Chapter 1

1.55 The fit for work service no longer does the second element of its service, namely assessments and referrals, because of low take-up.

Chapter 2

Salaried district judges are office holders, not workers, and so cannot bring a whistleblowing claim *Gilham v Ministry of Justice EWCA* [2017] Civ 2220.

A cycle courier was a worker because of his obligation to perform work (Addison Lee Ltd v Gascoigne UKEAT/0289/17). Also see *Addison Lee Ltd v Lange & Ors UKEAT/0037/18* where the claimant was also held to be a worker. The Deliveroo case has been appealed to the High Court.

The Government has published 'the Good Work Plan' as a response to the Taylor review.

Chapter 3

3.21-24 An employment tribunal can construe a contract in a deduction of wages claim. The CA in *Agarwal v Cardiff University & Anr* [2018] EWCA Civ 2084 said that *Delaney v Staples*, to which the ET and the EAT in Agarwal were not referred, is binding authority that an ET has jurisdiction to resolve any issue necessary to determine whether a sum claimed under Part II is properly payable, including an issue as to the meaning of the contract of employment.

3.25-33 Where there is an express term stating 'No Oral Modification', then a subsequent oral variation is not valid - *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] UKSC 24.

3.117 The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No. 2) Order 2018 comes into force on 6 April 2019 amends ss8-11 of the ERA so that the rights of itemised payslips is extended to workers rather than just employees.

Chapter 4

4.143 In response to a consultation, the Government has decided that it is best not to legislate in relation to caste discrimination and just to rely on case law such as *Chandhok v Tirkey* (*Caste in Great Britain and equality law: a public consultation Government consultation response*, July 2018).

4.201 (also 10.103) A union is also liable for sexual harassment by its lay officials if it was done in the course of performing their role of union representatives. The lay officials are agents of the union (*Unite the Union v Nailard [2018] EWCA Civ 1203*). S109(2) Equality Act.

Chapter 5

No important updates

Chapter 6

6.118 The Parental Bereavement (Leave and Pay) Act 2018 is expected to come into force in 2020. It provides a right to primary carers (not just parents) to time off work following the death of a child.

Parents or carers will be entitled to at least two weeks' leave following the loss of a child under the age of 18 or a stillbirth after 24 weeks of pregnancy. Employees with 26 weeks' continuous service will be entitled to paid leave at the statutory rate or 90% of average earnings, whichever is the lower. The leave will be unpaid for those without such service.

6.95 The House of Commons Women and Equalities Committee has published the 'Fathers and the Workplace' which proposes that shared parental leave be replaced by 12 weeks paternal leave which fathers would be entitled to in their own right, as opposed to being shared with the mother.

6.105 In *Capita Customer Management Ltd v. Ali* [2018] UKEAT 0161/17 the EAT said that it was not direct sex discrimination for an employer to enhance maternity pay, but pay only statutory shared parental pay. The case was not brought as one of indirect discrimination, for example because more men than women take shared parental leave/pay, even though women are entitled to it. If it had, there may have been a different result.

Chapter 7

7.60 Further to the case of Jaeger, a firefighter was required to be on stand-by within 8 minutes of the workplace. This was found by the ECJ to be working time, even though it was spent at home, because there was an obligation to be physically present at a location decided by the employer (*Ville de Nivelles v. Rudy Matzak*, C 518/15).

7.75-92 A worker does not automatically lose his right to take leave or payment in lieu of leave not taken on termination, unless the employer can show that it has specifically given the worker the opportunity to take it leave (*Kreuziger v Berlin* C-619/16 and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu* C-684/16)

7.86 8.22, 8.32 In *King v Sash Window Workshop Ltd* [2017] ECJ C-214/16, the tribunal found that the claimant was a worker rather than self-employed, and therefore entitled to holiday pay. It was found that a worker who does not take his paid annual holiday because the employer had refused to pay, can carry over this entitlement, and claim all the way back to the 1996 date of the Working Time Directive (note that this is an ECJ case, and therefore only applies to the 4 weeks EU entitlement). This could lead to a large increase in the number of cases where worker status is claimed. It is not clear how this will interact with the Deduction from Wages Regulations 214.

7.108 Compensation for injury to feelings is not generally available for a claim under the WTR (*Gomes v Higher Level Care Ltd* [2018] EWCA Civ 418), The natural remedy for that wrong is to make a payment of compensation for that time based on their rate of pay.

Chapter 8

8.10 An employment tribunal has jurisdiction to construe a contract of employment in a claim for unauthorised deduction of wages (*Agarwal v Cardiff University & Ors* [2018] EWCA Civ 2084)

8.22 Following *Dudley Metropolitan Borough Council v Willetts* UKEAT/0334/16/JOJ, the EAT in *Flowers v East of England Ambulance Trust* UKEAT/0235/17/JOJ found that voluntary overtime should be taken into account for holiday pay, as it was part of normal remuneration if it was paid over a sufficient period of time. (Also note case of *Albert Holzkamm GmbH & Co. KG* Case C-385/17 where the ECJ said that during their minimum period of annual leave guaranteed by EU law, workers are entitled to their normal remuneration, in spite of prior periods of short-time working. However, the length of that minimum period of annual leave depends on the work actually performed during the reference period.)

7.86 8.22, 8.32 In *King v Sash Window Workshop Ltd* [2017] ECJ C-214/16, the tribunal found that the claimant was a worker rather than self-employed, and therefore entitled to holiday pay. It was found that a worker who does not take his paid annual holiday because the employer had refused to pay, can carry over this entitlement, and claim all the way back to the 1996 date of the Working Time Directive (note that this is an ECJ case, and therefore only applies to the 4 weeks EU entitlement). This could lead to a large increase in the number of cases where worker status is claimed. It is not clear how this will interact with the Deduction from Wages Regulations 214. (Also note that the EAT in the case of *Coletta v Bath Hill Court* UKEAT/0200/17 found that the Limitation Act 1980 did not limit the period that a claim for deductions from wages can go back (in England and Wales) to 6 years, but this is also now subject to the 2014 Regulations in relation to cases brought from 1 July 2015).

8.47 The Court of Appeal in *Royal Mencap Society v Tomlinson-Blake / Shannon v Rampersad (t/a Clifton House Residential Home)* [2018] EWCA Civ 1641 decided who carers who were on call and slept at a client's home, were not entitled to the minimum wage while they are asleep, meaning that only the time which is spent awake and working counts for the NMW. Leave has been requested to appeal to the Supreme Court.

Chapter 9

9.8-9.10 The ECJ found that there can still be a transfer of undertakings under the Acquired Rights Directive even where there was a five month break between outsourcing the contracts (*Colino Sigüenza v Ayuntamiento de Valladolid [2018] EUECJ C-472/16*).

Chapter 10

10.35 The High Court in *Hincks v Sense Network* [2018] EWHC 533 gave guidance that where an employer gives a reference relying on the findings of an earlier investigation, it does not have to review the procedural fairness of that investigation, so long as it had a proper and legitimate basis.

10.74 In a whistleblowing case, it is the knowledge of the investigating officer that counts, not the person who has tainted the evidence that was given to that officer (*Royal Mail Ltd v Jhuti* [2017] EWCA Civ 1632)

10.103 (also 4.201)) A union is also liable for sexual harassment by its lay officials if it was done in the course of performing their role of union representatives. The lay officials are agents of the union (*Unite the Union v Nailard [2018] EWCA Civ 1203*). S109(2) Equality Act.

10.103 In *Bellman v Northampton Recruitment Ltd* [2018] EWCA Civ 2214, the Court of Appeal found that on the particular facts of the case, where the managing director of a small company, who was in effect the only real decision-maker in the company, had attacked a colleague at a work party, the employer was vicariously liable.

10.106 The Court of Appeal in *WM Morrison Supermarkets Plc v Various Claimants* [2018] EWCA Civ 2339 upheld the decision that it was vicariously liable for the criminal actions of an employee, which in fact harmed the employer, who had taken steps to prevent such actions. Leave was granted to appeal to the Supreme Court.

1.107, 10.47 The Telecommunications (Lawful Business Practice)(Interception of Communications) Regulations 2000 (Telecommunications Regulations) have been replaced by the Investigatory Powers (Interception by Businesses etc. for Monitoring and Record-Keeping Purposes) Regulations 2018, further to the GDPR, although they are largely the same.

Chapter 11
No important updates

Chapter 12
12.3-12.11 The EAT held that an employer who had taken into account previous incidents of misconduct *which had not been treated at the time as misconduct* was entitled to do so, as they were relevant to the disciplinary matters that were being considered. There would have been a significant risk to patients' safety if they had been ignored. The dismissal was therefore fair (*NHS24 v Pillar* UKEATS/0005/16). If these incidents had, however, been the subject of a warning which had expired, then this would have been unfair.

Chapter 13
No important updates

Chapter 14
No important updates

Chapter 15
15.7, 17.5 The *Gisda Cyf v Barratt* case was limited to unfair dismissal claims under the ERA 1996. Here, the Supreme Court extended the same principles to the situation under common law. It found that, in the absence of an express term in the contract as to when notice takes effect, and then there is an implied term when giving written notice of dismissal that notice must have been communicated or come to the mind of the addressee. In other words, it would be the date on which the dismissal notice letter came to the claimant's attention and she had a reasonable opportunity of

reading it. Here, the employer was aware the employee was been on holiday and would not open the letter until her return. This brings the common law in line with *Gisda Cyf* (*Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] UKSC 22*).

This may cause difficulties for employers whose employees cannot be contacted, for example if they are hospitalised, and so it is advisable for employers to include express terms relating to when notice takes effect in their employment contracts.

15.7 Giving notice is usually unambiguous, but on the facts of this case, it was not. The employee had been offered a job in another department, so gave her notice. The new job was withdrawn, so she sought to rescind her notice, but the employer refused. The EAT said she could withdraw it (*East Kent Hospitals University NHS Foundation Trust v Levy UKEAT/0232/17/LA*).

Chapter 16
No important updates

Chapter 17
15.7, 17.5 The *Gisda Cyf v Barratt* case was limited to unfair dismissal claims under the ERA 1996. Here, the Supreme Court extended the same principles to the situation under common law. It found that, in the absence of an express term in the contract as to when notice takes effect, then there is an implied term when giving written notice of dismissal that notice must have been communicated or come to the mind of the addressee. In other words, it would be the date on which the dismissal notice letter came to the claimant's attention and she had a reasonable opportunity of reading it. Here, the employer was aware the employee was been on holiday and would not open the letter until her return. This brings the common law in line with *Gisda Cyf* (*Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood [2018] UKSC 22*).

This may cause difficulties for employers whose employees cannot be contacted, for example if they are hospitalised, and so it is advisable for employers to include express terms relating to when notice takes effect in their employment contracts.

Chapter 18
No important updates

Chapter 19
19.29 The Trade Secrets etc Enforcement Regulations 2018, which implement the Trade Secrets Directive, came into force on 9 June 2018. They provide for a statutory definition of what is a trade secret and put the existing common law on a statutory footing, as well as dealing with remedies.

Chapter 20
20.66 Following *Canadian Imperial Bank of Commerce v Beck* [2009] IRLR 740, a tribunal should inspect confidential documents and decide what is not only relevant to issues actually in dispute but

also necessary for the fair disposal of the proceedings (*Dhanda v TSB Bank plc* [2017] UKEAT/0294/17).

Practice Direction (Employment Appeal Tribunal - Procedure) 2018 make a few changes, such as Respondent to prepare bundle if Claimant is unrepresented.

The Law Commission consultation paper 'Employment Law Hearing Structures' makes a number of suggestions, such as extending limitation periods for employment cases to six months, and raising the limit on breach of contract claims from £25,000.

Chapters 21 –23
No important updates