A reconstructive study of the 'legal guardian' role enacted by HR

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This research note examines one of the tensions identified in the role of HR: the challenge of reconciling the often competing aims of organisational performance with fairness for employees (Boxall and Purcell, 2011; Keegan and Francis, 2010; Wright and Snell, 2005). This tension is arguably reflected in the CIPD's current manifesto to 'champion better work and better working lives' (CIPD, 2015).

The context for the research is HR practitioners' application of protective employment law, specifically the Equality Act 2010. In taking a reconstructive 'both-and' stance (Jules and Good, 2014) towards performance and fairness, the research analyses the nuances of HR practice and, as such is oriented to be of relevance to practitioners as well as academics (Visser, 2010). Whilst an analysis of the perceptions of HR practitioners may be 'innocuous and uninteresting' to IR scholars (Marsden, 1999, p.109), the actions, spans of control, and agendas of HR functions are integral to outcomes for workers and merit analysis. The research makes an original contribution in its findings of the ways in which HR practitioners construct 'doing the right thing' as first and foremost protection of their organisation from litigation whilst also emphasising the 'rightness' of this for employees.

The paper identifies the existing literature which considers HR's role in implementing legal requirements, outlines the methodology of the data collection and analysis, and presents an overview of the findings.

HR roles in the application of 'hard' employment law

In the era of the protective employment legislation introduced by Labour governments in the late 1960s and 1970s, including the first anti-discrimination laws, the Equal Pay Act of 1970, the Sex Discrimination Act of 1975, and the Race Relations Act of 1976 (McKay, 2011), personnel specialists had begun to derive confidence as 'interpreters and implementers' of the law within their organisations (Legge, 1995, p. 9). Legge presents the personnel management role in this respect as a form of 'deviant innovation', that is, the 'attempt by personnel specialists to gain acceptance for a different kind of organisational success criteria, reflective of social as much as business values, by which their contribution could be judged' (ibid. p. 12-13).

The personnel/HR role most readily aligned with regulation is Storey's (1992) 'regulator' construction. 'Regulators' 'were interventionists involved in the traditional and essentially tactical role of formulating, promulgating and monitoring the observance of employment rules and industrial relations policy' (Caldwell, 2003, p. 986). In Storey's construction, the regulator can appear to act strategically in that they may be involved in 'big' decisions, however these decisions rarely relate to the strategic orientation of the organisation (1992, p. 176).

The regulator maintains a significant presence operationally, and line managers working with a regulator can 'feel displaced and upstaged' (*ibid*). Notably, Storey talks of the regulator role as potentially becoming defunct, as practitioners see the evolution of the personnel role away from regulation to more aspirational 'modern activities' including development, communication and leadership (1992, p. 177). This discourse is located in a broader rejection by practitioners of pluralist frames of reference for the practice of personnel (*ibid*). Interestingly therefore, the regulator role is viewed as an outmoded, unappealing role from the point of its introduction into the lexicon of HR.

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Reflecting Storey's construction, the legitimacy of the regulator role was perceived to have diminished in the context of the dismantling of collective bargaining (Caldwell, 2003; Cunningham and Hyman, 1999). Participants in the study undertaken by Caldwell (2003, p. 998) indicated, however, that the regulator role was being 'refuelled' or 'reborn' 'by a plethora of new social and employment legislation, as well as new ethical business policies'. As there is now an additional wealth of employment legislation, and an 'expansion of the protectorate' (McCrudden, 2008, p. 206), this suggests that the regulatory role will have been sustained in HR practice, and is perhaps, to draw on Caldwell's analogy, reignited with each change to the employment law terrain.

Paradigms of HRM largely silence any role that HR currently has in respect of external regulation. The dominant HRM paradigm is based in market-oriented, unitarist frameworks which do not consider the role played by the state in constructing, and altering, equality law (Martínez Lucio and Stuart, 2011), and the resulting impact this has on the work of HR generalists. In the contemporary HRM context, Purcell separates HR practitioners into two types in respect of employment rights: 'custodians of rights' and 'gatekeepers' (2012, p. 161). 'Custodians' champion both employment rights and good management practice; Purcell proposes that this involves encouraging the use of alternative dispute procedures within the organisation. 'Gatekeepers' are defined by Purcell as those HR practitioners who minimise exposure to litigation and who act as problem-solvers while lacking the authority to change management behaviour.

Wright and Snell's (2005, p. 180) construction of HR practitioners as 'legal guardians' perhaps aligns most closely with Purcell's 'gatekeeper'. Wright and Snell suggest that the 'legal guardian' aspect of HR's role prioritises compliance to legal and regulatory systems with the aim of avoiding legal proceedings. Legal guardianship in the main can be seen to reflect the suggestion by de Gama *et al.* (2012, p. 106) that the HR function is 'the umpire of fairness and the conscience for the organisation' as opposed to being the 'critic and conscience of an organisation'. In order to investigate these constructions of HR's role further, an in-depth qualitative study of HR practitioner talk was undertaken in 2014-15 in the South West of England.

Methodology and method

This study draws from Edley's (2001) critical variant of Potter and Wetherell's (1987) discourse-analytic approach. This involves an examination of the local deployment of discourses in the context of their broader social implications (Edley, 2001). Therefore, whilst the focus of this study is ostensibly the micro discourses (Alvesson and Kärreman, 2000) of individual practitioners iterating their experiences of enacting equality in their respective organisations, these discussions relate to, implicate and are informed by practitioners' understandings of the discourses of their practitioner networks, the HR profession and of equality and regulation.

The study uses a non-probability sample of 40 HR practitioners, based on the judgement of the researcher to achieve the particular aims of the research (Henry, 1990). Of the non-probability sample types, the sample is 'purposive', as defined by Oliver (2006). Selection of participants for this study was based on their job title, their sex, organisational sector, size of organisation and whether the organisation recognised unions.

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Quantification is generally, although not universally, rejected by discourse-analytic scholars. In order to increase the relevance of the data to non-discourse analytic researchers and practitioners, this study draws on the discourse-analytic work of Hardy (2001) in its use of basic counting techniques to identify to the reader the number of times a discourse occurs in the transcripts of talk, and the number of practitioners who iterate the discourse. This is presented in Table 1 below. Discursive analysis of the talk within each discourse identified in Table 1 is beyond the scope of this research note; this will be reported upon in forthcoming papers.

Findings

Table 1: The discourses of legal guardianship identified in HR practitioner talk

Discourse	Performative aspect of the discourse	Number of practitioners	Number of instances
Focus on compliance	Talk which locates legal guardianship intertextually in the wider discourses of equality and diversity, and the role of HR	19	26
'My job is to protect you'	Talk of ownership of the role of protecting the organisation as a whole, and its line managers, from litigation	14	21
The claim to employment law knowledge	A claim to specialism and expertise; juxtaposes the complexity of employment law with line managers who are 'too busy' to deal with this	12	17
'Well, the solicitor says…'	The requirement to back HR advice with the force of the external legal advisor	15	18
Doing the right thing	Utilitarian arguments and ethical arguments often presented in such a way that it is difficult to disentangle them	19	32
Border control	Talk of HR controlling the borders of legally permissible practice	20	32
Tribunal talk	Talk of raising awareness, consequences and risk associated with employment tribunals	17	23
Good line managers	Know to check with HR	25	34
Hand-held line managers	Too reliant on HR	17	21
Dinosaur line managers	Exhibit old-fashioned and risky behaviour; attempt to resist HR	19	39
'I know my rights'	Talk of trade union reps and employees in the context of rights and awareness:	28	39
	Puppet reps: Enable the HR practitioner to fulfil an employee champion role by proxy		
	Linkers: Reps who highlight members' characteristics when representing them in individualised HR processes		
	Rights-Googlers: Employees aware of their rights: sometimes misinformed about specifics		
	Passive South West employees: Less aware of rights and less volatile than employees elsewhere in the country		
The bedrock of process	The importance of process; Controlling line manager decision-making by only devolving elements of HR processes	17	31

Discussion

Wright and Snell (2005, p. 180) define legal guardianship as that aspect of an HR practitioner's role that prioritises compliance to legal and regulatory systems with the aim of avoiding legal proceedings. The findings expand and modify Wright and Snell's (2005) definition in identifying a 'regulator'-type role (Storey, 1992), a 'legal guardian' now understood in a unitarist framing of the employment relationship. Whilst the primary orientation of the role is to protect the organisation from litigation, practitioners claim that a good level of fairness for employees is ensured in compliance with the law. These aspects of the findings are considered below. The discourses identified in the study which highlight the ways in which HR practitioners undertake the legal guardian role by steering line managers' decision-making will be considered in a separate paper focusing on the HR/line manager relationship.

Ostensibly, whilst legal guardianship appears far removed from HR business partnering and Ulrich's calls for practitioners to move 'beyond the roles of policy police and regulatory watchdogs' (1997, p. viii), the legal guardianship aspect of HR generalist practice represents a hybridisation of HRM and personnel management discourses: arguably 'legal guardians' are regulators (Storey, 1992) operating in a unitarist understanding of the employment relationship. This is evidenced in the discourse of 'My job is to protect you' in which HR practitioners identify that an essential part of their role is to ensure that managers do not breach employment law given the financial and reputational risks of legal action.

Whilst the starting point for HR is the avoidance of legal action, implicit in this from the perspectives of the practitioners is that 'right' outcomes are also achieved for employees. This is evident in the discourse of 'Doing the right thing' which highlights that practitioners maintain an ostensibly organisation-focused role and simultaneously act covertly as 'employee champions' (Ulrich, 1997) identified by practitioners in the discourse of 'Doing the right thing' as 'wearing two hats' role for example by steering reps to help employees. Therefore, whilst the findings reflect de Gama *et al.* (2012) in that HR act primarily as the conscience for the organisation, the construction of the equality law requires practitioners to devote considerable time and skill to achieving outcomes that are fair for employees. Whether the wearing of 'two hats' indicates a genuine aim on the part of HR to act for employees or constitute part of the overarching aim to protect the organisation is difficult to discern.

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HR practitioners demonstrate noticeably few oscillations (Edley, 2001) and tensions in iterating what their practice involves. This arguably demonstrates that legal guardian role is one that HR practitioners are very used to enacting and arguably that the role enables practitioners to assume both a business-oriented and a social justice position, thereby going some way to satisfying the often contradictory performance and employee welfare

concerns identified in the HR literature. To practitioners, the law enables HR to be both management's 'partner' and employees' 'champion' (Ulrich, 1997, p. 45).

Conclusion

In the context of the literature which identifies the tension in HR practice between organisational performance and fairness of employees, this empirical study finds that HR practitioners claim a role that is principally oriented to protecting their organisation from legal action but that also implicitly involves fair outcomes for employees given the scope of the equality law. The HR practitioners in the study demonstrate ownership of a role which aims to produce organisationally sensible outcomes (Edelman *et al.*, 1999) that balance commercial and social justice aims. The study highlights the significance of hard law as the basis for the fairness element of the legal guardian role undertaken by HR.

About the author

Having previously worked as a generalist Human Resource Manager, Helen Mortimore is a Senior Lecturer in HRM, teaching on a range of undergraduate and postgraduate business and HRM modules. The underpinning aim of Helen's research is to examine the realities of HRM in work organisations from the perspectives of HR practitioners.

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