

EMPLOYMENT LAW PRACTICE SERIES

General Editor: Professor John McMullen

THE LAW OF  
INDUSTRIAL ACTION  
AND TRADE UNION  
RECOGNITION

JOHN BOWERS QC  
MICHAEL DUGGAN  
DAVID READE



OXFORD

# The Law of Industrial Action and Trade Union Recognition

JOHN BOWERS QC  
MICHAEL DUGGAN  
and  
DAVID READE

*Foreword by*  
Mr Justice Burton  
*President of the Employment Appeal Tribunal and*  
*Chairman of the Central Arbitration Committee*

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THE LAW OF INDUSTRIAL ACTION AND  
TRADE UNION RECOGNITION

## EMPLOYMENT LAW PRACTICE SERIES

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*National Head of Employment Law, Pinsents*  
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## GENERAL EDITOR'S PREFACE

The law relating to trade union recognition and industrial action is complex and fast changing. Much of British labour law is affected severely by changes in Government. But collective labour law is realigned on these occasions perhaps more than most areas. A study of the law in this area involves a review of the legal regulation of the power imbalance inherent in the employment relationship. Speaking of its importance and of the relative weaponry of strike and lockout, Sir Otto Kahn Freund stated: 'there can be no equilibrium in industrial relations without a freedom to strike' (*Labour and the Law* 2nd edn, p 226). Where, as another labour law scholar puts it, the importance of legal study of the subject comes in, is this: 'Agreement on the importance of this freedom, however, leaves open the question of how far it is or should be protected or limited by law . . .' (Lord Wedderburn, *Labour and the Law* 3rd edn, p 512). Nonetheless, despite its key importance, the subject is less well covered in ordinary text books and many practitioners lose sight of the area once they have finished their degree studies in labour law. We believe that this text therefore fills an important gap for the employment lawyer.

The aim of the authors' work is to provide a comprehensive analysis of the law on industrial action and trade union recognition. It deals with the principles of economic torts, the relevance of common law defences, and the trade dispute immunity (which is, as authors state, a 'shuttlecock' between the Judiciary and Parliament). The authors equip the reader with a thorough grounding of first principles in this area. They highlight the complexity of the rules introduced by the Thatcher Government concerning ballots; and examine less common forms of industrial action such as sit-ins and lock-outs. Employment lawyers need to understand both the collective and the individual dimension of industrial action and this book duly covers the effect of strikes on the individual employment contract, unfair dismissal rules and social benefits.

It is timely that the authors have also covered the new law on statutory trade union recognition, a regime which is destined to survive the Government's

review in 2003 of the Employment Relations Act 1999. The authors also bring to bear their first hand experience of the rules relating to applications under the Act for trade union recognition and highlight the emerging 'case law' of the Central Arbitration Committee.

The aim of this series is to provide analysis of the law combining intellectual rigour with practical relevance. In this I believe the authors have admirably succeeded.

Professor John McMullen  
Leeds  
December 2003

## FOREWORD

What was in 1987 the very first book on the *The Modern Law of Strikes* has now evolved into *The Law of Industrial Action and Trade Union Recognition* and has become a staple requirement for all those in the employment field. As we all aim to improve and enhance industrial relations, and ever more mechanisms are created to achieve conciliation and partnership between the two sides of industry, it is still essential to understand, evaluate and provide for the alternative: while as for trade union recognition, this has once again taken *central* stage, and this book contains so far as I know the first detailed consideration of the actual operation of the new statutory scheme by reference to the cases reported on the CAC's website, and it is a masterly analysis. The extraordinary industry of John Bowers QC, Michael Duggan and David Reade, and their extensive knowledge of the subject combine to ensure that this book is not only immensely readable but a vital tool for unions and employers, arbitrators and conciliators, lawyers and judges alike.

Mr Justice Burton  
President of the Employment Appeal Tribunal and  
Chairman of the Central Arbitration Committee



## PREFACE

We have all enjoyed writing this book. Two of us worked on the original work *The Modern Law of Strikes* in 1987 since when much has changed. We have been joined by David Reade and have now included the law on trade union recognition which is a fascinating area under the jurisdiction of Sir Michael Burton as Chair. We thank him for his gracious Foreword to this book.

Labour law is very dynamic. In order to prove the point, on the very date when we were writing the Preface (2 December 2003) the Government published the Employment Relations Bill. This Bill seeks to implement some of the changes which had been recommended as a consequence of the Review of the Employment Relations Act 1999. The recommendations of that review are considered in the main body of the work. A copy of the Bill can be found at [www.publications.parliament.uk/pa/pabills.htm](http://www.publications.parliament.uk/pa/pabills.htm). It is not practical to make the consequent revisions to the text and in any event the Bill may undergo amendment during the course of its progress through Parliament. We thus can only highlight the areas which the Bill addresses so far as they impact upon this book using the clause numbers in the present version of the Bill.

### Trade Union Recognition

There will be:

- the power for the CAC to shorten the period over which the parties are to seek to agree the appropriate bargaining unit (cl.2);
- an obligation upon an employer to provide information to the Union following the acceptance of an application by the CAC (cl.3);
- amendment of the provisions on determination of the appropriate bargaining unit by the CAC, to make clear that the employer's view on any other bargaining unit it considers appropriate should be taken into account (cl.4);
- provision for the appointment of a suitably qualified independent person

to allow communication between the union and the workers after the acceptance of an application for recognition (cl.5);

- power for the CAC to extend the notification period, under para 24, over which the parties may notify it that they do not want a ballot to be conducted (cl.6);
- provision for postal votes for absent workers where a workplace ballot has been ordered (cl.7);
- clarification that existing recognition agreements only block applications if they include all of the following: pay, hours and holidays (cl.8);
- amendments to the notice provisions for an employer wishing to terminate negotiating arrangements (cl.9);
- a right of appeal against the demand for the costs of the conduct of a ballot (cl.10);
- revision to the Secretary of State's power to amend the schedule (cl.11);
- a power for the Secretary of State to make orders to enable the CAC to require the provision of information about workers to enable communication (cl.12);
- a power for the Secretary of State to make orders to deal with the amalgamation of unions or changes in the identity of employers (cl.13);
- a power to enable the CAC to require an employer to provide information about union membership and employment in a bargaining unit (cl.14);
- a definition of pay so as to exclude pension issues (cl.15); and
- a power for ACAS to require the provision of information from the parties where it is seeking to bring about a settlement of a recognition dispute (cl.16).

### **Industrial Action**

There are:

- new provisions about the information to be provided about the employees to be balloted for industrial action (cl.17);
- new provisions about the information to be provided about the employees in a notice of industrial action (cl.20); and
- amendments relating to the provisions protecting employees from dismissal during protected industrial action (cl.21).

We are grateful to our publishers, OUP, not least for accommodating our several late changes which have meant that the book is up to date as of

*Preface*

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2 December 2003. We also thank all of our colleagues at Littleton Chambers. The book is dedicated to the memory of Lord Gladwin of Clee, who started his career as a union representative on Grimsby Docks and became a distinguished leader of the GMB, and a member both of the House of Lords and the Employment Appeal Tribunal.

John Bowers  
Michael Duggan  
David Reade

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## TABLE OF CASES

Acrow (Automation) Ltd v Rex Chainbelt Inc. [1971] 3 All ER 1175; [1971] 1 WLR 1676 .....	3.64, 13.28
AEEU v Huntleigh Healthcare Ltd (TUR1/19/00) .....	20.04
AEEU and Control Techniques Drives Ltd (TUR1/109/01) .....	19.08, 19.33
Agnew v Munro 1891 128 Sc LR 335 .....	8.65
Allen v Flood [1898] AC 1 .....	3.13, 3.39–3.40, 3.55, 3.60, 3.102–3.103
American Cyanamid Co. v Ethicon Ltd [1975] AC 396 .....	8.17, 11.02–11.06, 11.11, 13.44
Amicus v GE Caledonian Ltd (TUR1/120/1) 5 April 2002 .....	18.29
Amicus and Black and Decker (TUR1/215/02) 19 February 2003 .....	20.13
Amicus Britton Gelpas Ltd (TUR1/17/02) 22 April 2002 .....	18.29
Amicus and Polypipe Building Products Ltd (TUR1/199) .....	19.52
Amicus, GMB and Alan Worswick (TUR1/157/02) .....	19.47
Amicus & GMB v Alan Worswick (TUR1/57/02) .....	18.29, 18.32
Ansah v Ansah [1977] Fam 138 .....	13.17
Armstrong v Sheppard & Short Ltd [1959] 2 QB 384 .....	11.47
Arrowsmith v Jenkins [1963] 2 QB 561 .....	8.66
Associated British Ports v Transport and General Workers Union [1989] IRLR 291; aff'd [1989] ICR 557 (HL) .....	3.44, 4.15, 4.54
Associated Newspapers Group v Flynn (1970) 10 KIR 17 .....	4.52
Associated Newspapers Group v Wade [1979] 1 WLR 697; [1979] ICR 664 .	3.50, 3.65, 11.10, 11.18
Association of Licensed Aircraft Engineers v British European Airways [1973] ICR 601 .....	13.35
Att.-Gen. v Albany Hotel Co. Ltd [1896] 2 Ch 696 .....	11.56
Att.-Gen. v Butterworth [1963] 1 QB 696 .....	13.27
Att.-Gen. v Manchester Corp. [1893] 2 Ch 87 .....	11.27
Att.-Gen. v PYA Quarries Ltd [1957] 2 QB 169 .....	8.16
Att.-Gen. v Royal Society for the Prevention of Cruelty to Animals, <i>The Times</i> , 2 June 1985 .....	13.27
Att.-Gen. v Times Newspapers Ltd [1974] AC 273 .....	13.15, 13.27
Austin-Rover Group Ltd v Amalgamated Union of Engineering Workers (TASS) [1985] IRLR 162 .....	11.71, 13.21–13.22, 13.24, 13.36
Australian Consolidated Presses Ltd v Morgan [1965] 112 CLR 483 .....	13.45
B & S Design v Victor Green Publications Ltd [1984] ICR 419 .....	3.98
BAJ and Mirror Group Newspapers Ltd (TUR1/75/01) .....	19.47
BALPA and Ryanair Ltd (TUR1/70/01) 25 May 2001 .....	19.12, 19.29
Bank Tejarat and Unfi (TUR3/1/00) .....	22.06, 22.18
Bannister v Bannister [1948] 2 All ER 133 .....	13.13
Barber v Penley (1893) 2 Ch 447 .....	8.91
Barclays Bank Ltd v Rosenberg, <i>Financial Times</i> , 12 June 1985 .....	11.56

## Table of Cases

Barrets & Baird (Wholesale Ltd) v Institution of Professional Civil Servants [1987] IRLR 3	3.44, 3.50, 3.79, 3.82, 4.69, 11.05, 11.72
Barton v Armstrong [1976] AC 104	3.97
Bartrum v Healeswood [1973] FSR 85	13.18
Baxter v Limb Group of Companies [1994] IRLR 572	9.20
BBC v Hearn [1977] IRLR 273	4.07–4.08, 4.34
Beaverbrook Newspapers Ltd v Keys [1978] IRLR 34; [1978] ICR 582	4.52, 11.18
BECTU v BBC (TUR1/274/03) 27 October 2003	19.47
BECTU v Sky Subscriber Services (TUR1/222/02)	20.27
Beese v Woodhouse [1970] 1 WLR 586	11.02
Beeston Shipping v Bananaft International SA; <i>The Eastern Venture</i> [1985] 1 All ER 923	13.04
Beetham v Trinidad Cement Ltd [1960] AC 132	4.09, 4.24
Bent's Brewery Co. Ltd v Hogan [1945] 2 All ER 570	4.11
BFAWU and Seabrook Potato Crisps Ltd (TUR1/54)	20.13
Biba Ltd v Stratford Investments Ltd [1973] Ch 281	11.25
Bibby v Chief Constable of Essex (2000) 164 JP 297	8.67
Bigham v GKN Kwikform Ltd [1992] ICR 113	9.40
Birmingham and Midland Motor Omnibus Co. Ltd v LNWR Co. [1913] 3 KB 850	14.07
Black v Admiralty Commissioners [1924] KB 661	3.57
Bloomfield v Springfield Hosiery Finishing Co. Ltd [1972] ICR 91	10.02
Bolton Roadways Ltd v Edwards [1987] IRLR 392	9.24
Bond v CAV Ltd [1983] IRLR 360	6.16, 15.08
Boulting v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606	3.43, 3.48
Bowater Containers Ltd v Blake EAT 522/81	9.08
Bowes & Partners v Press [1894] 1 QB 202	2.03, 6.09, 14.02
Boxfoldia v National Graphical Association (1982) [1988] IRLR 383; ICR 752	3.35, 14.02
Brimelow v Casson [1924] 1 Ch 302	3.55
British Airports Authority v Ashton [1983] IRLR 287	8.40
British Association of Advisers and Lecturers in Physical Education v National Union of Teachers [1986] IRLR 497	3.110
British Industrial Plastics Ltd v Ferguson [1940] 1 All ER 479	3.32
British Motor Trades Association v Salvadori [1949] Ch 556	3.17, 3.39
Broome v DPP [1974] AC 587; [1974] ICR 84; [1974] IRLR 26	8.47, 8.51, 8.55, 8.66
Brown v Bonnyrig Magistrates (1936) SC 258	11.74
Brutus v Cozens [1973] AC 854	8.74
BT plc v CWU [2003] EWHC 937; [2004] IRLR	5.43
Burden v Rigler [1911] 1 KB 337	8.24
Burgess v Stevedoring Services Limited [2002] UKPC 39; [2002] IRLR 810	1.07, 6.06, 6.08
Button v DPP [1966] AC 591	8.73
Byrne Bros (Formwork) Ltd v Baird [2002] IRLR 96	18.20
Callow v Young (1886) 55 LT 543	13.05
Camden Exhibition and Display Ltd v Lynott [1966] 1 QB 555	4.67
Camden London Borough Council v Alpenoak (1985) 135 NLJ 1209	13.05
Camden Nominees Ltd v Forcey [1940] 1 Ch 352	3.55
Camellia Tanker SA v International Transport Workers' Federation [1976] ICR 274	3.39, 3.89, 4.20

## Table of Cases

Cartlidge v Chief Adjudication Officer [1986] IRLR 182	.10.17–10.18, 10.22
Cawley v Frost [1976] 1 WLR 1207	.8.84
Cayne v Global Natural Resources [1984] 1 All ER 225	.11.05
Chanel Ltd v F.G.M. Cosmetics [1981] FSR 471	.13.11
Chapman v Honig [1963] 2 QB 502	.13.27
Chappell v Times Newspapers Ltd [1975] ICR 145	.6.18, 11.19, 15.08
Chiltern District Council v Keane [1985] 1 WLR 619	.13.10, 13.12
Christmas v Eicke (1848) 6 Dow & L 156	.13.06
Churchman v Joint Shop Stewards Committee [1972] 1 WLR 1094	.13.17, 13.41
City and Hackney Health Authority v National Union of Public Employees [1985] IRLR 252	.6.13
Clarke v Chadburn [1984] IRLR 350; [1985] 1 WLR 78	.3.124, 11.76, 13.15, 13.39
Clarke and others v Heathfield and others (No. 2) [1985] ICR 606	.13.42, 13.44, 13.53
Coates v Modern Methods and Materials Ltd [1982] ICR 763	.9.05, 9.13, 9.21, 9.26–9.28
Collins v Wayne Iron Works (1910) 227 Pa 326 (US)	.11.68
Comet Products UK Ltd v Hawkez Plastics Ltd [1971] 2 QB 67	.13.25
Con-Mech (Engineers) v Amalgamated Union of Engineering Workers [1973] ICR 620	.13.15, 13.26
Connex South Eastern Ltd v National Union of Rail, Maritime and Transport Workers [1999] IRLR 249	.5.26, 9.07, 9.17, 11.64
Connor v Kent [1891] 2 QB 545	.8.61
Conway v Wade [1909] AC 506	.4.10, 4.47
Cory Lighterage Ltd v Transport and General Workers' Union [1973] ICR 339	.4.13, 4.45
Coulston v Gardiner (1681) 3 Swan 279	.13.50
Courtaulds Northern Spinning Ltd v Moosa [1984] IRLR 43	.9.01, 9.42, 9.50
Crazy Prices (NI) Ltd v Hewitt [1980] IRLR 396	.4.43
Crofter Handwoven Harris Tweed Co. v Veitch [1942] AC 435	.3.56, 3.61, 3.90, 3.104
Crosfield Electronics Ltd v Baginsky and others [1975] 3 All ER 97	.12.02
Crosville Wales Ltd v Tracey [1993] IRLR 60	.9.40
Cuckson v Stones (1858) 1 E & E 248	.15.02
Cunard SS Co. Ltd v Stacey [1955] 2 Lloyd's Rep 247	.3.30
Daily Mirror Newspapers v Gardner [1968] 2 QB 762	.3.15, 3.65, 3.76, 11.52
Dallimore v Williams & Jesson (1912) 29 TLR 67	.4.32
Danchevsky v Danchevsky [1975] Fam 17	.13.34
D.C. Builders v Rees [1966] 2 QB 617	.3.92
Dean v Dean [1987] Fam Law 200	.13.18
Deborah Building Equipment Ltd v Scaffco Ltd, <i>The Times</i> , 5 November 1986	.13.18
Denaby and Cadeby Main Collieries v Yorkshire Miners' Association [1906] AC 384	.2.06
Dillon v Byrne QJPR 112	.8.76
Dimbleby & Sons Ltd v National Union of Journalists [1984] 1 All ER 117; [1984] 1 All ER 751; [1984] 1 WLR 427; [1984] IRLR 67; [1984] IRLR 161	.3.02, 3.81, 3.83, 4.19, 4.36, 4.45, 11.08, 11.52, 11.66
Dimskal Shipping SA v International Transport Workers Federation [1992] IRLR 78; [1992] ICR 37	.4.72
Dixon v Wilson Walton Engineering Ltd [1979] ICR 438	.9.22
DPP v Clarke (1991) 94 Cr App Rep 359	.8.77
DPP v Fidler [1992] 1 WLR 91	.8.60
DPP v Jones [1999] 2 All ER 257	.8.26–8.27, 8.66

## Table of Cases

DPP v Orum [1988] 3 All ER 449	8.77
Drake v Morgan [1978] ICR 56	3.129
Drew v St. Edmundsbury Borough Council [1980] ICR 513	6.04
Duncan v Jones [1936] 1 KB 218	8.67
Dunford and Elliott Ltd v Johnson & Firth Brown Ltd [1977] 1 Lloyd's Rep 505	11.05
Duport Steels Ltd v Sirs [1980] ICR 161; [1980] IRLR 116	4.14, 11.12, 11.21, 14.02
E (a minor) v Dorset County Council [1994] 4 All ER 640; [1994] 3 WLR 853	3.44
Eastern Trust Co v McKenzie, Mann Co. Ltd [1915] AC 750	13.22
Eaton v Cobb [1950] 1 All ER 1016	8.66
Ebbw Vale Steel Iron and Coal Co. v Tew (1935) 79 SJ 593	14.01
Eckman v Midland Bank Ltd [1973] ICR 71	13.50
Edison (Thomas E.) Ltd v Bullock (1912) 15 CLR 679	11.47
Edwards v Halliwell [1950] 2 All ER 1064	3.126
Edwards v SOGAT [1971] Ch 354	3.85
Edwin Hall & Partners v First National Financial Corp'n plc [1988] 3 All ER 801	3.59
Eisey v Smith [1983] IRLR 292	8.62
Electrical, Electronic, Telecommunication and Plumbing Union v Times Newspapers Ltd [1980] 3 WLR 98	3.109
Ellerton v Thirsk (1820) 1 Jac & W 376	13.06
Elliott v Klinger [1967] 1 WLR 1165	13.06
Emerald Construction Co. Ltd v Lowthian [1966] 1 WLR 691	3.31, 3.64
EMI Records Ltd v Kudhail and others, <i>The Times</i> , 16 June 1983	11.61
Enfield London Borough Council v Mahoney [1983] 1 WLR 749	13.41
Examite Ltd v Whittaker [1977] IRLR 312	4.18
Exchange Telegraph Co. v Gregory & Co. [1896] 1 QB 147	3.85
Express & Star Ltd v Bunday [1986] IRLR 477; [1988] ICR 379	5.23, 9.07, 9.10, 9.20
Express & Star Ltd v National Graphical Association (1982) [1985] IRLR 455; [1986] IRLR 222, [1986] ICR 589, CA	3.120, 13.32, 13.36
Express Newspapers Ltd v Keys [1980] IRLR 247	11.17
Express Newspapers Ltd v McShane and Ashton [1980] AC 672; [1980] ICR 42	4.13, 4.14, 4.30
Express Newspapers Ltd v Mitchell [1982] IRLR 465	11.34, 13.08, 13.20
Fairclough v Manchester Ship Canal Co. (1897) 41 SJ 225	13.48
Falconer v ASLEF and NUR [1986] IRLR 331	3.16, 3.27, 3.32, 3.71, 3.74, 3.83, 7.01, 11.36
Faust v Power Packing Casemakers Ltd [1983] IRLR 117	5.22, 6.08, 9.12, 9.18
Favard v Favard (1896) 75 LT 664	13.14
Federation of Offshore Workers' Trade Unions v Norway (App 38190/97, 27 June 2002)	1.08, 16.04
Fellowes & Son v Fisher [1975] 2 All ER 829	11.05
Field v Receiver of Metropolitan Police [1907] 2 KB 853	8.71
Fisher v York Trailer Co. Ltd [1979] ICR 834	9.07, 9.09
Fletcher v Bealey (1885) 28 ChD 688	11.27
Ford Motor Co. v AEU [1969] 2 QB 302	2.09
Foss v Harbottle (1843) 2 Hare 461	3.126
Foulkes v Chief Constable of the Merseyside Police [1998] 3 All ER 704, CA	8.67
Fowler v Kibble [1922] 1 Ch 487	8.59, 8.63

*Table of Cases*

Francome v Mirror Group Newspapers Ltd [1984] 1 WLR 892	11.03
Frith v Lord Donegal (1834) 2 DPC 527	13.06
Fullarton Computer Industries Ltd v CAC [2001] IRLR 752, Ct of Session	20.08
Fulwell v Bragg (1983) 127 SJ 171	11.05
Gait v Abbott (1862) 6 LT 852	11.31
Galt v Philp [1984] IRLR 156	6.14, 8.40
Garden Cottage Foods Ltd v Milk Marketing Board [1984] AC 130	11.03
Garret v Taylor (1620) Cro Jac 567	3.88
Garvey v J & J Maybank (Oldham) Ltd [1979] IRLR 408	10.04
General Aviation Services (UK) v Transport and General Workers' Union [1974]	
ICR 35	4.53
General Aviation Services (UK) v Transport and General Workers' Union [1975]	
ICR 276	4.42
General Aviation Services (UK) v Transport and General Workers' Union [1985]	
ICR 615	3.113
General Engineering Services v Kingston and St. Andrew Corporation [1989] IRLR 35	6.07
Glamorgan Coal Co. v South Wales Miners' Federation [1903] 2 KB 545	3.55
GLC v Jenkins [1975] 1 All ER 354	6.13
GMB v Ardengate Ltd (TUR3/3/03)	22.09, 22.18, 22.22
GMB and AJ Cheetham Ltd (TUR1/159/02)	19.12
GMB and Northbourne (TUR1/183/02)	18.27
GMB and Video Duplicating Ltd (TUR1/192/02)	19.31, 20.28
GPMU v DSR Ltd (TUR1/101/01)	18.17
GPMU and Getty Images Ltd (TUR1/104/01)	19.47–19.48
GPMU and Keely Print (TUR1/98/01)	18.21
GPMU and Red Letter Bradford Ltd (TUR1/12/00)	20.06
GPMU v Sentinel Colour Print (TUR1/37/01)	19.35
Goad v Amalgamated Union of Engineering Workers (No. 3) [1973] ICR 108	13.36
Gorse v Durham County Council [1971] 2 All ER 666	6.09, 15.07
Gouriet v Union of Post Office Workers [1978] AC 435	4.52, 4.57, 8.92
Graham v Bogle [1924] 1 IR 68	14.07
Granby Marketing Services Ltd v Interlego AG (1984) 1 RPC 209	3.59
Graphical Paper and Media Union v Derry Print Ltd and John Brown Printers [2002]	
IRLR 380	18.26–18.28
Greig v Insole [1978] 3 All ER 449	3.31, 3.58
Gustafsson v Sweden (1996) 28 EHRR 409	1.08, 16.02
GWK Ltd v Dunlop Rubber Co. Ltd (1926) 42 TLR 376	3.77
Hadkinson v Hadkinson [1952] P 285	13.22
Hadmor Productions Ltd v Hamilton [1982] IRLR 102; [1983] 1 AC 191	3.40,
3.66–3.67, 3.88, 4.44–4.45, 4.66, 11.07, 11.21, 11.65	
Hanson v Fashion Industries (Hartlepool) Ltd [1981] ICR 35	10.02
Health Computing Ltd v Meek [1980] IRLR 437; [1981] ICR 24	4.09, 4.11, 4.42
Heath v Longman (J.F.) (Meat Salesmen) Ltd [1973] 1 All ER 1228; [1973]	
ICR 407	9.01, 9.33
Heath v White (1844) 2 Dow & L 40	13.06
Heaton's Transport (St. Helen's) Ltd v Transport and General Workers' Union [1972]	
ICR 308; [1973] AC 15	3.112, 3.115, 13.30, 13.36, 13.48



*Table of Cases*

Henthorn and Taylor v Central Electricity Generating Board [1980] IRLR 361	.15.06
Hersees of Woodstock v Goldstein (1963) 38 DLR 2d 449 (Canada)	.3.17
Higginbotham v MacGilchrist 1930 SC 625	.13.44
Hickman v Maisey [1900] 1 QB 712	.8.23
Highlands Fabricators Ltd v McLaughlin [1985] ICR 183	.9.38
Hillfinch Properties Ltd v Newark Investments Ltd, <i>The Times</i> , 1 July 1981	.13.27
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ISTC and Eminox Ltd (TUR1/152/02)	.23.37
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