

EMPLOYMENT LAW AUTUMN 2020 REPORT

**Daniel Barnett, Outer Temple Chambers
Tuesday, 20 October 2020**



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About Daniel Barnett

Daniel Barnett is a leading employment law barrister practising from Outer Temple Chambers. With 25 years' experience defending public and private sector employers against employment claims, he has represented a Royal Family, several international airlines, and FTSE-100 companies. Employee clients include a former Chancellor of the Exchequer and many senior executives.

Daniel is a member of the BAILII advisory board, and a past chair of the Employment Lawyers' Association's publishing committee and electronic services working party. He is the author or co-author of eight books, including the Law Society Handbook on Employment Law (currently in its 7th edition). He is the creator of the Employment Law (UK) mailing list, an email alerter bulletin service sending details of breaking news in employment law three times a week to 30,000 recipients.

Legal directories describe him as "extremely knowledgeable and [he] can absorb pages of instructions at lightning speed", "involved in a number of highly contentious matters", "singled out for his work for large blue-chip companies", "combination of in-depth legal knowledge, pragmatism, quick response times and approachability", "inexhaustible", "tenacious", "knowledgeable" and "an excellent advocate".

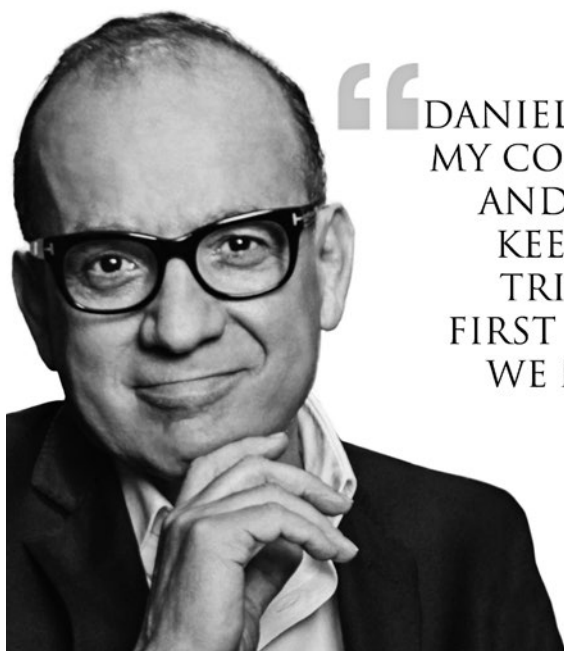
He is one of the leading speakers and trainers on the employment law and HR circuit. He has presented seminars for the House of Commons, the BBC, Oxford University, HSBC, Barclays Bank, Ocado, and dozens of other organisations in-house, and keynoted at national and international conferences. In 2013, 2014, 2016 and 2019 he wrote and presented the Employment Law MasterClass national tour, speaking to thousands of employment lawyers and HR Professionals around the UK. He produces the Employment Law Matters podcast, ranked #1 on the Apple Podcast Store for management podcasts in the UK.

As well as full-time practice as a barrister and speaker, Daniel is an experienced entrepreneur. He is the founder and owner of Employment Law Services Ltd (a legal publishing company), which provides marketing and educational services to employment lawyers and HR professionals. In 2007, he co-founded CPD Webinars Ltd, then the UK's leading webinar training company for lawyers, and sold it to Thomson Reuters in 2011. In 2015 he founded the HR Inner Circle (www.hrinnercircle.co.uk), a membership club for smart, ambitious HR Professionals.

Daniel has presented the legal hour, a weekly phone-in radio show, on LBC Radio since 2010. He is widely sought after as a commentator in both broadcast and print media on all legal issues.

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EMPLOYMENT LAW MATTERS



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Part 1:

The Job Support Scheme

FAQs

How do employers claim the payment?

What happens if there is not enough work for the employee?

Is redundancy a better option?

What if an employee cannot work?

Can the employer force the employee to work in this way?

What about an employee on a fixed term contract, or part-time employees?

What about employees who transfer into a business?

Can an employee take annual leave at the same time as being under the Job Support Scheme?

Would it be better to agree a permanent new working pattern with the employee?

Part 2:

More Coronavirus Stuff

Whistleblowing and Interim Relief

Taplin v C Shippam Ltd [1978] IRLR 450

McConnell and anor v Bombardier Aerospace/Short Brothers plc (No.2)[2009] IRLR 201, NICA

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Employment Rights Act 1996

43B Disclosures qualifying for protection.

- (1) *In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –*
- (a) *that a criminal offence has been committed, is being committed or is likely to be committed,*
 - (b) *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
 - (c) *that a miscarriage of justice has occurred, is occurring or is likely to occur,*
 - (d) *that the health or safety of any individual has been, is being or is likely to be endangered,*
 - (e) *that the environment has been, is being or is likely to be damaged, or*
 - (f) *that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

43C Disclosure to employer or other responsible person.

- (1) *A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –*
- (a) *to his employer, or*
 - (b) *where the worker reasonably believes that the relevant failure relates solely or mainly to –*
 - (i) *the conduct of a person other than his employer, or*
 - (ii) *any other matter for which a person other than his employer has legal responsibility, to that other person.*

Whistleblowing and interim relief in Covid times

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Part 3:

Health & Safety Detriments (and Dismissals) in the Time of Coronavirus

Employment Rights Act 1996

44 Health and safety cases.

- (1) *An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that –*
- (d) *in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
 - (e) *in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*
- (2) *For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.*

100 Health and safety cases.

- (1) *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that –*
- (d) *in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
 - (e) *in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*
- (2) *For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.*

Serious and Imminent Danger

Oudahar v Esporta Group Ltd (2011) IRLR 730

“The mere fact that an employer disagreed with an employee as to whether there were (for example) circumstances of danger, or whether the steps were appropriate, is irrelevant. The intention of Parliament was that an employee should be protected from dismissal if he took or proposed to take steps falling within section 100(1)(e)”

Hamilton v Solomon and Wu Limited (UKEAT/0126/18/RN)

“The claimant could not in the circumstances reasonably believe that there was a risk to the health and safety of any employee, including him, arising from the circumstances which actually existed at the respondent’s workshop In addition, I concluded that there were not ... “circumstances of danger which [the claimant] reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert” in the part of the workshop to which Mr Solomon had required him to go and work. That was because I concluded that it was not reasonable for the claimant to believe that his workplace was not safe because its dust extraction arrangements were to any extent inadequate.”

Part 4:

Three Significant Recent Cases

Conclusion:

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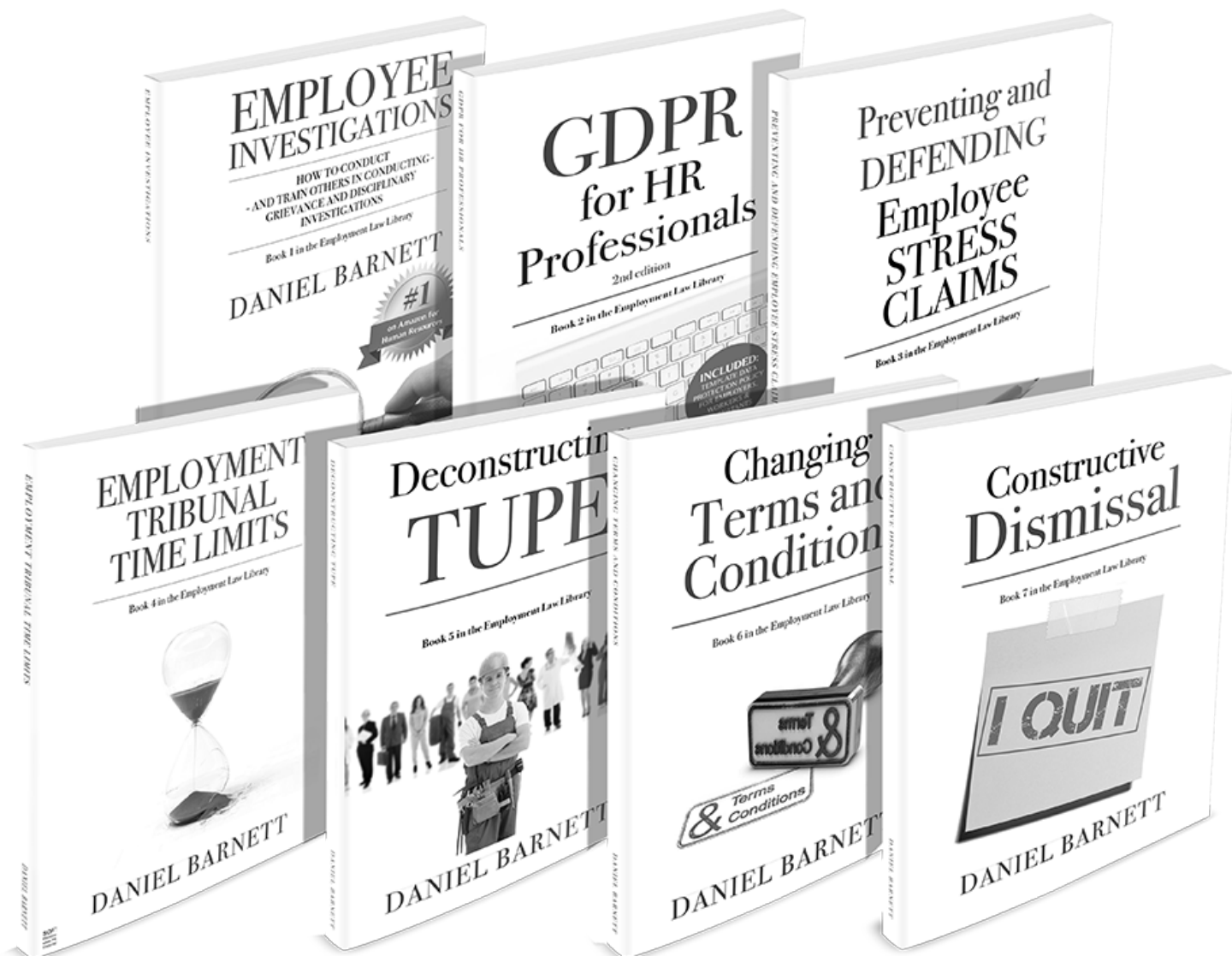
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Changing Contract Terms After A TUPE Transfer

Transfer of Undertakings (Protection of Employment) Regulations 2006

4. – (1) *Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*
- (4) *Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is –*
- (a) *the transfer itself; or*
 - (b) *a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.*
- (5) *Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is –*
- (a) *a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or*
 - (b) *a reason unconnected with the transfer.*
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Sue Whittle, Employment & Safety Advice LTD

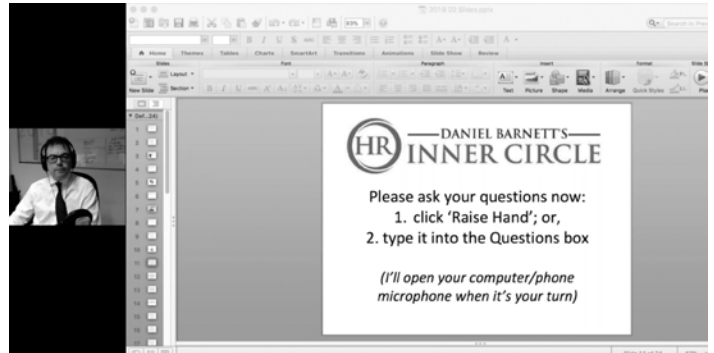


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What do you get?

1 Monthly live online 'Ask Me Anything' sessions: each month, we host an online video webinar, when you can share your HR problems and ask Daniel anything about employment law. You'll also receive a recording and a transcript each month, so you have a permanent record of the session even if you cannot be there.



“Daniel Barnett is an inspirational, walking and talking ‘how to understand mind-boggling employment law handbook!’”

Ellie King, HR Manager, RWE Technology



2 A specially recorded audio seminar every month, with HR shortcuts and workarounds you can't get anywhere else.

3 The monthly Inner Circular magazine, jam-packed with valuable information for ambitious HR professionals.



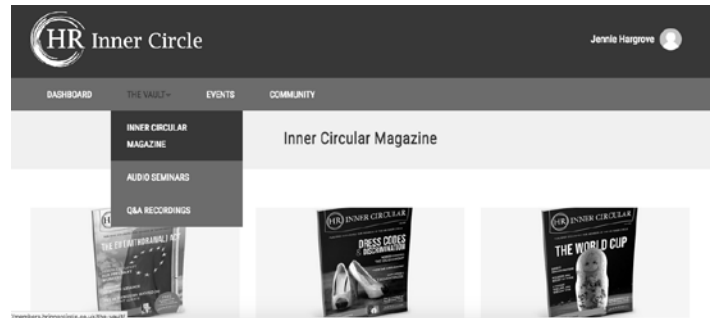
“It’s the support and help that you get, the reassurance that you’re talking to people who know what they’re talking about rather than people just randomly giving information.”

Nicky Jolley, HR2DAY LTD



4 Access to Daniel’s exclusive, private, invitation-only online Inner Circle group, where you get to discuss HR problems with other smart, ambitious professionals and download precedents and policies they have shared.

5 Access to the exclusive HR Inner Circle website which includes a back-catalogue of all the HRIC resources since the launch in 2015.



6 After six month’s membership, you become entitled to a 30 minute telephone consultation with Daniel Barnett once a year, which you can use for your most urgent and important employment law issues.

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What do others say about the HR Inner Circle?

“ I would thoroughly recommend it — it’s worth every penny, from the monthly magazine to the weekly podcasts to the monthly MP3s and just having the support network to call on for a ‘comfort blanket’ from time to time. I’ve been a member since it started. ”

- **Alison Melville** | Managing Director, Greig Melville HR

“ The help and support from peers is amazing. I have learned so much and on top of that, we get lots of help and information from Daniel. Why wouldn’t you join?! ”

- **Sneha Doshi** | Senior Employee Relations Advisor, Electrical Contractors’ Association

“ The Inner Circle is a forum where you can get HR advice in all different formats — the monthly magazine and audio seminars, the Facebook group, the fireside chats and the annual conference. It is excellent value for money. ”

- **Christine Cooper** | Corporate HR Manager, West Yorkshire Fire & Rescue Service

“ It’s an extremely helpful forum in which to bounce around ideas with very knowledgeable and experienced HR professionals, and ask for advice and views on employment relations issues. ”

- **Yolaine Bech** | HR Manager, Energy Intelligence Group (UK) Ltd

“ It’s a great environment for being able to ask questions of Daniel and other members. Really important for someone working on their own who needs to check things out, or just bounce a few ideas around. ”

- **Quentin Colborn**, Director, QC People Management Ltd

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“ It’s a fantastic support for HR professionals. The Facebook group is a great sense check when you work on your own, and a great way to get a different perspective, and the Q&A with Daniel is more than worth the monthly fee. We also really benefit from the substantial discounts offered on packages such as Daniel’s Getting Redundancy Right course and the Unconscious Bias seminar. ”

- **Nancy Prest** | Director, Doodle HR

“ HR can be a lonely role and as the person advising everyone around you it can often be difficult to find advice and peer support for you as an individual. We all know there are rarely right and wrong answers in HR, it’s an art not a science, and the HR Inner Circle gives you a group of like-minded individuals to share solutions, provide expertise and insight and a place to go when you just don’t have the answers. ”

- **Jo Mosley** | HR Director, The Salvation Army

“ If you are looking for a forum to discuss confidential issues that need prompt employment law advice, then this is definitely for you. In addition it offers other tools to help and support. The Facebook group is full of information and solutions to scenarios — invaluable for HR professionals. ”

- **Sheena Doyle** | Managing Director, The Really Useful HR Company Ltd

“ When I transitioned from big employers to an SME, I didn’t realise how much I would miss having peers to kick ideas around. If you haven’t got an internal network, you’ve got to build an external one. I got so much out of the discussion at an Inner Circle meetup recently and I look forward to getting the Inner Circular magazine each month. ”

- **Elizabeth Diver** | Group HR Director, The Big Issue Group

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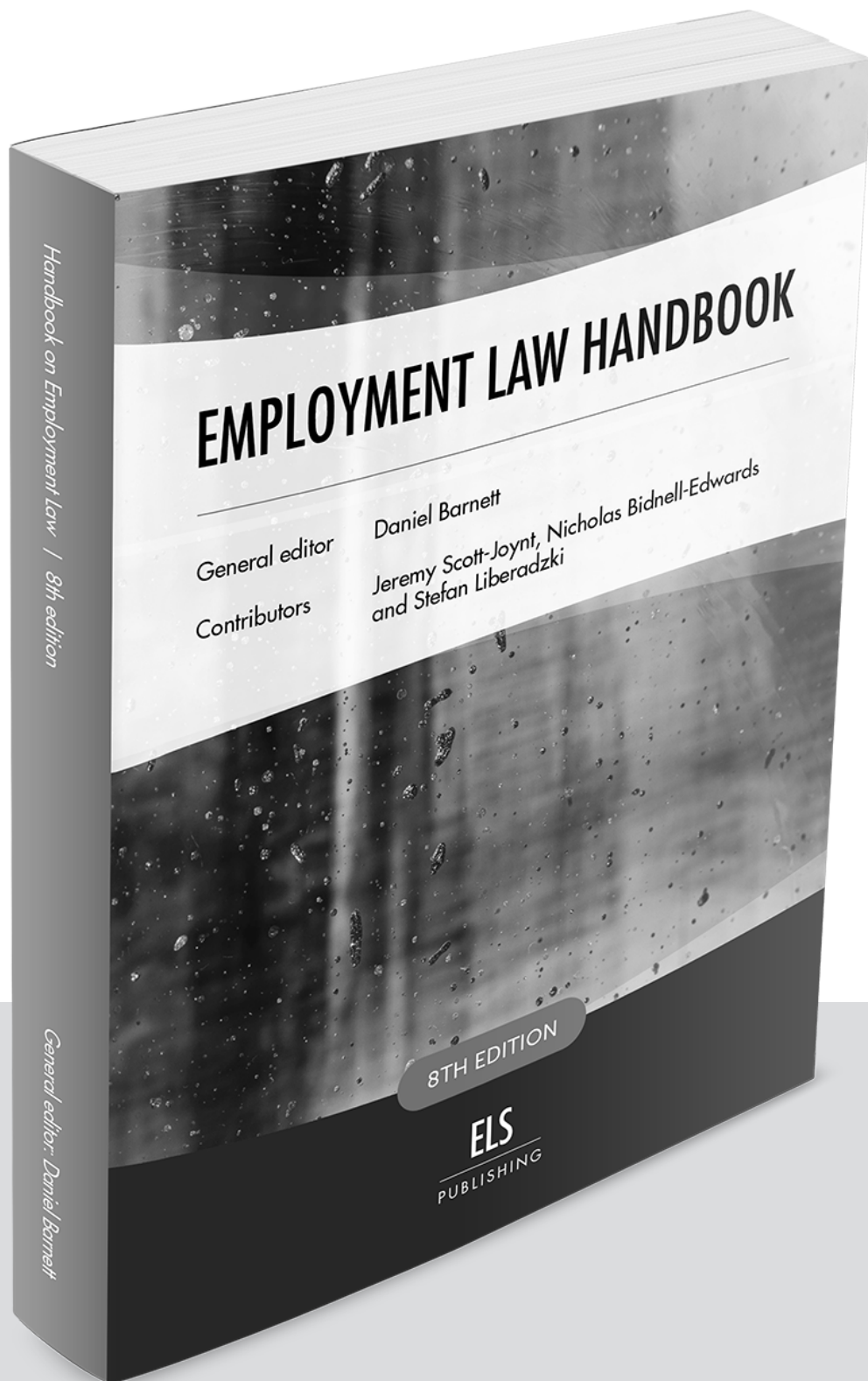


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