
Bhasin v Hrynew 2014 SCC 71	299, 314, 315, 316, 317, 318
Bohemier v Storwal International Inc (1982) 40 OR (2d) 264 (CA)	303, 311
Brisbois v Casteel Inc (1983) 2 CCEL 35 (Ont HC)	303
Brown v Waterloo Regional Board of Commissioners of Police (1982) 37 OR (2d) 277	302, 303
Brown v Waterloo Regional Board of Commissioners of Police (1983) 43 OR (2d) 113, [1983] OJ No 3154 (CA)	302
Cabiakman v Industrial Alliance Life Insurance Co 2004 SCC 55	316, 317
Cleary v Cabletronics Inc (1982) 390 OR (2d) 366	303
Deluce Holdings v Air Canada (1992) 12 OR (3d) 131 (Gen Div)	270
Denison v Fawcett [1958] OR 312-325 (CA, Ontario)	301
Earle v Leeds and Grenville County Board of Education [1986] OJ No 2054 (ON DC)	303
Empress Towers v Bank of Nova Scotia (1990) 73 DLR (4th) 400 (BCCA)	314
Farber v Royal Trust Co [1997] 1 SCR 846	309, 316
Fitzgibbons v Westpres [1983] BCJ No 164	304
Foley et al v Signtech Inc et al (1988) 66 OR (2d) 729	303
Guildford v Anglo-French Steamship (1883) 9 SCR 303	300, 301
Hall v Hebert [1993] 2 SCR 159	401
Honda Canada v Keys [2008] 294 DLR (4th)	163
Johnston v Muskoka Lakes Golf and Country Club Ltd (1983) 40 OR (2d) 762	303
Keys v Honda Canada Inc [2008] 2 SCR 362	299, 308, 312
Ljuboja v AIM Group Inc (2013) CanLII 76529 (ORLB)	313
Lloyd v Imperial Park [1997] 3 WWR 697	299, 309, 310, 311, 317
McKinley v BC Tel 2001 SCC 38	317
McMinn v Town of Oakville (1978) 19 OR (2d)	303
Messer v Barrett Co Ltd (1926) 59 OLR 566	296
Noftall v Anthony Group Ltd [1999] 175 Nfld & PEIR 70	310
Ontario v Sagaz [2001] 2 SCR 183	158
Peso Silver Mines v Cropper [1966] SCR 673	302, 305
Pilon v Peugeot Canada Ltd (1980) 29 OR (2d) 711 (HC)	303, 305
Piresferreira v Ayotte 2010 ONCA 384	299, 311, 312, 313

Table of Cases

Potter v New Brunswick Legal Aid Services Commission 2015 SCC 10	299, 310, 316, 317, 318
Rahemtulla v Vanfed Credit Union [1984] 3 WWR 296 (BCSC)	304, 311
Reference re Public Service Employee Relations Act (Alta) [1987] 1 SCR 313	306
Rutherford v Murray-Kay (1911) 3 OWN 29	301
Sanford v Carleton Road Industries Association 2014 NSSC 187	313
Saskatchewan Federation of Labour v Saskatchewan 2015 SCC 4	115
Shaffron v KRG Insurance Brokers [2009] 1 SCR 157	144
Shah v Xerox Canada Ltd (1998) 49 CCEL (2d) 30 (SC), aff'd (2000) 131 OAC 44 (ONCA)	310, 317
Sheppard v Sobeys Inc (1994) 127 Nfld & PEIR 199 (Nfld TD)	309
Slaight Communications [1989] 1 SCR 1038	306
Speck v Greater Niagara General Hospital (1983) 43 OR (2d) 611 (Ont HC)	303
Sulz v Canada (Attorney-General) 2006 BCSC 99	311
Sulz v Canada (Attorney-General) 2006 BCCA 582	311
Toronto Hockey Club v Arena Gardens of Toronto Ltd (1924) 55 OLR 509	301
Trask v Terra Nova Motors Ltd (1995) 127 Nfld & PEIR 310	304
Vorvis v Insurance Corporation of British Columbia [1989] 1 SCR 1085	298, 299, 302, 304, 305, 306, 307, 311,
Wallace v United Grain Growers [1997] 3 SCR 701	299, 307, 308, 309, 312, 317

New Zealand

Balfour v Attorney-General [1991] 1 NZLR 519	291
Bell-Booth Group Ltd v Attorney-General [1989] 3 NZLR 148	291
Bilgola Enterprises v Dymocks Franchise Systems [2000] 3 NZLR 169	150
Bobux Marketing v Raynor Marketing [2002] 1 NZLR 506 (CA, NZ)	147, 150
Lawrence Riverside v CP Holdings [2011] NZCA 547	150
Wholesale Distributors Ltd v Gibbons Holdings Ltd [2008] 1 NZLR 277	139

United States

Lewis v Benedict 361 US 459 (1960)	159
National Labor Relations Board v Hearst Publications 322 US 111 (1943)	328

TABLES OF LEGISLATION

UNITED KINGDOM STATUTES

Apportionment Act 1870	121, 122
s. 2	58
s. 7	122
Catering Wages Act 1943	223
Children and Families Act 2014	
Pt VII	509
Companies Act 2006	268
s. 33(1)	267
s. 168(1)	270
s. 168(5)(a)	270
Consumer Rights Act 2014	395
Contracts (Applicable Law) Act 1990	623
Contracts of Employment Act (COEA)	
1963	9, 21, 66, 102, 107, 109, 383, 385, 428, 429, 430, 452
s. 1(1)	369
s. 4(1)	369
s. 8(1)	370
Sch. 1	370
Sch. 1(2), (3), (4), (5)	370
Contracts of Employment	
Act 1965 (Contracts of	
Employment and Redundancy	
Payments Act (Northern	
Ireland) 1965)	
s. 4(1)	442
Copyright Act 1911	584
Copyright, Designs and Patents Act (CDPA)	
1988	582, 583, 584, 596
s. 11(2)	586, 592
s. 178	584
s. 215	584
s. 215(2)	587
s. 215(3)	587
s. 295	597
sch. 5, para. 11(1)	597
Dock Workers (Regulation of Employment)	
Act 1946	108
Employers and Workmen	
Act 1875	100, 194
Employers' Liability Act 1880	106
Employment Act 1980	392
Employment Act 2002	383, 392
s. 30	91, 469
s. 37	453
Employment Protection Act 1975	383
Sch. 11	391, 392
Employment Protection (Consolidation)	
Act 1978	329
Employment Rights Act (ERA)	
1996	203, 268, 327, 382, 391, 434, 435, 624, 641
Pt II	60, 71
Pt III	71, 506
Pt VIII	509
Pt X	40, 203, 521
Pt XI	521
s. 1	91, 226, 372, 387, 442, 452, 466, 552
s. 1(2)	452
s. 1(2)(a)	386
s. 1(2)(b)	386
s. 1(2)(c)	386
s. 1(3)	386, 452
s. 1(4)	386, 452
s. 1(4)(d)	386
s. 1(4)(j)	452
s. 1(4)(k)	386
ss. 1–4	385, 390
ss. 1–7	624
ss. 1–12	383
s. 2	394, 452
s. 2(1)	386
s. 2(3)	69
s. 3	387, 452
s. 3(1)	90, 466
s. 3(1)(a)–(aa)	386, 452
s. 3(1)(b)(i)	397
s. 3(1)(b)(ii)	386
s. 4	388
s. 6	452
s. 7A	392, 453
s. 7B	392, 453
ss. 13–27	434, 445
s. 14(5)	119
s. 23(2)	439
s. 23(3)	439, 445
s. 23(4)	439
s. 23(4A)	439, 445

Tables of Legislation

s. 23(4B).....	439	s. 198.....	372
s. 27.....	439	s. 199.....	524
s. 27(1)(a).....	254	s. 200.....	524
s. 31.....	509	s. 203.....	76, 80, 92, 376, 394
s. 34A–34L.....	351	s. 203(1).....	530
s. 43A–43L.....	26	s. 204.....	634, 635
s. 45A.....	82, 443	s. 205A.....	18, 228
s. 63D.....	228	s. 205A(1)(a).....	228
s. 64.....	508, 509	s. 205A(1)(b).....	228
s. 64(5)(b).....	507	s. 205A(1)(c).....	228
s. 66.....	508, 509	s. 205A(2)(a)–(d).....	228
s. 66(3)(b).....	507	s. 205A(6)(a).....	228
s. 71(4)–(5).....	509	s. 205A(6)(b).....	228
s. 75I.....	509	s. 205A(8).....	228
s. 77.....	509	s. 205A(11).....	228
s. 80C.....	509	s. 210(2).....	373
s. 80F.....	228	s. 210(3).....	375
s. 86.....	374, 429, 436, 521	s. 210(4).....	375
s. 86(1).....	372, 430	s. 210(5).....	375
s. 86(2).....	371	ss. 210–217.....	370
s. 86(3).....	430	ss. 210–219.....	521
s. 86(6).....	430	s. 211.....	373
ss. 86–91.....	427, 624	s. 211(1).....	373
ss. 87–90.....	429	s. 212(1).....	376, 377
s. 88(1).....	430	s. 212(3).....	375, 377, 378
s. 91(5).....	430	s. 212(3)(b).....	378
s. 94.....	228, 446	s. 212(3)(c).....	378, 379
s. 94(1).....	344, 624	s. 212(4).....	
s. 95(1).....	524, 534	s. 215.....	375
s. 95(1)(a).....	521	s. 215(2).....	375
s. 95(1)(b).....	532	ss. 215–217.....	375
s. 95(1)(c).....	76, 83, 546	s. 216(1).....	375
s. 97.....	373	s. 216(2).....	375
s. 97(1).....	373	s. 217.....	375
s. 97(1)(b).....	563	s. 218(1).....	374
s. 97(2).....	374	s. 218(2)–(5).....	374
s. 98(1).....	525	s. 218(6).....	374
s. 98(2).....	525	s. 230.....	79, 242, 342, 343, 351, 361
s. 98(3).....	525	s. 230(1).....	344, 373, 584
s. 98(4).....	203, 204	s. 230(2).....	347, 385
s. 99.....	510	s. 230(3).....	224, 336, 344, 358
s. 101A.....	82, 443	s. 230(3)(b).....	363
s. 104.....	510	s. 230(4).....	344
s. 108.....	89	s. 235(2)(a).....	532
s. 108(1).....	372, 523	s. 235(2)(b).....	532
ss. 113–117.....	94	Employment Tribunals Act 1996	
s. 123.....	436, 437	s. 3.....	173
s. 124.....	89, 437	s. 10.....	524
s. 135.....	228	Equal Pay Act 1970.....	431, 432, 433, 440
s. 136(1)(a).....	521	s. 1(2).....	431
s. 139.....	77	s. 2(3).....	433
s. 155.....	372	s. 2(5).....	440
s. 162(2)–(3).....	372	Equality Act 2010	203, 228, 631, 633, 641
s. 196.....	624	s. 13.....	75
s. 196(2).....	624	s. 13(1).....	531

Tables of Legislation

s. 13(2)	531	National Insurance Act 1966	109
s. 19	75	National Minimum Wage Act 1998 ...	62, 71,
s. 41(5)–(7)	356	224, 228, 243, 435, 631, 633	
ss. 64–71	61, 427	s. 1	427
s. 66(1)	431	s. 1(1)	433
s. 66(2)	431	s. 17	427, 433, 434
s. 71	432	s. 17(1)	433
ss. 72–76	427	s. 17(4)	434
s. 80(2)(a)	363	s. 18	434
s. 82	250	s. 19	434
s. 83	75, 251, 428, 431	s. 19D	434
s. 83(1)(a)	356	s. 34	356, 434
s. 83(2)(a)	337, 343	s. 34(2)(a)	356
s. 127	436	s. 34(2)(b)	356
s. 127(9)	436	s. 54	358, 428, 434
s. 128	433, 436	s. 54(3)	336
s. 129	440	Offences Against the Person Act 1861	
s. 130	440	s. 26	194
s. 132	440	Patents Act 1949	
Growth and Infrastructure Act 2013		s. 56(2)	585
s. 31	228	Patents Act 1977	582, 583, 584, 592,
s. 31(1)	18	596, 597	
Health and Safety at Work Act 1974		Pt I	585
s. 51	226	s. 39	590, 596
Human Rights Act (HRA)		s. 39(1)	585, 589, 590
1998	41, 50, 189, 202, 203,	s. 39(2)	586, 595, 598
204, 206, 207		s. 39(3)	586, 596, 598
s. 3	202	s. 40	585, 589, 594
s. 4	202	s. 40(3)	593
s. 6	202	s. 41	585
s. 6(1)	203	s. 42	585, 591, 592, 593
Art 11	115, 118	s. 42(2)	593
Immigration Act 1971		s. 42(3)	594, 595, 596, 598
s. 24(1)(b)(ii)	413, 414	s. 130(1)	583
Immigration, Asylum and Nationality		Poor Law Amendment Act 1834	193
Act 2006		Poor Relief Act 1662	193
s. 21	413	Race Relations Act 1976	
Industrial Relations		s. 78	239
Act 1971	109, 383, 559	Redundancy Payments Act 1965 ...	66, 102,
s. 28	370	103, 109	
s. 161	370	s. 4	370
s. 167	370	s. 8	370
Industrial Tribunals Act 1996	435	s. 8(1)	370
Interpretation Act 1978		Sale of Goods Act 1979	
s. 6	343	ss. 11–15	39
Limitation Act 1980		Sex Discrimination Act 1975 ...	136, 235, 431
s. 5	438	s. 82	239
Limited Liability Partnerships Act 2000		Sex Disqualification (Removal)	
s. 4(4)	351	Act 1919	233, 233
Master and Servant Act 1823	100, 194,	Social Security Contributions and	
366, 367		Benefits Act 1992	
Master and Servant Act 1867 ...	100, 194, 367	Pt XI	506
s. 3	194	Pt XII	507
National Insurance Act 1911	106	s. 164(2)(a)	372
National Insurance Act 1946	107, 238	Statute of Artificers 1562	193

Statute of Frauds 1677	385	Civil Proceedings Fees Order 2008, SI 2008/1053	438
Terms and Conditions of Employment Act 1959	391	Sch. 1	438
s. 8	391	Conditions of Employment and National Arbitration Order 1940, SR & O 1940/1305	108, 391
Trade Boards Act 1909	111	Deduction from Wages (Limitation) Regulations 2014, SI 2014/3322	439
Trade Boards Act 1918	111	reg. 3	83, 447
Trade Disputes Act 1906	111	Employment Protection (Part-time Employees) Regulations 1995, SI 1995/31	376
Trade Disputes Act 1965	117	Employment Tribunals Act 1996 (Application of Conciliation Provisions) Order 2014, SI 2014/431	438
Trade Union and Labour Relations Act 1974	594	Employment Tribunals Act 1996 (Tribunal Composition) Order 2012, SI 2012/988	173
s. 18(1)	594	Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, 2013/1237	438
Sch. 1, para. 5(2)(c)	546	Sch. 1	438
Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992	111, 115, 411	Sch. 1, para. 8(2)	623
Pt IV, ch II	357	Sch. 1, para. 76	438
Pt V	509	Sch. 1, para. 80(1)(a)	438
s. 58(2)(e)	372	Employment Tribunals and the Employment Appeal Tribunals Fees Order 2013, SI 2013/1893	175, 437
s. 146	411	Sch. 2	437
s. 152	411	Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, SI 1994/1623	173
s. 179	460, 463, 499, 594	Art. 3	436
s. 179(1)(a)–(b)	460	Art. 3(c)	436
s. 180	460	Art. 7	439
s. 180(2)	460	Art. 10	436
ss. 188–198	357	Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002/2034	61, 533
s. 236	617	reg. 1(2)	532
s. 238A	118, 508, 509, 510	reg. 8	372, 534
s. 296	111	reg. 8(5)	499
Trade Union Reform and Employment Rights Act 1993	383, 392, 453	Industrial Disputes Order 1951, SI 1951/1376	391
Truck Act 1896	60, 115	Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2006, SI 2006/2914	374
Unfair Contract Terms Act (UCTA) 1977	395	Maternity and Parental Leave etc. Regulations 1999, SI 1999/3312 reg. 9	509
s. 2	607	reg. 12A	509
s. 2(1)	486	reg. 17	509
Wages Act 1986	174, 603		
Wages Councils Act 1945 s. 19	391		
Sch. 3, para. 1(1)	391		
Wages of Artificers (Repeal of Wages Clauses in Statute of Artificers) Act 1813	193		
Workmen's Compensation Act 1897	106		

UNITED KINGDOM STATUTORY INSTRUMENTS

Agency Workers Regulations 2010, SI 2010/93	61
reg. 5	372
reg. 7(1), (2)	372
Civil Procedure Rules 1998, SI 1998/3132 PD7A	174
Civil Procedure (Amendment) Rules 2014, SI 2014/407	174

reg. 18.....	509
Sch. 2, para. 6(b)	511
National Minimum Wage Regulations	
1999, SI 1999/584.....	62, 243, 325, 336, 337
National Minimum Wage Regulations	
2015, SI 2015/621.....	244, 337, 359
reg. 3.....	244
reg. 20.....	244
reg. 32(1).....	244
reg. 32(2).....	244
reg. 34.....	244
reg. 34(1)(a).....	244
reg. 34(1)(b)	244
reg. 34(2)(a).....	244
reg. 49(1).....	244
reg. 49(2).....	244
reg. 57.....	226
reg. 57(1).....	237
reg. 57(3).....	237
Part-time Workers Regulations 2000,	
SI 2000/1551.....	61
Paternity and Adoption Leave Regulations	
2002, SI 2002/2788	
reg. 12.....	509
regs 13–14.....	509
Shared Parental Leave Regulations 2014,	
SI 2014/3050	
reg. 37.....	509
reg. 38.....	509
regs 40–41.....	509
Statutory Paternity Pay and Statutory	
Adoption Pay (General) Regulations	
2002, SI 2002/2822.....	507
Statutory Shared Parental Pay (General)	
Regulations 2014, SI 2014/3051	507
Transfer of Undertaking (Protection of	
Employment) Regulations 2006,	
SI 2006/246	
Working Time Regulations 1998, SI	
1998/1833	62, 82, 224, 225, 227, 243, 325, 428, 443, 631, 633
reg. 2.....	358, 428
reg. 2(1).....	337
reg. 4.....	443, 444, 446
reg. 4(1).....	82, 236, 444, 445, 446
reg. 4(2).....	82, 236, 444, 446
reg. 5.....	443
reg. 6(1).....	236
reg. 6(2).....	236, 446
reg. 6(7).....	236
reg. 7(1).....	236
reg. 7(2).....	236
reg. 7(6).....	236
reg. 8.....	236

reg. 19.....	226, 236
reg. 23.....	499
reg. 29.....	443
reg. 30.....	443, 445
reg. 36.....	356

EUROPEAN UNION LEGISLATION

Regulations

Council Regulation (EC) 44/2001 of	
22 December 2000 on jurisdiction	
and the recognition and enforcement	
of judgments in civil and	
commercial matters OJ 12/1	
[BIR Regulation].....	623
Regulation (EC) 593/2008 of the European	
Parliament and of the Council of	
17 June 2008 on the law applicable to	
contractual obligations OJ L177/6	
(Rome I Regulation).....	623, 626, 630, 636, 641
Recital 21	638
Recital 23	626
Art. 3.....	629
Art. 3(3).....	629, 630
Art. 4(3).....	638
Art. 8.....	627, 628
Art. 8(1).....	629
Art. 8(2).....	625, 627, 628, 629, 634, 635, 638
Art. 8(3).....	625, 627, 629, 638
Art. 8(4).....	625, 629, 638, 639
Art. 9(1).....	635, 637, 638
Art. 9(2).....	633, 634, 635, 637, 638
Art. 21	634
Regulation (EU) 1215/2012 of the	
European Parliament and of the	
Council of 12 December 2012 on	
jurisdiction and the recognition	
and enforcement of judgments in	
civil and commercial matters	
(recast) OJ 351/1	
[BIR recast].....	623, 626, 630
Recital 14	626
s. 5.....	624, 625
Art. 4.....	624
Art. 21(1).....	624
Art. 21(1)(b)(i).....	628
Art. 21(2)(a)	624
Art. 21(2)(b)	624
Art. 22(1).....	624, 625
Art. 23	624, 625
Art. 23(1).....	625
Art. 23(2).....	625

Directives

Council Directive (EC) 98/59 on the approximation of the laws of the Member States relating to collective redundancies [1998] OJ L225/16 ...	357
Council Directive (EC) 93/104 concerning certain aspects of the organization of working time [1993] OJ L307/20	444
Council Directive (EEC) 91/533 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L288/32	383, 395, 396
Art. 1(2)(a).....	372
Art. 6.....	395
Directive (EC) 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [1997] OJ L299/9	82, 198, 227, 428
Art. 31(2).....	198
Directive (EC) 96/71 of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1 (PWD)	636
Art. 3.....	636, 637, 638
Art. 3(1).....	636, 641
Art. 3(10).....	636, 637

Other Instruments

Charter of Fundamental Rights of the European Union (CFREU) [2012] OJ 326/391	189, 197
Ch IV.....	196
Art. 15.1.....	190
Art. 16	196
Art. 51	202

INTERNATIONAL LEGISLATION

Australia

Australia Act 1986 (Commonwealth of Australia)	
s. 11	275
Business Tax System (Alienation of Personal Services Income) Act 2000 (Commonwealth of Australia)	326
Conciliation and Arbitration Act 1904 (Commonwealth of Australia)	275

Fair Work Act 2009 (Commonwealth of Australia)	279, 284, 338
Pt 3-1.....	280
Pt 3-2.....	280
s. 352	335
ss. 357–362	339
s. 382	280
s. 387	281
s. 392(4).....	290
Income Tax Assessment Act 1997 (Commonwealth of Australia)	326
Industrial Arbitration Act 1940 (New South Wales)	
s. 88F.....	284
Industrial Relations Act 1991 (New South Wales)	
s. 275	284
Industrial Relations Act 1996 (New South Wales)	
s. 5(3).....	338
s. 106	284
s. 108A	284
Sch. 1.....	338
Industrial Relations Act 1999 (Queensland)	
s. 275	338
Industrial Relations Amendment (Unfair Contracts) Act 2002 (New South Wales)	284
Model Work Health and Safety Act	
s. 18(1).....	337
Workplace Relations Act 1996 (Commonwealth of Australia)	
s. 89A.....	276
Workplace Relations Amendment (Work Choices) Act 2005	279, 284
Workplace Relations and Other Legislation Amendment Act 1996 (Commonwealth of Australia)	276

Canada

Occupational Health and Safety Act	313
Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) SO 2009 c 23 (Bill 168).....	313

France

Code du Travail	
Art L2511-1	510

USA

National Labor Relations Act 1935	328
Restatement (Second) of Contracts 1981....	3
Restatement (Third) of Agency 2006	3

TREATIES AND CONVENTIONS	
European	
Convention (EEC) 80/934 on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 [1980] OJ L266/1 [Rome Convention]	
Art. 6.....	627, 628, 629, 639
Art. 6(1).....	639
Art. 6(2).....	628, 629
Art. 6(2)(a).....	638
Art. 6(3).....	639
Art. 7(2).....	637
Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [1968] OJ L299/32 [Brussels Convention].....	625, 632
Art. 5(1).....	625, 628
Council of Europe Convention on Action against Trafficking in Human Beings 2005 (No 197).....	406, 103
European Convention on Human Rights (1950)	200, 201, 203, 205, 206, 208, 406, 413
Art. 1.....	199
Art. 4.....	238, 406
Arts. 8–11	203
Art. 8.....	204
Art. 11	115, 188
Additional Protocol 1, Art. 1	192, 359
European Social Charter opened for signature on 18 October 1961.....	198, 199, 208, 406
Art. 6(4).....	191
App	199
European Treaty on the Functioning of the European Union (TFEU)	
Art. 56	635, 636
International Labour Organization	
ILO Declaration of Philadelphia (Declaration concerning the Aims and Purposes of the International Labour Organisation) 1944	218, 406
ILO Domestic Workers Convention 2011 (No 189).....	214, 406
ILO Freedom of Association and Protection of the Right to Organise Convention 1987 (No 87)	188, 406
ILO Right to Organise and Collective Bargaining Convention 1949 (No 98)	188, 406
United Nations	
UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations (Palermo Protocol)	406
Universal Declaration of Human Rights adopted by the UN General Assembly on 10 December 1948.....	188
Preamble	200

LIST OF ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
BIR	Brussels I Regulation
BIS	Department for Business, Innovation & Skills
BJIR	British Journal of Industrial Relations
CA	Court of Appeal
CDPA	Copyright, Designs and Patents Act 1988
CFREU	Charter of Fundamental Rights of the European Union
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
COEA	Contracts of Employment Act 1963
CSJPS	Civil and Social Justice Panel Survey
CSJS	Civil and Social Justice Survey
Cth	Commonwealth of Australia
CUP	Cambridge University Press
EA	Employment Act 2002
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIPR	European Intellectual Property Review
EqA	Equality Act 2010
EqPA	Equal Pay Act 1970
ERA	Employment Rights Act 1996
ET	Employment Tribunal
EU	European Union
FTER	Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002
FTSE	Financial Times Stock Exchange
FWC	Fair Work Commission
HC	High Court
HL	House of Lords
HMRC	HM Revenue & Customs
HR	Human Resources
HRA	Human Rights Act 1998
HRM	Human Resource Management
HUP	Harvard University Press
IER	Institute of Employment Rights
ILJ	Industrial Law Journal
ILO	International Labour Organization
IRA	Industrial Relations Act 1971
LQR	Law Quarterly Review

List of Abbreviations

MLR	Modern Law Review
MPLR	Maternity and Parental Leave etc Regulations 1999
NHS	National Health Service
NIRC	National Industrial Relations Court
NLJ	New Law Journal
NMW	National Minimum Wage
NMWA	National Minimum Wage Act 1998
NMWR	National Minimum Wage Regulations 2015
NSW	New South Wales
OJLS	Oxford Journal of Legal Studies
ONCA	Ontario Court of Appeal
OUP	Oxford University Press
PALR	Paternity and Adoption Leave Regulations 2002
PILON	payment in lieu of notice
PWD	Posted Workers Directive
Qld	Queensland
RC	Rome Convention
RIR	Rome I Regulation
RMT	National Union of Rail, Maritime and Transport Workers
SC	Supreme Court
SCC	Supreme Court of Canada
SER	standard employment relationship
SETA	Survey of Employment Tribunal Applications
SPLR	Shared Parental Leave Regulations 2014
TCR	'termination change and redundancy'
TFEU	Treaty on the Functioning of the European Union
TULRCA	Trade Union and Labour Relations (Consolidation) Act 1992
UCTA	Unfair Contract Terms Act 1977
UDHR	Universal Declaration of Human Rights
UN	United Nations
VAT	Value Added Tax
WDF	World Duty Free
WTR	Working Time Regulations 1998
YUP	Yale University Press

PART I

THE GENERAL PART—STRUCTURES
AND THEMES

1

GENERAL INTRODUCTION—AIMS, RATIONALE, AND METHODOLOGY

Mark Freedland

Introduction

The aims of this book can be condensed down to a single objective, which is that of effecting a critical re-analysis of the English law of the contract of employment in the form of a multi-authored but closely co-ordinated treatise. This notion of ‘critical re-analysis’ is fairly akin to that of ‘re-statement’, certainly to some versions of the idea of re-statement; but this work does not have the ambition to codify the English law of the contract of employment, and is in this respect in some contrast, for instance, with the products of the American Restatement project.¹ The notion of critical re-analysis is at once more broadly contextual, and perhaps also more underlyingly normative, than that of ‘re-statement’; but that does not prevent the authors of this work from aspiring to a degree of authoritativeness in the way that ‘re-statements’ tend to do. This introductory chapter sets out and develops the programme of the team of authors for fulfilling this objective. It first seeks to identify an overall *rationale* for the work, a reason for carrying it out, which is articulated in terms of the ‘problematical centrality of the contract of employment’ to the theory and practice of labour law.

The chapter then seeks to develop a distinctive *methodology* for carrying out the work, one which draws upon the variety of particular interests within the law of the contract of employment which the authors bring to this work and the variety of perspectives from which they survey the subject. This methodology has three aspects, by which is meant three dimensions in which that body of law can be analysed and understood. These aspects are:

¹ For example, Restatement (Second) of Contracts (1981) and Restatement (Third) of Agency (2006).

- (1) the institutional basis,
- (2) a normative critique, and
- (3) a doctrinal analysis.

Each of these is introduced in the succeeding sections, and, in a concluding section, it is explained how they are inter-related to each other in the course of this work.

1. The Problematical Centrality of the Contract of Employment

The centrality of the contract of employment to labour law is generally accepted as a descriptive proposition, but is much disputed, indeed often denied, as a normative proposition. This antithesis presents a foundational problem for labour law which this work seeks to address in all its aspects. The descriptive centrality of the contract of employment to English labour law is axiomatic, in the sense that labour law identifies the contract of employment as the legal paradigm for the employment relation: the contract of employment becomes almost by definition labour law's way of rendering or characterizing the employment relation. However, no sooner is that identity made than it is revealed as a highly problematical one. Does it and should it include every kind of employment relation? Moreover, for those employment relations which are within its descriptive category, which elements in those relations count and should count as terms or provisions of the legal contract? On the other hand, what provisions or regulations of labour law are, and should be, imposed upon and made part of the contract of employment? Furthermore, the contract of employment, thus descriptively located at the centre of the stage of labour law, presents three very basic normative issues or problems.

First, the contract of employment seems, as a central focus for labour law, in its nature to prioritize individual work relations over collective ones, indeed, in the view of many, individualistic values over solidaristic ones. Secondly, its contractual element seems, as a central focus for labour law, in its nature to favour arguments for 'freedom of contract', often in the guise of 'flexibility', over arguments for worker protection. Thirdly, it is often regarded, as a central focus for labour law, as perpetuating pre-modern views of employment relations as strictly hierarchical ones characterized by obligations of deference or obedience on the part of workers, and by entitlements to continuing discretionary control on the part of employers or managers.²

Moreover, the contract of employment, thus located at the centre of labour law, also seems to present several further issues or problems which are both normative and structural in character. First, there is a structural question of whether the

² P Davies and M Freedland (eds), *Kahn-Freund's Labour and the Law* (Stevens 1983) 17–18.

contract of employment represents a sufficiently or suitably comprehensive category of personal work relations to serve as the dominant paradigm for the legal regulation of those relations.³ This issue becomes especially problematical in so far as that dominant paradigm consists not of the contract of employment in all its possible forms but more particularly of a 'standard' contract of employment.⁴ Secondly, there is a further and distinct structural question of whether the law of the contract of employment, understood as basically a body of judge-made common law, sufficiently or suitably integrates a large set of norms derived from legislation on the one hand and collective agreements on the other. The latter problem seems to be receding in practical importance;⁵ but the former problem seems to be gaining in practical importance.⁶

Thirdly, there is a further question, both structural and normative, as to whether the law of the contract of employment is sufficiently, or on a contrasting view excessively, distinct from the general law of contract.⁷ One might ask this question of various aspects of the law of the contract of employment, perhaps especially with regard to the termination of the contract and the remedies for wrongful termination. By this path of argument, one arrives at a position in which the contract of employment and the law of the contract of employment are indeed identified as central to labour law, but in which that centrality is fraught with analytical and normative issues and problems. The essential rationale for this work is the shared view of its authors that this is an extremely important set of issues and problems which might in some measure be addressed by their concerted efforts. The remaining sections of this introductory chapter seek to establish a methodology for an inquiry which is framed by this rationale.

³ See B Hepple, 'Restructuring Employment Rights' (1986) 15 ILJ 69; Lord Wedderburn, 'From Here to Autonomy?' (1987) 16 ILJ 1, 5–7; M Freedland, *The Personal Employment Contract* (OUP 2003); and M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2012).

⁴ See A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP 2001) 1–2; and D Marsden, 'The "Network Economy" and Models of the Employment Contract' (2004) 42 BJIR 659, 663–70; and compare also Z Adams and S Deakin, 'Institutional Solutions to Precariousness and Inequality in Labour Markets' (2014) 52 BJIR 779.

⁵ O Kahn-Freund, 'Collective Agreements' (1941) 4 MLR 225, 226–7; O Kahn-Freund, 'Collective Agreements under War Legislation' (1943) 6 MLR 112, 115–16; O Kahn-Freund, 'Legal Framework' in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell 1954) 42 and 58; A Flanders, 'Collective Bargaining—A Theoretical Analysis' (1968) 6 BJIR 1, 6–10; and O Kahn-Freund, 'The Shifting Frontiers of the Law: Law and Custom in Labour Relations' (1969) 22 CLP 1.

⁶ See B Hepple, *Rights at Work: Global, European and British Perspectives* (Sweet & Maxwell 2005) 65 and A Bogg, 'Common Law and Statute in the Law of Employment' (2015) 68 CLP (forthcoming).

⁷ H Collins, 'Contractual Autonomy' in A Bogg, C Costello, ACL Davies, and J Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 45.

2. The Institutional Basis of the Law of the Contract of Employment

There already exists a quite well-developed body of critical legal discourse which exposes and explores the above-mentioned set of issues and problems. However, there would seem to be scope for a rather fuller articulation than currently exists of the institutional and procedural context within which the law of the contract of employment operates and develops. This articulation could usefully replicate, in a changed environment, and in a changed form, the kind of institutional and contextual exposition which used to take place under the disciplinary umbrella of ‘industrial relations’, a genre of social studies which has become greatly diminished to the point where it exercises very little influence upon the way in which exponents of the law of the contract of employment understand the factual context or practical operation of that body of law.

As a result, sight has somewhat been lost of the institutional apparatus for the formation and the conduct of those arrangements for work which labour law recognizes and identifies as ‘contracts of employment’. One of the principal aims of this work will be to re-acquire some ways of capturing and analysing those realities, both at the theoretical level and at the empirical level, and to make use of the insights thus obtained to illuminate the prevailing understanding of the law of the contract of employment. There are various genres of writing which can be drawn upon for this purpose, with which the team of authors have had some significant engagement, for example those which concern institutional theory and systems theory in general,⁸ and, more particularly, theories of ‘relational contracts’,⁹ ‘network contracting’,¹⁰ ‘behavioural conflict in the workplace’,¹¹ and ‘workers’ voice’.¹² Drawing upon such ideas, we seek to locate the technical or

⁸ S Deakin, ‘The Contribution of Labour Law to Economic and Human Development’ in G Davidov and B Langille, *The Idea of Labour Law* (OUP 2011) 162–3.

⁹ I Macneil, ‘Contracts: Adjustment of Long-term Economic Relations Under Classical, Neo-classical, and Relational Contract Law’ (1978) 72 *Northwestern University Law Review* 854; I Macneil, *The New Social Contract: An Enquiry into Modern Contractual Relations* (YUP 1980); H Collins, ‘The Contract of Employment in 3D’ in D Campbell, L Mulcahy, and S Wheeler (eds), *Changing Concepts of Contract* (Palgrave MacMillan 2013) 65; RC Bird, ‘Employment as a Relational Contract’ (2005) 8 *University of Pennsylvania Journal of Labor and Employment Law* 148; D Brodie, ‘How Relational is the Employment Contract?’ (2011) 40 *ILJ* 232; and Chapter 7 of the present work.

¹⁰ G Teubner, *Networks as Connected Contracts*, edited by H Collins with an introduction (Hart 2011); and M Amstutz and G Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation* (Hart 2009).

¹¹ L Barmes, ‘Common Law Confusion and Empirical Research in Labour Law’ in A Bogg, C Costello, ACL Davies, and J Prassl (eds), *The Autonomy of Labour Law* (Hart 2015) 107; and L Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (OUP 2015).

¹² A Bogg and T Novitz, ‘The Purposes and Techniques of Voice’ in A Bogg and T Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 3.

doctrinal law of the contract of employment in an understanding of the theory and practice of work relations which it is hoped will be seen to represent a distinctive feature of the present work.

Sixty years ago, Otto Kahn-Freund produced a piece of writing which had a comparable aim, and, in a few illuminating pages, fulfilled a comparable function; it had a truly foundational significance for the study and exposition of the law of the contract of employment.¹³ Allan Flanders and Hugh Clegg, engaged upon compiling an edited volume on ‘The System of Industrial Relations in Great Britain’, invited Kahn-Freund to contribute a long and quite comprehensive chapter on ‘The Legal Framework’, and within that chapter he provided, and indeed gave considerable prominence to, a succinct but ground-breaking account of the law of the contract of employment. In so doing, he fully anticipated—in a sense provided the original inspiration for—the notion of ‘the problematical centrality of the contract of employment’ around which this chapter is organized.

Kahn-Freund was there engaged upon locating the law of the contract of employment within the ‘system of industrial relations’ as it was then constituted. He was thinking about the law of the contract of employment as a system within a system (that of labour law) within a system (that of industrial relations); and he was concerned to identify the interactions and inter-dependences between those systems. At that time, this was a very creative undertaking, indeed quite consciously in part a work of construction rather than description, to the extent that the place of the law in industrial relations was a deliberately limited one¹⁴—which Kahn-Freund was himself identifying as the rightful state of affairs—and the place of the law of the contract of employment within that body of law was far from well established and, moreover, was from the outset a controversial one for thinkers such as him whose focus was on collective labour relations and, above all, on collective bargaining.

If this chapter and this work seek to perform a corresponding function for current times, that involves a recognition and exploration of the fact that each of those systems or sub-systems has been crucially transformed in the intervening years, as therefore, have been those interactions and inter-dependences between them. Labour lawyers are well accustomed to thinking about the ways in which their discipline has become an intensely developed one, with policy orientations which are hotly disputed both descriptively and normatively, but which are almost universally agreed upon as being very different from those of the era of ‘collective

¹³ O Kahn-Freund, ‘Legal Framework’ in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell 1954) 42.

¹⁴ For a recent examination of the relationship between industrial relations and labour law, see figure 2 in BE Kaufman, ‘History of the British Industrial Relations Field Reconsidered: Getting from the Webbs to the New Employment Relations Paradigm’ (2014) 52 BJIR 1, 4.

laissez-faire'.¹⁵ They are, perhaps, less well accustomed to reflecting upon some at least of the equally fundamental changes in the institutional environment of labour and employment relations which have taken place and which have transformed the role and character of the law of the contract of employment as Kahn-Freund was then portraying it.

So radical has this transformation been that it has extended to the very frame of reference itself for describing the institutional environment within which the law of the contract of employment functions: this would no longer be envisaged as that of 'the system of industrial relations', and instead one finds that the corresponding body of social and economic practice is typically identified and studied under the heading of 'human resource management'. This work is by no means the place for a general revisiting of that whole set of issues; but recognizing the epistemological turn from 'industrial relations' to 'human resource management' does assist in recognizing some of the key changes in that particular composite body of social, economic, and legal arrangements or practice which we are accustomed to think of as 'the contract of employment'.

Thus, by building upon that observation, and also upon the insights of Hugh Collins concerning the increasingly *bureaucratic* character of employment relations¹⁶ and the increasingly '*standard-form*' character of the process of contracting for employment,¹⁷ one can begin to construct a picture of the institutional basis of the contract of employment which is in some ways¹⁸ dramatically different from the one which Kahn-Freund was describing. For Kahn-Freund, the legal contract of employment was above all the artificial reification, into the form of a contractual agreement between the employer and the employee, of a set of arrangements for employment which were still in 1954 essentially informal ones, especially so far as individual dealings with each worker were concerned. Even the partial formalization of those individual dealings which was imposed by employment legislation from 1963 onwards did not wholly disrupt that vision of the contract of employment, because it soon emerged from the case law that the courts accepted that the

¹⁵ See H Collins, 'The Productive Disintegration of Labour Law' (1997) 26 ILJ 296; G Davidov and B Langille, *The Idea of Labour Law* (OUP 2011); S Deakin and F Wilkinson, 'The Evolution of Collective Laissez-Faire' (2004) 17 Historical Studies in Industrial Relations 1; P Davies and M Freedland, *Labour Legislation and Public Policy* (Clarendon Press/OUP 1993) chapters 10 and 11; and W McCarthy, 'The Rise and Fall of Collective Laissez Faire' in W McCarthy (ed), *Legal Intervention in Industrial Relations: Gains and Losses* (Blackwell 1992) 1–78.

¹⁶ H Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 ILJ 1.

¹⁷ H Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36 ILJ 2.

¹⁸ Though not in others; the bureaucratization of employment relations has, as Collins himself perceived, somewhat paradoxically often included the reassertion of unbridled managerial discretion, albeit now in the form of explicit rules conferring powers upon the employing enterprise to *vary the terms of the contract of employment itself*—rules which therefore in a formal sense bureaucratize the relation while in a substantive sense de-bureaucratizing it.

legislator had required the employer only to provide, *post hoc*, certain particulars of the terms of the contract of employment, rather than to embody the contract itself in documentary form.¹⁹ This may seem a nicety, but it was one which helped to sustain a view of the contract of employment as still in essence a ‘figment of the legal imagination’.²⁰

That foundational idea of the legal contract of employment as a figment of the legal imagination has remained valid in so far as it identifies the falsity of any idea of the contract as one which is *individually negotiated* by any but the most advantaged of workers;²¹ but it has, it is suggested, become seriously misleading in so far as it conjures up the vision of a still essentially *informal* set of arrangements of which the ‘contractual’ character is no more than a legal abstraction. It is quite to the contrary; many if not most employment relations are today couched in an array of documents which are self-consciously contractual and legal in character, much of the *purpose* of which is to align the work relation with employment legislation, fiscal regulation, and the social security system. Moreover, this characteristic is by no means confined to what remains of the ‘standard employment relationship’. The burgeoning case law concerning casual, formerly regarded as ‘atypical’, employment relations provides a window upon a world of substantively loose but procedurally highly formalized and self-consciously contractual work arrangements. In certain leading cases such as *Autoclenz*,²² the very point at issue is whether the courts can and will break through a carefully constructed formal contractual carapace of actual or virtual ‘self-employment’ to find a different ‘reality’ underneath it.

Furthermore, the institutional arrangements which sustain this new contractualism have themselves been considerably transformed into the emergent genre of ‘human resource management’. The business of contracting for employment, and the implementation and termination of arrangements for employment, has been to a significant extent entrusted to specialized cadres of ‘human resource managers’, whose professional training and practice is quite tightly geared to the demands of employment legislation in general and discrimination legislation in particular.²³ This effect is greatly heightened by the rapid growth of employment via employment agencies and other intermediary enterprises, the very function of which is to handle the task of labour contracting and of ‘human resource management’ more broadly speaking; the business of those intermediary organizations is very much

¹⁹ For a comprehensive discussion of the statutory provisions of the Contracts of Employment Act 1963, see Chapter 20, section 1A–C.

²⁰ Davies and Freedland (eds), *Kahn-Freund's Labour and the Law* (n 2) 18.

²¹ *Ibid.*, 23–6 and 31; and see further Chapter 18, section 2.

²² *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745, [2011] ICR 1157.

²³ P Edwards, ‘The Employment Relationship and the Field of Industrial Relations’ in P Edwards (ed), *Industrial Relations: Theory and Practice* (2nd edn, Wiley 2009) 25–6.

that of professionalized employment contracting ‘in the shadow of the law’, to transpose Brian Bercusson’s famous phrase.²⁴

All that said, one needs to take care not to fall into the trap of in any way taking it for granted that these transformations are straightforwardly negative ones in a normative sense. There may be significant advantages in the transition from the institutional framework of industrial relations to that of human resource management; it has for instance done much to embed the drive against various kinds of discrimination and harassment in the institutional practice of employing enterprises, even if that drive is still far from its destination. Moreover, the argument which has been advanced in this section has not been intended as a normative one, but rather as one which indicates that the factual character and the institutional basis of ‘the contract of employment’ have been significantly transformed in recent decades—so much so that we need to begin to re-conceive our understanding of the very notion of ‘the contract of employment’ in the particular ways that have been indicated in the course of this section. In the next section, the focus turns to some normative implications which follow from that set of descriptive arguments. There are, however, one or two crucial descriptive steps which need to be taken before reaching that point, in particular to inquire further into the institutional basis of the law of the contract of employment.

Thus far, some key transformations in the organizational institutions by and within which contracts of employment are made and implemented have been identified, and it has been argued that those transformations affect and indeed alter the very nature of contracts of employment. The extent of those transformations, however, would be seriously understated if they were envisaged simply in terms of a transition from the organizational structures of ‘industrial relations’ to those of ‘human resource management’. This might suggest that the institutions of ‘human resource management’ had become the very seat and location of power in which contracts of employment are made and carried out. In fact, the agencies of ‘human resource management’ are themselves very often no more than the executants of organizational employment strategies which have been formulated elsewhere in the structures of employing enterprises²⁵ often themselves situated in networks of enterprises;²⁶ and account has to be taken of structural changes in those enterprises and networks in order fully to understand the present reality of the institutional basis of the law of the contract of employment.

²⁴ B Bercusson, ‘The Dynamic of European Labour Law After Maastricht’ (1994) 23 ILJ 1, 20 and B Bercusson, *European Labour Law* (Butterworths 1996) 541.

²⁵ MR Allen and PM Wright, ‘Strategic Management and HRM’ in P Boxall, J Purcell, and PM Wright (eds), *The Oxford Handbook of Human Resource Management* (OUP 2008) 88.

²⁶ See J Prassl, *The Concept of the Employer* (OUP 2015) 36–42 on the sharing and parcelling out of employer functions between or amongst two or more legal entities; and Chapter 16 of the present work.

There is a further such point, which is a more abstract or theoretical one. In this section it has been argued that the turn to 'human resource management' has tended to transform the making of a contract of employment into a more formalized and documented practice than it previously was, and in that sense the contract of employment has become a more concrete institution. At the same time, it is important to remember that this is still primarily a legal conception, and a legal construction of practical transactions which do not necessarily or clearly identify themselves as contracts of employment. The legal construction of the contract of employment is a process into which there are many inputs from diverse sources, centrally prominent among which is a very highly complex body of employment legislation. By means of this set of arguments, one arrives at a position in which 'the contract of employment' is identified as an evolving legal institution within a changing social and economic institutional setting. This is a starting point from which to consider how best to formulate an appropriate normative critique of the law of the contract of employment; but first it will be useful to develop somewhat further, in certain particular dimensions, that notion of the contract of employment as an evolving legal institution within a changing social and economic institutional setting.

3. The Contract of Employment between Agreement and Regulation

The suggestion which is advanced in this section, by way of further development of the idea of the contract of employment as an evolving legal institution within a changing social and economic institutional setting, concerns the sense in which and the extent to which the employment relation can satisfactorily be identified as a contractual one.²⁷ This is a question which has always been a central conundrum for labour law theorists, especially as it has many ideological implications or overtones; it has often been formulated in terms of the dichotomy between 'status' and 'contract';²⁸ it essentially concerns the set of issues about how far the norms of the employment relation are open to be determined by the parties themselves or, on the other hand, are pre-determined by legislation or collective bargaining or are

²⁷ See B Hepple, 'Restructuring Employment Rights' (1986) 15 ILJ 69; Lord Wedderburn, 'From Here to Autonomy?' (1987) 16 ILJ 1, 5–7; and Freedland, *The Personal Employment Contract* (n 3).

²⁸ See RH Graveson, 'The Movement from Status to Contract' (1941) 4 MLR 261, 270; O Kahn-Freund, 'A Note on Status and Contract in British Labour Law' (1967) 30 MLR 635, 635–42; M Freedland, 'Status and Contract in the Law of Public Employment' (1991) 20 ILJ 72; M Freedland and N Kountouris, 'Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe' (2008) 37 ILJ 49, 57–9; and *Buckland v Bournemouth University Higher Education Corporation* [2010] EWCA Civ 121, [2011] QB 323 [19]–[20] (Sedley LJ).

derived from other external sources. In this section, it is argued that, rather than chasing down a line between ‘status’ and ‘contract’, we should think of the contract of employment as existing in a mixed domain of voluntarily agreed arrangements and imposed norms. It is that idea which is expressed by the heading of ‘the contract of employment between agreement and regulation’.

That idea will be developed in the following way. It will be suggested that the location of the contract of employment between agreement and regulation is an extremely complex and subtle one, perhaps more so than has hitherto been recognized. It will also be suggested that it is useful to carry out an institutional or organizational analysis of the ways in which these interactions between ‘agreement’ and ‘regulation’ take place within employing enterprises or organizations however large or small. At the heart of that analysis is the idea that the functioning of work enterprises or ‘employers’ is organized and controlled by the *activity of management*. That activity of management includes the creation and conduct of employment relations, and therefore the formulation and application of the norms which govern those relations, and hence, in legal terms, the making, implementation, and termination of contracts of employment. It is argued that by focusing on the particular and quite rapidly changing ways in which this ‘activity of management’ is interposed between agreement and regulation, we can better understand the real nature and working of the contract of employment.

This argument, about the interposition of the activity of management between agreement and regulation, is advanced at two different levels: first, at a general level on which it applies across various different legal and social systems at different times, and secondly, at a particular level on which it applies to the legal and social system under consideration in this work and at the present time. The argument at the general level is that the proposing and administering of contracts of employment can usefully be thought about as an activity of management undertaken by the ‘employer’ or working enterprise, and that the contribution of that activity is to situate the contract of employment ‘between agreement and regulation’ in various material senses. It is appropriate to enlarge somewhat upon those general propositions.

At the core of this general argument is the idea that contracts of employment are typically *proposed to workers by employers* or working enterprises, and then once made are *administered by employers* or working enterprises. Contracts of employment are typically proposed to workers by employers or working enterprises in a double sense: first that it is typically the employer or working enterprise which offers to engage the worker rather than the worker who initiates the engagement, and secondly that it is typically the employer or working enterprise which proposes the terms of that engagement rather than its being the role of the worker to do so. Moreover, it is then typically the employer or working enterprise which provides the documentation for the engagement, which proposes or organizes subsequent elaborations or modifications of the terms of engagement, which lays down rules of

work, and in those senses and more generally administers the contract of employment as part of its managerial activity.²⁹ In short, it is generally the employer or working enterprise which proposes and manages the contract of employment rather than its being the worker who does so. The worker is generally confronted at the outset with a proposal for a contract of employment more or less on a 'take it or leave it' basis, subject to the possibility of some negotiation about some terms and conditions;³⁰ and may be similarly confronted on the same basis with variations or elaborations or renewals of the contract of employment in the course of the employment relation.

All this might seem to be too obvious to be worth stating, at least at that level of generality. However, important arguments follow on from that generalization. It is through this process of proposing and administration of contracts of employment that employers or working enterprises respond to the various kinds of external controls and constraints which may be imposed upon the employment relations in question, most obviously and importantly those of legislation and collective bargaining. It is this process which locates and characterizes contracts of employment as generally lying 'between agreement and regulation'. The contract of employment generally speaking lives in the normative space which is opened up by the worker's initial engagement and bounded by external regulation; it is a space which is largely occupied and controlled by the activity of management.

Although this conceptual space lies within the plain sight of labour lawyers, they may have given insufficient attention to what goes on within it, and could therefore usefully refocus upon it. There have been certain theoretical and even ideological factors which might explain some neglectfulness in this area. On the one hand, proponents of collective bargaining³¹ and of worker-protective employment legislation³² have been concerned to emphasize and seek to maximize the efficacy of those constraints upon unbridled managerial prerogative. On the other hand, neo-liberals have for their part largely concentrated upon the stifling effects of those constraints upon freedom of contract in the employment sphere.³³ That

²⁹ H Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36 ILJ 2.

³⁰ See H Collins, *Employment Law* (2nd edn, OUP 2010) 6–8; H Collins, *Regulating Contracts* (Oxford 1999) 228–36; F Kessler 'Contracts of Adhesion—Some Thoughts About Freedom of Contract' (1943) 43 Columbia Law Review 629; and Davies and Freedland (eds), *Kahn-Freund's Labour and the Law* (n 2) 23–6 and 31.

³¹ Davies and Freedland (eds), *Kahn-Freund's Labour and the Law* (n 2) 69–70.

³² G Morris, 'The Development of Statutory Employment Rights in Britain and Enforcement Mechanisms' in L Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart 2012) 7–21.

³³ B Kaufman, 'Labour Law and Employment Regulation: Institutional and Neoclassical Perspectives' in K Dau-Schmidt, S Harris, and O Lobel (eds), *Labor and Employment Law and Economics* (Edward Elgar 2009) 3–14; R Posner, 'Some Economics of Labor Law' (1984) 51 University of Chicago Law Review 988–1004; and compare, from a different perspective, S Deakin, 'The Law and Economics of Employment Protection Legislation' in C Estlund and M Wachter (eds), *Research Handbook on the Economics of Labor and Employment Law* (Edward Elgar 2012) 330.

having been said, some credit should be given to relational contract theorists for having been interested in this conceptual space, as also in a rather different way are some labour market economists; very important insights into the process of management of contracts of employment are offered from both of those perspectives. However, we might usefully proceed further along a path of analysis of this area of management of employment contracts 'between agreement and regulation'.

At this point, the argument turns from the general level to a more specific one. The management of employment contracts between agreement and regulation is a very context-specific process; the styles and approaches of employment contract management seem to vary widely, and to be highly contingent upon the regulatory context and prevailing attitudes at the time and in the place in question. The significance of these contingent factors is apt to be underestimated both in the making of the law of the contract of employment and in theorizing about it. Trying to avoid that error, and therefore emphasizing the contingent and probably ephemeral character of the observations which are being put forward, we can nevertheless make some suggestions about the evolving characteristics of employment contract management in the UK at the present time. These are counterpoised against some frequently made generalizations which can be regarded as suspect ones.

It is suggested that the makers and theorists of the law of the contract of employment have inherited, and still generally maintain, a core understanding of that contract in which it is identified as, at bottom, in Kahn-Freund's famous words, 'a figment of the legal imagination'.³⁴ That celebrated characterization makes several very important points, some of which are more universal than others. One point which it makes and which is of nearly universal application is that contracts of employment only rarely consist of the fully and freely negotiated bargain which represents the ideal form of the general private law of contract. However, it is suggested that the 'figment' characterization also carries a further set of messages which is a much more contingent one, namely that the contract of employment is an essentially artificial legal construct imposed by lawyers upon a reality of employment relations in which employers and workers enter into work arrangements without self-consciously making legal contracts and without consciously orienting themselves to an environment of legal regulation. In the language of systems theory, the 'figment' characterization identifies a disjunction, a lack of contact, between the legal discourse of the contract of employment, and the factual discourse of employment relations; these were seen as two systems which were not talking to each other and were not meaningfully related to each other.

³⁴ Davies and Freedland (eds), *Kahn-Freund's Labour and the Law* (n 2) 18.

This was an important and valid observation when Kahn-Freund made it. However, it does not satisfactorily describe the current relationship between the 'legal' contract of employment and the practice of contracting for employment in the UK. It is not just that legislation has imposed a requirement upon employers to give written particulars of the main terms and conditions of contracts of employment. It is rather that a widespread specialization and professionalization of the process of management of contracts of employment has brought about a state of affairs in which employment relations are now often, indeed almost typically, conceived and conducted in self-consciously legal contractual forms, closely and consciously adjusted to an environment of legal regulation. This assertion will be substantiated in more detail, and then some of its normative implications for the law of the contract of employment will be considered.

First, reference is made to a widespread specialization and professionalization of the process of management of contracts of employment. There is quite a general institutional transformation of employers or work enterprises in this respect. It is readily observable in those organizations which maintain a specific unit of 'human resource management' or which outsource that specific function to a specialist human resource management enterprise, the latter having become a very widespread practice. Moreover, the whole vast phenomenon of outsourcing of employment relations themselves to intermediary enterprises—employment agencies and labour sub-contractors of every kind—can and should be understood in this way.³⁵ It should also be noted that, in those extended senses, the specialization and professionalization of the process of management of contracts of employment often (though far from universally) extends even to very small work enterprises and personal employers, since they are increasingly offered, and disposed to accept, many forms of specialized and professionalized advice and intermediation in or for the carrying out of that function.

It is suggested, furthermore, that the specialization and professionalization of the process of management of contracts of employment is fast becoming a pervasive feature of the conduct of work enterprises in a yet more extended sense. It goes beyond the entrusting of that process and that function to specialists and professionals inside or outside the work enterprise; it also tends to transform the whole business of management of work enterprises large and small as a matter of style and approach. Several linked assertions are advanced by way of enlargement of that argument. First, a general trend towards the intensified contractualization of employment relations can be observed, as the mechanical disciplines of the

³⁵ See H Collins, 'Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws' (1990) 10 OJLS 353; Freedland, *The Personal Employment Contract* (n 3) 22; and S Deakin and F Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2005) 314.

Fordist assembly line³⁶ are often replaced not, as might have been predicted, by more open-textured employment relations but rather by ever-closer contractual or sub-contractual specification of those relations through various forms of target-setting, 'bench-marking', appraisal, time apportionment,³⁷ and 'performance management'.³⁸

Secondly, it is suggested that this intensified contractualization of employment relations should be seen as part and parcel of an increasingly legally conscious style of and approach to the management of employment relations. Labour lawyers are well accustomed to recognizing this in the form of an enhanced managerial awareness of legal risks arising from the conduct of employment relations, and a corresponding impulse consciously to respond to and 'manage' those risks by anticipating and providing for those risks in various contractual forms. However, a strong trend towards various kinds of legally conscious or legally designed contractualism in the management of employment relations can also be observed, which goes beyond the functions of straightforward regulatory compliance or legal risk management in the generally accepted sense.

That is to say, those concerned with the management of employment relations by and within work enterprises, and the various professionals and enterprises who advise them and intermediate for them, have become well tuned to a legal regulatory environment which is a complex and exacting one but one which provides extensive scope for manoeuvre by means of the choice, adaptation, and adjustment of the legal forms of contracting for employment. Thus one finds that there is a generally heightened consciousness of the ways in which choices of legal forms of contract intermesh with commercial or general organizational decisions and strategies concerning the employment of workers. Obvious manifestations of this tendency are to be found in the making of legally conscious choices between employment and self-employment³⁹ and between direct employment and indirect employment via intermediary agencies,⁴⁰ but I suggest that these are no more than major instances of a larger trend towards a kind of generalized managerial arbitrage between all kinds and combinations of forms of contract of employment or other

³⁶ Supiot has defined 'Fordism' as 'a large industrial business engaging in mass production based on a narrow specialization of jobs and competencies and pyramidal management (hierarchical structure of labour, separation between product design and manufacture)': Supiot, *Beyond Employment* (n 4) 1.

³⁷ See H Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 ILJ 17.

³⁸ See GP Latham, LM Sulsky, and H MacDonald, 'Performance Management' in P Boxall, J Purcell, and PM Wright (eds), *The Oxford Handbook of Human Resource Management* (OUP 2008) 364–77.

³⁹ See Collins, *Employment Law* (n 30) 36–42; and P Davies and M Freedland, *Labour Law: Text and Materials* (2nd edn, Weidenfeld and Nicholson 1984) 81.

⁴⁰ See Freedland, *The Personal Employment Contract* (n 3) 33–5; and Prassl, *The Concept of the Employer* (n 26) 42–54.

personal work contracts.⁴¹ The emergence and growing prominence of various forms of ‘zero-hours contract’ is a key case in point.⁴²

That set of observations brings the argument about ‘the contract of employment between agreement and regulation’ to a point at which one can think about its normative implications. It is suggested that the tendencies which have been identified serve to bring about a particular and slightly unexpected kind of precarization of employment contracts, namely a highly managed and formalized, and legally conscious kind. It has long been accepted that there has been a strong trend in the UK towards the precarization of employment relations and employment contracts; that is to say, that various relatively precarious forms of employment contract and relation, especially those of part-time work, fixed-term work, temporary agency work, and ‘zero-hours’ or ‘on-call’ work, have become so widespread that they can no longer be regarded as ‘marginal’ or ‘atypical’ in any statistical sense.⁴³ However, there has, at least in the past, been a tendency to locate that growth of precarious work predominantly in the *informal* sector of the labour economy, associating it quite strongly with phenomena of relative *anomie* in the forms of very low or negligible compliance with various kinds of legal regulation—employment law, tax and social security law, immigration law, health and safety law, human rights law, and so on.

It would now seem that, although there is still no doubt a highly significant presence and problem of employment relations which are both informal and precarious, the picture which was previously entertained of precarious work may have considerably under-represented the growing presence of the kind of employment relations which are highly managed in a contractually formalized and legally conscious way, as depicted in the foregoing set of arguments—but which are nevertheless unmistakably and deliberately set up and administered in the mode of precarity. Indeed, one could go so far as to suggest that this trend towards legally formalized but substantively precarious employment contracting has leapt over the firebreaks which used to be interposed between the ‘standard’ and the ‘marginal’ sectors of the labour economy, largely dissolving any meaningful qualitative division between the two sectors. On both sides of that original divide, employment relations tend to be managed into contractual forms which are increasingly discrete rather than relational ones, as employers or work enterprises predictably

⁴¹ See Freedland, *The Personal Employment Contract* (n 3) 12–57 for an analysis of the legal challenges these processes present.

⁴² See A Adams, M Freedland, and J Prassl, ‘The “Zero-Hours Contract”: Regulating Casual Work, or Legitimizing Precarity?’, Oxford Legal Studies Research Paper No 11/2015, available from SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2507693 (accessed 14 August 2015).

⁴³ D Weil, *The Fissured Workplace* (HUP 2014); S Fredman, ‘Precarious Norms for Precarious Workers’ in J Fudge and R Owens (eds), *Precarious Work, Women and the New Economy* (Hart 2006) 177; and N Kountouris, ‘The Legal Determinants of Precariousness in Personal Work Relations: A European Perspective’ (2013) 34 *Comparative Labor Law & Policy Journal* 21.

take advantage of radically reduced constraints from collective bargaining, and as arbitrage between contractual, and indeed highly contractualized, forms of employment becomes a more and more legally and conventionally accepted pattern or style of management.

This set of observations might lead on to some further normative reflections about the development and the exposition of the law of the contract of employment, at least by throwing into sharp relief some features of the institutional context which have perhaps hitherto been understated. The arguments presented in this section could be seen as confirming the need for a certain kind of judicial activism along the path opened up by the *Autoclenz*⁴⁴ jurisprudence but which needs to be more clearly rationalized and further extended.⁴⁵ These arguments also point up the dangers of a growing legislative enthusiasm for the negotiability of employment rights, of which employee shareholder legislation is such an extreme example.⁴⁶ But even more is it to be hoped that the suggestions advanced in this section might influence the ways in which the tasks of exposition and theorizing the law of the contract of employment are to be conceived. Rather than on the one hand thinking of the law of the contract of employment as an abstract body of common law, or at the other extreme thinking of it as having become simply part of the technical apparatus of a larger body of primarily legislative employment or labour law, this might now be regarded as the body of law which tempers and moderates the processes of contractual management of employment relations in which employers or work enterprises are engaged, often in a highly legally articulate and intelligent way. It is that normative task or notion which it has been sought to capture in the idea of (the law of) the contract of employment between agreement and regulation.

4. A Normative Reconstruction of the Law of the Contract of Employment

The argument thus far has served to identify the contract of employment as a legally constructed institution embodying the arrangements for employment of a worker to which the law of the contract of employment assigns legal validity and a set of legal effects; and we have also considered the way in which contracts of employment are made and implemented in an elaborate institutional setting, the

⁴⁴ *Autoclenz Ltd v Belcher* [2011] UKSC 41, [2011] 4 All ER 745, [2011] ICR 1157.

⁴⁵ Since the judgment of the Supreme Court in *Autoclenz* was handed down, there have been some reported decisions where it has been applied to treat the terms of a written contract as a 'sham', e.g. see *Suhail v Herts Urgent Care* [2012] All ER (D) 334 (Nov), (2013) 130 BMLR 27 (EAT).

⁴⁶ Employment Rights Act, (ERA) s 205A introduced by the Growth and Infrastructure Act 2013, s 31(1), on which, see J Prassl, 'Employee Shareholder "Status": Dismantling the Contract of Employment' (2013) 42 ILJ 307.