

Contents

Preface	<i>page</i> xxiii
Acknowledgements	xxvi
Table of Cases	xxvii
Table of Statutes	li
Table of Statutory Instruments	lxxi
Table of European Union Instruments	lxxx
Table of ILO Instruments	lxxxiv
Table of Other International Instruments	lxxxvi
List of Abbreviations	lxxxviii

Part I Introduction	1
1 Nature and Sources of Labour Law	3
What is Labour Law?	4
Significance of Labour Law	4
The Employment Relation	6
United Kingdom Labour Law	9
European Union Employment Law	11
Competence	11
Effects	14
Compliance	16
Regulatory Standards with Criminal Sanctions	17
Individual Civil Claims	18
Collective Bargaining	19
Effectiveness of Labour Law	22
Sources of Workplace Conflict	23
Labour Courts and Dispute Resolution	26
Internal Dispute Resolution Procedures	27
Conciliation	27
Arbitration	28
Employment Tribunals	29
The Employment Appeal Tribunal and the Courts	34

Prospects for Labour Law	36
Flexibility and Security	36
Vulnerable Workers	38
Social Exclusion	40
Regulatory Strategies	40
Voice at Work	42
Work/Life Balance	43
Human Rights	44
Globalisation	44
2 Globalisation and Labour Law	47
Introduction	48
International Standards	49
ILO Conventions	50
ILO Supervision	52
Global Trade	54
The Social Clause	54
Legacy of the Social Clause	55
Working Abroad	58
Rome I Regulation and Contract	59
Rome I Regulation and Statute	60
Posted Workers and Working Conditions	63
Core Standards	63
Raising Standards	65
Globalisation and Exploitation	67
Morecambe Bay	67
Gangmasters (Licensing) Act 2004	68
Forced Labour, Modern Slavery and Human Rights	71
Convention Rights	71
British Law	73
Global Corporations	76
Codes of Conduct	77
Global Framework Agreements	79
OECD Guidelines for Multinational Enterprises	81
OECD Guidelines in Outline	81
OECD Procedures in Operation	83
Global Unions	85
Global Union Organisation	86
Global Union Action	87
Global Labour Law	89
Right to Bargain Collectively	90
Right to Collective Action	91
Conclusion	92

Part II	The Contract of Employment	97
3	Terms of the Contract of Employment	99
	The Contract of Service	99
	Freedom of Contract	100
	Implied Terms and the Standard Model of Employment	101
	Criticisms of the Contractual Model	104
	Indeterminacy and Plurality of Sources of Rules Governing Employment	108
	Regulating Express Terms	110
	Disclosure of Terms of Employment	115
	Written Statement of Particulars	115
	Implied Duty of Disclosure	120
	Unfair Terms	122
	Organisational Rules	123
	Collective Agreements	128
	Legal Enforceability	128
	Incorporation	129
	Enforcement by Employees	130
	Enforcement by Employers	133
	The Binding Force of Collective Agreements	135
	The Autonomy of Labour Law	136
4	Authority and Co-operation	138
	The Legal Construction of Hierarchy	138
	Mutual Trust and Confidence	143
	Good Faith	147
	Arbitrariness and Irrationality in Discretionary Decisions	148
	An Essential Foundation of the Contract?	150
	Performance in Good Faith	152
	Loyalty and Confidentiality	154
	Duty of Loyalty	155
	Confidential Information	157
	Lawfulness	159
	Health and Safety Risks	160
	Tax Evasion	160
	Immigration	162
	Restraint of Trade	163
5	Flexibility and Precarious Work	168
	The Need for Flexibility	169
	Unilateral Variation of Terms	171

Enforcement of the Contract	171
Claim for Unfair Dismissal	173
Variation by Collective Agreement	175
Changing the Job	177
Flexibility and Variation Clauses	179
Temporary and Casual Employment	184
Umbrella Contracts	188
Continuity of Employment	192
Conversion of Fixed-term Contracts into Permanent Contracts	195
Precarious Work	196
6 The Personal Scope of Labour Law	198
The Challenge of Employment Status	198
Contracts of Employment and Contracts for Services	202
Bogus and Sham Contracts	208
Workers and Dependent Contractors	213
EU Worker	220
A Contract Personally to Do Work	221
Towards a Unified Concept of Employment Status?	225
Employers' Responsibility in Triangular Relations	229
Associated Employers	230
Service Companies	231
Agency Workers	232
Platforms	240
Vulnerable Workers	242
 Part III Statutory Regulation of the Employment Relationship	 247
7 Wages	249
The Wage/Work Bargain	249
Deductions for Incomplete and Unsatisfactory Work	253
Withholding Pay at Common Law	254
Statutory Protection against Deductions	259
A Duty to Provide Work?	264
Shortage of Work	264
Suspension	266
Garden Leave	266
Reputation and Employability	267
The Principle of Mutuality	268
National Minimum Wage	269
Scope of Application	272

Setting the National Minimum Wage	273
Assessing Whether the Minimum Wage is Paid	275
Calculating Working Hours	276
Calculating Total Remuneration Minus Reductions	280
Enforcement of the National Minimum Wage	282
Impact of the National Minimum Wage	285
Fair Wages	287
8 Working Time	289
Introduction	290
International Standards	292
From Conflict . . .	293
. . . to Co-operation	294
Working Time Directive	296
Challenging the Legality of the Directive	297
Extending the Reach of the Directive	299
Questions of Scope	300
‘Worker’	301
‘Working Time’	302
Limits and Entitlements	305
Limits	305
Entitlements	308
Annual Leave	309
Nature of the Right to Annual Leave	310
Exercising the Right to Annual Leave	311
Payment during Annual Leave	313
What is Pay?	313
Timing of Payment	315
The Question of Deferred Pay	316
Holiday Pay and Sickness Absence	317
Holiday Pay and Unused Leave	319
Exclusions	320
Unmeasured Working Time	322
‘Other Special Cases’	323
Negotiated Flexibility and the Role of Collective Agreements	326
The Directive and Collective Agreements	326
The Regulations and Collective Agreements	328
Enforcement and Remedies	329
Individual Remedies	331
Individual Remedies and Regulation 4	333
Conclusion	335

9	Equality	337
	Introduction	338
	‘Protected Characteristics’	339
	Disability	340
	Race	343
	Religion/Belief	345
	Gender Identity	347
	‘Discrimination’: An Introduction	348
	Direct Discrimination	349
	Intention, Motivation and Discrimination	350
	‘Less Favourable Treatment’: Appearance Rules	354
	Discrimination on the Basis of Association or Perception	357
	Indirect Discrimination	358
	Justification	361
	‘Multiple Discrimination’	367
	Positive Action	367
	Harassment	371
	Victimisation	373
	Disability	375
	Duty of Reasonable Accommodation	375
	Discrimination Arising from Disability	378
	Prohibited Discrimination	379
	‘General Occupational Requirement’ and Other Exceptions to the Prohibitions on Discrimination	380
	Equal Pay	387
	Establishing a Claim	393
	Burden of Proof	394
	Remedies	395
10	Work/Life Balance	397
	Statutory Entitlements to Leave and Flexible Working	397
	Right to Paid Leave on Birth of a Child	400
	Statutory Maternity Leave	400
	Rights during Maternity Leave and Pregnancy	401
	Maternity Pay	405
	Return from Maternity Leave	407
	Paid Paternity or Partner Leave at the Time of Birth	409
	Shared Parental Leave and Shared Parental Pay	409
	Unpaid Parental Leave and Emergency Leave	412
	Right to Request ‘Flexible Working’	418
	Discrimination against Part-time Workers	421
	A Vision of the Work/Life Balance	429

11	Civil Liberties at Work	431
	Protecting Human Rights at Work	432
	Indirect Effect of the Human Rights Act	432
	The Influence of the European Court of Human Rights	435
	Privacy	438
	Surveillance	440
	Confidential Records	445
	Testing for Drugs and Alcohol	450
	Lifestyle and Sexual Orientation	451
	Freedom of Religion	455
	Dress as a Manifestation of Religion	455
	Hours of Work	457
	Refusal to Perform Duties on Religious Grounds	457
	Freedom of Expression	458
	Speech of Trade Union Organisers	460
	Social Media	461
	Political Activities	463
	Whistleblowing	466
	Qualifying Disclosure	468
	Appropriate Person	470
	Dress Codes	472
Part IV	Collective Labour Rights	475
12	Freedom of Association and the Right to Organise	477
	Introduction	478
	Refusal of Employment	479
	TULRCA 1992, Section 137	479
	TULRCA 1992, Section 152	481
	Blacklisting	483
	Consulting Association	484
	Blacklists Regulations 2010	487
	Discrimination	490
	The <i>Wilson and Palmer</i> Case	491
	The Strasbourg Application	492
	Legislative Responses to <i>Wilson and Palmer</i>	494
	Trade Union Services and Representation	495
	Discriminatory Inducements	497
	Victimisation of Workers' Representatives	500
	Nature of the Activity	501
	Timing of the Activity	503

Victimisation and the Problem of Remedies	505
The <i>Lynch</i> and <i>Thomas</i> Cases	506
Lessons of the <i>Lynch</i> and <i>Thomas</i> Cases	508
Trade Union Security and the Right Not to Join	510
The Closed Shop and Organisational Security	511
International Law and the Closed Shop	513
Organisational Security and Legal Restriction	515
Statutory Framework	515
‘100 per cent Campaigns’ and ‘Fair Shares’ Agreements	517
Conclusion	520
13 Freedom of Association and Trade Union Autonomy	522
Introduction	522
Trade Union Definition, Listing and Status	525
Trade Union Objects	527
Objects Clauses	529
Political Objects	531
Trade Union Government	534
Rule-book Constraints	535
Constitutional Conflict	537
Trade Union Elections	539
Statutory Procedures	540
Rule-book Obligations	542
Trade Union Members’ Rights	545
Right to Information	545
Right Not to Strike	547
Trade Union Exclusion and Expulsion	551
<i>Cheall</i> and its Progeny	552
<i>ASLEF</i> and its Progeny	555
Trade Union Disciplinary Procedures and Decisions	557
Disciplinary Procedures	558
Disciplinary Decisions	564
Certification Officer	565
Conclusion	569
14 The Right to Bargain Collectively	571
Introduction	572
Collective Bargaining and International Standards	573
International Labour Organization	573
Council of Europe	576
Collective Bargaining Practice	579
Bargaining Decentralisation	580
Legacy of Voluntarism	582

The Statutory Recognition Procedure	587
Applications and Admissibility	588
Bargaining Unit	592
Establishing Majority Support	595
Forcing a Ballot	595
Conduct of the Ballot	597
The Problem of Employer Resistance	600
News International	601
Cable & Wireless plc	604
Declaration of Recognition	607
Collective Bargaining Method	608
Enterprise Change and Derecognition	610
Rights of Recognised Trade Unions: Facilities for Collective Bargaining	614
Legal Framework	615
Trade Union Facilities under Attack	618
Rights of Recognised Trade Unions: Information for Collective Bargaining	622
Statutory Obligation	623
Law in Practice	626
Conclusion	629
15 The Right to be Informed and Consulted	633
Introduction	634
Consultation Rights and European Law	635
From Specific Duties . . .	636
Resisting Employer Avoidance	638
. . . to General Obligations	641
Limited Impact	643
European Works Councils	646
The ‘Recast Directive’	648
Redundancy Consultation	651
Collective Redundancy	652
‘Proposing’ to Dismiss	655
Employee Representatives	658
Process of Consultation	660
Special Circumstances	663
Enforcement of Duty to Consult	665
Information and Consultation Procedures	669
Questions of Scope	670
Pre-existing Agreements	672
Establishing a Procedure	675
Enforcing the Employer’s Obligation	678

Protection of Employee Representatives	680
Implementing the Directive	682
European Works Councils	684
Questions of Scope	685
Special Negotiating Body	688
Negotiating an Agreement	690
Subsidiary Requirements	694
Rights and Duties of Workers' Representatives	696
Enforcement	698
Conclusion	702
16 Collective Action and the Right to Strike	705
Introduction	706
Right to Strike and International Standards	707
The International Labour Organization	708
Council of Europe	710
Common-law Liability and Statutory Protection	712
Common-law Liability	713
Statutory Protection	716
Narrow Scope of Protected Action	720
'Trade' Disputes, not 'Political' Disputes	721
Narrow Scope of 'Trade' Disputes	723
Before the Ballot	725
Notice of Intention to Ballot	726
Duty to Provide Explanation to Employer	728
The Ballot	730
The Statutory Duty	731
Conduct of the Ballot	733
After the Ballot	736
Notice of Ballot Result	737
Notice of Industrial Action	739
Prohibitions and Restrictions	743
Picketing	743
Secondary Action	746
The Human Rights Act 1998	749
Stalling in the Court of Appeal	750
Into First Gear on Convention Rights	752
Conclusion	755
17 Liability for Collective Action	758
Introduction	759
Labour Injunctions	760
Interim Injunctions	761
Evolution of the Law	763

Labour Injunctions in Practice	765
The Employer's Interest	766
The Public Interest	768
Trade Union Liability	772
Injunctions against Trade Unions	772
Enforcing the Injunction	774
Discipline and Dismissal	779
Action Short of Dismissal	780
Dismissal and Replacement	782
Protected Industrial Action	785
Statutory Protection	786
Limits of Statutory Protection	788
Unprotected and Unofficial Industrial Action	791
Unprotected Action	791
Unofficial Action	793
The 'Public Interest'	796
Prohibited Industrial Action	797
Alternatives to Litigation	803
Conciliation	803
Arbitration and Other Powers	805
Conclusion	808
Part V Termination of Employment	811
18 Wrongful Dismissal	813
The Right to Protection against Unjustified Dismissal	813
Common Law and Statute	818
Breach of the Duty to Give Notice	824
Implied Term of Reasonable Notice	824
Statutory Minimum Notice Period	825
Wrongful Dismissal without Notice	826
Justified Summary Dismissal	830
Implied Term of Mutual Trust and Confidence	833
<i>Johnson</i> Exclusion Zone	834
Economic Loss	836
Psychiatric Illness	838
Disciplinary Procedure	841
Right to Representation	842
Contractual Disciplinary Procedure	844
Terms Restricting Grounds of Dismissal	849
Injunctions	851
Reform	855

19	Unfair Dismissal	856
	Qualifying Conditions	857
	Contract of Employment	857
	Qualifying Period of Continuous Service	858
	Three-month Limitation Period	861
	Effective Date of Termination	861
	Statutory Concept of Dismissal	863
	Dismissal or Resignation?	864
	Constructive Dismissal	866
	Frustration	869
	Agreed Termination and Settlements	871
	The Test of Fairness	873
	Principal Reason for Dismissal	874
	Substantial Reason	875
	Automatically Unfair Dismissal	876
	The Range of Reasonable Responses Test	878
	Procedural Fairness	889
	Remedies for Unfair Dismissal	893
	Compliance and Corrective Justice	893
	Reinstatement	895
	Compensation	899
	Upper Limit on Compensation	910
	Effectiveness	911
20	Economic Dismissal	913
	Competing Policies	914
	Dismissal for Redundancy	918
	Redundancy and Unfair Dismissal	918
	Aim of Redundancy Payments	919
	Qualifying Conditions for Redundancy Payments	920
	Statutory Concept of Redundancy	922
	Reorganisation Involving New Job Specifications	925
	Flexibility Clauses	929
	Place of Work and Mobility Clauses	930
	Claims for Unfair Dismissal	931
	Some Other Substantial Reason for Dismissal	931
	Fairness of Selection for Redundancy	932
	Redeployment	935
	Offer of Alternative Employment	935
	Failure to Consider Redeployment	937
	Insolvency	938
	Protection of Wages	939
	Corporate Rescue	941

Transfers of Undertakings	944
Acquired Rights Directive	944
Dismissals before the Sale or Transfer	946
Dismissals after the Transfer	951
Variation of Terms by Transferee	951
Outsourcing	954
Controlling Capital	958
Index	962