

# **A Reflexive Approach to the Critical Interpretation of Employment Tribunal Judgements**

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## Abstract

This thesis is based on the critical interpretation of a selected series of employment tribunal judgements all of which deal with aspects of standard or burden of proof in sex and race discrimination cases. A reflexive approach is adopted in an attempt to provide a better understanding of discrimination law as an organisational discourse and as a potential force for emancipatory change in the workplace. The research examines the conceptual links between management, employment relations, discrimination law and everyday social processes in an attempt to uncover the influence on employment relationships and professional practice of a more thoughtful interpretation of employment tribunal texts.

My contributions to knowledge in the domains of research methodology and professional practice fall into 3 categories. First, an exploration and synthesis of reflexive approaches, hermeneutic understanding and aspects of legal theory to develop and embed my subjective epistemic stance within a pluralistic conceptual framework. Second, the design and employment of a distinctive interpretative analytical framework for discourse analysis drawing on established perspectives in the fields of management and legal theory. Combining the 2 contributions in an epistemologically consistent way has allowed me to bring a methodologically individual dimension to the examination of employment tribunal narratives under the banner of *discourse analysis with a critical edge*. My third contribution has been to use the analytical framework to detect the storylines of inference drawing, common sense interpretations and legal responses to social issues. By exposing the key role played by the subjective concept of drawing inferences, I have undermined the perception of the employment tribunal as an 'objective industrial court'. Further, I have shown how 2 of our most prevalent informal social and subjective theories - commonsense and reasonableness - feature heavily in the legal arena of the employment tribunal and how legal solutions to social problems may present unintended consequences for the employment relationship. In so doing, I have disturbed the image of discrimination law as a sealed and singular phenomenon operating beyond the social contexts in which it impacts and opened up potential avenues of further multi-discipline research around subjective interpretations in environments framed by legislation and authority.

Finally, I have unearthed some personal dilemmas and opportunities as a senior professional working within a large public sector organisation around how I engage with my professional practice.

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9. Synopsis of Igen Ltd v Wong, Chamberlain Solicitors and another v Emokpae, Brunel University v Webster and the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission (2005) IRLR 258 CA.
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11. Burden of Proof Directive.

**Bibliography**

## **Candidate's Statement**

I confirm that this thesis is my own work and has not been undertaken in collaboration with any other organisation.

## CHAPTER ONE

### INTRODUCTION

#### **A stone worth lifting**

As I read a newspaper or professional journal or listen to the news on television or radio, I continue to be surprised by the prominence given to cases involving workplace disputes and the seemingly unquenchable public thirst for details of the latest 'outrage'. Increasingly, I detect that this interest is not solely about the alleged behaviour of the employer, but also about the employee's behaviour in bringing the matter to an employment tribunal. Such widely reported cases tend to involve the potential for large cash payouts, the involvement of high profile figures and organisations, or both. They represent, or course, only a tiny fraction of the 'employment casework industry' and the vast majority of workplace disputes are resolved through in-house employment relations procedures or mediated agreement before an employment tribunal hearing becomes necessary. Even where the hearing stage is reached, the remedies are usually of little interest beyond the parties involved go largely unreported and the financial compensations relatively minor.

As an experienced personnel professional, I have been engaged with employment practice and work related legal matters for most of my working life and it seems to me that the surprise I referred to in the first sentence of this introduction needs to be unpacked. Accordingly, this narrative is a personal venture into aspects of workplace law and practice and an attempt at combining my professional and intellectual interests. I should be clear from the outset that my work – and therefore this narrative – is founded on four straightforward principles which at this stage I invite the reader to acknowledge. First, to be classified as a worker in 21<sup>st</sup> Century Britain

encompasses a very broad definition and for the individual provides access to a wide range of employment law statutes. Second, to gain access to the personnel profession in 21<sup>st</sup> Century Britain increasingly involves an understanding of these statutes at the technical level and their application in the workplace. Third, that for anyone involved in the world of work, it is almost impossible to be unaffected by the flow of workplace legislation in recent years. Fourth, the legal framework is constantly embellished by evolving casework and decisions made in the various tribunals and courts which form the practical infrastructure of employment law interpretation.

Running alongside this rapid expansion of the legislative framework and the creation of an increasingly complex suite of workplace policies has been an extensive, but largely inconclusive, debate about whether employment law provisions have swung the balance of power in employment relationships in favour of the employer or the employee. Daniels (2006) argues much of the legislation introduced in the late 1970s was designed to reduce the collective strength of trade unions and swing the balance back in favour of the employer. By contrast, more recent entries on the statute book focus on individual protection and send the needle back in the direction of the employee or worker. My focus on sex and race discrimination - born in the 1970s and widely seen as an attempt to socially engineer a 'fairer' workplace - may shed some light on this employer/employee balance issue. It should not be assumed at this stage, however, that the intended benefits and protections for the employee have all emerged in practice. Potentially, something of a double bluff perhaps for the critical researcher seeking to emancipate the oppressed.

What appears less evident to most is that many of the original employment law provisions - dating back to the 1970s - remain pretty much intact and this is particularly so with regard to sex and race discrimination law. I recognise that discrimination law now has a much wider application with later provisions now covering disability, sexual orientation, religious belief and age. That aside, and with the benefit of over 40 years of legislative amendments

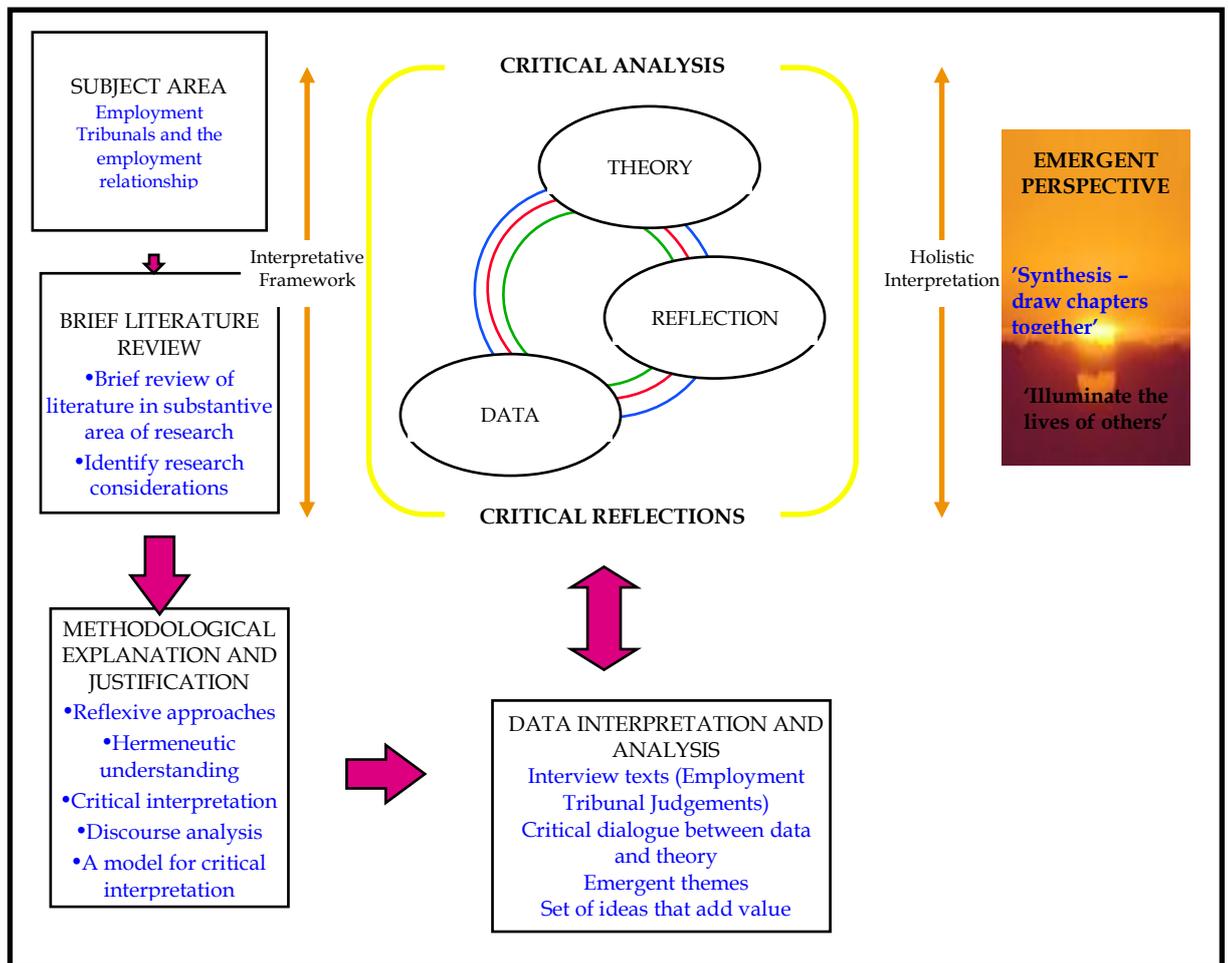
and case law to support and clarify the original sex and race discrimination statutes, a student of employment law could be forgiven for making an early assumption that most of the “hard cases” would have been determined, that the application of the law would be relatively straightforward for managers and workers alike and that the scope for alternative interpretations would be at the margins of legal debate. What follows is designed to consider this suggestion, particularly in the context of how employment tribunal determinations are reached and the relationship between employment law, personnel practice and individual responses. I seek to examine what lies beneath the surface of employment tribunal judgements and what are these texts saying that matters to individual employment relationships and professional personnel practice?

To help me achieve these aspirations, I am seeking to indicate the emergence of employment legislation as an influential and pervasive discourse - particularly for those employed in the personnel profession - and to illustrate how one element of this legislation - discrimination law - has become part of the psyche of the workplace. I will be developing the argument that legislative provisions are now so embedded within organisation policies and practices that it is impossible to escape their reach. What is less clear, to me at least, is an understanding of the dynamic between this legislative framework, the ‘theatre’ played out in employment tribunals, the practice of the personnel profession and the influence on individual employment relationships. I also seek to examine the taken for granted picture of employment tribunals as neutral, ‘discrimination free zones’ making legal decisions according to legal rules within a legal framework and to consider the impact of such employment tribunal decisions. Whilst I recognise that Mansell et al (2004: p12) have a point with their contention that “the law works because the institution itself has become a part of our “taken for granted” world”, it does raise a question about whether we take too much for granted, particularly in the context of the interplay between employment law and workplace matters.

In my view, it is important to lift this stone to see what lies beneath and I invite the reader to join me on the research journey outlined in the next section. The potential prize is a degree of illumination around my research issue: towards a better understanding of the impact of discrimination law as a potential force for emancipatory change in the workplace. Underpinning this prize, is a potential three part contribution to knowledge; the creation of a multi-faceted critical perspective, the design and use of a distinctive interpretative analytical framework and the emergence of a set of ideas that add value to personnel practice.

### **Research strategy**

This short preamble points in the direction of the raw material and the focus for this study and it is important to set out at this early stage how it will be used to produce a meaningful research project. Figure 1.1. illustrates my route map and is discussed briefly below.



**Figure 1.1** Research Strategy – Critical interpretations of employment tribunal judgements

The opening paragraphs of this chapter provide an indication of my subject area of interest and I recognise that the complex area of employment relations has been a regular watering hole for researchers. What appears to be a far less visited source is the public record of employment tribunal judgements. An examination of how these documents might be exposed to alternative interpretations might extend our thinking in the employment relations field. Drawing together and probing this data field which spans employment law and employment relations has the potential to reveal some interesting implications for personnel policy and practice.

The literature review is designed to explore and challenge these ideas, to provide some theoretical basis to the debate and, most importantly, to identify

potential research considerations. I will draw on writings around employment relations in organisations and the psychological contract at the theoretical level to provide a backdrop to my considerations of the influence of discrimination law. In an attempt to reflect more practical impacts, I will look to some of the key agencies involved in the employment relations arena to add a degree of balance to the debate.

The next step along the route involves consideration of my philosophical underpinnings and methodological approach and the development of a framework for analysis – what I later term the ‘research engine’. My ambition here is to provide a pluralistic approach drawing on critical reflexivity and hermeneutic understanding ‘spiced up’ with elements of legal interpretation to provide a distinctive interpretative model. The second part of the thesis brings the interpretative framework ‘face to face’ with the employment tribunal texts designed to produce a thoughtful discourse analytical debate. All of this should allow me to facilitate the reflexive analysis I seek to undertake and to generate some emergent themes which may, in turn, elicit a set of ideas that add value to the personnel profession.

The research strategy illustrated at Figure 1.1 and the explanatory narrative contained in this section of my introduction betray an approach based on reference to existing literature to identify research considerations or ‘hunches’ followed by a reflective analysis designed to generate tentative ideas or theories as an outcome of such analysis. An approach firmly located under the ‘inductive banner’ and in contrast with the deductive approach more closely aligned with positivist thinking. The latter recognisable by the development of a theory or theories prior to empirical research. (Gill and Johnson, 1997).

### **Pursuit of a professional and intellectual identity**

Moving on, the remainder of this introduction is devoted to setting the professional and intellectual scene from a personal perspective, outlining my

approach to critical interpretation through discourse analysis and presenting my analytical framework for interpretation. The chapter concludes with a short summary of my intended research journey.

As I have already indicated, my professional interest in employment law, and specifically, sex and race discrimination law, has developed over 20 years of working across a range of appointments in the personnel profession. My direct experience is wholly public sector based and often close to the policy development arm of Government departments. Any wider understanding of legislative influence in the private and voluntary sectors has been gained indirectly through interaction with colleagues and engagement with the subject through a range of learning opportunities and literary sources.

To some extent, this is a personal and professional story – from a distance and close up. When I came to Thames Valley Police in 1997 as their first non-uniform, professionally qualified Head of Human Resources, I joined an organisation caught in the headlights of two damaging employment tribunal cases. Their first of any real significance to be faced by the organisation. Having only previously witnessed employment tribunal activity at a ‘safe distance’ – from a relatively detached policy desk in the Ministry of Defence – I could almost touch the tension created within the organisation by having to face the drama of colleague on colleague confrontations played out in public. Attempting to influence the appeal stages of the cases ‘from the stands’ certainly brought me closer to the action than I had been previously. As has been the experience of many of my contemporary professional colleagues, it was not too long before I found myself even closer to the action as a witness for the organisation. Involvement in employment tribunals from these three vantage points has provided me with a significant experiential perspective. A perspective which has, of course, to be recognised in my own pre-understandings and my approach to this research project.

Within the wider context of sex and race discrimination law, a particular aspect of legal interpretation has attracted my intellectual as well as my professional interest. New Burden of Proof Regulations, introduced in 2003, have sparked a fierce debate and a significant shift in the determination of discrimination cases. The employment tribunal cases which represent my data field are all drawn from this area of discrimination law.

Remaining at the intellectual level, I am also intrigued by the language, legal interpretation and debate around this whole area of the employment environment and the opportunities for critical and reflexive study. A language that is widely recognised to be power-laden and an effective camouflage against the intrusion of the non lawyer (Holland and Webb, 2003). My own reading of the situation is that most of this discourse has been confined to legal jurisprudence rather than organisational theory and investigated even less as a source of multi-disciplinary study. I sense that I have lived through the creation of a *new* workplace discourse with multiple meanings that merit further examination.

At this introductory point, I have chosen to make a somewhat artificial split between professional and intellectual perspectives to aid my understanding and explanation. I recognize that I will need to draw them together later as I endeavour to satisfy one of the central tenets of DBA study, providing a bridge between theory and management practice. I also note that my own experiences - both social and professional - will contaminate my work to some extent and that part of my task is to harness my contribution as a researcher as a positive and illuminating contribution to this discourse. That said, I make no apology for seeking to establish in the mind of the reader that this professional exposure and experience on the one hand and my intellectual interest in employment law and legal interpretation on the other provide my starting off point for this thesis.

## **A route towards critical interpretation**

It seems to me that the routes to critical discovery allow the researcher considerable scope for epistemological perspective and methodological choice. As far as the former is concerned, I do not intend to pass up this opportunity for exploration as I seek to draw on and blend a critical perspective, reflexivity and hermeneutic understanding. I am encouraged by such latitude and the apparent endorsement given by Cassell and Symon (2004: p2) “qualitative methods might be informed by all possible epistemological positions” and the assertion by Fournie and Grey (2000) that critical research draws on a number of intellectual traditions and is committed to some form of reflexivity. McAuley et al (2007: 48) record with elegant simplicity the opportunities provided by a critical theoretical perspective, “it enables us to reflect on the ways in which we need to constantly question issues of organisational design, leadership and communication.....” Equally, I take on board the importance of surfacing my own philosophical assumptions through reflection to underpin my approach to this research project and to help provide the consistency between theory and method, thinking and doing. I will comment on methodological choice later in this section, but, for now, suffice to say that I will be developing an approach to analysis that allows me to exploit the pluralistic epistemological position mentioned here.

Johnson and Duberley (2000) categorise and link epistemological approaches to reflexivity in a manner that helps to provide the clarity and consistency I referred to in the preceding paragraph. In their contention, critical research encourages epistemic reflexivity which “entails the researcher attempting to think about their own thinking ...” (Johnson and Duberley (2000: p178)). These authors do not deal with hermeneutic approaches substantively and this might illustrate a doubt concerning where to place the hermeneutic tradition: as a philosophy or as methodological choice. The title of the McAuley (1985) article “Hermeneutics as a Practical Research Methodology in Management” would appear to leave little room for doubt, but in McAuley

(2004: p192) he comments “hermeneutics is understood as a philosophical take on interpretivist social science”. For my part, this apparent lack of certainty only serves to provide further encouragement to explore these muddy waters.

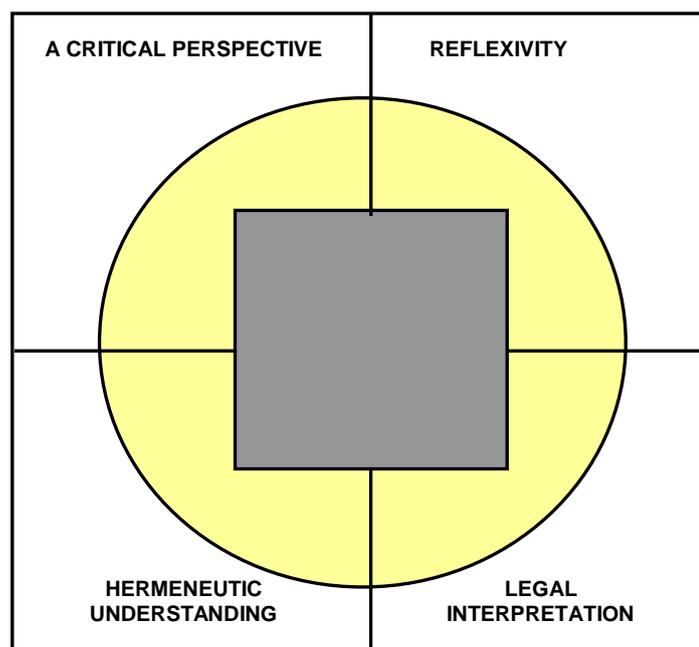
I include this short debate here to illustrate the potential difficulties of trying to separate theory and method, but, more importantly, to announce to the reader that my own ‘philosophical mix’ includes a critical epistemology, the associated reflection on the process of understanding and the key hermeneutic principle of engaging my own pre-understandings. If a label is necessary, critical interpretation seems to fit the bill.

Whilst not wishing to complicate this ‘mix’ still further and risk compromising my research by drawing on alternative disciplines and underestimating or undermining the distinctive features of each, there is no escaping the recognition that my research material and venue are located within a legislative framework, subject to legal rules and legal interpretation. It seems appropriate, therefore, to consider ideas from legal theory in the critical and interpretative dimensions and to import such thinking to inform my interpretative lens.

The development of legal theory has progressed along a route not unlike the journey undertaken by the social sciences and is characterised by various points of departure from the dominant positivist base. By way of example, Dworkin (1986: vii) opens his anti-positivist account with the challenging statement “that legal reasoning is an exercise in constructive interpretation”. In a more populist sense, Dominic Carman (2002: 65) describes his father – George Carman QC – as abiding by the motto that “The life of the law is not logic but experience.” The issues raised by alternative interpretations in a legal context and why it is that some interpretations are deemed to be more authoritative than others are central to the debate amongst critical legal thinkers (Mansell et al, 2004). The refusal to accept the legal positivists view of law ‘as it is’ and somehow hermetically sealed, protected from other influences – moral or social

enquiry, for example – marks the point where most commentators launch their alternative jurisprudence (Wacks, 2005).

Albeit briefly at this stage, I have attempted to show how a critical perspective, reflexivity, hermeneutic understanding and legal interpretation can form a rich and exiting cocktail: my version of critical interpretation. The ‘philosophical mix’ is represented at Figure 1.2. I will develop these thoughts in more detail in chapter 4.



**Figure 1.2** The Philosophical Mix

### **Critical interpretation through discourse analysis**

At this stage of my opening piece, I seek to harness the fusion of the professional, intellectual and epistemological dimensions discussed briefly above to inform a methodological approach consistent with this philosophical and professional underpinning. In other words, to outline the practical element of the research proposition and to provide a brief introduction to the methodological considerations that are the focus of Chapter 5. Developing

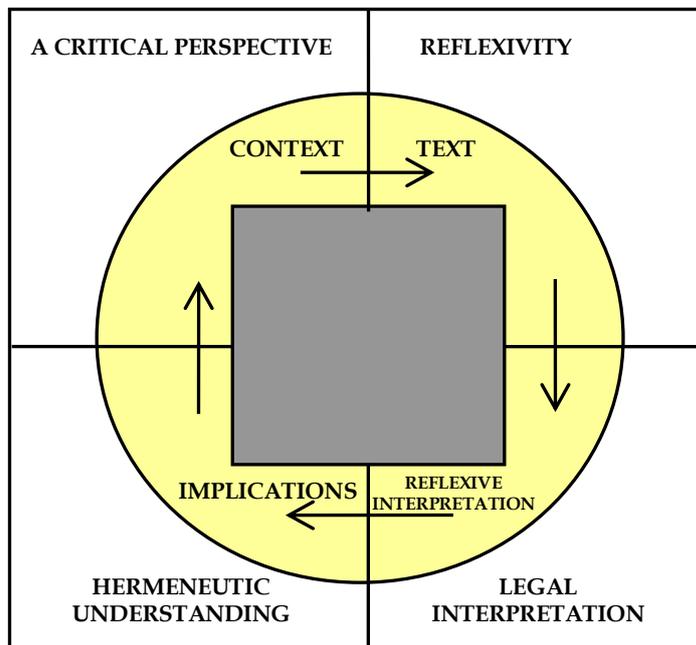
these conceptual and methodological considerations into a practical interpretative analytical framework is a substantive part of my research project and the focus of Chapter 7.

In turning to discourse analysis as a methodology, I am recognising that interpretation and analysis of text have long been associated with legal scholarship and, more recently, discourse analysis has emerged as one of the 'new' critical approaches that are becoming increasingly evident in management and social research. Interest in discourse does, of course, go well beyond the epoch referred to here as 'new', but there is some support for the view that discourse analysis is a topical theme in management studies and one that offers the potential for an exciting contribution to qualitative research – see Alvesson and Skoldberg (2000).

As part of my dipping a toe in the unpredictable and diverse waters of discourse analysis – albeit naively – I have been around a few buoys, completed a number of circles and reached a few dead-ends in my endeavours to make sense of the 'sub-disciplines' of discourse analysis. In so doing, I have formed a view that many of the choices are mine, I may need to defend my choices at a later stage, but they need to work for me in the context of this research project. To help me, I will draw on the established perspectives of Ronald Dworkin and Norman Fairclough in their respective spheres of legal theory and critical discourse analysis. Dworkin is regarded as one of positivism's most important critics, rejecting the notion of a general theory about the existence and content of law in favour of a theory based on constructive interpretation. In his distinctive style of critical discourse analysis, Fairclough has focussed on the significance of language as an important part of our social lives and how language is connected to other areas of our social environment. Beyond this, I attempt to put a personal spin on the process of analysis and develop a distinctive approach. My venture into discourse analysis for the purposes of this research will attempt to release some of the potential to which Alvesson and Skoldberg refer.

As a further prelude to the discussion in Chapter 5, I invite the reader to note that I am proposing a four phase methodological approach to discourse analysis designed to uncover alternative interpretations. First, to relate the social issue in question – in my case, sex and race discrimination at work – to the social event of the employment tribunal and locate it within the wider **context** of employment practice. Second, to select and identify the examples of **text** which form the ‘raw material’ for analysis. Third, to undertake the **reflexive interpretation** process of analysing the chosen discourse. Fourth, to consider the **implications** of the first three phases in terms of emergent ideas that may add value to legal and personnel practice.

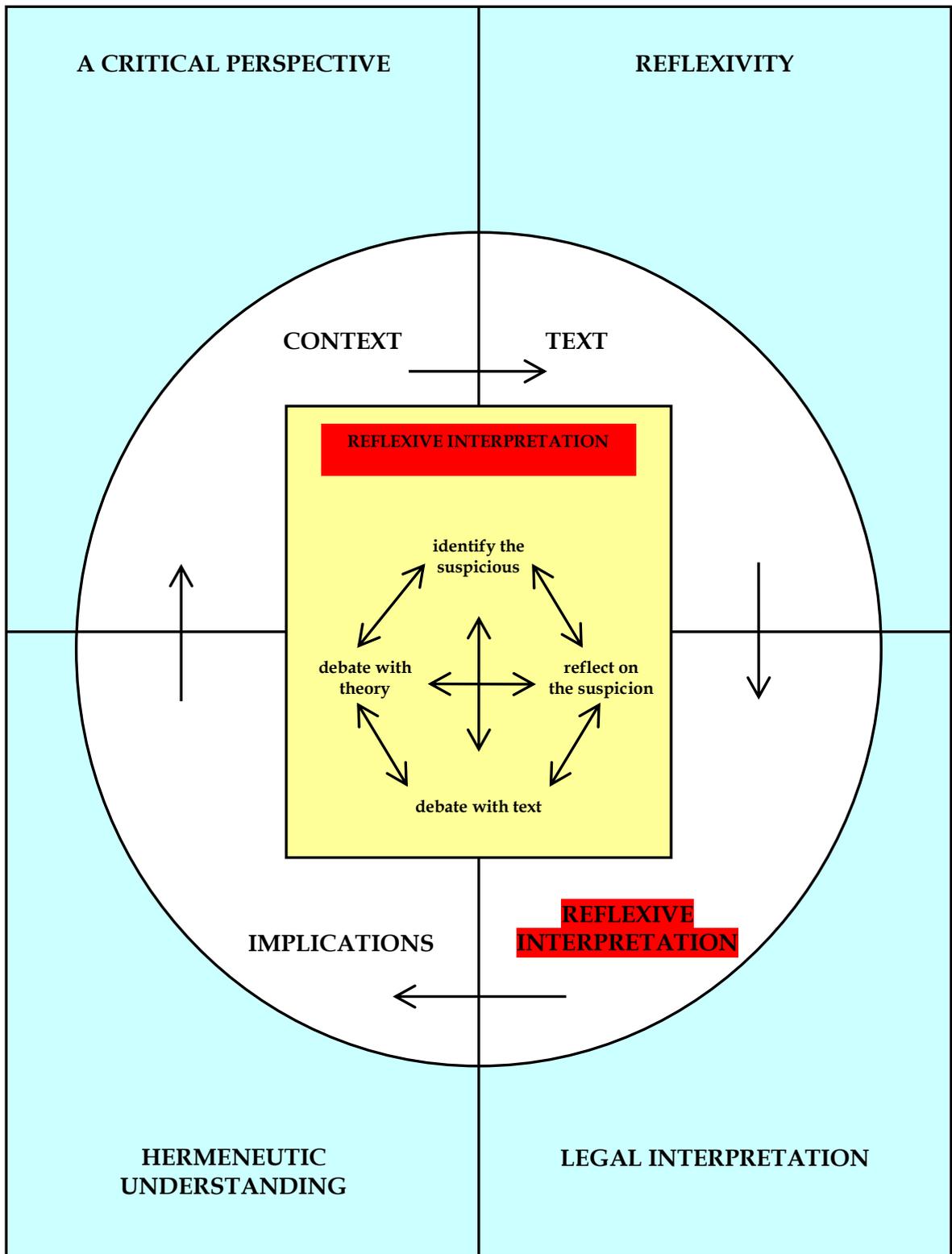
The ‘philosophical mix’ and my approach to methodological process are brought together and illustrated at Figure 1.3



**Figure 1.3** Philosophical Mix Meets Methodological Process

## **An interpretative analytical framework**

In closing this introduction, I complete the signposting exercise by reference to Chapter 7 where theory and method meet and are 'brought to life' in a 'research engine' designed to facilitate and frame my analysis. This involves looking more closely at the reflexive interpretation phase of the approach to reveal how the model can work in practice. To me this necessitates a multi-directional circularity of thinking based on identifying 'suspicious' words, phrases or propositions, reflecting on this suspicion and debating this thinking with the text and the wider theoretical library. This synthesis of conceptual backdrop and analysis through reflexive interpretation is represented at Figure 1.4. I seek to apply these elements in a consistent and unified way in order to produce the outcomes I seek and to demonstrate **discourse analysis with a critical edge.**



**Figure 1.4** Discourse Analysis with a Critical Edge

From the analysis represented at Figure 1.4, my ambition is to identify a number of emergent themes which, when subjected to deeper analysis, release ideas of value to the personnel and legal professions. These discoveries provide the subject matter for chapters 8 -10.

### **Research journey in short**

As I embark on my research journey, my aim is to illustrate and expose alternative interpretations of employment tribunal texts drawn from one aspect of discrimination law, namely the burden of proof in sex and race discrimination cases. Beyond that, to examine the influence of these alternative interpretations on individual employment relationships and personnel professional practice through a reflexive critical analysis. In so doing, I seek to make a contribution to knowledge in three ways. First, I am looking to adopt a critical perspective and draw on aspects of reflexive approaches, hermeneutic understanding and legal theory to create a pluralistic epistemological environment. Second, to develop and employ a distinctive interpretative analytical framework driven by discourse analysis and designed to operate within this environment. I have termed this **discourse analysis with a critical edge**. Third, I seek to translate my emergent themes into a set of ideas that add value in my professional practice.

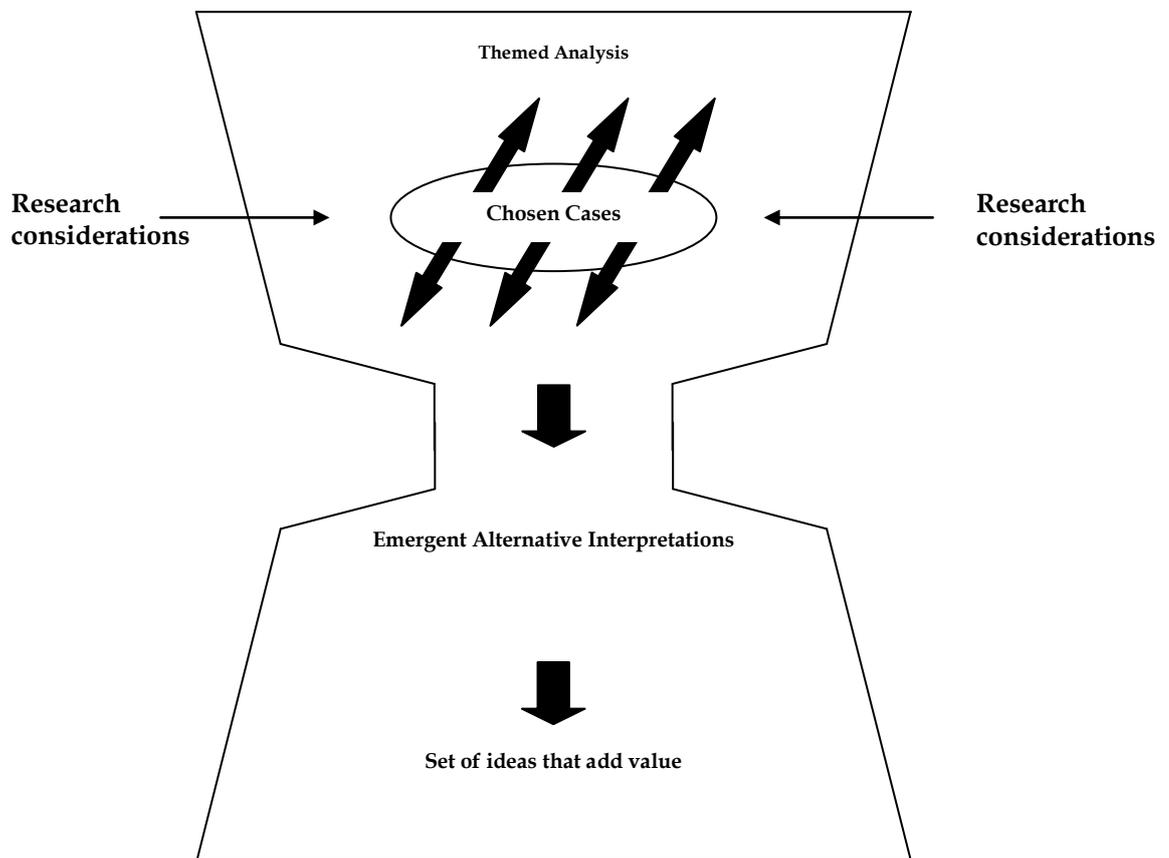
In my attempt to achieve these ambitions, I intend to follow a process of exploring my epistemological perspective and my methodological approach through to a reflexive cycle designed to engage with my pre-understandings, expose any inconsistencies, draw out alternative interpretations and generate a set of tentative ideas.

My focus at the outset will be to locate my professional background as a Personnel Director and my research interest in discrimination law in the fabric of organisation and employment relations literature. As well as providing the employment landscape base-camp for my research venture, it is designed to

identify research considerations for debate later in the thesis. I will then endeavour to develop a convincing and consistent conceptual foundation based on the synthesis of a critical perspective, reflexivity and hermeneutic interpretation. More distinctively, and, perhaps, more controversially, I seek to sharpen my research focus and influence my interpretative analytical framework by reference to legal theory. In bringing together ideas from all four dimensions under the heading of **critical interpretation**, I seek to establish an analytical process that leaves little room for the “taken for granted” and much scope for critical questions.

At the research methods level, I will explore a methodology based on the analysis of text and seek to provide a route to the critical examination of employment tribunal judgements – as one manifestation of the employment discourse. Accordingly, I will illustrate the development of an interpretative analytical framework influenced by perspectives on legal theory and by approaches to the analysis of texts within their social contexts. In essence, my approach will be to pursue a form of interpretative analysis that I have chosen to term **discourse analysis with a critical edge**.

In exercising my analytical framework, I seek to engage in a healthy debate with the text and produce a robust and thoughtful critical analysis. In a practical sense, this will involve a themed analysis of the data designed to uncover alternative interpretations which can be debated with my research considerations drawn from prior reading. All of this should allow me to extract the raw material for a set of ideas that add value. The approach is depicted at Figure 1.5. Unlike many research strategies, where the endeavour is the elimination of variance, I seek to feed off variability and difference to encourage interpretation and promote understanding (Potter and Wetherell, 1987).



**Figure 1.5** Themed analysis of employment tribunal judgements

In sum, I seek to examine the presumption of employment tribunals as the ‘legal theatre’ for resolution of employment matters in a ‘neutral manner’ according to legal rules and to discover and analyse the contradictions and inconsistencies revealed by my interpretation. Along the way, I turn to my analysis of the written judgements to contribute to the understanding of the core assumptions that lie behind such judgements and how they might influence personnel practice and individual employment relationships. I look to do so with a pluralistic approach that represents a significant challenge in itself, particularly around my own reflexive capabilities. Undaunted and aware that some consistent themes may emerge that seek to deny my quest to unsettle the established discourse, I set off in search of contradictions and alternative images.

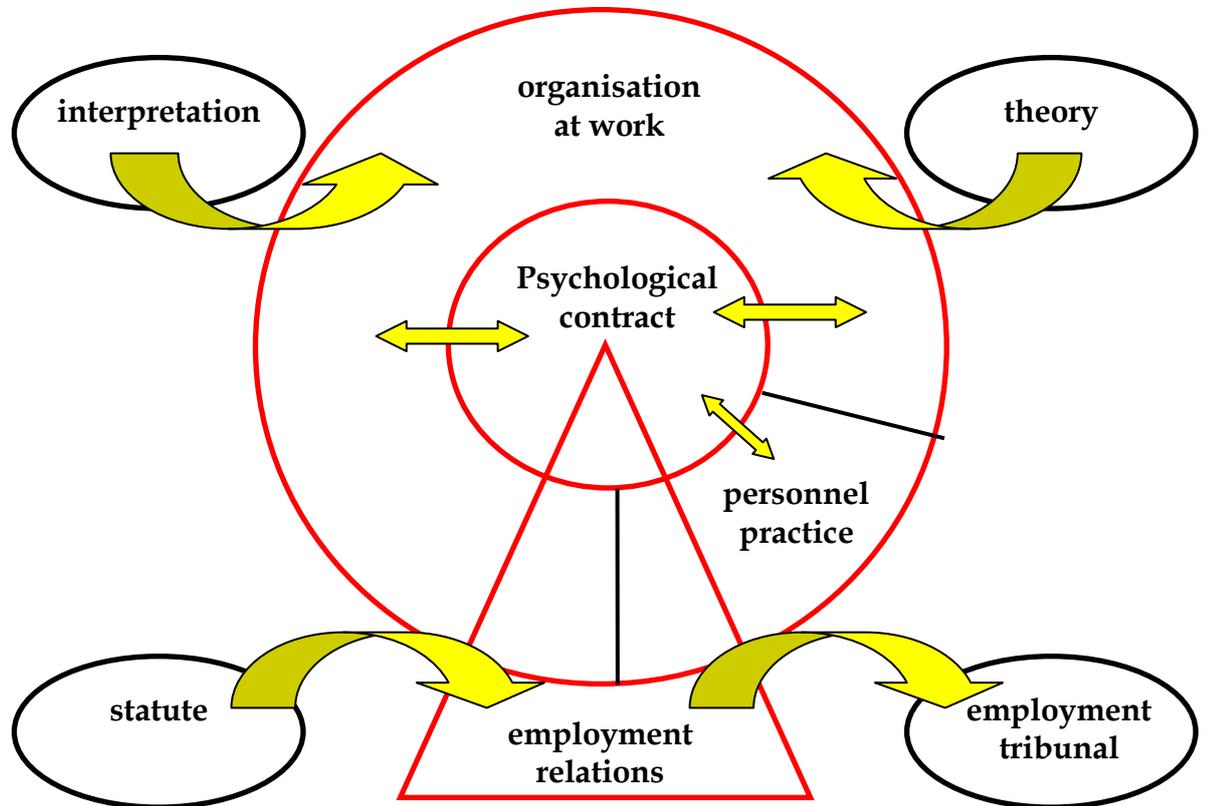
## CHAPTER TWO

### A PERSPECTIVE ON THE EMPLOYMENT LANDSCAPE

Before progressing to the more conceptual and analytical phases of this research, it is important to consider employment relations in the wider organisational context and to understand how employment law has taken hold in organisational life. This chapter seeks to provide that understanding. I will begin with a brief consideration of the importance of organisation theory in my debate around organisation issues and move through to a discussion about employment relations at this macro - or organisational level - and then - as an exemplar - examine an issue at the micro level through reference to the connections between employment relations and the psychological contract. In covering this ground, with reference to the relevant literature, I will attempt to expose the influence of the management agenda, represented by the guru, and an apparent reluctance of practitioners to consider the role of organisation theory in the employment relations equation. Beyond that, I seek to illustrate how employment relations and the elements of the organisation associated with personnel professional practice are involved in attempting to balance organisational and individual aspirations within an increasingly complex legislative and policy framework. The latter is designed, in the main, to protect the interests of the worker and to contribute to maintaining the aspirational balance referred to here.

The employment tribunal process can be viewed as the release valve for the most heated employment relations exchanges. They lie outside the organisation and offer the opportunity to decide workplace disputes in a 'neutral' and legally based arena. They are not necessarily concerned with resolution of the human relationship issues they are presented with. Attempts to integrate these tribunal decisions back into the organisation are rarely straightforward and these difficulties are the subject of further discussion later

in this thesis. For now, Figure 2.1 is designed to illustrate the scope and inter-connectivity of the various components I have mentioned here and endeavour to show personnel practice and employment relations as parts of the organisation whole.



**Figure 2.1** The personnel practice and employment relations components

What the diagram above also illustrates are the potential links between theory and practice, policy and implementation and statute and interpretation. It promotes questions about the extent to which organisational theory is relevant to the practitioner and the role of the researcher in trying to make sense of these multiple dimensions. Fundamentally, it draws attention to the complex nature of knowledge production as a practical activity within 'real world' surroundings. In other words, it encourages reflexivity. (Tsoukas and Knudsen, 2003)

I have used the term 'reflexivity' on a number of occasions already in this narrative and built the concept into my interpretative framework introduced in

Chapter 1 and developed more fully in Chapter 8. I pause to offer an explanation of what I mean by reflexivity in the context of this research project. I start from the premise of attempting to think about my thinking (Johnson and Duberley, 2000) and the mutual and continual relationship between myself as the researcher and my research material (Alvesson and Skoldberg, 2000). At the practical level, this entails considering how my pre-conceptions, interpretations and reflections interact with my empirical research material in the pursuit of knowledge development. I seek to demonstrate these reflexive characteristics by conscious recognition and linguistic transparency of my epistemological commitments as the research project progresses.

In traversing and debating the components identified in Figure 2.1, I am looking to try to understand the interrelationships highlighted and to draw out a number of research considerations for examination later in this narrative. I approach this task in a reflexive manner aware that any references in this chapter are likely to surface in discussion later in this thesis.

### **Organisation theory and the organisational context**

At the start of this chapter, I hinted at the challenge of persuading practitioners in the management field of the relevance of organisation theory. Even at the policy making level there appears to be a greater appetite for a consultant's 'ready made model' rather than influential theory based on context based research. Tsoukas and Knudsen (2003) suggest that a lack of clarity around what organisation theory actually represents may be partly responsible. Perhaps, but I also suggest that the continuing drive for efficiency and performance improvement in organisational activity has led to a preference for more purposive approaches and the greater recognition of instrumentalism within corporate strategy. Busy managers tend to adopt a reductionist approach, looking to reduce a mass of information to smaller units which enable them to make decisions. I have lost count of how many times I have heard the beleaguered manager cry "that is fine in theory, but I need results".

At such times, the manager is more likely to turn to a project plan and a set of performance indicators rather than consider the sociological discourse or the managerial discourse. What Shenhav (2000) describes as the backbone of organisation theory. Resorting to such instant solutions is even more likely if they can be 'justified' by a recent guru comment or model. Huczynski (1996) attempts to explain the popularity of guru generated management ideas and highlighted predictability, control and esteem as key managerial requirements. He argued that management ideas are likely to continue to flourish and to be in demand if they hit these three buttons.

The theoretical dimension is left virtually untouched in popular management literature, ignoring the political nature of organisations and the consideration of on what terms management is actually conducted in the organisation (Huczynski (1996)). Chiapello and Fairclough (2002:207) capture this point rather elegantly:

“...such texts (those of influential management gurus) have a real influence on the maintenance of dominant ideologies and on the actions of the managers who read them. Yet the lack of a scientific apparatus and a relatively unsophisticated style lead social scientists to treat them with disinterest or contempt, as is more generally the case with popular literature and television. Consequently, such texts are rarely subjected to critique, leaving the field free for them to do their doctrinal work. It seems to us, by contrast, that studying such texts is one of the tasks of social science as we conceive it – to subject to debate what presents itself as given and obvious, and to expose to critique all the social agencies which impose themselves on people, in order to enhance democratic debate.”

When confronted by a more reflective researcher, this context-free, quick-fix becomes less certain and the guru proposition is frequently undermined. It also exposes the lack of reflective activity amongst such writers. It seems reasonable to question the oppressive effect of such guru grand narratives and to seek to uncover the consequences of leaping aboard the latest trend.

Having inflicted a few metaphorical blows on the 'superficial guru' for paying scant regard to organisation theory, I sense that I owe the reader – and the balance of my thesis – an understanding of what organisation theory is and why it is considered important. According to Starbuck (2003: 143), “organisation theory is a collection of general propositions about organisations” and concludes his contribution with the thought that organisation theory is now so complex that it leaves students struggling to make sense of it. This might explain, partially at least, why theory is placed on one side. The description provided by McAuley et al (2007) is rather more elegant and refreshingly void of academic mystery:

“It (organisation theory) is a body of thinking and writing that describes, explains and influences what goes on in organizations. It provides an underpinning body of knowledge that enables us to explore and develop management and leadership theory.” (McAuley et al, 2007: xiii)

Starbuck (2003) also contends that organisation theory is a relatively young phenomenon, with attention focussed on the second half of the 20<sup>th</sup> Century. Shenhav (2000) also places the birth of organisation theory in this epoch and suggests that organisation theory is a 1950s American creation. These commentators address the questions of what organisation theory is, organisation theory's lifespan and, to some extent, the space occupied by organisation theory in the thinking of management researchers. So far, however, I fall short in providing an answer to the significant question posed at the beginning of this paragraph: why is organisation theory important?

In search of an answer, I turn to McAuley et al (2007) for help. The authors address the question as follows:

“Firstly, organization theory helps us to reflect upon and understand who we are and why we are who we are. Secondly, organization theory is about us and how we interact with others during our encounters in a vast array of different, often deceptively ordinary and mundane, social contexts that we take for granted because we cannot see or imagine any alternative to how things appear to be.” (McAuley et al, 2007: 5).

Again, the clarity of the message is important and one wonders if it had been presented consistently in these terms whether some of the complexity referred to earlier would be quite so daunting. To be fair to others, another recent contribution to the understanding of organisation theory – Hatch and Cunliffe (2006: 4) – provides a further neat and unambiguous commentary:

“.....whenever you create your own meaning or grasp someone else’s, you make things, feelings, ideas, experiences values and expectations into ideas or concepts. In doing this, you explain yourself and your world and this constitutes theorising.”

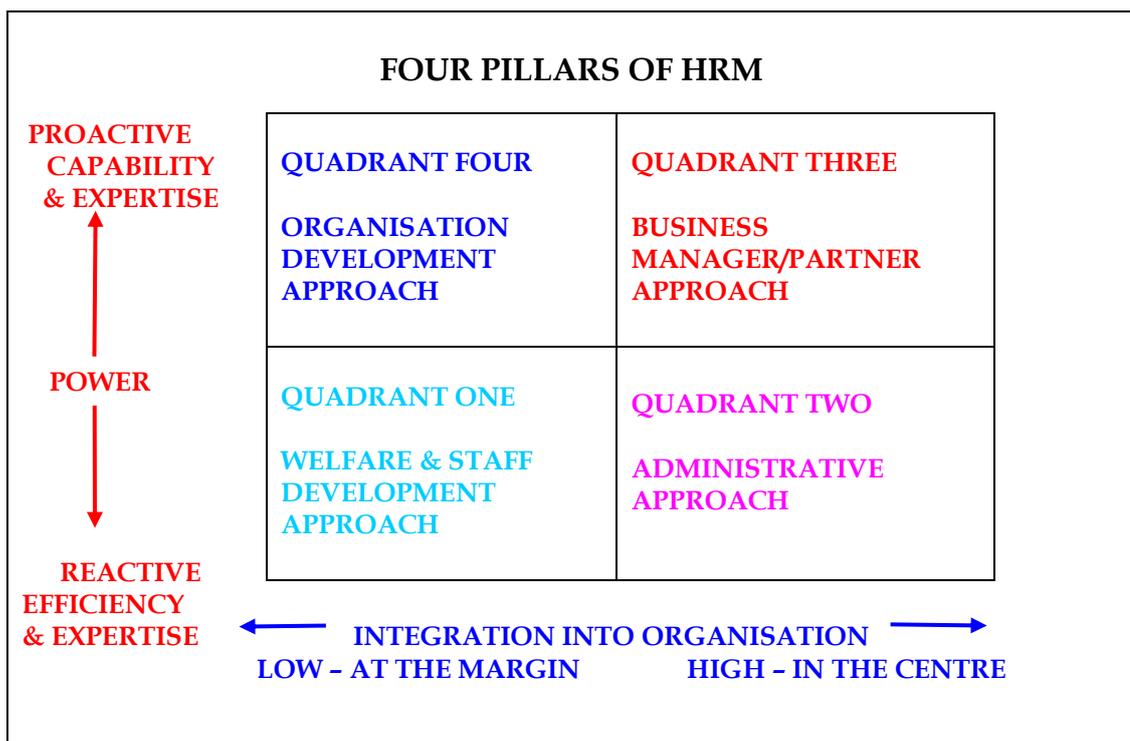
At the level of my own professional practice and in the niche environment of human resources theory, the work of David Ulrich has established a widespread following, contemporary currency and dominant influence in many organisations (Chartered Institute of Personnel and Development, 2006). The ‘Ulrich Model’ is based on the central premise that the HR function can be represented with clarity by reference to a small number of roles and a consequent structural design. The emphasis on structure has not gone unnoticed: “But the main route to achieve the goal of a strategic, value-adding and business-aligned function has, we believe, been through structural change.” (Chartered Institute of Personnel and Development, 2006:2). Ulrich’s work around a model for the HR function emerged in 1997 and has been through 2 iterations in 2001 and 2005 (Ulrich, 1997, Ulrich and Beatty, 2001 and Ulrich and Brockbank, 2005). This thinking is best illustrated in the chart below reproduced from Ulrich (2005):

Employee champion	Employee advocate (EA) Human capital (HC) developer	Employees are increasingly critical to the success of organisation. EA focuses on today's employee; HC developer focuses on how employees prepare for the future.
Administration expert	Functional expert	HR practices are central to HR value. Some HR practices are delivered through administrative efficiency (for example technology), and others through policies, menus, and interventions, expanding the 'functional expert' role.
Change agent	Strategic partner	Being a strategic partner has multiple roles: business expert, change agent, knowledge manager, and consultant. Being a change agent represents only part of the strategic partner role.
Strategic partner	Strategic partner	See above
	Leader	The sum of the above four roles equals leadership, but being an HR leader also has implications for leading the HR function, integrating work of other functions, ensuring corporate governance, and monitoring the HR community.

**Figure 2.2** Evolution of HR Roles (Source: Ulrich and Brockbank, 2005).

In addition to the power laden emphasis on structural definition as a key change component within the model presented by Ulrich and his co-writers, there seems to me to be two further significant implications. First, the model suggests a profession increasingly process driven, bound by hierarchy and regulation and drifting further away from reflexive practice and autonomy of action. Second, a compartmentalisation and constraining of career options, particularly within the *functional expert* category. Neither of these two outcomes appeal to this writer and, whilst recognising the potential impact at the organisation level of the *strategic partner* and *HR leader* roles, seem to undermine the opportunity for understanding of the complex relationships depicted earlier in Figure 2.1.

McAuley (2000) adds support to the idea that the business partner model can lead to a form of elitism within the HR function noting that “... being at the centre for HR professionals has been seen as the place to be”. In their 1993 model of HR roles – entitled ‘Four Pillars of HRM’ – Shipton and McAuley acknowledge Ulrich’s work, but endeavour to go a stage further by linking the roles to the proactive and reactive power of HR and how HRM is integrated into the organisation. The Shipton and McAuley (1993) model is reproduced at Figure 2.3 below:



**Figure 2.3** The Four Pillars of HRM (Source: Shipton and McAuley, 1993)

The authors also point out the dangers of HR becoming too closely aligned with other senior management roles and denying their particular professional input. Darwin et al (2002) pick up this theme suggesting that such management intimacy might have added to the difficulties of organisational downsizing and delayering in the 1980s and 1990s. The idea of the schizophrenic HR professional operating in the dual roles of detached, independent critical friend whilst at the same time being aligned with and

contributing to business goals is an interesting one. I will return to the point in the concluding chapter of this thesis.

Perhaps the comments above and the examples from human resources theory are a sign of a recognition of the need to counter the charges of complexity around organisational theory and to encourage an improved relationship with the practice of management. It is also pertinent – in the context of a discourse analysis based study like this one – to point out how language and power are increasingly recognised as central to the process and product of, formulating organisation theory (Chia and King, 2001). Any theories which flow from my analysis of employment tribunal texts – however tentative – will only be relevant if they help make sense of what is going on and helps us to understand how language and power play a part in this sense making.

### **Employment relations at the organisational level**

As recently as three years ago, the Chartered Institute of Personnel and Development devoted a research paper to the question ‘What is Employee Relations?’ (Chartered Institute of Personnel and Development, 2004). To a large extent, their answer was based on charting the decline of trade union focussed industrial relations and suggesting that the emphasis has shifted, and has continued to shift towards individual relationships. It was suggested that, for personnel professionals, the management of the employment relationship remains a key activity and a critical component of business performance. It was further contended that regulation of the workplace continues to extend its influence. Nothing new here, but it is worth considering how feasible the *management* of the employment relationship actually is, particularly if the emphasis is on individual commitment.

To suggest that we can *manage* engagement at the personal level seems to me to represent a rather unsatisfactory attempt to justify the role of the

personnel professional and to grossly over simplify the complexity of our individual 'deals' with the organisation in which we work. Our aspiration needs to be much more limited. I would argue that to *influence* the construction of the workplace relationship within a much broader context of our relationship with organisations and with society is a more appropriate ambition.

It is also worth considering why some organisations develop more acceptable employment policy than others, perhaps by attempting to comply with the spirit of the legislation rather than the letter. To some extent, this can be explained by an organisation's approach to risk and the degree of public accountability it is subject to. However, the fact that 'employers of choice' can be found in every sector suggests that the balance between individual and organisation is a key factor and that organisations need to work with the legislation rather than against it.

Finally in this brief examination of employment relations at the organisational level, we should note that the changes to employment law featured in the next chapter and the timespan of my research project are located within the New Labour era. Kilpatrick (2003) considered the regulatory aspects of unfair dismissal before and under New Labour and posed the question 'Has New Labour Reconfigured Employment Legislation?' She argues that whilst the academic lawyer fraternity have continued to seek legislative change in response to social and demographic developments, relatively minor changes to individual employment rights are not consistent with a wider transformation agenda. As a result, legislative changes introduced under the banner of fairness at work, for example, have failed to bring about the flexibility in employment for which they were designed (Kilpatrick, 2003). As we have seen already, the lack of consistency between aspirational design, workplace application and intended consequences is a feature of the employment relations environment.

## **Employment relations and the psychological contract**

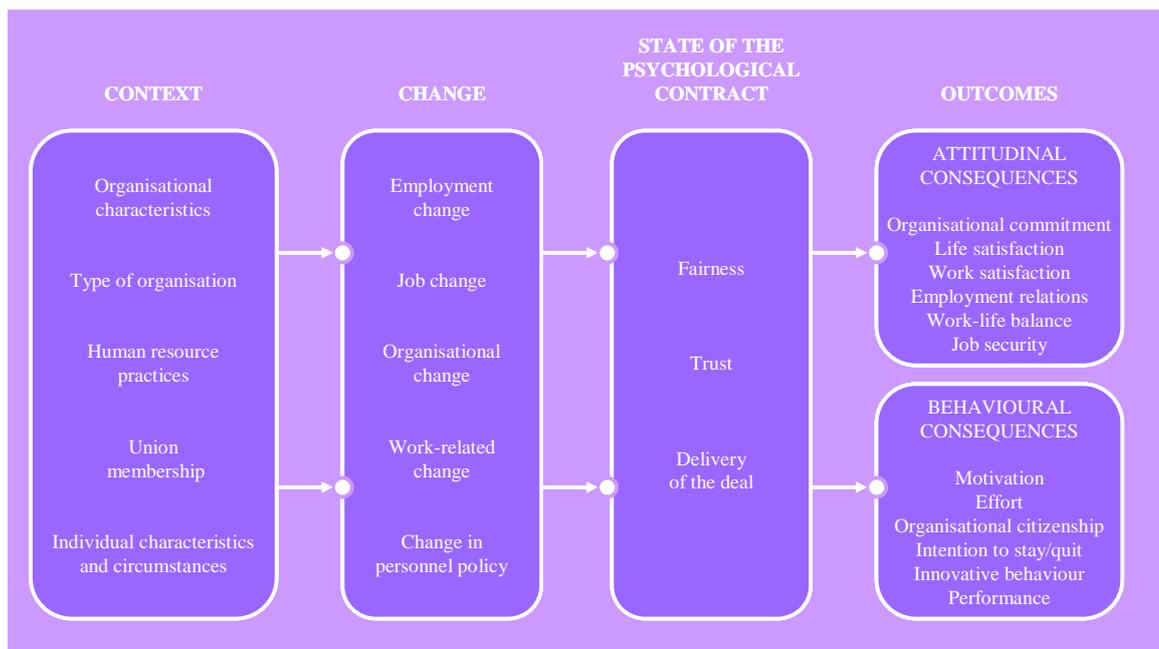
One distinct aspect of the employment relationship that has attracted the attention of this writer is the nature of the psychological contract in organisations. The work of Argyris (1960) and Schein (1965) established a platform for further debate and research around a behavioural perspective on the employment relationship based on unwritten reciprocal expectations. Herzberg (1968) picked up the theme and observed that in most organisations the requisite structure was in place to provide employees with the 'hygiene' system they needed; an appropriate salary, satisfactory working conditions etc, but the 'motivator' needs of employees, with a focus on the psychological growth of individuals, were not readily available. More importantly perhaps, Herzberg promoted the thought that employees believed the managerial discourse and that it was the hygiene factors that explained why people worked in an organisation.

More recently, Rousseau (1995) has picked up the baton and argued that all contracts are fundamentally psychological. She defines psychological contracts as "beliefs, based upon promises expressed or implied, regarding an exchange agreement between an individual, and, in organisations, the employing firm and its agents." (Rousseau, 2004: 120).

The importance of the psychological contract literature to my own work lies primarily in its place amongst ways of understanding changes to the employment relationship during the latter part of the last century. This link to change is picked up by Goffee and Jones (2006: 6): "...the psychological contract for many (but never for all) involved movement up a relatively stable career ladder, often with one organisation". Although in common with many other social research concepts, the psychological contract cannot be characterised by a single definition, it is widely accepted that Rousseau's work published in 1989 forms the starting point for most research in this area (Conway and Briner, 2006). By the time a further iteration of her work emerged

in 2001, Rousseau and Shalk (2001) make one of the very few references I have been able to discover to the legal influence in psychological contracts.

The Chartered Institute of Personnel and Development report (Guest and Conway, 2001) concentrates on organisational change and the psychological contract making the rather grand claim that the results are based on its annual survey of the ‘state of the employment relationship’. The report draws on an ‘established conceptual framework’ and is reproduced at Figure 2.4 below:



**Figure 2.4** Conceptual framework (Source: Guest and Conway, 2001).

Somewhat surprisingly the framework does not contain the words law or legal and appears not to recognise that the psychological commitments made by individuals and organisations are increasingly informed by what the law says I can expect from my employer and vice versa.

Referring to a systems model of industrial relations, Guest (2004: 542) comments that “this traditional system of industrial relations has begun to break down... where there has been only a weak legal framework to support it”. The link drawn between trade union activity and the influence of legal

frameworks is clearly appropriate, but, for me, it underplays the worker's awareness of employment law and willingness to pursue a legal route if other avenues do not meet their expectations.

Pratt and Doucet (2000) suggest that a number of features of organisational life – financial insecurity, competitive marketplaces and inconsistent empowerment for example – have affected what they term the “bonds between individuals and between individuals and their organisations” (Pratt and Doucet, 2000: 204). This in turn has led to a sense of ambivalence in the context of work relationships. Unlike many previous writers on the subject of psychological contracts, we see here mention of individuals' relationships with each other as well as with their parent organisation and the proposition that there are alternatives to the polarity of positive and negative organisational relationships. These two arguments provide added dimensions to the psychological contract debate and resonate with me when reflecting about the contracts or bonds we construct in our working lives.

In a rather ambitious aspiration, Conway and Briner (2005: 179 – 180) attempt to provide what they term “a comprehensive review of psychological contract research and theory” and “to critically evaluate psychological contract research and theory and suggest ways in which the field can be further developed”. In so doing, they acknowledge that psychological contract researchers have limited themselves to two issues – breach and contents – and that the research field is potentially much wider. Further, Conway and Briner (2005: 109) remark that “the near exclusive use of the survey method has no doubt hampered conceptual, theoretical and empirical advance in this area”. I share their view of the restricted nature and limitations of psychological contract research to date, but once again I note that the legislative framework does not feature in their review of the territory or in suggested future directions. This apparent failure to recognise that employment legislation has gained entry to the psychology of workplace exchanges between employers and

workers concerns me. Whilst the focus of this work is not on the psychological contract directly and in isolation, I will enter this research with a sense that legal protections are part of individual psychological contracts.

What we have seen so far in this section provides important insights on the psychological elements of employment contracts, but very little has been said about the relationship between the legal and the psychological. Rousseau and Schalk (2001:19) argue that, "Law plays a key part in legitimating the terms of psychological contracts." Their argument is based on the premise that societal factors shape psychological contracts in a number of ways and understanding these helps us to understand how public policy and legal instruments support or undermine psychological contracts in employment.

There is widespread support for the contention that "the traditional psychological contract between employers and employee has broken down through endless downsizing and reengineering" (Kets de Vries, 2005: 62). The 'new psychological contract' is also widely recognised and characterised by an adult to adult relationship between the organisation and the individual, in contrast to the parent / child relationship described by the likes of Argyris and Schein (Wellin, 2007). In the new relationship, increased responsibility rests with the individual and the contribution from the employer is less about job security and more about portable human capital enhanced by knowledge and learning.

Far less has been said about the potential for employment legislation and employment policy to fracture or reinforce the new psychological contract. Echoing Rousseau and Schalk, Stone (2002) does break the relative silence by suggesting that the new psychological contract now describes the employment relationship and goes on to discuss the potential impact on contract law. Again emphasising the theme of employment law as a force for legitimising the psychological contract rather than influencing the psychological considerations of individuals.

I venture to suggest that there may be a connection between a recognition of the employment law element of the psychological contract I have argued for above and this breakdown of more traditional employment relationships. It is also worth reflecting on the extent to which we have witnessed a breakdown of such relationships or a renegotiation of psychological contracts influenced by increased individual rights. Wellin (2007) supports the idea of 'personal deals' that can be managed in the interests of increased business performance, but, for me at least, underplays the legal framework in which these personal deals operate.

### **Employment relations and personnel professional practice**

This section is increasingly concerned with the bridge between theory and management practice to which I referred earlier. To help this connection, I draw on comment from some of the major players in this arena, including the Advisory, Conciliation and Arbitration Service (ACAS), the Chartered Institute of Personnel and Development (CIPD), the Confederation of British Industry (CBI), the Trades Union Congress (TUC) and the Department of Trade and Industry (DTI).

The publication in July 2001 of the Government's consultation paper 'Routes to Resolution: Improving Dispute Resolution in Britain' provides a recent illustration of the significance of the employment legislation in organisational dynamics and, to some extent, reflects a concern that employees are increasingly resorting to litigation to address employment disputes. The DTI estimated that the number of justiciable disputes was in the range of 500000 to 900000 per annum and that 15 to 25% of these actually registered in the employment tribunal arena – see Johnson (2001). For their part, the Employment Tribunal Service recorded some 115000 tribunal applications in 2003/2004, a 17% increase over the previous year (Income Data Services Brief (2004). Although this follows a fall in the number of applications over the

previous two years from a peak of 130000 in 2001, the number of sex discrimination applications had risen from 8000 to 17000 and the trend of citing more than one jurisdiction continues. The latest statistical data available from the Employment Tribunal Service shows that the number of claims accepted under all jurisdictions was again 115000 for the financial year 2005/2006 and that the number of sex discrimination cases accepted stood at over 14000 (Employment Tribunals Service, 2006). The indications are that cases are becoming more complex and hearings lasting longer. Before moving on, I need to say a little more about the employment tribunal system itself.

Employment tribunals, although introduced in 1964 – as industrial tribunals – did not really emerge as an established part of the industrial relations environment until the 1980s as a result of the extension of individual rights contained in the legislation outlined briefly in the introductory paragraphs of this narrative. Their composition – a legally qualified chair and two lay members – provides what has been referred to as an ‘industrial jury’ with considerable workplace knowledge and experience (Waite: 2002). Their task is to employ this knowledge and experience to meet the overriding objective of dealing with cases justly.

The Employment Tribunal now covers 80 ‘jurisdictions’, including such matters as unfair dismissal, breach of contract, discrimination in its various forms, parental leave and working time. The work of the employment tribunals is ‘overseen’ by a number of appellate authorities and it is here where stated case law is produced for the guidance of the wider employment community. In support, the DTI directs the Employment Tribunals Service to perform the following role: “Our role is to carry out the administrative tasks necessary to enable applications to Employment Tribunals and appeals to the Employment Appeal Tribunal to be determined” (Employment Tribunals Service, 2006).

With an influence far beyond its original remit, the employment tribunal system has attracted criticism from a number of directions. Suff (2006), as

author of an ACAS policy discussion paper, identified some of the concerns about the employment tribunal system, primarily from an ACAS perspective, as complexity, cost, increasingly adversarial tribunals and a system slow to deliver outcomes. As a result, employers complained of a growing compensation culture and employee representatives claimed that individual access to fair resolution was being eroded. She responds to the unwritten question – ‘is the employment tribunal system fit for purpose?’ – with two important points. First, “Britain’s employment tribunal system still offers a far preferable alternative to the much more legalistic route for settling individual rights cases that exists in many other European countries such as Germany and France”; and second, “The logic of avoiding legal dependency is as strong, if not stronger, today as it was when employment tribunals were first set up.” (Suff, 2006: 2).

Her interest is one I share. That is how to ensure that the employment tribunal system delivers what it was designed to deliver: “an accessible, speedy, informal and inexpensive dispute resolution mechanism”. (Suff (2006: 2)). I am not convinced that this aim is being achieved – evidenced by some of the legal arguments that we will encounter later in this narrative – and it is clear that Suff agrees. In her conclusion, she says “The tribunal system is characterised by a tendency towards legal dependency.” (Suff, 2006: 17).

In September 2005, the General Secretary of the TUC responded angrily to a suggestion from the CBI that the employment tribunal system was clogged with vexatious claims and the proposal to introduce charges for individual’s bringing claims. Brendon Barber responded by saying that “Employment tribunals are an important last resort in resolving workplace disputes and access to them should not be limited to those who can afford to pay.” (Barber, 2005).

Unsurprisingly, the increased application of a legal framework to workplace issues has made an impression on the view of the employment

relationship held by professional bodies. In 1997, the then Institute of Personnel and Development advised organisations to review their approach to the employment relationship to build a constructive relationship with employees in order to prevent a return to the adversarial industrial relations of the 1970s. Significantly, the Institute of Personnel and Development drew attention to the 'new' employment relationship and the role of employment legislation in this process. Somewhat ironically in the light of the constant flow of employment legislation in recent years, the Institute of Personnel and Development took the view "that, as far as possible, the role of the law in the workplace should be minimised" (Institute of Personnel and Development, 1997: 12).

Emerging alongside this encouragement to build constructive partnerships at work was a clear recognition that the employment relationship could no longer be seen as a 'master and servant' situation with all the cards held by the employer. The latter must now tread carefully through a complex mix of worker rights designed to shift the balance to a relationship of equals. Whilst the employment contract remains at the heart of the employment relationship, the emphasis on legal obligations has been strengthened by a myriad of new legislation and case law. In principle, both employers and employees continue to support the notions of early conflict resolution interventions when disputes at work occur in order to limit the damage to the employment relationship. In practice, however, the number of cases submitted to employment tribunals continues at a very high level.

In the wider context of employment relations in organisations and the link to the psychological contract, the advent of discrimination law has contributed to the changing dynamic of the workplace. One of these effects seems to me a defensive stance taken by many employers to counter possible tribunal claims. Turner (2002) provides an interesting perspective on this:

"I think employers have for many years been on the back foot. I think they have been frightened of legislation and the use of legislation by

employees and representatives of employees against them. I think they have tended to lose track of common sense values”.

This defensive reaction by employers has often resulted in tightly drawn policies that inhibit discretionary action and disturb the balance of the relationship between individual and organisation.

Looking forward, the European Commission is engaged in a consultation exercise examining ways to modernise Labour Law in the context of the 21<sup>st</sup> Century (European Commission, 2006) with a focus on individual law provisions rather than collective law. The document is motivated by a flexibility agenda aimed at securing the European Commission’s competitive position into the future under the rather intriguing banner of ‘flexicurity’ (European Commission, 2006: 4). Helpfully, we are reminded that “The original purpose of Labour Law was to offset the inherent economic and social inequality within the employment relationship”. (European Commission, 2006: 5). We are encouraged to consider alternative approaches to the contractual relationship whilst at the same time paying attention to the potential social inequalities of short-term, low paid roles. From this author’s perspective, the presence of a ‘live’ debate makes the ‘real world of day to day employment relationships’ and the continual engagement with employment law provisions an even more worthwhile research arena.

Closer to home, the DTI produced a policy statement in March 2006 entitled ‘Success at Work: Protecting Vulnerable Workers, Supporting Good Employers’ which included a section on ‘good workplaces’. The idea intended to promote a direct link between company performance and individual workplace satisfaction based around employee friendly policies and practices. The psychological commitment perhaps! Success at Work also identified an ambitious review programme covering seven key areas: dispute resolution, an employment standard, maternity leave and pay, employment particulars,

statutory redundancy, time off for public duties and employment law guidance. (DTI, 2006)

More recently, in December 2006 the DTI also announced an independent review – chaired by Michael Gibbons – of employment dispute resolution, particularly the 2004 Dispute Resolution Regulations. The latter introduced measures designed to simplify discipline and grievance procedures and stem the flow of cases to employment tribunals. The terms of reference also included the following statement:

“Proposals emerging from the review should be genuinely deregulatory, reduce the complexity of the current system and reduce costs to business and employees. They should preserve existing employee rights and ensure access to justice. Proposals should be cost –effective for Government to implement.” (Gibbons: 2007)

The final report of the Gibbons Review was published in March 2007 and is now subject to Government consultation. Although not a specific focus of attention in this thesis, I note in passing that the report recommends the repeal of the statutory dispute resolution procedures only three years after their introduction on the grounds that they are too prescriptive and complex!

### **Research considerations**

At this stage and in the light of the discussion above, I invite the reader to consider the idea that whilst discrimination legislation may have been designed to, and in some case led to, improvements in the working environment, it may not necessarily have taken working relationships in the direction originally envisaged. Moreover, it has had a powerful effect on the personnel and legal professions. Unintended consequences appear to have emerged and four of these will inform my analysis later in this work. They are that:

- employment law has established a pivotal position in employment relations.
- employment law now forms a key element of the psychological contracts between workers and employers.
- personnel professional practice has moved closer to legal practice
- the employment tribunal system has yet to fully deliver on the expectation of easy access to workplace dispute resolution

In the narrower context of discrimination law and employment tribunals, I also ask the reader to note a fifth research consideration to bear in mind as the analysis develops:

- The contradictions inherent in the interplay between a reality constructed through language on the balance of probabilities – reliant on interpretation and inference – and its production within an objectively designed, legal framework, set of tribunal rules and procedures needs to be better understood.

Against the backdrop of this flurry of activity, on the legislative and policy fronts, and as will be clear already, my particular interest lies in discrimination law and that I am using employment tribunal judgements to represent this area of activity. By a close examination of a sample of such texts, I will be seeking to illustrate how a number of key principles employed to interpret particular events leads to inconsistencies with the rule bound construction of an ‘industrial court’ and, as a result, carries implications for personnel practice.

## **Closing thoughts on chapter two**

It is my contention that employment law has emerged as a prominent organisational discourse over the last three decades or so and has impacted on the contractual relationship that lies at the heart of the mutual expectations of individuals and organisations – informal and formal, psychological and contractual. This emergence opens a number of avenues of interest that deserve the attention of critical management researchers. As Garfinkel (1967) illustrated in his work around how jurors reach decisions, making sense of the world and a particular set of circumstances – even in what would generally be perceived to be a rule bound context such as a court or tribunal – may not be quite as straightforward as it appears at first sight.

## CHAPTER THREE

### DISCRIMINATION LAW AND THE BURDEN OF PROOF

In the previous chapter, we have seen how employment relations intervenes at the organisational level and considered employment relations in the context of the psychological contract and personnel professional practice. Throughout, I have alluded to the employment law dimension of these connections and suggested that this may have been underplayed in management research. Before attempting to substantiate this claim, I recognise the need to invite the reader into what some might regard as the sterile and researcher free zone of employment legislation that forms the focus of my study.

Even a cursory examination of 'new' law from the early 1970s to the present day would reveal the emergence of a brand of legislation grouped under the generic heading employment law – alternatively referred to as labour law or industrial law. By way of indication, inquirers would discover early employment legislation enactment for the period such as the Equal Pay Act 1970, the Industrial Relations Act 1971, the Sex Discrimination Act 1975 and the Race Relations Act 1976. All focus on the workplace and represent attempts to 'legislate out' specific inequalities and potential unfairness in organisational life. We have seen in the previous chapter how these workplace legislative provisions have become an essential element of employment relations.

Wrapped around this collection of statutes is a range of institutions of employment law designed to 'bring the legislation to life' through practical application: most notably, the Advisory, Conciliation and Arbitration Service (ACAS) and the Employment Tribunal (formerly the Industrial Tribunal).

Beyond the latter, the Employment Appeal Tribunal (EAT), the Court of Appeal (CA) and the House of Lords (HL) provide ascending appellant authorities for employment law issues. All judgements are publicly available and significant developments are reported widely across the media spectrum, but specifically in the Industrial Relations Law Reports (IRLR). Whilst the latter is the favoured reference point for those with a professional interest, the former is the strongest influence on public opinion forming and increasingly likely to be utilised by the public relations machinery of Government or organisations to promote a chosen message.

Within the extensive and growing body of employment law lies the specific category of discrimination law. In more recent years, the discrimination legislation of the 1970s has been refined and extended to cover areas such as age, disability, religion or belief and sexual orientation. Whilst in no way wishing to underestimate the significance of such developments, the focus for this thesis rests with sex and race discrimination. These are areas of discrimination law that are more mature than most and areas to which I have been more exposed in my professional practice. Moreover, they tend to produce the more complex combinations of legal argument, emotional involvement and public interest.

As I have already indicated, the employment law discourse is represented, in part, by the official texts that flow from each employment tribunal, EAT, CA and HL hearing, all of which become a matter of accessible public record. It is this source of written texts that I seek to harvest and to add a degree of practical research credibility to the assertion that “such public records constitute a potential goldmine for sociological investigation” (Silverman, 2001: 135).

Although the principal employment law statutes have been around for over thirty years, they are breached consistently at considerable financial and emotional cost to individuals and organisations. Discrimination in particular –

alleged or real – continues to absorb organisation and legal capacity to a significant level. As Grint (1991: p217) points out “securing the backing of the law is not the equivalent of removing sex discrimination’ and, in any case, many forms of discrimination are beyond the grasp of legal reprimand”. Is he, in part at least, hinting that legislation has driven discrimination underground? In my own work and in discussion with legal colleagues (Goss, 2007), we recognise that discrimination emerges at three levels. First, individuals are genuinely unaware that their actions constitute an unlawful act. Second, individuals are aware that they have committed an unlawful discriminatory act, but believe that they have done ‘the right thing’ in a business sense, e.g. not hiring women of child bearing age. Third, individuals seek to ‘cover up’ their actions in the knowledge that they have committed an unlawful discriminatory act. This sentiment is expressed succinctly in an extract from one of the cases I will return to later in this thesis:

“In order to find discrimination on the ground of race or sex, the tribunal must find that subjectively racial or sexual considerations were in the mind of the discriminator” (Bahl v The Law Society and other (2004) IRLR 799 CA).

Within the broader spectrum of discrimination law, a topical and distinct aspect of legal determination – the burden and standard of proof – has attracted the attention of this author. In part, this reflects an increased intellectual and professional interest in these issues, but also a sense that the jurisprudence angles lie at the heart of the legal interpretation of discrimination matters. It has long been recognised that not all discrimination is conscious and that pre-conceptions and prejudices may lead individuals to discriminate without being conscious of their motivations. This in turn has made discrimination acts very difficult to prove even at the lower standards applied in civil cases, on the balance of probabilities. The introduction of the Burden of Proof Directive was designed to help overcome this difficulty and, as we shall see, has sponsored considerable case law in attempts to clarify the situation.

The purpose of this chapter is to provide an introduction to the key legal principles engaged in my analysis, to illustrate the fast moving burden of proof case law in recent years and to explain why this particular area of employment law provides fertile ground for my research project. It is important to explain these key concepts at this stage and to understand how they relate to the analytical phases of this thesis.

## **Legal Principles**

By way of introduction to discrimination law and the review of burden of proof case law later in this chapter, it is important to understand what is meant by the concepts of burden of proof and standard of proof. These two concepts are important to understand at this stage because they are central issues in the cases I have selected for analysis. Indeed, the cases track the development of burden of proof interpretation over a 25 year period. At the end of this section, I also include a brief discussion of three terms that merit some clarification in advance of the analysis of my chosen employment tribunal texts: discrimination, unlawful discrimination and inference.

In essence, the burden of proof involves the responsibility for proving a disputed allegation and the standard of proof sets the level of proof required to satisfy a tribunal on a particular point. In civil cases – including those conducted in employment tribunals – the standard of proof is at the level of ‘balance of probabilities’ which means that the version alleged is simply more probable than not. This is a lower standard of proof than the ‘beyond reasonable doubt’ demanded in criminal cases. Whilst the latter has remained a consistent feature of industrial/employment tribunals, the burden of proof issue has been an equally consistent source of debate.

Prior to the introduction of the Burden of Proof Regulations in 2003, the legal authorities with regard to the burden of proof in discrimination cases (King, 1991 and Zafar, 1998) confirmed that it was for the complainant to make

out her case on the balance of probabilities. The burden of proof remained with the claimant throughout the proceedings. Although tribunals were reminded that the claimant may find this difficult to do, they were not bound to produce a finding of unlawful discrimination even if they found the employer's explanation unconvincing.

The Burden of Proof Regulations moved away from this position and introduced the concept of a shifting burden of proof into employment legislation. A concept deemed unnecessary in the King (1991) judgement where it was suggested that evidence of less favourable treatment and a difference of race may indicate racial discrimination. In such circumstances, tribunals were expected to seek an explanation from the employer, but the guidance stopped short of requiring the respondent to *prove* that no discrimination had occurred.

This shift in responsibility for establishing that any discrimination was not on an unlawful ground is made clear in Article 4(1) of the Burden of Proof Directive:

“.....when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.”

As we shall discover as this thesis develops, it is now a requirement that once the complainant has made a *prima facie* case from which an inference of discrimination may be drawn, the respondent is required to prove that no unlawful discrimination took place. Successive cases on this issue and the resultant guidance have indicated that the burden on the respondent in such circumstances has been set at a high level and that there has been some debate about whether the bar has been set too high.

In trying to provide an explanation of the significance of this move in the key legal principle of burden of proof as it relates to the employment context, it is also important to understand the terms discrimination, unlawful discrimination and inference. In everyday usage, discrimination indicates choice or preference and it is only when such different treatment is based on an unlawful ground – gender, race for example – that we have unlawful discrimination in the employment law sense. We should not underestimate this need for precision in language usage.

Any sort of reflection on my own experiences in the workplace brings to mind many occasions where colleagues have suggested that they have been discriminated against. More often than not, they equate discrimination with unlawful discrimination and quite often they are reflecting that they did not receive the response expected. To hear the claim ‘I have been discriminated against’ is not, I suggest, an unusual occurrence.

Aside from understanding the distinction between discrimination and unlawful discrimination, it is also important to understand how the term ‘inference’ is applied in the determination of discrimination cases. As I have already indicated, unlawful discrimination is frequently difficult to prove since discriminators are not always aware of their unconscious motivations. This extract from *Sinclair Roche & Temperley v Heard* (2004) IRLR 763 EAT confirms the prominence of inference:

“In order to find discrimination, an employment tribunal must set out the relevant facts, draw its inferences if appropriate and then conclude that there is a prima facie case of unfavourable treatment by reference to those facts,....”

To put this in terms familiar in criminal court proceedings, where there is no direct evidence of discrimination, inferences of such discrimination from circumstantial evidence may be made. Gifis (2003) defines inference as: “A deduction from the facts given, which is usually less than certain but which

may be sufficient to support a finding of fact; .....” A definition which sits neatly with the employment tribunal extract above, but also emphasises the lack of certainty which pervades such decisions. It is also worth noting that criminal law involves a positive thought process – *mens rae* – discrimination law does not.

So much for the legal principles at the heart of this narrative, I now turn to a review of the burden of proof case law and the main points that emerge from consideration by the appellants courts.

### **Case Law**

Until very recently, the key authority on the determination of burden of proof in sex and race discrimination cases rested with *King v Great Britain China Centre* (1991) IRLR 513, subsequently endorsed by the HL in *Zafar v Glasgow City Council* (1998) IRLR 36. In essence, these judgements confirmed that the legal burden of proof remained with the complainant throughout the proceedings and that the employment tribunal was not necessarily bound to make an inference of discrimination even if it did not accept the employer’s explanation of events.

This emphasis was about to change with the introduction of the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations on 12 October 2003 and now to be found in Section 63A of the Sex Discrimination Act. As we shall see, the precise impact of the regulations remains a matter of continuing legal debate, but as Korn (2004) suggests the most obvious reading is that where a complainant can establish an arguable case of discrimination on the facts, the legal burden of providing an adequate explanation shifts to the employer. Further, an employment tribunal is bound to uphold the complaint if it is not satisfied that the employer’s explanation is adequate.

The effect of the change to the burden of proof provisions was considered by an appellate tribunal for the first time in *Barton v Investec Henderson Crostwaite Securities Ltd* (2003) IRLR 332 EAT. The EAT confirmed that the test set out by the HL in the *Zafar* case needed to be revised in the light of the amendment to the burden of proof. For the benefit of readers, the judgement included a '12 point plan' which has subsequently been labelled the 'Barton Guidelines'. Notwithstanding these early attempts to clarify the effect of the new regulations, the appellate courts found it necessary to engage with the new regulations throughout 2004 and, in early 2005, to refine the decision in *Barton* so as to provide further guidance on the burden of proof in sex discrimination cases.

*University of Huddersfield v Wolff* (2004) IRLR 534 EAT was reported in July 2004, followed closely by *Chamberlain Solicitors v Emokpae* (2004) IRLR 592 EAT in August 2004, *Sinclair Roche & Temperley v Heard* (2004) IRLR 763 EAT in October 2004 and *Webster v Brunel University* (2004) EAT in December 2004. All four cases indicate the ongoing tensions between the new regulations and the existing, and extensive, body of jurisprudence on this key issue (Rubenstein, 2004).

Amidst this ongoing legal debate, a further case was played out in Tribunal that merits mention here. *Law Society v Bahl* (2003) IRLR 640 EAT, was determined prior to the changes on the burden of proof and produced what were referred to as 'undisputed principles' for proving direct race and sex discrimination. This did not prevent an appeal to the CA, by Ms Bahl in July 2004(!) and a further substantive judgement on the issues at stake.

The importance of this case and its place amongst the selection referred to here lies in the clear distinction drawn between unreasonable treatment and unlawful discrimination. The two do not necessarily equate. At least they do not equate in law. In the workplace, the distinction is often less clear and, as I

have suggested earlier, the word discrimination is often used to imply different treatment, but not necessarily linked to a category designated as unlawful.

Next in this review of burden of proof cases, the beginning of 2005 provides an important reference point for my research with three discrimination cases being determined in the CA: *Chamberlain Solicitors v Emokpae*, *Brunel University v Webster* and *Igen Ltd v Wong* (2005) IRLR 258 CA. All three cases were heard together and each sought clarification on aspects of the burden of proof regulations in discrimination cases. As Rubenstein (2005: 226) makes clear, clarification was keenly sought:

“The three statutory commissions (Equal Opportunities Commission, Commission for Racial Equality and Disability Rights Commission) were allowed to jointly intervene and Robin Allen QC was instructed to help sort out the confusion arising from inconsistent authorities at both EAT and Court of Appeal level.”

The intervention of the statutory commissions is relatively uncommon and was allowed in recognition of the potential impact of the decisions on practice in discrimination cases. The decision takes us back – with some important amendments – to the ‘Barton guidelines’ decided in 2003. Not quite full circle, but certainly a tour with much retracing of ground.

Finally, in early 2007, the Court of Appeal handed down its decision in *Madarassy v Nomura International Plc* (2006) IRLR 246 CA, revisiting the issue of burden of proof in discrimination cases. Although to a very large extent confirming the approach taken in *Chamberlain Solicitors v Emokpae*, *Brunel University v Webster* and *Igen Ltd. v Wong* IRLR 258 CA, the case provides a useful methodology for working through the burden of proof provisions and, in not suggesting any change of direction with regard to dealing with the burden of proof in discrimination cases, seems to indicate that we have reached a degree of common understanding, at least in the eyes of the appellant courts,

three years after the introduction of the Burden of Proof Regulations. A point recognised by Lord Justice Mummery in his judgement:

“The guidance in *Igen v Wong*...does not need to be amended to make it work better. The only possible value of this judgement... is in showing how the burden of proof should work” (paragraphs 12 and 13).

I am less convinced that the situation is as clear at the practitioner level as Mummery alludes to in his opening remarks:

“We were informed that, as evidenced by this clutch of appeals and by appeals pending in other cases, employment tribunals are experiencing difficulty with the burden of proof in sex and race discrimination cases. This is surprising, as the Court of Appeal analysed the law in depth and gave clear and sound detailed guidance in *Igen v Wong* (2005) IRLR 258. At the end of the judgement of the court an Annex set out guidance in 13 short and logically arranged numbered paragraphs. The judicial guidelines were framed with expert assistance from the Commissions for Equal Opportunities, Racial Equality and Disability Rights, which, with the permission of the court, intervened in *Igen v Wong* and made submissions through leading counsel (Mr Robin Allen QC). None of the parties in these appeals challenges the correctness of *Igen v Wong*.”

According to Hetherington (2007), these doubts are not confined to the practitioners – legal or personnel professionals – working in organisations, but stretch to the higher reaches of Matrix Chambers:

“Recent judgments have shown that, despite the Court of Appeal’s best efforts to provide guidance in *Igen v Wong*, tribunals are still grappling with the burden of proof provisions in the discrimination statutes. The Court of Appeal’s judgment in *Madarassy v Nomura* appears to come dangerously close to removing any material effect from the provisions altogether.”

In other words, she is questioning – if the Madarassy judgement holds good – what has changed since the introduction of the Burden of Proof regulations. Her analysis argues that if the establishment of less favourable treatment is not sufficient to shift the burden of proof to the respondent, the ‘old law’ – where the burden of proof is placed heavily on the claimant – remains pretty much intact. If this is the position adopted by a member of one of the leading employment law practices – Matrix Chambers – the personnel practitioner may remain on the back foot!

Lord Justice Mummery also makes two further comments about the development of the burden of proof provisions which merit repeating here:

“Some of the difficulties with the new burden of proof are attributable to the process of adapting to change. It takes time for everyone to get used to the new law”

and

“Now tribunals and courts are faced with amended statutory provisions, which changed the law, but do not explain how it actually works. The difficulty is in knowing how much difference the amendments should make in practice.”

These difficulties are, of course, at the centre of the concerns I laid out at the beginning of this thesis. Trying to understand how the law interacts with employment relations, increasingly played out within the legal framework of an Employment Tribunal is a core element of my research.

Before leaving *Madarassy v Nomura* for the moment, I record one further comment from Lord Justice Mummery which provides a smile in the course of my endeavours:

“I should add that there is really no need..... for another judgement giving general guidance. Repetition is

superfluous, qualification is unnecessary and contradiction is confusing.”

Taken together, the cases outlined above provide my data field and, I submit, fertile ground for the analysis conducted in Chapter 8. Further comments on the cases chosen for analysis is included under the case selection section in Chapter 5 and a brief synopsis of the cases mentioned here is included in appendices 1-10.

### **Why is this area of employment law important?**

The interpretation of this area of law has been a key issue in a number of cases over the last two or three years and although we seem to be approaching a degree of consensus, remains the subject of considerable debate. Moreover, I contend that it has a particular relevance to personnel practice and the employment relationship since it has a direct bearing on how cases are approached and managed. I remarked in the previous chapter on a sense of defensive employer reactions to discrimination law in general and it seems to me that the shifting of the burden of proof may provoke a similar sort of reaction.

Some of Lord Justice Mummery’s comments in *Madassary v Nomura International Plc* (2006) IRLR 246 CA, a case referred to in the previous section, support such contentions:

“I do not underestimate the significance of the burden of proof in discrimination cases. There is probably no other area of the civil law in which the burden of proof plays a larger part than in discrimination cases. Arguments on the burden of proof surface in almost every case. The factual content of the cases does not simply involve testing the credibility of witnesses on contested issues of fact. Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the

burden of proof applied by the fact finding body is clear and certain.”

Mummery is, of course, referring specifically to the significance of the legal aspects of the burden of proof in discrimination cases. However, when we remind ourselves that the claimants and respondents in employment tribunal cases are employers and workers, not their legal representatives, the importance of this area of employment law in the wider context of work is more evident. Whilst I accept that such legal representatives acting in employment tribunals, and more so in the appellate courts, may decide the tactics of the case and, on occasion, descend into seemingly academic legal debate, the outcome of the case comes to rest with the parties lodging or defending the claims. If discrimination law is to be seen as a force for emancipatory change in the workplace, the complexities and nuances of the law must be penetrated by a wider audience.

### **Closing thoughts on chapter three**

In this brief ‘technical’ chapter, I have attempted to explain the legal principles and the importance of language in our understanding of the standard and burden of proof in employment law cases. Further, I have shown how the implementation of the Burden of Proof Directive has impacted on these principles and spawned a case law debate in an attempt to clarify the correct interpretation of the Directive. A debate followed closely by the employment relations community looking for guidance on how to approach the management of potential discrimination cases.

We have also seen in this chapter that the making of ‘good law’ represents only a part of the story. How the law is interpreted and applied through the tribunals and the courts and then added to the body of knowledge we see reflected in case law completes the picture. One of the difficulties with the latter – as Rubenstein (2007) points out – is that it is only relatively recently

that employment law specialists have begun to take their place as key decision makers in discrimination cases. Even now, they are very few in number at Court of Appeal and House of Lords levels. The quest to find individuals with a balance between a deep understanding of the complexities of discrimination law and an understanding of how workplace issues are played out day to day may be far from easy, but it does matter to employment relations practitioners.

As my research project progresses, it is my intention to prick the employment law bubble and subject the products of the employment tribunal arena to the sort of social analysis that is rarely entertained in the wider management literature. Additionally, I seek to enter this technical and complex area of law and illustrate how a deeper reading and understanding of discrimination law narratives can inform the wider practice of employment relations. Engaging in a distinctive way with a small element of employment tribunal material forms a substantive element of this thesis and contribution to the body of knowledge in this area.

## CHAPTER FOUR

### EPISTEMOLOGICAL CONSIDERATIONS

#### Setting the conceptual parameters

Recognising that no researcher, including this one, can stand outside their epistemological commitments (Johnson et al, 2004), I switch my attention to this 'cleansing process' and to outlining my own philosophical stance. As I have already indicated, I am seeking to set out a conceptual framework that draws together the hermeneutic interpretation of meaning and the reflexivity implicit in the philosophy of critical theory. A potential synthesis recognised by others before me, including Forester (1983: 236): "Critical theory .... provides a foundation for .... the interpretative analysis of meaning." What O'Neill (1974) describes as our essential "making sense together." As I move towards the development of an interpretative analytical framework for my research – the subject of Chapter 6 – the purpose of this chapter is to set out the epistemological foundation on which it is based.

However, before doing that, I should say a few words about how I have reached my personal epistemological position and give brief mention to the alternatives that I have considered, but rejected. To many, this might be seen as an inconsequential matter and that the notion of truth is an everyday concept based on our beliefs and common sense interpretations. The researcher cannot afford to dismiss the issue so lightly and for this work to be given any academic credence, the writer's ontological and epistemological perspectives need to be clear.

The attempt to locate my version of truth and give it some sort of label betrays, in itself, a positivist trait of the search for a definitive answer. For those within the positivist school, the ability to pursue central engagement with the subject and to reach a position of absolute truth is a given. The relative simplicity of the positivist approach to management research, the clear epistemological underpinnings and the overt definition of truth criteria represent a seductive and reassuring cocktail. Furthermore, the idea that we are able to conduct objective, scientific research to establish a 'truthlike theory' which remains current until a 'better' theory is established and progress knowledge in this way seems to make some sense and perhaps explains why positivist approaches remain the dominant force in management research (McAuley et al, 2007).

Unfortunately, for me, it makes less sense, particularly in the arena of human relations. If I return for a moment to my employment tribunal scenario, I can accept the existence of a legal framework and even the claims to superior knowledge that it implies, but I am unable to justify excluding the subjectivity of the human actors involved. Nor can I subscribe to the assumption of a neutral observational language. For me, this is epistemologically unsustainable. The idea of me as the researcher engaging with my research material without bringing my experiences and biases to bear is not a tenable position. In reaching this position, I recognise that, to some extent, I am complicating the research process and, much more significantly, removing a key epistemological pillar of the managerial agenda. A step which puts me in direct debate with concepts of hierarchical structures, superior knowledge and status quo enforcing language. The implications of this stance will pervade my analysis in later chapters and I will return to how it influences my approach to my professional practice at the conclusion of the thesis.

At this point, I should admit to a certain affinity with the postmodern technique of critique and the excavation of alternatives. I would even go so far

as to say that I practice the technique as an important element of my own management style. I suspect that I would be regarded by my colleagues as an individual who allows others to elucidate their solutions before making a quiet, but hopefully, impactful interjection which unsettles the argument and widens the discussion. However, I recognise this as a technique to establish positions and encourage reflection rather than an end in itself. To depersonalise this thinking, I turn to an illustration of what I have termed a postmodern technique drawn from the MacPherson's (1998) inquiry into the death of Stephen Lawrence. Perhaps the most important recommendation to emerge from the report was aimed at changing police thinking from treating people equally to treating people according to need. To me, this represents a clear attempt to disturb the mindset of those employed in the criminal justice system, but, significantly, it was equally clearly intended to address a perceived problem. It was about promoting change in practice.

Accepting that postmodernism does provide a "different lens" and that the consideration of alternatives broadens the search for truth, it is inescapably difficult for the practitioner seeking to shape management practice in the future to survive on alternatives alone. Parker (1992: 11) describes this dilemma as "a retreat into the sophistry of academic speculation". I find the postmodern technique helpful in my efforts to demystify management and not without reward in my working life, but the disabling effects of postmodern epistemology and the associated lack of space for intervention and engagement I find less attractive. It seems to me that if management research is to be seen to be worthwhile and to be assigned an element of utility, the complete abandonment of the notions of truth and progress is unhelpful.

Bhaskar (1978) notes that a subjectivist epistemology is capable of being combined with either realist or subjectivist ontological positions and I recognise that the debate continues between the ideas of soft postmodernism based on the first combination and hard postmodernism based on the latter combination. I also acknowledge that the postmodern perspective can make a contribution to

management research (Kilduff and Mehra, 1997). In the extreme dimension, it is just not for me. I am left with the Kantian position that involves the acceptance of an objective reality and the unavoidability of the influence of my a priori assumptions on how I view that reality. I prefer the critical theorists' position of trying to disturb the established knowledge and practice, but in a way which promotes change and the surfacing of suppressed voices.

My position is complicated by the difficulty in trying to differentiate between social reality and social construction. Returning again to the employment tribunal scenario, I am prepared to accept the social reality of the legal framework, but the decision making process involves an interpretation (subjective) of the evidence (subjective) in the quest for reasonableness (subjective). The decision seeks to be practical in application and accepted, in legal spheres at least, as fair in all the circumstances. In essence, bringing together consensus and practical application.

This leaves me in what some might refer to as the 'grey area' between the positivist and postmodern extremes. My challenge now is to show that rather than being an uncomfortable 'sitting on the fence' position, my stance represents a distinctive and sound conceptual basis for my work.

### **A critical perspective and reflexive approaches**

It would be reasonable to suggest that a considerable proportion of the vast array of management research available to the enthusiastic student might seek to shelter under the banner of critical approaches and claim to be undertaking research in a critical manner. What this means is often unclear and there is a need to distinguish between this broad canvas of critical thinking and the more tightly defined critical theoretical approach (Johnson and Duberley, 2000). My own approach falls within the latter dimension, particularly in so much as my research is concerned with understanding restrictive influences and seeking to posit alternative considerations. In other words, to promote

change and provide an escape route from such restrictive influences. Not by revising practices necessarily, but by encouraging reflexive activity amongst those involved in a given social context.

Fournier and Grey (2000) offer three criteria that distinguish critical management studies. First, critical perspectives place the pursuit of knowledge above output and efficiency and, as a result, do not carry the baggage of attempting to improve managerial effectiveness. Second, they seek to uncover alternatives to the 'grand design' often portrayed as the only way forward. Finally, critical studies focus on revealing power relations and control structures. Taken together, those three elements provide a useful reference point for critical research and gel rather neatly with the Johnson and Duberley perspective outlined in the preceding paragraph.

I should at this point make reference to some of the alternative perspectives within the critical dimensions, critical theory, critical realism and pragmatism to name but three. Whilst my particular leaning is towards the consensus criteria associated with critical theory and the discovery possibilities created through a smooth integration with the hermeneutic art of interpretation, I do not regard the various perspectives as necessarily incommensurable. More that each perspective seeks different outcomes: pragmatism, for example, would be keen to demonstrate practical adequacy as a knowledge criteria. Critical realists would be more likely to look for practical ways of testing any potential improvement theories.

The concept of reflexivity is central to critical management research in order to expose the a priori 'baggage' that influences how we engage with the world. Applied in this context, such reflection liberates the researcher and allows a way forward through consensus in a democratic debate. Thus, the critical researcher would reject the extremes of positivism's 'objectivist illusions' and also eschew the 'anything goes' and relativism associated with the postmodernist position. Holland (1999) stresses the importance of exposing the

underlying assumptions on which arguments are built and seeks to extend the work of Kuhn (1962) and Burrell and Morgan (1979) by describing paradigm analysis as the “pathway to reflexivity” (Holland, 1999: 466.) I mention Holland’s work here because, significantly for me, his framework of types of reflexivity leads him to ‘transdisciplinary reflexivity’, a state of reflexivity that allows the researcher to overcome the restrictions imposed by such as discipline, mindset or paradigm and opens the door to alethic pluralism. In resisting the temptation to sail too close to the postmodern edge, he helps to establish a distinctive critical position whilst retaining the central tenet of reflexivity.

### **Hermeneutic understanding**

The hermeneutic tradition encompasses the notion of spiritual knowing, achieved through a concentration on interpretation and understanding. The emotional and intellectual preunderstanding of the researcher is important and this ultimately leads to reflection and an understanding of the researcher’s own limitations. Accordingly, any output from the research is likely to centre on hermeneutic clarification and an insight into the intentions of the various players in the arena of study ( McAuley, 2001). Research in the hermeneutic paradigm does not lead to the emergence of *facts*, only *interpretations*. Such interpretations should not be granted a status beyond that of hypotheses since they can be adjusted in the light of new information (Held, 1990). As the hermeneutic paradigm does not allow for an objective evaluation of intersubjective agreement, the hermeneutician relies on a common understanding and shared satisfaction of expectation between researcher and researched. Furthermore, as Held (1990: 313) points out, the researched needs to be understood in its historical context: “The meaning of text, for example, is always open to future interpretations from new perspectives”.

Some readers will feel short-changed by my attempt to explain hermeneutics, but to be more precise would suggest the presence of a neat

definition that I have yet to uncover. Beyond a widespread acceptance that the hermeneutic approach involves a relationship between researcher and researched designed to reveal alternative meanings often hidden beneath the surface of an accepted truth, writers in this arena seem content to identify characteristics of hermeneutics without trying too hard to pigeon-hole their underlying dimension. To some extent, such latitude appeals to this writer since it makes it easier to associate with other dimensions without denying fundamental elements of the hermeneutic personality. More of this later.

Alvesson and Skoldberg (2000) place their chapter on hermeneutics quite deliberately – it seems to me – between their chapters on *Data Orientated Methods and Critical Theory* – between empirical and more theoretically critical approaches – to emphasise the importance they attach to interpretation, be it of data or theory. Whilst I recognise that their handling of hermeneutics is somewhat complex in places, I will attempt to feed off this theme of data and theory interpretation later in this chapter and show how, taken together, hermeneutics and critical theory offer a powerful and, perhaps, radical methodological approach. A synthesis that I will term *critical interpretation*.

### **Critical interpretation**

The quotation from Forester (1983) at the beginning of this chapter is by no means the only reference to attempts to link hermeneutics and critical theory. By way of further example, McAuley (1997: 469) – in his review of the work of Sievers (1994) – notes that “Sievers uses both Hermeneutic epistemology and Critical Theory as underpinning philosophy”. Philips and Brown (1993: 1548) apply critical hermeneutics to their analysis of organisational communication and remark that “The most important potential contribution of critical hermeneutics lies in its extension of existing interpretive approaches to the study of management”.

More recently, Alvesson and Skoldberg (2000: 110) introduce their chapter on critical theory with the comment “Critical theory is characterised by an interpretative approach combined with a pronounced interest in critically disputing actual social realities. It is sometimes referred to as critical hermeneutics.” This theme is developed further by the end of the chapter where Alvesson and Skoldberg (2000: 144) describe critical research “as a kind of *triple hermeneutics*” which they break down into simple hermeneutics, double hermeneutics and triple hermeneutics as follows:

- “Simple hermeneutics – in social contexts – concerns individuals’ interpretations of themselves and their own subjective or intersubjective (cultural) reality, and the meaning they assign to this.”
- “Double hermeneutics is what interpretative social scientists are engaged in, when they attempt to understand and develop knowledge about this reality. Social science is thus a matter of interpreting interpretive beings.”
- “The triple hermeneutics of critical theory includes the aforementioned double hermeneutics, and a third element as well. This encompasses the critical interpretation of unconscious processes, ideologies, power relations, and other expressions of dominance that entail the privileging of certain interests over others, within the forms of understanding which appear to be spontaneously generated.”

McAuley (1985: 298) emphasises that “The hermeneutic paradigm does not replace other paradigms: it complements and enriches them”. He goes on to make the point that “what hermeneutic approaches do is to give greater depth to our understanding of the ways in which actors shape up and give meaning to their lives” (McAuley, 1985: 296). In seeking to establish some form of synthesis between critical theory and hermeneutics, in order to portray a critical research framework that can be placed under the heading of critical interpretation, I have been keen to discover such signs of similarity and congruence between what some would see as quite distinct schools of thought. McAuley (1985: 296) assists further with the comment that “the use of the hermeneutic approach is not designed to discount or discredit other approaches to organisational life – that is, more positivistic approaches”. This ‘neutral’

stance in relation to other approaches whilst retaining a distinctive methodological position helps to promote association with a critical philosophy. Additionally, the merger of hermeneutics with critical theory allows the latter to defend more robustly the criticism that 'critical theory offers more criticism of positivism and empiricism and less in the way of constructive methodological suggestions' (Alvesson and Skoldberg, 2000: 130).

Finally in this section and in an attempt to provide further clarity of definition, I turn to the entry headed *critical hermeneutics* in the summary of qualitative terminology penned by Schwandt (2001: 44). His description points to the following components being present: a sceptical view of given meanings and interpretations; critiques of meanings and practices designed to change society and free individuals; and a concern beyond the relationship between language, meaning and understanding to social and organizational practices.

These three dimensions sit comfortably with the approach I have outlined above and bring together rather neatly the critical and the hermeneutic.

### **Critical interpretation in a legal context**

Not unlike the way in which critical perspectives have emerged as response to the domination of positivism in the management disciplines, various legal theories set themselves against the historic primacy of classical and analytical jurisprudence. To some extent, picking up where the legal realism movement – influential in the United States in the 1920s and 1930s – left off and seeking to extend the challenges to natural law and positivist legal philosophy to another level (Tebbit, 2000).

MacCormick (1994: xv - xvi) comments that his own thinking has shifted from an “already muted version of legal positivism” to his present stance in what might be called “a post-positivist institutional theory of law”. By which

he means that he retains an acceptance of the simple formulaic logic of the rule of law that *Rule + Facts = Conclusion*, but beyond that he indicates that “an account of rational *practical* discourse can be constructed”. To some extent, this reflects a less certain approach to legal determination and a retraction of some of the harsher elements of criticism directed at Dworkin’s theory of law as an interpretative concept.

Ward (1998: 6) takes the critical perspective and the anti-positivist argument a stage further and contends that the law is “a matter of opinion, nothing more and nothing less”. This contention is central to much critical legal thinking and, in particular, to the attempts to undermine the notion of the neutrality of the adjudicator. Ward (1998: 156), drawing on the work of Kelman (1987), suggests that “every legal judgement and every judge is a political actor affecting a particular political agenda”. A comment from the heart of a committed critical legal theorist! Equally of interest to this writer, is the attachment of some critical legal theorists to the theories of language. Hutchinson (1988) asserts that we all ‘live’ in language and because language and imagination are inextricably linked ‘we are never not in a story’. Frug (1992) comments that “our legal contexts are conversationally created, through the interaction of all of us in the social situation”, a line supplemented by Hunt (1990) in his assertion that law is textual and no more than a social and contingent construct.

According to Harris (1997: 109), those engaged in critical legal studies “seek to ‘deconstruct’ or ‘trash’ the law by showing how the materials to hand could be manipulated either way, that coherent exposition is an illusion, that there are no purposes, principles or policy constraints with any dispositive bite, and that consequently every outcome is arbitrary”. This contention goes too far for my liking, but it does illustrate how far the debate has been stretched from the positivist starting point.

Drawing back from some of the more extreme views expressed by some critical legal theorists, at least part of the credit for rediscovering the 'forgotten threads of connection between jurisprudence and philosophy' must go to Oxford University's former Professor of Jurisprudence, Herbert Hart (Lacey (2004) p: 5). Notwithstanding his commitment to positivist principles and an analytical approach to philosophy, Hart was a passionate advocate for placing the philosophical aspects of legal scholarship above the mechanical application of a set of rules and to an extent responsible for igniting the debate that has followed on from a fairly sterile acceptance of natural law at face value. His work has also encouraged me to look across the legal and management disciplines and attempt to synthesise elements of critical interpretation and legal interpretation. Hart's own intellectual journey seems to leave this door ajar "a combination of methods is crucial to philosophical innovation" (Lacey (2004) p: 4).

Hart supplemented his analytical philosophy with elements of linguistics to create a version of legal positivism with a strong philosophical base. The relationships between language and the law is central to Hart's thinking and much of his argument is characterised by precision in the choice and use of individual words (Wacks (2005)). In terms of jurisprudence and philosophy, Hart's "The Concept of Law" published in 1961 remains one of the most important contributions to the subject and an inescapable reference point for legal scholars (Hart, 1991).

To this point and quite deliberately, I have only made passing mention of Ronald Dworkin's sophisticated and much debated alternative to legal positivism in this very brief skate across the ground of legal theory. Dworkin has been described as "the most influential English-language legal theorist of his generation and as being responsible for "establishing a third alternative to legal positivism and natural law theory: an interpretative theory of law" – see Bix (1999: 81). For my research task, I have in part been influenced by Dworkin's contention – described by Harris (1997: 190) – that "law is

interpretative through and through". As Dane (1996: 116) points out, Dworkin is a man who "rejects legal positivism, but also embraces legal hermeneutics".

Dworkin brought to the table an interpretive approach to law – in practice and in theory – which he referred to as 'constructive interpretation'. In essence, he argues that legal issues cannot be simply decided and that they need to be interpreted if they are to be understood. Going further, he contends that they should be interpreted constructively and principally against the two criteria of 'best fit' and moral value. He was looking to find the best interpretation of what had gone before rather than sticking to the positivist attempt to see law objectively 'as it is' or value free. As Bix (1999) explains, Dworkin favours an interpretation of 'law as integrity' where the interpretive process produces individual or collective rights in a consistent and coherent way.

It is clear that Dworkin was not prepared to accept the legal positivist's stance that there is a separation between law as it is – descriptive legal theory – and law as it ought to be – normative legal theory. He eschewed the contention that there is no connection between the law and morality. From this I draw some support for my arguments later in this narrative where I seek to illustrate that the employment tribunals do not provide decisions that can be explained by logical deduction from a set of predetermined legal rules. They are much more complex than that.

In his latest book, Dworkin (2006) relates his view that interpretive concepts must flow from a shared practice. As individuals we might disagree about the criteria for determining injustice for example, but we share the concept (interpretive) of justice itself. We also understand that we interpret justice based on our knowledge of the particular circumstances, our knowledge of the law and related infrastructure etc. If we accept this line, as I do, we are accepting that the doctrine of law is an interpretative concept. This convergence around recognising concepts as interpretive, but, at the same time,

making a distinction between the concept itself and the interpretation of particular instances underpins Dworkin's thinking and leads him to the statement:

"So a useful theory of an interpretative concept.....cannot simply report the criteria people use to identify instances or simply excavate the deep structure of what people mainly agree our instances. A useful theory of an interpretative concept must itself be an interpretation....." (Dworkin, 2006: 12)

Dworkin does not depart from his long held premise that it is not possible to separate morality and the law. Indeed, he goes further and suggests that the domain of legal theory can be better understood as an element of the domain of morality.

This brief excursion into the realms of legal theory is intended to illustrate that critical responses to positivism are active in the field of law and, to some extent, mirror the debates in the social and management sciences. Accepting that his thinking has been challenged robustly by supporters of Hart's legal positivism and by a 'new breed' of critical legal theorists, Dworkin provides a post-positivist standpoint and a model for constructive interpretation to which I will return later.

#### **Closing thoughts on chapter four**

In this chapter, I have attempted to construct a conceptual framework for my research project and, in so doing, I have devoted considerable space to my philosophical approach. In part, this reflects my support for the Alvesson and Skoldberg (2000: 4) comment that "it is not methods, but ontology and epistemology which are the determinants of good social science". A remark very much in line with the view of Potter and Wetherell (1987: 159), "developing an adequate theoretical understanding or interpretation is at least as important as perfecting a cast iron methodology". More broadly and to add to

the completeness of my theoretical framework, I have examined briefly some of the topical debates in legal theory in an endeavour to show how legal theory might influence critical interpretation. As my research project progresses, I believe that such investment will be rewarded by facilitating the interplay between theory and data in a reflexive manner.

I have also sought to address the challenge set by Alvesson and Deetz (2000) to articulate a relationship between the critical tradition – characterised by critical theory – and the interpretive tradition – characterised by hermeneutics – under the more generic banner of critical management research. In my terms, critical interpretation. In so doing, I have endeavoured to address their three overlapping tasks for this critical type of management research: to provide insight, to offer critique and to consider the more pragmatic element of using the research to enable change. I may ultimately differ in my approach to the third component – what Alvesson and Deetz (2000: 20) term “transformative redefinition” – but I support the ambition to address all three elements in my research project.

I am left more reassured that a blend of critical theory and hermeneutics provides an opportunity to underpin a reflexive research process. Critical theory provides a skeptical element to our understanding of the world and it is given more substance and an outlet to a more sustainable methodological approach through association with the search for interpretation and understanding that forms the backbone of hermeneutics.

I conclude this chapter with the thought that if I am to adopt, however naively, the mantle of the critical management researcher, my ‘success factors’ are more about promoting a healthy debate amongst the various actors in the employment law arena than they are about searching for *facts* or *superior knowledge*. At best, I may uncover a set of ideas that add value in the legal and personnel professions. To my mind, this is a worthwhile pursuit. I contend that the pluralistic conceptual framework I have outlined above provides a

distinctive starting point from which to pursue this ambition. It also provides the opportunity to establish knowledge criteria based around consensus and coherence within the employment relations domain.

## CHAPTER FIVE

### METHODOLOGICAL CONSIDERATIONS

#### **Methodological choice for critical interpretation**

Whilst not wishing to fall into the trap of commencing this part of my narrative with an apology, I am prepared to admit – and it will already be clear to the reader – that I have fallen victim to the “explosion of interest in qualitative methods” (Symon and Cassell, 1998: 1) and that I intend to tap into this embarrassment of riches (Denzin and Lincoln, 1998). For me, such methods in management research provide the more exciting and potentially revealing routes to developing our knowledge about the management of organisations. As my research journey progresses, I recognise that I will be increasingly called upon to justify this rather grand claim and to put more substance to my methodological choices. Similarly, I acknowledge that the quality of my qualitative research will, to a considerable extent, depend upon the research decisions taken (Seale, 1999).

In inviting the reader to accept, for the moment at least, that a qualitative approach makes sense for the research journey I have so far outlined, I accept fully that the defining of a research strategy and the making of methodological choices is a complex issue. Under the banner of qualitative research, the range of methodology and method available invariably involves a considered choice and a series of compromises between the many approaches. Moreover, as Denzin and Lincoln (1998: 5) point out, qualitative research “privileges no single methodology over any other”. The research process is not simply about

choosing a particular method to conduct a piece of research, but also about the different relationships between theory and method and researcher and research material (Morgan, 1983). All of which adds to the difficulty of mounting a conclusive argument about the authority of one methodology over another since all have inherent strengths and weaknesses, particularly when issues such as social context, philosophical assumptions and availability of data are added into the decision making cocktail.

It is also important to recognise the significance of underlying assumptions in any research analysis (Burrell and Morgan, 1979) and to display an understanding of what Morgan (1983: 13) terms the “possible modes of engagement” with the research object. Both are vital if the research process and interpretation of research results are to have any sense of credibility or foundation. Having addressed the significant challenge of association with a particular theoretical framework – the lens through which to view the research – and looked more closely at an appropriate research methodology, the researcher faces some more practical choices. As Gill and Johnson (1997: 128) have pointed out, “inevitably the researcher must choose between these different approaches in making an area of interest researchable”. In other words, the research project must be ‘doable’.

To reach the point of being comfortable with one’s theoretical perspective and to be broadly aware of the direction of the potential challenges is a significant advance in itself. To have adopted a position that falls within the extensive frame of critical management research still leaves the door open to a multitude of ways of conducting research (Alvesson and Deetz, 2000). To begin to suggest a research process that moves beyond the restrictions imposed by the Burrell and Morgan (1979) ‘paradigmatic incommensurability’ towards synthesis and similarity extends the complexity of choice to another level. Undeterred, I find myself seduced by critical research and its inherent challenge to restricted thinking and established practices (Alvesson and Deetz, 2000). As this narrative unfolds, I aim to convince the reader that adopting this critical

perspective in relation to discourse analysis – and more narrowly, the interpretation and analysis of written text - provides the potential to facilitate the ‘conversation’ between theory, reflection and data and to release alternative interpretations.

Even such a brief look at some of the issues around methodological choice, serves to illustrate the significance of research design in any management research project and, in particular, the need to expose the strands of coherence running from the meta-level conceptual framework through to the research strategy and extending to the research methods themselves. In other words, to recognise the need to locate my research design and my chosen research methodology within the paradigm of critical management research – in my terms, more accurately described as critical interpretation - and to link the various elements of the design in a coherent fashion. Pursuit of this goal will be the focus here rather than an examination of the numerous alternative methodologies and/or to explanations as to why they have been dismissed.

### **Approaches to discourse analysis**

Wood and Kroger (2000) suggest that the engagement of researchers in the social sciences with the analysis of discourse has a relatively short history. They claim that the ‘turn to language’ did not appear until the 1980’s, but, significantly, the move attracted interest across the spectrum of social science disciplines. Moreover, a number of approaches to discourse analysis emerged, each with a distinct personality of its own. This eclectic theme is picked up by Wodak and Meker (2001) and by Phillips and Jorgensen (2002) as they draw distinctions between the various forms of discourse analysis, both in terms of research methods and underlying theoretical connections. What follows in the remainder of this chapter is an attempt to touch on some of these varieties of discourse analysis and to make my own position clear.

Alvesson and Skoldberg (2000: 203) include in *discourse* “all kinds of language use (speech acts) in oral and written social connections, that is, utterances and written documents. A discourse is a social text”. This leads them to an alignment with Potter and Wetherell (1987: 7) who view *discourse* in the open sense to “cover all forms of spoken interactions, formal and informal, and written texts of all kinds” and view *discourse analysis* as “analysis of any of these”. Potter and Wetherell are keen to point out that discourse analysis in their terms is not a concern “purely with discourse per se”, but a study of social texts “to gain a better understanding of social life and social interaction”.

Alvesson and Skoldberg (2000:200) comment that the interest in language “has tended to move from limited linguistic units to larger textual units – discourses” and it is becoming increasingly clear that discourse and discourse analysis represent topical themes in the social and management sciences. They also point out that discourse analysis has the ability to deepen and vary the various philosophical approaches and make a contribution to providing a critique for more data orientated methods. Travers (2001: 121) offers further support for this line with the comment, “There have, however, been a large number of studies published in the inter-disciplinary field of discourse analysis, which has become one of the fastest growing areas of work in the human sciences”.

Discourse analysis calls on the researcher to remain reflective and sceptical throughout the research process to try to ensure that the analysis picks up the variations and nuances in the conversation or script. There is a real need to go beyond what is actually said or written and begin to *interpret* the discourse in a way that reveals something about what is in the mind of the speaker or writer and to say something about the social context in which the discourse takes place. Barry et al (2006) package approaches to discourse analysis as essentially a researcher’s choice between working within a text, working outward from the text to its context or a combination of the two

whereby textual analysis is integral to conceptual considerations. They propose that all three approaches are now widely employed in organisational research.

Whilst recognising the presence of numerous other styles of discourse analysis, Phillips and Jorgensen (2002) divide the 'field of discourse analysis' - or more precisely 'social constructionist discourse analysis' - into three areas: Laclau and Mouffe's discourse theory, critical discourse analysis and discursive psychology. In so doing, they seek to present for each approach 'a complete package' of philosophical premises, theoretical models, methodological guidelines and specific techniques for analysis embedded within the paradigm of social constructionism (Phillips and Jorgensen, 2002:4). All three variations share the common premise that our use of language is not a neutral activity - their differentiation of the three approaches can be described as follows:

- **Laclau and Mouffe's discourse theory**  
"The theory has its starting point in the poststructuralist idea that discourse constructs the social world in meaning, and that, owing to the fundamental instability of language, meaning can never be permanently fixed." (Phillips and Jorgensen, 2002: 6).
- **Critical discourse analysis**  
"Critical discourse analysis, .....with special focus on Norman Fairclough's approach, also places weight on the active role of discourse in constructing the social world." The point of departure from Laclau and Mouffe is Fairclough's commitment to the idea that discourse is just one element of any social practice. (Phillips and Jorgensen, 2002: 7).
- **Discursive psychology**  
"Discursive psychology.....shares critical discourse analysis' empirical focus on specific instances of language use in social interaction." The principal ambition being ".....to explore the ways in which people's selves, thoughts and emotions are formed and transformed through social interaction and to cast light on the role of these processes in social and cultural reproduction and change." Rather than a focus on "internal psychological conditions". (Phillips and Jorgensen, 2002: 7).

My interest lies in the critical discourse analysis approach and the potential to explore the employment tribunal discourse as one component of the employment relations environment. I turn my attention in this direction.

Scollon (2001: 140) provides a useful definition: "Critical Discourse Analysis is a programme of social analysis that critically analyses discourse – that is to say language in use – as a means of addressing problems of social change." Equally helpfully, Van Dijk (2001: 96) terms critical discourse analysis as "discourse with an attitude" and claims that "Critical discourse analysis can be conducted in, and combined with, any approach and sub-discipline in the humanities and social sciences." Accordingly, a central theme in critical discourse analysis involves the conversation or narrative being studied to be viewed from a political perspective to reveal the *power* relationships and to *emancipate* the meaning for those who do not hold such authority (Travers, 2001). Although discourse analysis methods may differ in detail, they would normally involve the adoption of some of the principles of literary theory applied to a particular context.

As Fairclough and Wodak (1997) point out, critical discourse analysis is distinguished by a particular view of the relationship between language and society and the relationship between analysis and the practices analysed. More specifically, critical discourse analysis posits language as a form of social practice and in doing so implies a relationship between the discourse and the context in which the discourse is produced. Fairclough (2003) carries the baton a stage further and expresses the concern that the two 'disciplines' of linguistic analysis and social research have led independent lives for too long. Unashamedly motivated by a desire to expose dominating forces, the researcher under the critical discourse analysis banner seeks to intervene, unsettle and promote change. In my quest for a methodology consistent with a theoretical synthesis of reflexivity and interpretation, the critical variant of discourse analysis commands attention and offers the potential identified by Wodak

(2001:64), “research in CDA must be multi-theoretical and multi-methodological, critical and self-reflective”.

Van Dijk (1997), Wodak and Meyer (2001) and Wetherell, Taylor and Yates (2001) all identify Norman Fairclough as a key exponent of critical analysis. Whilst promoting the value of textual analysis as an element of social science, Fairclough (2003) recognises that textual analysis does have its limitations. For him, no analysis can be objective, complete or definitive and to uncover meaning it is necessary to interpret texts within their social context.

Fairclough (2003) concludes his own assessment of textual analysis by commenting that critical discourse analysis is but one form of critical social research, a wider subject which seeks to examine how societies work. This is a very grand ambition and demands that researchers concern themselves with important social issues. My choice of research focus – discrimination law and its influence on the employment relationship – is one of those important issues that deserve attention. Much of Fairclough’s research work is now centred around ‘new capitalism’ and he is very clear that the phenomenon is leading to social transformation that cannot be understood without an appreciation of the language used. (Fairclough, 2003). I contend that the language around discrimination, employment law and workplace dispute resolution is similarly impactful.

Significantly for this writer, Fairclough (1992) has provided a vehicle for critical discourse analysis through the interpretation of Bhaskar’s (1986) concept of ‘explanatory critique’ and translation into an analytical framework. As Dick (2004) explains, Fairclough has based his approach to critical discourse analysis on the work of Foucault and constructed a three dimensional framework for analysis of discourse. First, there is a need to understand how a piece of text is constructed, what is it trying to achieve and how is it trying to achieve its purpose. Second, the context in which a piece of text is produced needs to be examined to guide the forms of interpretation which might follow. Third, the

wider 'social home' of the piece of discourse needs to be considered and the extent to which dominant discourses are reinforced or challenged. Taken together, these steps allow the researcher to analyse discourse from a take nothing for granted stand point and, it seems to me, across any form of discourse drawn from any source. Utilisation of such an approach with documents that influence future interpretations, practice and behaviour – such as employment tribunal judgements – has added attraction.

The three stage model is revisited in Chapter 7 and represents an important influence on the interpretative analytical framework I intend to use to conduct my own research.

### **Employment tribunal judgements as a data source**

In attempting to demonstrate how critical discourse analysis offers the consistency I seek between method and data source, I am encouraged by the Alvesson and Skoldberg (2000: 206) comment quoted here: "Discourse analysis is often interested in accounts or documents which have arisen in the natural course of events, rather than in interaction between participants and researchers." As I have already indicated by reference to the 'researcher intervention free zone' that surrounds and adds to the value of 'historic' documents, employment tribunal judgements represent a data source that is free from the researcher's involvement at the point of entry. Additionally, employment tribunal judgements are in ready supply and freely available over a timeframe spanning four decades.

To further the 'purity' of data source point – from a researcher perspective at least - in the specific case of employment tribunal judgements, the transcription of the 'story' has, of course, already been undertaken by the members of the tribunal, invariably drafted by the legally qualified chair. Unlike the researcher who can refer back to a tape recording of an interview to

check the accuracy of the transcription, the textual analyst must rely on what is actually written and build any insight or inference on that basis.

From a different angle, employment tribunal judgements represent an attractive data source in that they would generally be perceived as being produced in an objective, rule bound, context. It occurs to this writer that such a perception merits challenge, particularly when the players are bound by a burden of proof that relies on 'the balance of probabilities' rather than 'beyond reasonable doubt' leaves considerable scope for interpretation and inference.

It seems to me, that this particular collection of social texts has been left relatively untouched by management researchers to date and is not without scope for critical examination. The seminal work of Garfinkel (1967) concluded that jurors tend to look for evidence to support their conclusions rather than look at the evidence and deduce a decision. This implies a retrospective search for justification with outcome preceding decision. My research provides an opportunity to uncover whether this proposition holds good in the context of written employment tribunal judgements.

### **Case selection**

The choice of individual case for analysis was always going to be a difficult one and one that is wide open to comment and any number of possible alternatives. However, it is important to recognise that case selection is a crucial element of the research project, that those selected serve the research issue and that the case selection criteria are clear (Hodson, 1999). As I have already indicated, hundreds of discrimination cases are determined by employment tribunals each year. Of these, a number proceed to the various appellant authorities and a few cases come to be regarded as significant in case law terms. By way of example, the IRLR contained reports on 34 discrimination cases in 2002 spread evenly over the main jurisdictions: 10 involving race discrimination and 9 involving sex discrimination (Rubenstein (2003)). In 2003,

the number of discrimination cases rose to 43 - 11 involving race discrimination and 16 involving sex discrimination (Rubenstein (2004)) - and in 2004, 42 discrimination cases were reported - 8 involving race discrimination and 15 involving sex discrimination (Rubenstein (2005)). 2005 saw 45 cases reported of which 15 related to sex discrimination and 13 related to race discrimination (Rubenstein, 2006) and, in 2006, 32 cases were reported of which 9 related to sex discrimination and 5 related to race discrimination (Rubenstein, 2007).

Now in its 20th iteration, the annual IRLR publication "Discrimination: a guide to the relevant case law on sex, race and disability discrimination and equal pay" - referenced in the previous paragraph - is recognised in the employment law arena as the 'bible' of discrimination case law and I make use of it to help define my field of analysis. I have already revealed my interest in the standard of evidence and burden of proof issues surrounding discrimination in sex and race discrimination law and the cases selected for analysis represent this interest. My case selection criteria can be summarised as follows:

- the case involves an allegation of sex or race discrimination
- the case contains debate and comment around the concepts of burden of proof or standard of proof
- the case is heard by at least one appellate court beyond the initial industrial / employment tribunal
- the case is considered sufficiently important to be included in Rubenstein's annual review of cases reported in the IRLR under the burden of proof or standard of proof headings (Rubenstein, 2003 - 2007)
- the cases are within my sphere of professional knowledge and considered likely to contribute to the social issue being researched (Hodson, 1999).

The judgements listed below are drawn from my review of the relevant case law in Chapter three and set against the selection criteria outlined in the previous paragraph. They are designed to provide a rich analytical source:

- King v Great Britain China Centre (1991) IRLR 513 CA
- Zafar v Glasgow City Council (1998) IRLR 36 HL
- Barton v Investec Henderson Crosthwaite Securities Ltd (2003) IRLR 332 EAT
- University of Huddersfield v Wolff (2004) IRLR 534 EAT
- Chamberlain Solicitors and another v Emokpae (2004) IRLR 592 EAT
- Sinclair Roche & Temperley and others v Heard and another (2004) IRLR 763 EAT
- Webster v Brunel University (2004) EAT
- Bahl v The Law Society and others (2004) IRLR 799 CA
- Igen Ltd and others v Wong, Chamberlain Solicitors and another v Emokpae, Brunel University v Webster and the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission (2005) IRLR 258 CA.
- Madarassy v Nomura International Plc (2006) IRLR 246 CA.

In line with normal legal practice, these cases include extensive reference to previous legal authorities and, in so doing, add a deeper context to the ground covered in these 10 judgements alone. This degree of coverage over a 15 year period allows me to claim with some confidence that, taken together, the cases 'tell the story' of how the concepts of burden of proof and standard of proof have been interpreted in discrimination case law.

### **Coding the data**

Having identified employment tribunal texts as a relevant and available data source and made the selection of the cases to be analysed, the data

demands reading and re-reading in search of words or phrases of interest (Wetherell et al, 2001). My refinement on this approach is explained in more detail in Chapter 7, but, in short, involves three steps: noting words, phrases or constructs which raise a degree of suspicion in my mind; reflection on the grounds for my suspicion; and considering the relationship between my reflective analysis and the text plus existing theory. Such deep analysis seeks to reveal patterns that emerge from the data to put those into some sort of order that can be examined and re-examined as the research progresses. Wetherell et al (2001) acknowledge that not all patterns will last the distance of the research project or that the researcher can hope to identify all the patterns present in the data, let alone include them in the writing-up of the research project. A selection of patterns that advance the research issue is inevitable and the exclusion of some patterns – consciously or unconsciously – equally so.

The coding of the researcher's findings is an essential requirement of discourse analysis and it is important to be clear on how the coding is to be managed before engagement with the data begins. Seale (1999: 154) provides a helpful statement about what coding involves "representing the researcher's thoughts about how data might be interpreted, given a particular set of concerns." Seale (1991: 154) goes on to warn about the dangers of coding too early in the analysis and, as a result, "fixing the meaning" before other possibilities have been explored. He recommends a more flexible approach where early visits to the data are more about signposting potential areas of interest rather than looking for outcomes at this stage.

With Seale's advice in mind, my coding framework includes the following:

- my coding category starts from a word, phrase or construct that gives cause for suspicion e.g. inference
- my second categorisation involves the identification of a qualifying word, phrase or construct e.g. justifiable inference

- my third categorisation involves identification of any relationship with any word, phrase or construct elsewhere in the specific text under review
- my fourth categorisation involves identification of any relationship with any word, phrase or construct elsewhere in the set of texts (selected cases) under review
- my fifth categorisation is about any potential relationship with the wider employment relationship literature, particularly that relating to my research considerations.

Once the data has been coded in this way, it provides a sort of ‘processed product’ drawn from the raw material of the employment tribunal texts and one that underpins the analysis to be undertaken later in this thesis. The important point to make here is that the coding exercise is about identification rather than reflection. The latter comes later and forms an important part of the interpretative analytical framework. As Seale (1991) makes clear, it is important not to close off awareness of discovery at this early stage.

### **Closing thoughts on chapter five**

In this chapter, I have worked through the essential considerations of methodological choice and, specifically, approaches to discourse analysis. In so doing, I have endeavoured to maintain consistency with the conceptual threads that permeate my work. I have also said something about employment tribunal texts and the potentially illuminating value they may hold. I have attempted to justify my case selection around a particular area of discrimination law and a set of criteria designed to tell the story of the development of case law in this important area. To provide a rich data source, and, finally, I have outlined my approach to coding as a pre-requisite for the analysis which follows.

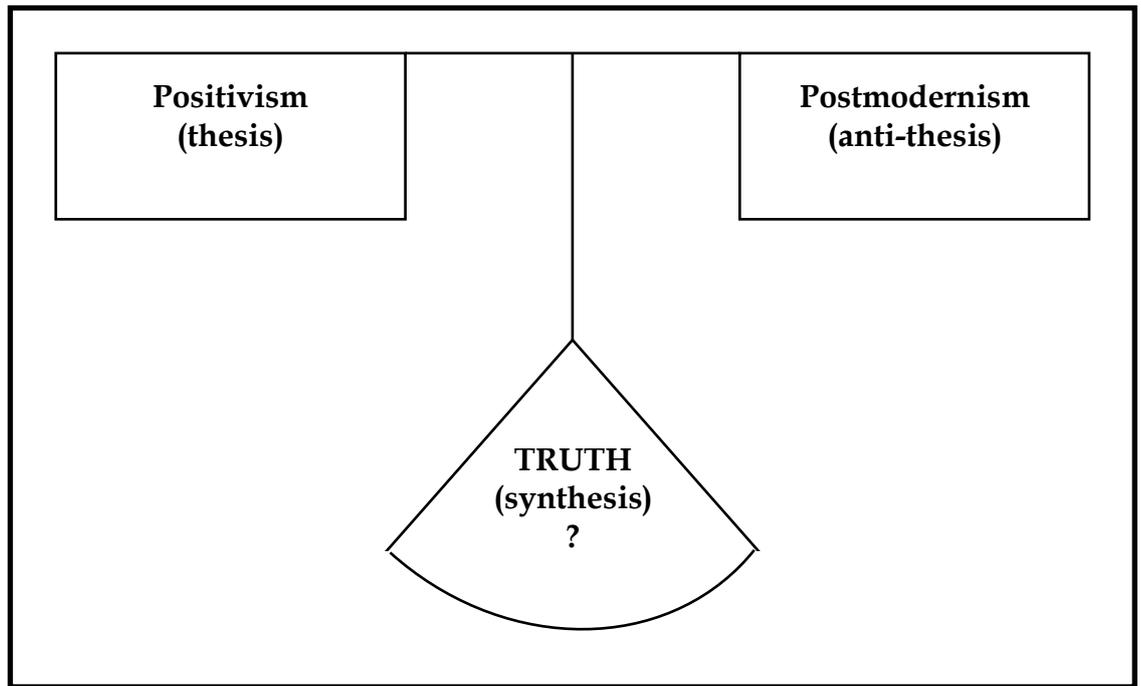
## CHAPTER SIX

### REFLECTIONS ON THE RESEARCH PROJECT SO FAR

#### **My thinking journey**

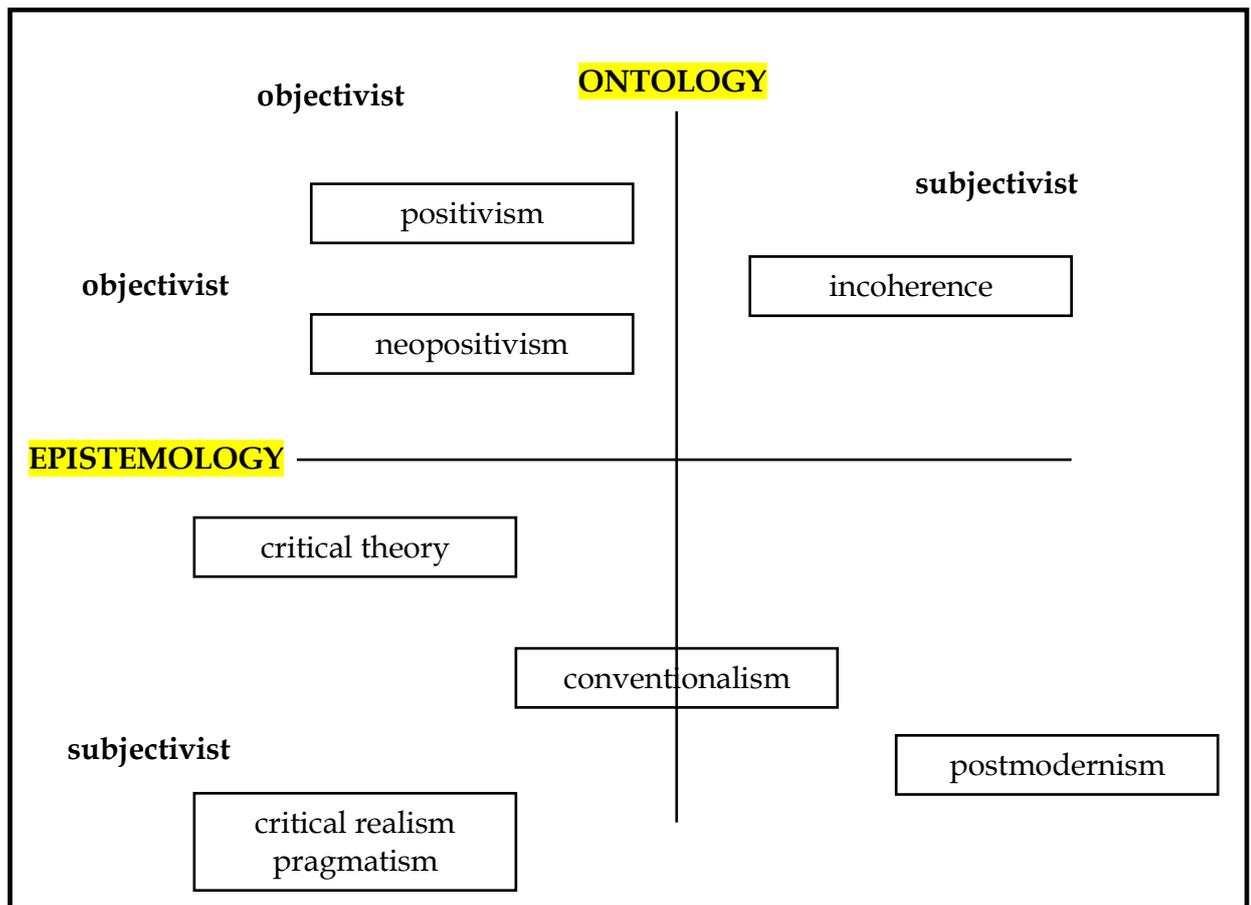
Having progressed through a depiction of my chosen research area against the backdrop of a wider employment landscape, engaged in a debate about my epistemological stance and methodological approach and before turning to the construction and running of the 'research engine' in the next chapter, it might be helpful to the reader, not to say therapeutic for the writer, to reflect on the practical issues of coming this far on the research journey. In essence, to give an insight into my research style and to illustrate the storyboard of my thinking journey.

Although I attempted to 'draw a picture' of my research journey in Chapter 1, figure 1.1, I was not suggesting any obvious clarity of thought at the outset of my study or that the journey has not been punctuated by numerous twists and turns along the way. The drawing of pictures and the development of mind maps are important elements of my thinking process at work and they have been equally important to me in this academic endeavour. They were crucial to me as I wrestled with my first meaningful exposure to the complexities and contradictions around epistemology, ontology and reflexivity and sought to escape from the dominant managerial discourse that I had become so familiar with, not to say, influenced by. One of my earliest scribbles is reproduced below at figure 6.1 and reflects an attempt to make sense of the question 'what is truth in management research?' The pendulum was to swing repeatedly between the 'positivism and postmodern extremes' as my reading and thinking turned corner after corner.



**Figure 6.1** The truth pendulum

I recognise that not everyone would share my representation of postmodernism as the anti-thesis of positivism, but it served to put epistemology into some sort of personal perspective and to open the door to the synthesis of the objective ontological and the subjective epistemological position. Such a synthesis drew me ever closer to the critical domain and an association with the important starting point for the critical researcher that any accepted truth is there to be challenged. It is also in tune with – and indeed informed by – the Johnson and Duberley four quadrant model reproduced at Figure 6.2 below:

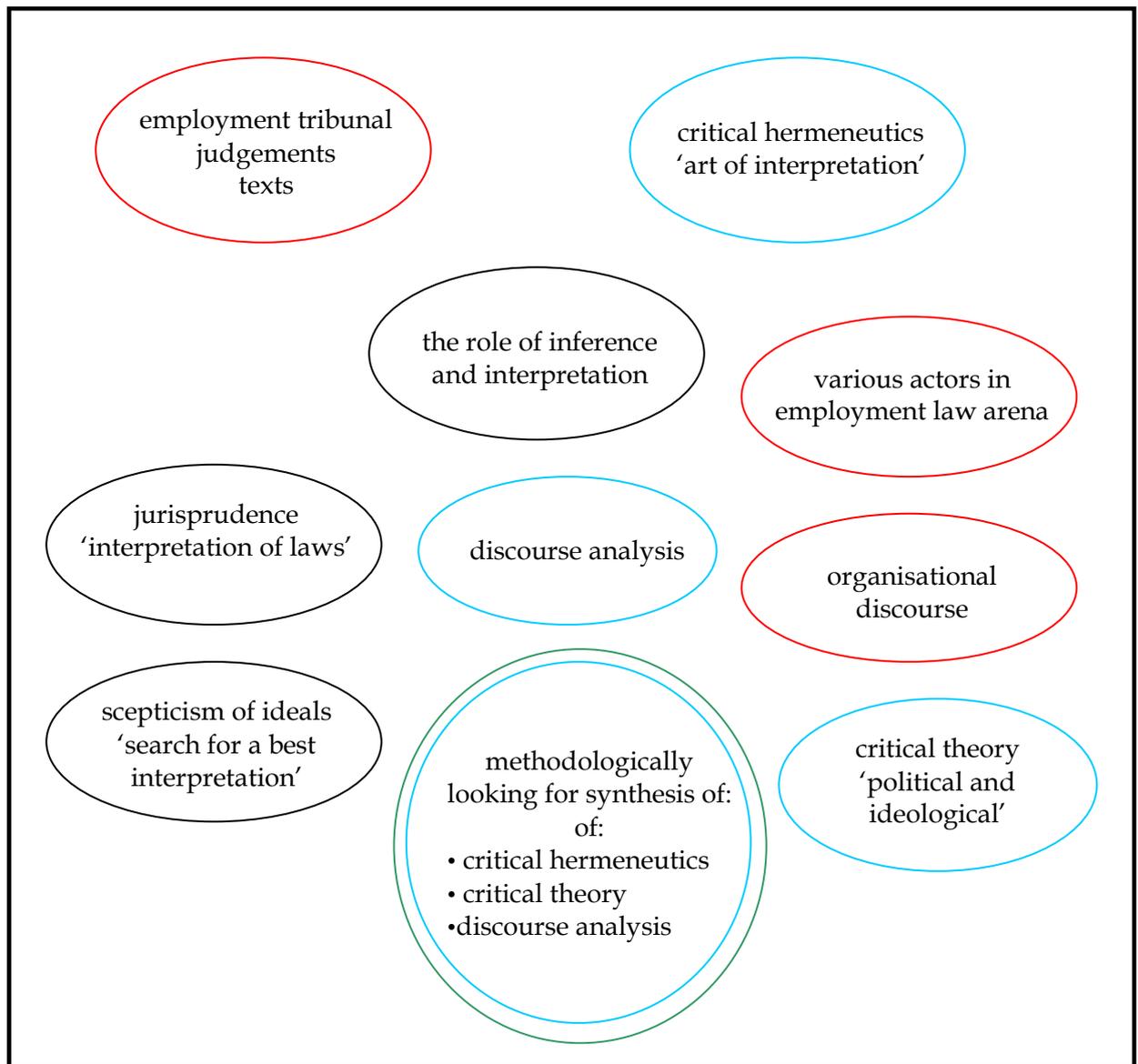


**Figure 6.2** Reflexivity and management research (Johnson and Duberley, 2000: 180).

In marking out the ‘south-west quadrant’, Johnson and Duberley (2000) are not defining a specific epistemic personality, but highlighting an extensive ‘grey area’ with many opportunities for pluralistic approaches. A DBA colleague of mine has consistently eschewed attaching a label to his epistemological perspective, arguing strongly that others should attach such labels if they so choose. I share his reservations and I have gone to some lengths to draw on a number of perspectives to build my own, distinctive conceptual foundation. What I have found, however, is that the established labels do provide important reference points to navigate around.

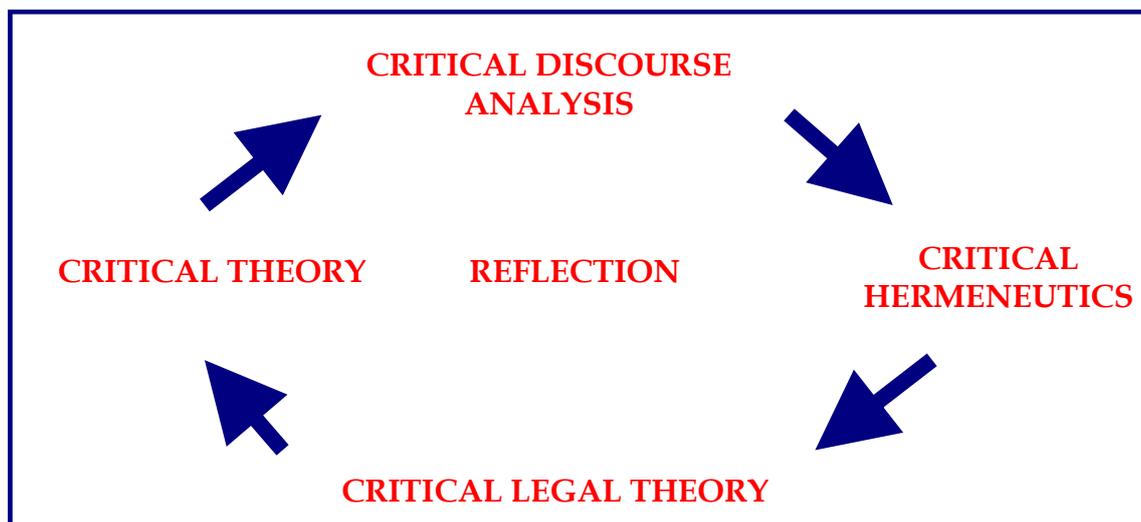
The next step on my reading and thinking journey was to assemble a few of the elements that seemed to me more secure in my research ‘package’ than

others. These are represented at Figure 6.3 as a jumble of potential foundation stones.



**Figure 6.3:** A few foundation stones

Consolidation of a developing and personalised conceptual model, recognising some of the connections, is shown in the more mature diagram at Figure 6.4.

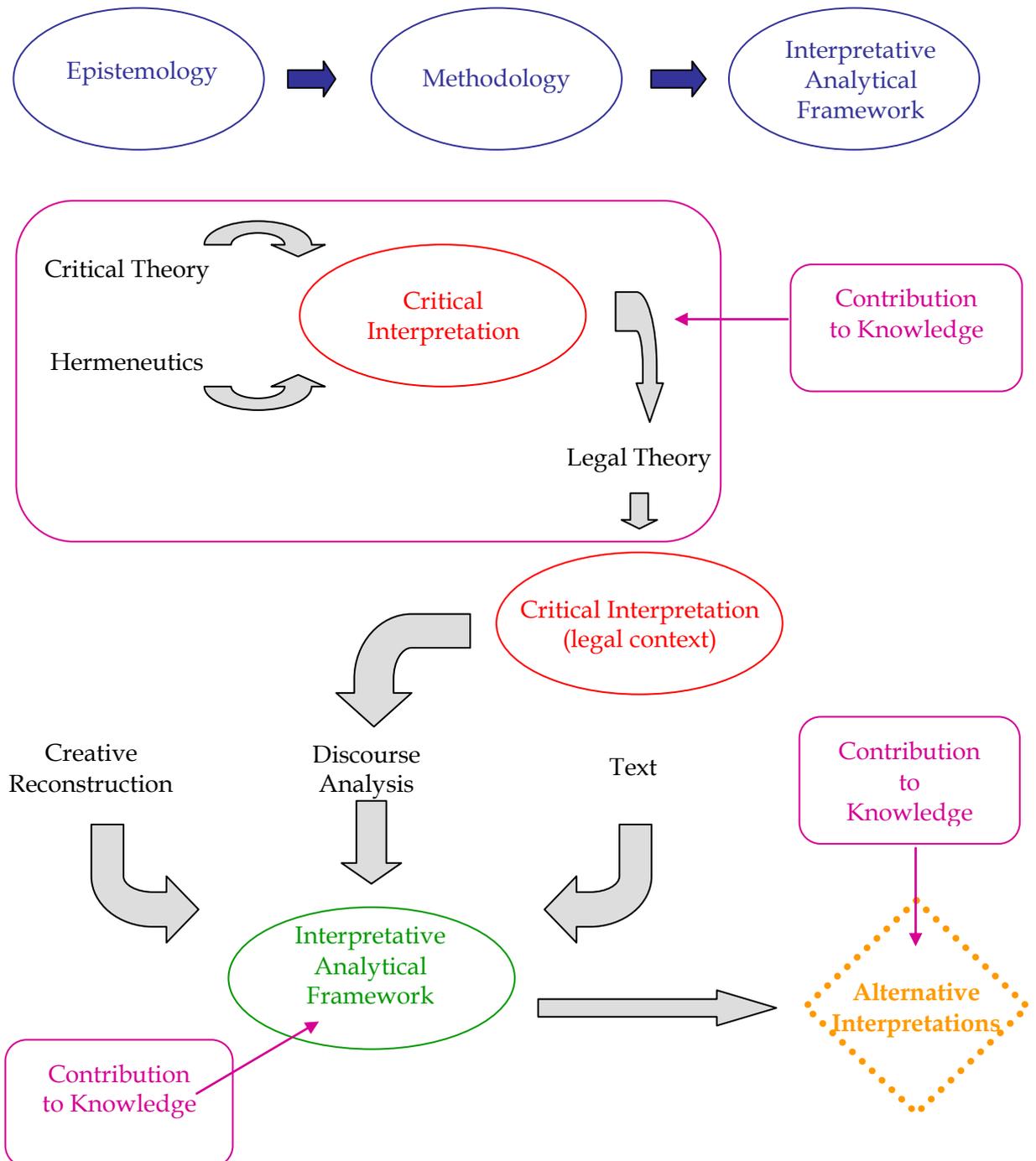


**Figure 6.4:** Conceptual construction

Looking for some support for my developing thinking, I was encouraged to find Alvesson and Skoldberg (2000: 207) confirm their view that the ideas of discourse analysis and associated streams such as conversation analysis and ethnomethodology are “exciting and worthy of serious attention”. Travers (2001) remarks on the strong links between critical discourse analysis – reflected in the various approaches to the study of language – and the ideas and concepts of critical theory. For the social psychologists Potter and Wetherell (1987: 1), a failure to accommodate discourse analysis of social texts damages the “theoretical and empirical” adequacy of the research. Phillips and Brown (1993: 1567) suggest that a critical hermeneutic approach is likely to provide more reflective research through a combination of an “inescapably interpretative impact” and “an objectifying formal moment of analysis”. These references were helpful in that they illustrated the synergy between critical research and critical discourse analysis and the potential they offer for a quality piece of research.

Taking these thoughts into account and increasingly reassured that the components represented at Figure 6.4 ‘felt right’ from a personal perspective, I embarked on the process of joining-up my conceptual founding with a research methodology and the design of an interpretative analytical framework to bring my research to life. Figure 6.5 provides a visual image of my search for

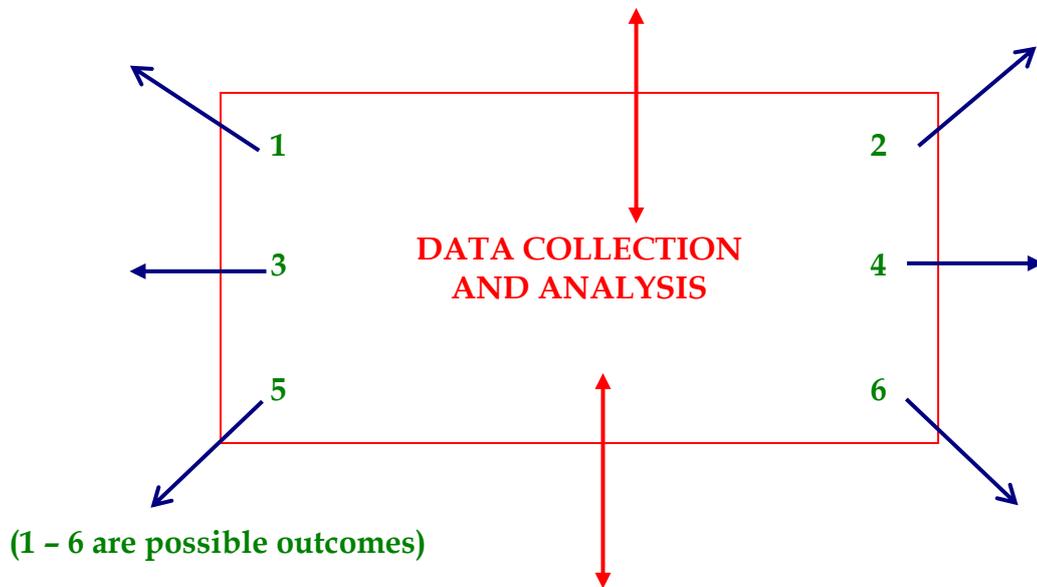
consistency in thinking and practice and represents one of the most satisfying drawings that I have been able to produce. It represents the point where I felt comfortable to get my hands dirty with some data analysis and perhaps of greater significance revealed where any potential contribution to knowledge might come from. Not quite a eureka moment but pretty close!



**Figure 6.5:** Consistency of theory and practice in research

I also recognise that by adopting this conceptual and methodological construction, I embraced the interpretative paradigm, characterised by the “treatment of social reality as text, whose meaning needs to be deciphered” (Tsoukas and Knudsen (2003: 17)). From a personal and practical point of view, this is best reflected in my attempt to use a distinctive interpretative analytical framework to analyse the employment tribunal texts which make up my data field in such a way that I can draw out a number of research themes and debate these themes with the early research considerations identified in Chapter 2. It is this three-dimensional conversation between the text, the research considerations and the research themes which offers the potential to produce a set of interesting ideas for the professional practice of people management. Any such ideas can be strengthened further by reference to the existing body of literature. Once again, I resort to a drawing to better explain my thinking – see Figure 6.6.

**RESEARCH CONSIDERATIONS:**



**RESEARCH THEMES**

**FINDINGS - REFLECTION ON USEFULNESS AND SIGNIFICANCE**

- |    |    |
|----|----|
| 1. | 2. |
| 3. | 4. |

**Figure 6.6:** Generating a set of ideas

In the midst of all this learning and reflective activity around epistemological perspectives, the forms discourse analysis and how they might be used to design and underpin an interpretative framework, two interviews with Robert Turner, Senior Master, Royal Courts of Justice, provided an enjoyable and informative diversion. Robert had been one of the earliest Industrial Tribunal Chairs going back to the late 1960s and early 1970s when, in his words:

“industrial tribunals differed from today in that they were objective tribunals. Objective in the sense that they had a set of regulations which

they enforced. If the case fell within the parameters of those regulations then you won or you lost.”

In his view, it was not until the introduction of unfair dismissal legislation that a subjective – or human – element of employment law began to emerge around the concept of fairness. This change marked a significant move away from a deterministic employment situation to one where human values began to play a part. Robert went on to remark that:

“In many ways, there was a deterioration initially in the relationships in employment as a result of this new subjective approach to employment. There were many more heavily contested cases on the basis of unfair dismissal, what was unfair?”

He was also very clear that this was happening at a time when the role of very powerful Trade Unions was beginning to change and employers were realising the importance of positive staff relationships which recognised the needs of individuals.

Having read this thesis to this point, the reader will appreciate that what I was learning served to fuel my hunches about the subjective association between employment relationships and employment legislation. Robert had, of course, thus far been talking about a period of time which pre-dated my particular interest in discrimination law. I asked him if he considered that important statutes such as the Sex Discrimination Act and Race Relations Act of the 1970s resulted from a policy motivated wish to improve the employment environment for workers or as a result of a policy response to the breakdown of employment relations that was already happening. His response was illuminating and contained a number of strands:

“I think it was a number of factors; it was a period where the trade unions were very strong and were influencing governments in a way that probably never happened before and never happens again. It is trite to comment on beer and sandwiches at number 10, but it was very much that sort of atmosphere where the trade unions were so strong that they

could dictate the management of the firms. It was not the management who were in charge. The trade unions should not have got to the stage where they were dictating the management policies of firms they usually did it badly it usually led to poor, weak management looking over their shoulders at what the trade unions would say or do with regard to any decision that was made. There wasn't an atmosphere of cooperation and consultation it was very much a confrontational situation. You sat on either side of the table it didn't work. We lost a lot of good industry because of this and equally it led to very poor management."

I went on to ask Robert where the influence for the 1975 Sex Discrimination Act came from. Was it pressure from the unions, was it pressure from management, was it pressure from Government, was it pressure for a better working environment or was it a combination of all of those? Again his response was fascinating:

"It was never pressure from the unions, the unions were always very male orientated. I don't think the unions can claim to have made a significant improvement to the present situation of women. In 17 years of working with the unions, I hardly ever met a women trade union member who held a significant post, you never met a shop steward who was a woman, you very seldom met senior executives of a union who were women. I don't believe generally that the trade union movement in those days was promoting women's rights. The government I think did play a significant part in this. They could see a political reward in supporting women's rights. Women constitute 50% of the vote. The government could see sex discrimination in the work place and supported legislation to prevent sex discrimination I think there was a genuine social realisation that women were entitled to the same rights as men."

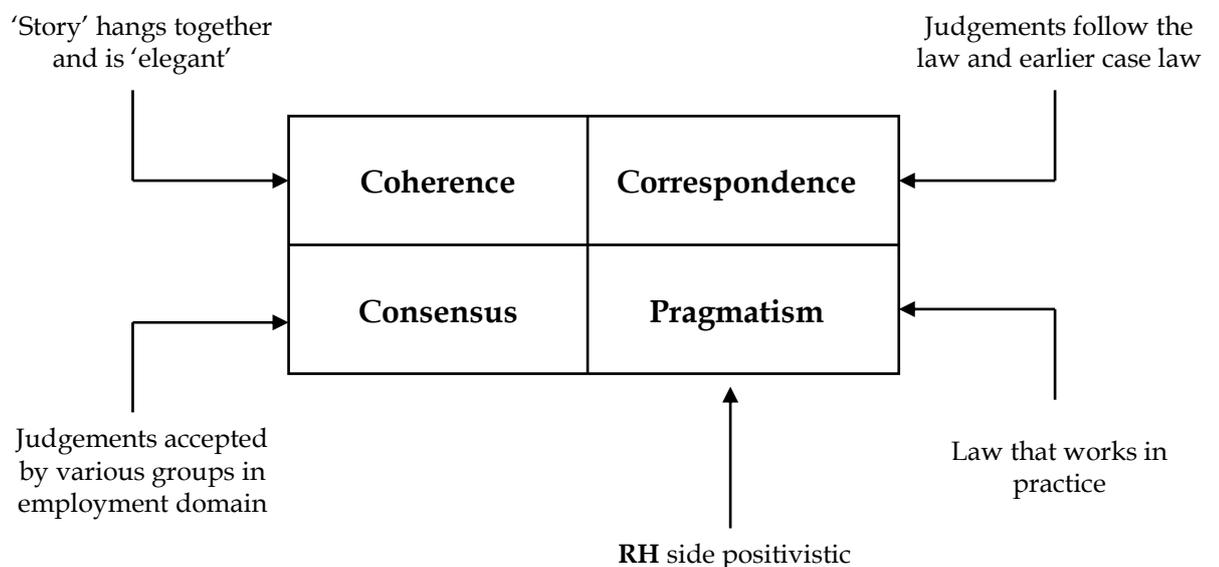
Before leaving this interview with Robert Turner, I need to record one further statement from him that has stayed with me throughout this research:

"Where you have subjective problems, you have to adapt a different approach. In an objective problem it would be enough to explain in your judgement as a tribunal chairman why the law found this way rather than that way. With a subjective decision, you must always explain not why the one party won

but why the one party lost. Nobody worries about the reasons as to why they won. A good judgement will always explain to the loser in a subjective case why he lost. If this is done properly that loser goes away satisfied with why he lost. This is what judges and courts should do.”

This short excursion outside the world of written text provided a refreshingly honest and personal first hand perspective on tribunal and employment relationship activity and, to some extent, “grounded” my thinking in the practicalities of the day. I recognise that the views represented here are those of one individual influenced by his own preconceptions and social experiences. However, they do add to the richness of my personal and internal debate and also chime pretty well – in time and concept – with the idea of a behavioural perspective on employment relationships and the importance of hygiene factors promoted by Argyris (1960), Schein (1965) and Herzberg (1968).

Finally in this short review of my thinking journey, I return to the point of entry and a consideration of what truth might look like in relation to my epistemological and methodological perspectives. Darwin (2004) drew my attention to the concept of alethic pluralism or, in other words, an acceptance that truth is a multi-faceted concept and that the analysis of my data may reveal evidence of more than one theory of truth – see Figure 6.7 below.



**Figure 6.7:** Theories of truth (based on Darwin, 2005)

For instance, Dworkin's anti-positivist stance – discussed in Chapter 4 – may point to the coherence and consensus theories of truth as the 'justification' for this argument. As I have attempted to illustrate with my annotations outside Darwin's four box model, this would support Dworkin's ideas of best fit taking into account all the circumstances of the case. In pursuing this line, Dworkin, and indeed anyone who accepts that there may be more than one interpretation – or version of truth – is open to challenge. There will always be the need to explain why a particular interpretation adds value in the face of any number of alternatives that might have value claims. As I fall into this camp, I will respond to this challenge as my analysis unfolds in subsequent chapters.

The value, for me at least, in John Darwin's illumination is not to point to one version of truth that I can attach myself to, but helping me to undermine the very idea of one version of truth holding primacy.

### **Closing thoughts on chapter six**

The purpose of this chapter has been to catch my breath along the research journey and to reflect on my learning and approach as a novice researcher. I have endeavoured to show how my thinking has matured and how my meeting with Robert Turner helped to put some of my emerging ideas into perspective. My energies restored, I approach the next step of my journey: the design and use of my interpretative analytical framework.

## CHAPTER SEVEN

### DESIGN AND USE OF AN INTERPRETATIVE ANALYTICAL FRAMEWORK

As should be clear by this point, I am endeavouring to bring together a critical philosophy and the hermeneutic interest in insight and understanding. What some writers have termed critical interpretation (Denzin and Lincoln, 2003). Further, to locate this combination within a conceptual framework bolstered by reference to some of the theoretical considerations resident in legal theory. Under this conceptual umbrella, I am developing a research methodology based on critical discourse analysis and, in particular, the textual analysis of employment tribunal judgements. I have termed this *discourse analysis with a critical edge*.

Having developed these philosophical and methodological underpinnings in detail in the previous two chapters, it is now time to put these to one side for the moment and to concentrate on developing the 'engine' to drive the research. In other words, to consolidate this thinking into an interpretative analytical framework and a practical process of analysis that allows me to address the 'how' question of my research methodology. Once this has been done, I introduce the reader to extracts from the chosen employment tribunal texts substantially for the first time and expose my analytical framework to practical usage. The use of references to other work is limited in this chapter as I endeavour to provide the route map and operating instructions for my analysis rather than seeking to relate my interpretation activity back to what has gone before in the literature. This task is 'on ice' until the emerging themes are dealt with substantively, in the chapters that follow this one.

I have already identified a range of approaches to legal interpretation (Chapter four) and discourse analysis (Chapter five) as influential in their respective spheres focussing on the contributions of Dworkin and Fairclough respectively. It is my intention now to draw on these established perspectives and to set out my own model for the critical interpretation of employment tribunal judgements. To do so, demands that I provide a brief refresher of the ideas presented by Dworkin and Fairclough and outline their respective analytical models.

### **Legal interpretation**

The discussion of critical interpretation in a legal context in Chapter 4 concluded with a summary of Dworkin's stance on legal interpretation and pointed the way to his model for constructive interpretation. I return to this theme now.

It is important to be clear at this stage that Dworkin's constructive interpretation was not referring to the brand of interpretation more often associated with lawyers. This approach can best be described as an attempt to interpret what was in the mind of the writer of a particular statute or legal authority. In other words, to rely on descriptive legal theory and to see *law as it is*. Dworkin was seeking to expose a more subjective interpretative attitude that presents the law as it *ought to be* (normative legal theory) and the outcome as 'best fit' located within a three stage analytical approach (Harris, 1997). Dworkin argues that having identified the elements that are part of law at the pre-interpretive stage, adjudicators then proceed to the interpretive stage and develop a theory that represents these elements in their best light. This allows for the settlement of legal questions at the post-interpretive stage. Diagrammatically, Dworkin's approach is represented at Figure 7.1.



**Figure 7.1** Dworkin’s approach to constructive interpretation

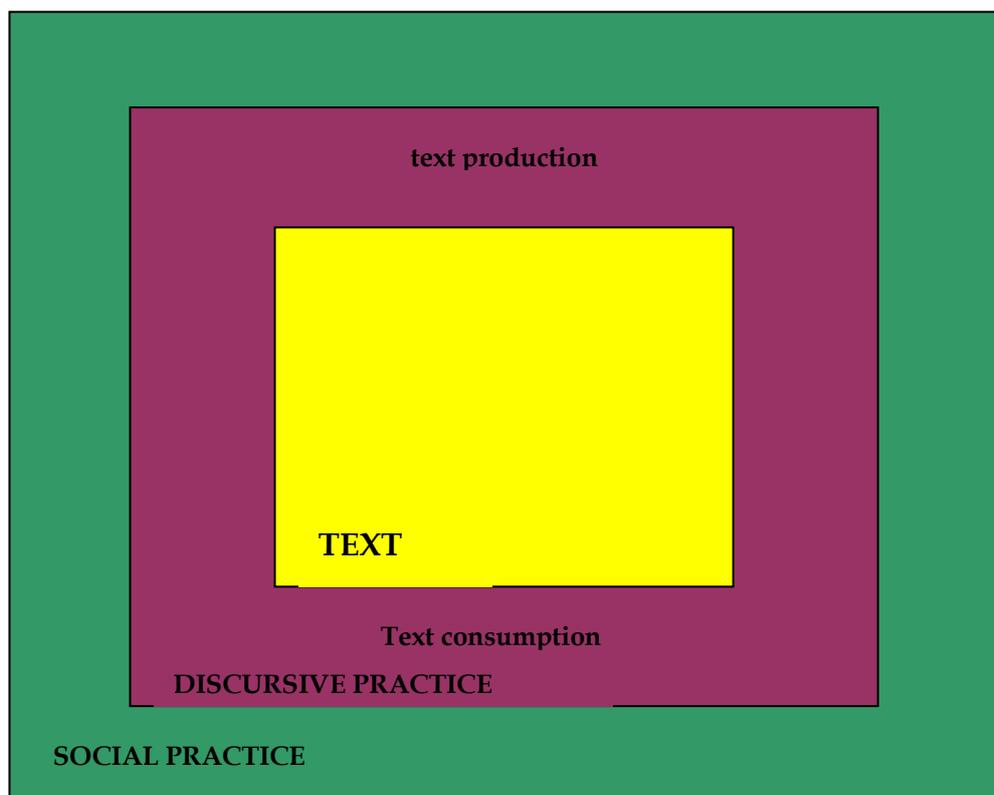
What is important to highlight here is that Dworkin advanced a theory of law which is not entirely rule based and a contention that legal questions almost always yield ‘right answers’ to a certain set of circumstances (Bix, 1999). He argued that the legal system is not a closed logical system in which decisions can be deduced from the logical application of pre-determined legal rules alone. Hence, as Bix (1999) argues, Dworkin’s constructive interpretation involves a double aspect: the interpretation of the current body of law and the creation of ‘new law’ according to the principle of best fit. This second element has a particular significance when it forms part of a landmark judgement and, often, includes a set of guiding principles which lead to a readjustment in legal and personnel professional practice. Such judgements are devoured by lawyers and employment relations specialists alike in a continuing race to stay ahead, or at least in line, with the latest case law. Back in the workplace, subtle – or sometimes not so subtle – changes of personnel policy or practice are enacted to ‘bring the new case law to life’.

### **Interpretation and discourse analysis**

In similar vein, the review of discourse analysis in Chapter 5 drew to a close with a look at Fairclough’s approach and again suggested that his model for analysis would be visited later in this narrative. I turn to this now as a second influence on my own approach. Fairclough (1992) advanced a three dimensional model “for empirical research on communication and society” (Phillips and Jorgensen, 2002:68). This involves a specific discourse analysis of each of the following three elements:

- stage one - the linguistic features of the text (text)
- stage two - the processes relating to the production and consumption of the text (discursive practice)
- stage three - the wider social practice to which the communicative event belongs (social practice)

Fairclough's model is reproduced diagrammatically at Figure 7.2



**Figure 7.2** Fairclough's three-dimensional model for critical discourse analysis (1992b: 73)

As Phillips and Jorgensen (2002) point out, Fairclough draws heavily on the concepts of interdiscursivity and intertextuality in the discursive practice stage of his analytical approach and they merit brief exploration here.

"Interdiscursivity occurs when different discourses and genres are articulated together in a communicative event" and "Intertextuality refers to the condition whereby all communicative events draw on earlier events" (Phillips and

Jorgensen (2002: 73), the former being a form of the latter. In other words, we all draw on phrases or words used previously to reformulate a new discourse and, on some occasions, draw explicitly on earlier texts. Thus, supporting the contention that texts can be seen as links in an intertextual chain (Fairclough, 1995). Central to Fairclough's approach is that discourse forms part of social practice and texts can not be analysed in isolation. To reach understanding, texts must be interpreted in relation to other texts and their social context thereby giving rise to a range of interpretations and potential meanings (Phillips and Jorgensen, 2002). The links between discourse and social practice open up a particularly important element of Fairclough's thinking in relation to the practice of management. Phillips and Jorgenson (2002: 82) put it succinctly: "According to Fairclough's theory, a high level of interdiscursivity is associated with change, while a low level of interdiscursivity signals the reproduction of the established order".

Recognising that Fairclough presents his approach as a coherent model with inter-related parts, albeit separated analytically, I am reluctant to suggest that any one of the elements can be given precedence over another or be considered in isolation. However, to inform my critical interpretation of employment tribunal judgements, my particular interest lies with the second and third segments. That is, how existing discourses are drawn upon to create and interpret text and the influence of discursive practice on confirming or re-shaping existing discourse. These seem to me to take me in the direction of what is going on in the context of legal interpretation.

### **A model for discourse analysis with a critical edge**

With critical interpretation as the goal, the avenues outlined above – pre-interpretive, interpretive and post-interpretive – as depicted in the Dworkin approach and – text, discursive practice and social practice – according to Fairclough's analytical style, influence my thinking towards the four phase

approach highlighted alongside the Dworkin and Fairclough approaches in the model at Figure 7.3.

RONALD DWORKIN		NORMAN FAIRCLOUGH	
<b>Pre-interpretative</b> <ul style="list-style-type: none"> <li>• identification of institutions and material that are generally recognised as part of law</li> </ul>		<b>Text</b> <ul style="list-style-type: none"> <li>• understanding how a piece of text is constructed</li> <li>• what is the text trying to achieve? – persuade, justify, defend, explain, accuse, assert for example</li> <li>• how does the text achieve its aims – what words, phrases are used and what propositions* made?</li> </ul>	
<b>Interpretative</b> <ul style="list-style-type: none"> <li>• development of a theory that shows the material identified at the pre-interpretative stage in its best light</li> </ul>		<b>Discursive practice</b> <ul style="list-style-type: none"> <li>• an examination of the context of text production</li> <li>• how does the context influence the types of interpretation that might be made?</li> <li>• the interpretation of a particular statement or question in context with impact on the subsequent text that is produced in response</li> </ul>	
<b>Post-interpretative</b> <ul style="list-style-type: none"> <li>• settle any legal questions based on the theory developed at the interpretative stage</li> </ul>		<b>Social practice</b> <ul style="list-style-type: none"> <li>• an examination of the propositions made</li> <li>• to what extent the dominant discourses are taken for granted or reinforced or challenged or defended</li> <li>• such challenging or defensive propositions are competing for dominant recognition and a sign that competing discourses exist in that particular domain</li> <li>• Fairclough calls this the ‘hegemonic ** struggle’</li> </ul>	
RD	STEVEN CHASE		NF
pre-i	Context		dp
pre-i	Text		t
i	Reflexive interpretation		dp
			t
			sp
post-i	Implications		sp

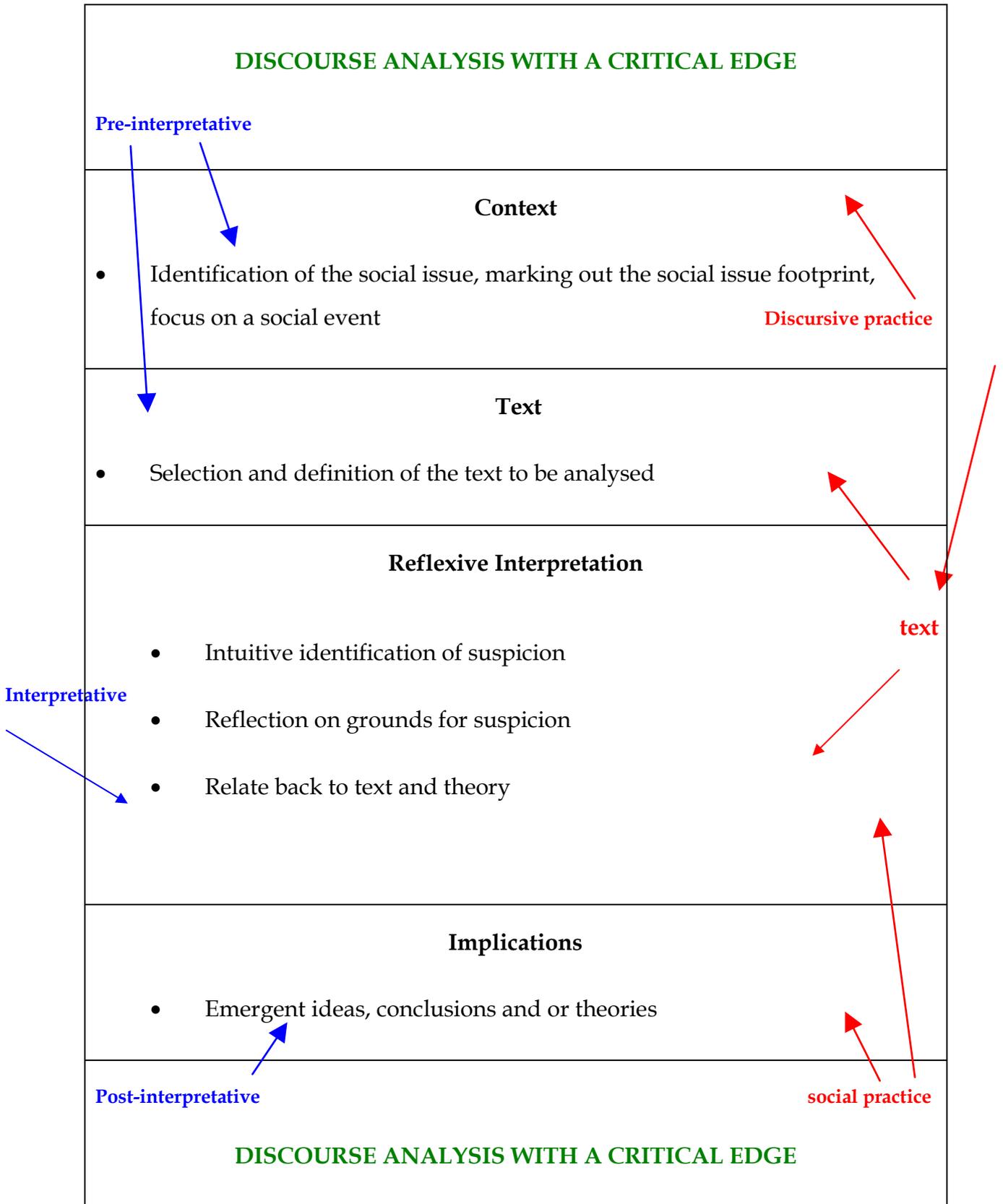
\* propositions – statements that are treated as self-evident ‘facts’.

\*\* hegemony – the process through which contested views of reality are dealt with in order to secure ideological consent

**Figure 7.3** Developing a Model for Discourse Analysis (The Dworkin elements of the model are based on Harris (1997:190) and the Fairclough elements on Dick (2004:205-206)

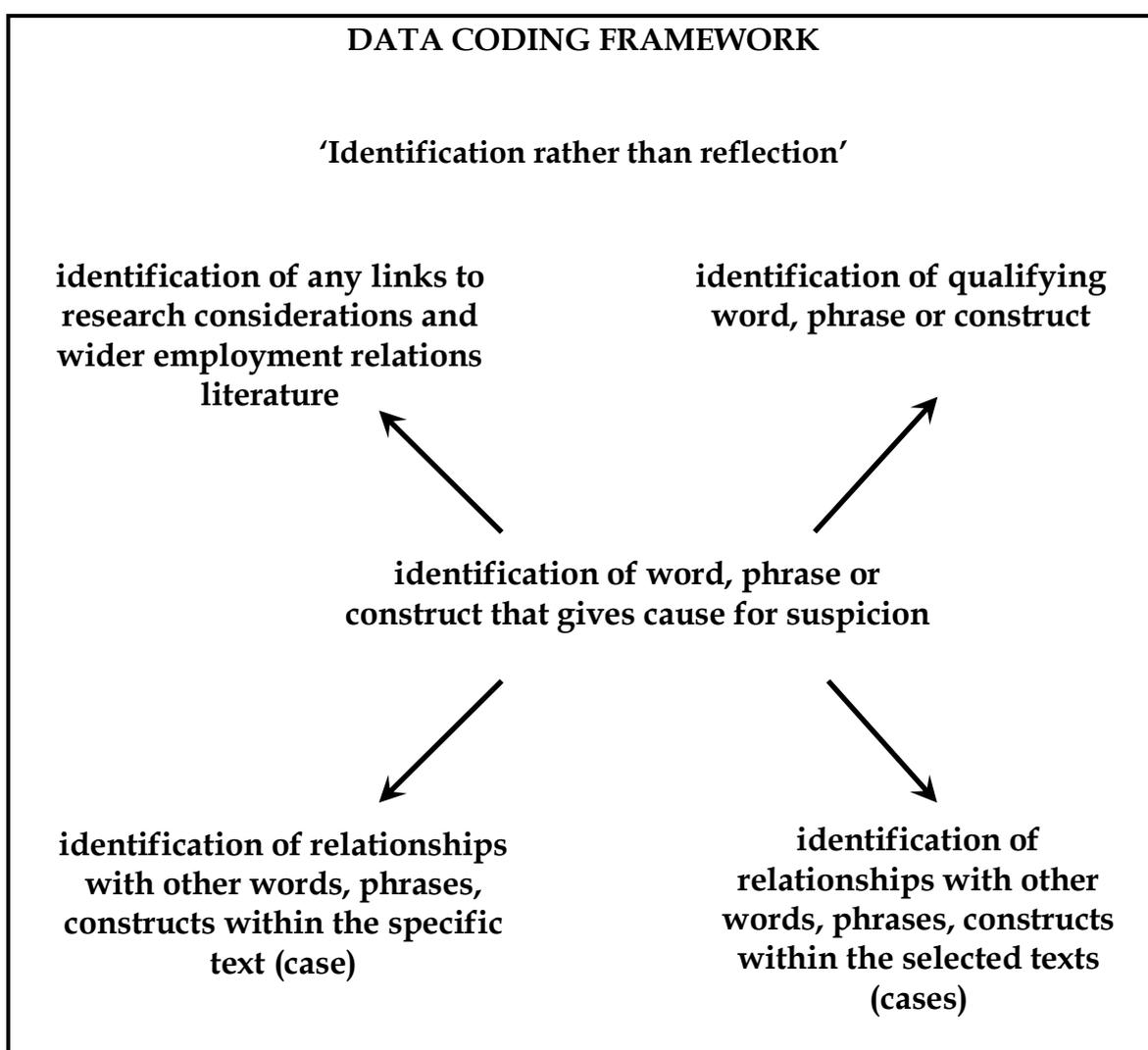
Simplistically, my phase one relates to aspects of Dworkin's pre-interpretive stage and Fairclough's discursive practice stages. Phase two relates to Dworkin's pre-interpretive stage and Fairclough's text stage. My phase three is informed by Dworkin's interpretive stage and Fairclough's text / discursive practice / social practice stages. My phase four allows for influence from all parts of the Dworkin and Fairclough models - although specifically the Dworkin post-interpretative stage and Fairclough's social practice stage. More importantly, it opens the door to my own critical reflection and the emergence of tentative ideas. For clarity, I have used the word "phase" purely to differentiate from the term "stage" most commonly used with reference to Dworkin and Fairclough.

The four phases of my approach to analysis are presented as a step by step process of conversation with the text and are depicted at Figure 7.4 under the heading *Discourse Analysis with a Critical Edge*. The influences of Dworkin and Fairclough are recognised in blue and red type respectively.



**Figure 7.4** A model for discourse analysis with a critical edge.

The practical usage of the model relies to a large extent on the hard graft or reading, rereading and coding the data having been undertaken prior to this point. As we saw at the end of Chapter 5, the 'body of evidence' collected during this process is fundamental to good research and discourse analysis in particular. As far as my project is concerned, the 'deep dive' examination of the data underpins the reflexive interpretation phase of my analysis. By way of reminder, the features of the data coding framework are illustrated at Figure 7.5.



**Figure 7.5** Data Coding Framework.

To bring my approach to life before using it more purposefully in Chapter 8 and beyond, the remainder of this chapter is devoted to explaining the individual phases of the model and demonstrating how this four dimensional approach - illustrated at Figure 7.4 - can be related to the data by way of a worked example under each heading.

### **Context**

At first glance, this section should be one of the most straightforward elements of this narrative: discrimination is the social issue, legal and personnel practice and employment relations represent the wider context, the employment tribunal is the specific event. Identification complete. Indeed it is and I would not wish the reader to let go of this uncomplicated concept. However, what is less straightforward is the relationship and interaction between the issue, the context and the event and how meanings are constructed in this 'relationship'. What in ethnomethodological terms would be viewed as the "reflexivity of social interaction and context" (Holstein and Gubrium, 1998: 153).

The interpretation that follows in the subsequent phases is intended to be seen as part of, and contributing to, its social context. In essence therefore, I am looking at employment tribunal judgements as texts, as an element of a social event (the tribunal), within their social context (legal and personnel practice and employment relations). This in itself provides an interesting challenge since law is often reported as existing in books (Mansell et al, 2004) and employment issues exist within the social situation of the workplace. The need to guard against interpretations drawn from one venue being turned into predictions or generalisations that can be classed as evidence in alternative venues - the ontological paradox - is clear. A reminder that critical discourse analysis is about exploration and explanation rather than specific remedies is helpful. However, it is also difficult to escape the contention that for such an employment issue to be resolved in the legal environment of an employment

tribunal, the social problem – employment issue – needs to be translated into a legal problem and resolved according to legal rules. This tends to lead to a search for the facts that are legally relevant and the exclusion of those facts with no legal bearing. What also tends to be sidelined in such a restricted process is the social context of the issues being examined. By linking the contextual information to a piece of text drawn from that context, there is an opportunity to overcome this dilemma: the extract that follows illustrates the point:

#### CONTEXT

Text shown below is an extract from the decision in the case of **King (appellant) v The Great Britain-China Centre (respondent)** – Court of Appeal – 11 October 1991. An industrial (employment) tribunal had found that the respondent had unlawfully discriminated against the applicant on the ground of her race when it failed to short-list her for interview for a vacant position in the respondent organisation. The Employment Appeal Tribunal allowed the appeal from the Great Britain-China Centre and remitted the case to a different employment tribunal for a rehearing. The CA allowed the further appeal by Miss King and restored the order of the industrial tribunal.

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#### TEXT

“The Employment Appeal Tribunal rejected the submission that the decision of the majority of the industrial tribunal was perverse, but they accepted the primary submission on behalf of the respondent that the majority had erred in law.”

The context box sets out in brief terms the historical and social context, the nature of the complaint being examined and the decision of the ‘court’. The piece of text reproduced here could give the impression that the decision is a purely legal matter devoid of context. Such ‘context free’ decision making may have its place in some forms of jurisprudence and even in elements of criminal law, but it should not be forgotten that to ‘resolve’ the issue determined in employment tribunal very often involves translating the legal resolution back into the social environment of the workplace. Accordingly, context cannot be separated from the outcome of the case. This example also supports the argument deployed in the previous paragraph that the research cannot simply take the version of reality created in one environment – the employment tribunal – and propose it as evidence in another – the workplace. All that said, I

suggest that it is open to the researcher to subject the version of reality constructed through tribunal processes and the language of the judgement to the scrutiny of the critical discourse analyst's search for hidden or alternative realities or meaning. Having done that, it is also permissible to consider the transferability of a set of ideas from one context to some others, but not all others. It seems to me that this is a process that opens up all sorts of interpretative possibilities and workplace reintegration dilemmas which stretch far beyond the Tribunal door.

### **Text**

Moving on to the text phase of the analysis, the interest here is to select and define the piece of text for analysis. As we have seen, the text needs to be placed in context to aid our understanding. For example; in Sinclair Roche, we are provided with a helpful and uncomplicated 'definition' of the process of reaching a finding of discrimination. Perhaps an interesting development in itself since the definition is written down almost 30 years after the Sex Discrimination Act became law. I reproduce this below to guide the reader.

## CONTEXT

Text shown below is an extract from the decision in the case of **Sinclair Roche and Temperley and others (appellants) v Heard and another (respondent)** – Employment Appeal Tribunal – 22 July 2004. The appeal was against the decision of an employment tribunal that two junior partners in a law firm were discriminated against on grounds of sex by not being promoted to senior equity partners. The Employment Appeal Tribunal overruled the decision of the employment tribunal and allowed the appeal.

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## TEXT

In order to find discrimination, an employment tribunal must set out the relevant facts, draw its inferences if appropriate and then conclude that there is a prima facie case of unfavourable treatment by reference to those facts, and then look to the respondent for an explanation to rebut the prima facie case. If the tribunal satisfied itself that there has been on the face of it unfavourable treatment, it has effectively only reached halfway. It must set out clearly its conclusion as to the nature and extent of such unfavourable treatment, so that the respondent can understand what it is that it has to explain.

It must then fully and carefully consider what the explanations of the employer were, and why, if such be the case, such explanations provide no answer. It may be that there is no explanation, or there may be an explanation which only confirms the existence of discrimination, or there may be a non-discriminatory explanation which redounds to the employer's discredit such as it always behaves badly to everyone, or there may be a non-discriminatory explanation which is wholly admirable.

Beyond this case and the 'uncomplicated definition', the year of 2004 came to an end – that is, in terms of burden of proof decisions – with *Webster v Brunel University*, a case heard in the EAT on 14 December 2004. The decision provided a helpful review of all the recent cases on the shifting the burden of proof and it includes an important 'general structure for a discrimination finding' as shown below:

## CONTEXT

Text shown below is an extract from the decision in the case of Webster (appellant) v Brunel University (respondent) – Employment Appeal Tribunal – 14 December 2004. An employment tribunal had dismissed Ms Webster’s race discrimination allegations on the grounds that she had failed to establish that the person complained of was an employee.

---

## TEXT

The general structure required for a discrimination finding of an employment tribunal is now clear.... The tribunal must set out the relevant facts, draw its inferences if appropriate and then conclude that there is a *prima facie* case of unfavourable treatment by reference to those facts (identifying it), and then look to the respondent for an explanation to rebut the *prima facie* case. The employment tribunal must plainly make quite clear what the unfavourable treatment is which is *prima facie* discriminatory, so that the respondent can understand what it is that it has to explain.

To my mind, these two pieces of text earn their place in the analysis because they go to the heart of the social issue under the microscope, namely discrimination. They also attempt to explain what discrimination is and the process for reaching a conclusion that discrimination has taken place. What the two extracts also illustrate is the discursive practice of closely aligning texts with previous ones to reformulate the discourse. The language used sets the tone for much legal argument and professional consideration. It also highlights a continuing thirst to develop an authoritative position based on a given set of circumstances which can then guide others in entirely different circumstances.

The close relationship between phases one and two of the analysis – context and text – is equally evident in the linkages between phases two and three – text and reflexive interpretation. Indeed, in selecting a particular piece of text for analysis I am already involving myself in the reflexive cycle that makes up phase three of the analysis. Whilst not in any sense claiming any analytical breakthrough here, reaching this position of understanding the

circularity of the debate and the impracticality of attempting to analyse material in isolation represents an important learning point for me.

### **Reflexive interpretation**

Armed with an identified social issue, placed in context, and mindful of the social constructionist premise that my approach to a particular data set could provide an interpretation which differs from an alternative approach to the same data set, I make my way into the analysis. Drawing on Phillips and Jorgensen (2002), I recognise that I will find myself emphasising some elements and downplaying others as I search for alternative, perhaps disguised or hidden, meanings. This is the essence of discourse analysis in the critical dimension.

As I illustrated at Figure 7.4, this third phase is itself made up of three components: the identification of suspicion, reflection on the grounds for suspicion and the relationship with existing text and theory. My first step in this third phase is, quite simply, to return to the coding exercise and identify the words, phrases or constructs that raised a degree of suspicion in my mind. Much of this 'suspicion' is driven by a sense of possible preference and/or bias. Bearing in mind that my data field is written in neutral language by design, I start from a premise that my 'suspicion' is more likely to rely on particular nuances rather than explicit statements. By way of worked example - and one which happens to fit the latter category - the extract from *King v Great Britain China Centre* below details one of the five principles and guidance included in the judgement and includes the words unnecessary and unhelpful:

### CONTEXT

Text shown below is an extract from the decision in the case of **King (appellant) v The Great Britain-China Centre (respondent)** - Court of Appeal - 11 October 1991. An industrial (employment) tribunal had found that the respondent had unlawfully discriminated against the applicant on the ground of her race when it failed to short-list her for interview for a vacant position in the respondent organisation. The Employment Appeal Tribunal allowed the appeal from the Great Britain-China Centre and remitted the case to a different employment tribunal for a rehearing. The CA allowed the further appeal by Miss King and restored the order of the industrial tribunal.

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### TEXT

“It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case”.

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### REFLEXIVE INTERPRETATION

In reflecting on why my suspicion was aroused by this particular piece of text, I acknowledge that the CA may not have been able to foresee the introduction of the Burden of Proof Regulations in October 2003 (12 years later), but the use of the words “unnecessary” and “unhelpful” in the first line of the extract above appear to have been an attempt to *warn* the legal profession to steer clear of the particular complexity of a shifting evidential burden of proof. The latter is a complex area because it requires a Tribunal to *judge* at an early stage of proceedings if the person bringing the case has made a prima facie case of discrimination that the employer must explain. Issues around burden of proof remained problematical even after this milestone decision and as we shall see they have not been clarified entirely by the introduction of the 2003 regulations. This, and what follows in the remainder of the extract, seems to me to widen the scope for subjective construction rather than restricting it. Bearing in mind that the quote was written as one of the guiding principles for deciding discrimination cases, the suggestion that legislating for burden of proof determination is not the way forward carries some significance and raises a number of potential questions.

First, why was it considered unnecessary and unhelpful to legislate. Second, and on the other hand, why was it considered necessary to set down principles and guidelines? Third, why was so much scope for interpretation and drawing of inference being left open for future decision making. The list could continue, but the important point here is that a number of questions are raised by the text and they are open to interpretation.

To complete the reflexive interpretation cycle, it is necessary to relate these reflections back to other elements of texts or related theory. As we saw in chapter 3, attempts to clarify the burden of proof issue in discrimination cases is a recurrent theme in my case sample, both before and after the introduction of the Burden of Proof Regulations. What this suggests to me is that the appellate courts are trying to make the burden of proof concept work in a practical sense and give meaningful advice to those required to engage with this aspect the law.

In passing, I mention that the extract also includes the phrase ‘draw inferences’, an early mention of a concept that I will pick up in more detail in Chapter 7. At this stage, however, it is sufficient to point out that inference appears to hold a significant position in the decision making process in discrimination cases. An indisputably subjective concept at play within the legal framework of an employment tribunal.

By way of comparison, contrast the line taken regarding the need - or more precisely, the absence of a need - to introduce a shifting evidential burden of proof in the extract from the 1991 decision in *King v Great Britain China Centre* above to the much more prescriptive line taken in the quotation below from the Burden of Proof Regulations introduced twelve years later in 2003. From this point on, the Tribunal is being directed to draw an inference of sex discrimination if the employer’s explanation is inadequate.

#### CONTEXT

Text shown is an extract from Section 63A of the Sex Discrimination Act amended as a result of the introduction of the **Burden of Proof Directive**.

#### TEXT

“Where on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent (employer) has committed an act of discrimination against the complainant which is unlawful, the Tribunal shall uphold the complaint against the respondent (employer) unless the respondent (employer) proves that he did not commit that act.”

#### REFLEXIVE INTERPRETATION

On reflection, it appears that this “change of heart” after 12 year’s of case law has not provided sufficient definition around the burden of proof issue and that a change in the law would provide such clarity. Perhaps so, but there is also a “suspicion” that some may have felt that complainants were finding it hard to establish unlawful discrimination and that the pendulum had swung too much in favour of employers as advocates became more proficient in mounting a defence. Alternatively, the driver may have been a social one based on a sense that workplace discrimination remained commonplace and further action was required.

Reflecting on such questions, relating them back to the text, to relevant literature and to professional practice is at the heart of my analysis. This is the central task of the chapters which follow this one. I am attempting to achieve a more complete approach to reflexivity. Firstly, to be reflexive about my research methods and in particular how I deploy them and secondly, to understand how my own pre-understandings impact on my research endeavour. In other words, to embrace what Johnson and Duberley (2000) refer to as methodological reflexivity and epistemic reflexivity and to use this reflexivity to detect any bias that might contaminate my work (Tsoukas and Knudson, 2003).

### **Implications**

Phase four is to a large extent about responding to the 'so what' question. Does anything emerge from this analysis that might confirm or question existing theory? In the latter case, does the analysis suggest scope for tentative new theory? In an attempt to confront these points and to continue the example used throughout this Chapter, I turn to an extract from *Barton v Investec Henderson Crosthwaite Securities Ltd* – the first consideration of the new burden of proof regulations by an appellate court.

## CONTEXT

Text shown below is an extract from the decision in the case of **Barton (appellant) v Investec Henderson Crosthwaite Securities Ltd. (respondent)** – Employment Appeal Tribunal – 3 April 2003. An employment tribunal had found that the respondent had not unlawfully discriminated against the applicant on the ground of her sex when it paid a male comparator a higher remuneration package than Ms Barton. The Employment Appeal Tribunal allowed the appeal and remitted the case to a differently constituted employment tribunal.

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## TEXT

“To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.”

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## REFLEXIVE INTERPRETATION

Coming so soon after the enactment of the Burden of Proof Directive, I am left wondering why it should be necessary to elaborate in such absolute terms. If it was designed to remove all interpretative doubt, it clearly failed as our subsequent examination of burden of proof determination will reveal. If it reflects a political and social re-statement of the unacceptability of unlawful workplace discrimination, it calls into question the effectiveness of discrimination law now 30 years old. I will attempt to interpret these interpretations in Chapters 8-10, but, for now, I limit myself to illustrating the reflexive process.

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## IMPLICATIONS

What this shows is that the complainant having made a case that needs to be answered, the burden on the employer to do so is a tough one – “in no sense whatsoever”. Proving “one’s innocence” rather than being proven “to be guilty” is an entirely different test and, in my contention, brings the legal elements of the “industrial jury” even more into play than previously. This is in stark contrast to the aspiration of the personnel profession’s representative body quoted earlier in this narrative, that “as far as possible, the role of law in the workplace should be minimised”. The implication is a much closer link between employment relations and employment law rather than an arms length divide.

## **Closing thoughts on chapter seven**

My intention here has been to pull together what has gone before in this narrative into a workable model for critical interpretation. True to my research design, I have drawn on aspects of discourse analysis and legal interpretation to 'ground' the model and included a reflexive dimension to underpin the analysis. Further, I have illustrated how the model might work with several pieces of data to ease the reader into the analysis to be conducted in the subsequent chapters.

The remaining chapters will follow a similar pattern. Using the interpretative framework described in this Chapter, I will analyse a particular theme emerging from the material and provide key analysis and implication points at the close of each chapter together with summary comments on the theme.

Three of the most striking features of the *King v The Great Britain - China Centre* appear on page one of the judgement and do not require discourse analysis expertise to uncover. First, both the applicant (Miss King) and the respondent (Great Britain - China Centre) were represented at the Industrial Tribunal stage by Counsel, clearly indicating that highly qualified and experienced legal brains were on the scene. As early as 1988 - if not well before - the complexities of discrimination law were attracting considerable interest. Second, the Industrial Tribunal returned a majority decision, the two lay members outvoting the legally qualified chair to return a verdict that the respondent unlawfully discriminated against the applicant on the ground of her race. Third, a frequent and relatively inconsequent workplace event - the rejection of a job applicant - resulted in a Court of Appeal hearing and a set of discrimination guidelines that were to impact on discrimination case law for many years. Whilst my focus throughout this research project has been to employ my interpretative analytical framework to discover what is not said, these more visible influences should not go unrecorded.

## CHAPTER EIGHT

### DISCOURSE ANALYSIS WITH A CRITICAL EDGE - IN SEARCH OF INFERENCES

#### Background

My first analysis chapter considers the concept of inference and its role in deciding employment issues at tribunal hearings. As we have already seen in the examples of employment tribunal texts in Chapter 7, determinations of unlawful discrimination frequently depend on inferences drawn from the facts of a particular case. An outcome described in layman terms as “a conclusion reached on the basis of evidence and reasoning rather than from explicit statements” (Soames and Stevenson, 2003). For legal students, inference is more comprehensively defined as “a deduction from the facts given, which is usually less than certain, but which may be sufficient to support a finding of fact” or “a deduction of an ultimate fact from other proved facts, which proved facts, by virtue of the common experience of man, will support, but not compel such deductions” (Gifis, 2003). Both of these ‘legal definitions’ include reference to inference as a deduction from the available facts and a definition of deduction pays similar attention to inference: “deduction is a species of argument or inference where from a given set of premises the conclusion must follow” (Honderick, 1995:181). For completeness, the latter commentator also recognises the links between inference and inductive reasoning and adductive reasoning, respectively described as follows: “inference from particular to general” and “accepts a conclusion on the grounds that it explains the available evidence” (Honderick, 1995:405 and 1). Notwithstanding this recognition of broader perspectives on forms of inference and reasoning, the process of drawing inferences in law texts is predominantly linked to deductive reasoning.

The 'clash' of deductive reasoning most prevalent in legal determination and my inductive approach to the analysis of employment tribunal texts is exposed in this chapter.

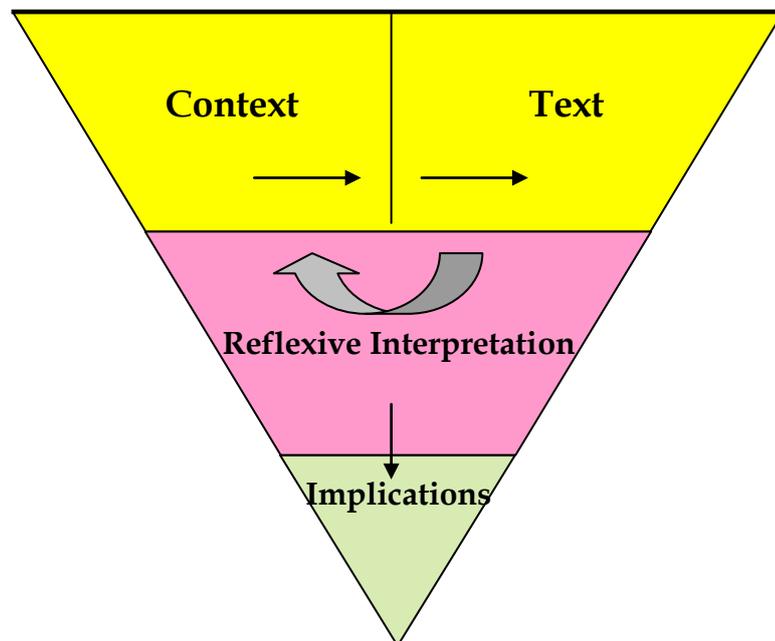
These various definitions provide a useful context for my research project and an interesting insight into how the elements of inference might influence employment decisions and subsequently be articulated as the 'common experience of man'. Further, they suggest how a conclusion to a social issue might be reached on the basis of evidence and reasoning in a legal setting. I will return to these themes in Chapters 9 and 10 respectively. For the present, I focus on inferences as powerful and seemingly taken for granted elements of legal determinations in employment cases. I will also seek to illustrate how inferences drawn from deductive reasoning can be subjected to alternative interpretations which question 'unavoidable meanings' and muddy the waters of the employment tribunal judgement. What is clear from reading and re-reading the employment tribunal texts in my sample is that the influence of inferences in discrimination cases is a common feature and not one to be underestimated.

In passing, I note that the role of inference has attracted comment beyond the confines of legal interpretation from authors providing guidance on the analysis of text and management research. Hodson (1999), for instance, expresses the need for caution when choosing a coding process that relies too heavily on inference during interpretation of the text suggesting that this reduces the reliability of the interpretation. Albeit in the context of observation analysis, Seale (1999) also posits the use of what he terms 'low inference descriptors' to strengthen the reliability of the interpretation and to preserve the neutrality of the researcher as much as possible. These wider references contrast beautifully with my theatre of analysis where inference is recognised and promoted as a route to decision making. I will return to the exposure of my discussion of inference to areas beyond the employment tribunal in my closing comments to this chapter.

The role of inference in the determination of discrimination cases is my first emergent theme.

## Analysis

It is now time to examine the role of inference in more detail, making use of the interpretative framework developed in the previous chapter and beginning with an analysis around context, text and reflexive interpretation before moving on to consider potential implications. The process is summarised diagrammatically for ease of reference in Figure 8.1 below.



**Figure 8.1:** Interpretative framework for discourse analysis with a critical edge.

In the 21 page CA judgement in *King v Great Britain China Centre*, as an example, the words 'inference', 'infer' or 'inferred' appear on 19 occasions. Moreover, this landmark judgement contained a set of guiding principles from the Court of Appeal that remained a point of reference in discrimination cases

for over 10 years. The concept of inference is central to these guidelines as the extract below illustrates.

### CONTEXT

Text shown below is an extract from the decision in the case of **King (appellant) v The Great Britain-China Centre (respondent)** – Court of Appeal – 11 October 1991. An industrial (employment) tribunal had found that the respondent had unlawfully discriminated against the applicant on the ground of her race when it failed to short-list her for interview for a vacant position in the respondent organisation. The Employment Appeal Tribunal allowed the appeal from the Great Britain-China Centre and remitted the case to a different employment tribunal for a rehearing. The Court of Appeal allowed the further appeal by Miss King and restored the order of the industrial tribunal.

### TEXT

1. It is for the applicant who complains of racial discrimination to make out his or her case. Thus if the applicant does not prove the case on the balance of probabilities he or she will fail.
2. It is important to bear in mind that it is unusual to find direct evidence of racial discrimination. Few employers will be prepared to admit such discrimination even to themselves. In some cases the discrimination will not be ill-intentioned but merely based on an assumption “he or she would not have fitted in”.
3. The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 65(2)(b) of the 1976 Act from an evasive or equivocal reply to a questionnaire.
3. Though there will be some cases where, for example, the non-selection of the applicant for a post or for promotion is clearly not on racial grounds, a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such circumstances the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be legitimate for the tribunal to **infer** that the discrimination was on racial grounds. This is not a matter of law but, as May LJ put it in Noone, “almost common sense”.
4. It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such **inferences** as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind both the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.

Let us consider the third principle – highlighted above – relate it to other mentions of inference in King and elsewhere in my sample cases and run it through the ‘reflexive interpretation’ phase of my interpretative framework. We should remind ourselves that at the time of the King judgement in 1991 the legal burden of proof in discrimination cases lay with the claimant and that this had been the case since the introduction of the Sex and Race Discrimination Acts in 1975 and 1976 respectively.

The principle includes the sentence:

“The outcome of the case will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.”

The clear implication being that inferences drawn from the facts rather than facts themselves are likely to determine the outcome of the case. Recognising that these principles are designed to assist employment tribunals to reach their conclusions, a further potential implication is that employment tribunal members will set out on a positive search for inferences as they absorb the written and verbal evidence presented to them. Whilst I am not suggesting that employment tribunals will put aside their responsibility to establish the facts of the case, it is hard to imagine that they will not also be forming a subjective opinion of the evidence and the witnesses presented to them. Essentially, building their conclusion around opinion – or inference – and then looking for facts to support such inference rather than drawing inferences from the facts.

Most observers, I suggest, would see this as a dilution of an objective focus on facts and a move in the direction of a more subjective focus on inference. Taken further, can such a subjective basis for decision making be made more objective by finding more and more facts to support the inference? This appears to be the implication of inserting the word *proper* in the sentence above. In other words, at which point is the standard of proof reached or the basis of the balance of probabilities in discrimination cases? At which point can

it be decided that one version of events is more probable than another? I don't really have a definitive answer to these questions, but my interpretation of the data in front of me is that the tipping point is likely to be a variable feature. So, not only are employment tribunals now faced with a shifting burden of proof as a result of legislation, but we might also be facing a shifting standard of proof in discrimination cases. A standard determined through the subjective application of reason and logic to militate a conclusion from a set of proven or accepted facts.

Beyond the use of the word inference and the impact of inferences on decision making, I am also particularly intrigued by the use of the word *proper* and other qualifying words and their relationship to inference. What does *proper* mean in this context? Does it differ from everyday, commonplace usage of the word *proper*, that is regarded to be genuine? If it does differ, is there scope for misunderstanding and the possibility of alternative meanings? Although *proper* is not elaborated upon in the original elements of the King narrative, the judgement does include an attempt at explanation by the inclusion of a reference to an extract from an earlier case – North West Thames Regional Health Authority v Noone (1988):

“It is not often that there is direct evidence of racial discrimination, and these complaints more often than not have to be dealt with on the basis of what are the proper inferences to be drawn from the primary facts. For myself I would have thought that it was almost common sense that, if there is a finding of discrimination and of difference of race and then an inadequate or unsatisfactory explanation by the employer for the discrimination, usually the legitimate inference will be that the discrimination was on racial grounds.”

In the above extract from Noone and elsewhere in the King decision itself, the word *legitimate* appears seemingly as an alternative to the word *proper*:

“It was therefore legitimate for them to draw an inference that the discrimination was on racial grounds.” and “... usually the legitimate inference will be that the discrimination was on racial grounds.”

Further, *just and equitable* is also used in King again apparently as an alternative to *proper* and/or *legitimate*:

“... the court or tribunal may draw any inference from that fact that it considers is just and equitable to draw ...”

In the case of *Zafar v Glasgow City Council*, considered by the HL in 1997, much of the King judgement is revisited and endorsed. Of particular note is the clarification of whether an inference of discrimination *should* be made in certain circumstances or whether it was *legitimate* to draw an inference of discrimination in such circumstances.

### CONTEXT

Text below is an extract from the decision in the case of **Zafar (appellant) v Glasgow City Council (respondents)** - House of Lords - 27 November 1997. An industrial (employment) tribunal had found that the respondents had unfairly dismissed and unlawfully discriminated against the applicant on the ground of his race when it failed to adopt a fair procedure in respect of his dismissal on disciplinary grounds. The Employment Appeal Tribunal dismissed the employers' appeal against the finding of race discrimination and unfair dismissal. The employers further appealed the finding of race discrimination to the Court of Session and their appeal was allowed on the grounds that the industrial tribunal had erred in finding that he had been treated less favourably than others and in making an inference of discrimination on racial grounds. Mr Zafar appealed to the House of Lords who dismissed the appeal.

### TEXT

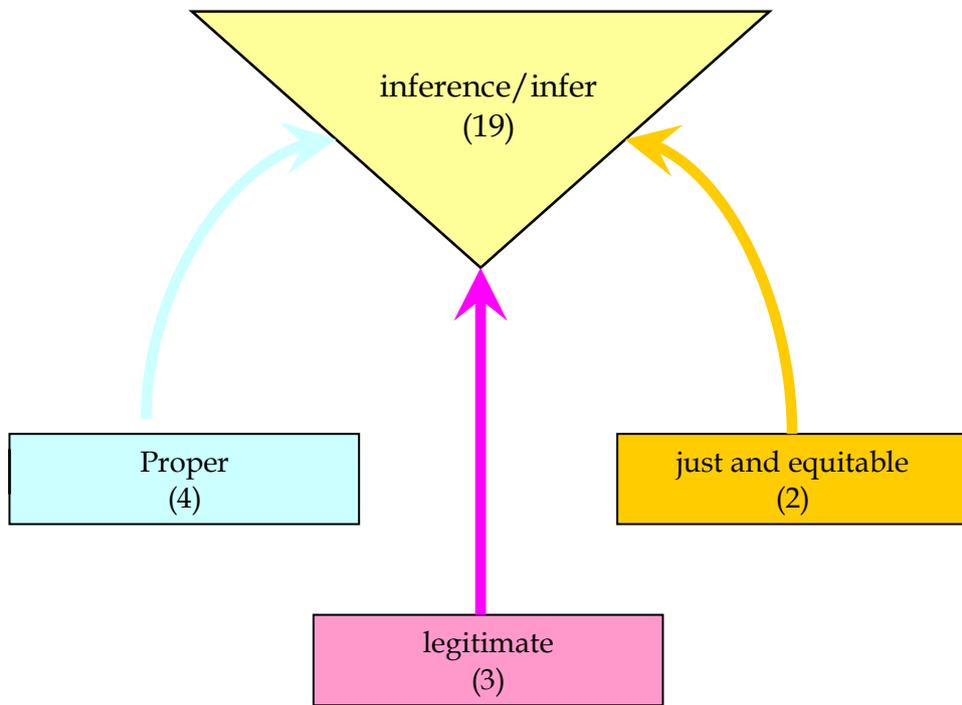
Over the years since 1975, the courts have sought to give guidance to industrial tribunals as to how **inferences** of fact can properly be drawn in this context.

In my judgement, that (making reference to King 1991) is the guidance which should in future be applied in these cases. In particular, certain remarks of mine.....

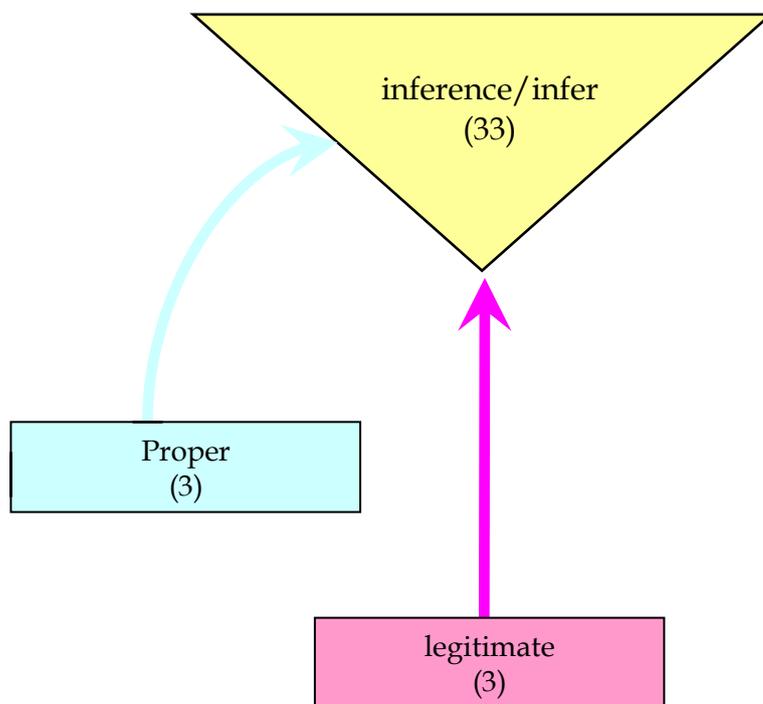
to the effect that such **inference** 'should' be drawn, put the matter too high, are inconsistent with later Court of Appeal authority and should not be followed.

Clear direction was given that *should* infer placed the matter too high and that *legitimate* to draw an inference was the correct position. Thus, leaving a greater degree of discretion with the tribunal than otherwise would have been the case and, in my contention, adding weight to the idea of a variable tipping point around standard of proof issues.

In the space of just two of my chosen cases - King and Zafar - and one referenced case - Noone - we have seen an indication of the significance attached to inferences and generated a debate around the qualifying words *proper, legitimate, just and equitable*. (See Figures 8.2 and 8.3.) Moreover, we have exposed the discussion about the weight to be attached to such inferences: *should* draw inference or *legitimate* to draw an inference.



**Figure 8.2:** Inference and Qualified Inference. (Data drawn from *King v Great Britain-China Centre* (1991) IRLR 513 CA.)



**Figure 8.3:** Inference and Qualified Inference. (Data drawn from *Zafar v Glasgow City Council* (1998) IRLR 36 HL.)

Such closer examination of these two texts in search of references to inference and qualified inference reveals the sort of language pattern that the discourse analyst strives to identify. As Fairclough (1999) points out, such textual analysis should be carried out seriously and thoroughly, but its real value in social research emerges when the relationship between textual analysis and social context is examined. This broad guidance seems to me to facilitate the interpretation of concepts and patterns which can be contextualised within the domain of a discrimination law determination at an employment tribunal, but also more widely within the domains of the employment relationship and the organisation footprint. For example, and in the context of this discussion about inference and qualified inference and my role as a personnel professional, it allows me to reflect on the considerable difference between advising a manager that she *should* take a particular course of action rather than advising her that it is *legitimate* for her to take a particular course of action. Missing this subtlety in policy writing could lead to unintended consequences if the policy is subsequently subjected to employment tribunal scrutiny and interpretation.

The Zafar case involved discussion about the relationship between unreasonable behaviour on the part of the employer and what inferences can be drawn from such unreasonable behaviour. An issue revisited at length in *Bahl v The Law Society* (2004) where the EAT confirmed that unreasonable behaviour does not equate to discriminatory behaviour. The notion of reasonableness and the ideas of the reasonable person are covered extensively in Chapter nine and I will not dwell on them here. Suffice to say, that the textual examples which follow illustrate a connection between inference and reasonableness.

### CONTEXT

Text below is an extract from the decision in the case of **Zafar (appellant) v Glasgow City Council (respondents)** - House of Lords – 27 November 1997. An industrial (employment) tribunal had found that the respondents had unfairly dismissed and unlawfully discriminated against the applicant on the ground of his race when it failed to adopt a fair procedure in respect of his dismissal on disciplinary grounds. The Employment Appeal Tribunal dismissed the employers' appeal against the finding of race discrimination and unfair dismissal. The employers further appealed the finding of race discrimination to the Court of Session and their appeal was allowed on the grounds that the industrial tribunal had erred in finding that he had been treated less favourably than others and in making an inference of discrimination on racial grounds. Mr Zafar appealed to the House of Lords who dismissed the appeal.

### TEXT

The industrial tribunal erred in drawing an **inference** that because the local authority had afforded the appellant treatment falling far below that of "a reasonable employer", there was a presumption that they had treated him differently and "less favourably" than others within the meaning of the definition of discrimination in s.1(1) of the Race Relations Act.

The conduct of a hypothetical reasonable employer is irrelevant to deciding whether a discrimination claimant has been treated by the alleged discriminator "less favourably" than that person treats or would have treated another. If the alleged discriminator is not a reasonable employer, he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably" for the purposes of the Act. The reasoning of Lord Morison in the Court of Session, that it cannot be **inferred** only from the fact that an employer had acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances could not be improved on.

The relationship between unreasonable behaviour and the drawing of inferences also attracted comment in *Igen Ltd and Others v Wong* (2005):

**CONTEXT**

Text shown below is an extract from the decision in the conjoined cases of *Igen Ltd. and others (appellants) v Ms Wong (respondent) and Chamberlain Solicitors and another (appellant) v Ms Emokpae (respondent) and Brunel University (appellant) v Ms Webster (respondent)* - Court of Appeal - 18 February 2005.

**TEXT**

Whilst we would caution ETs against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground, we cannot say that the ET was wrong to draw that inference.....

*Bahl v The Law Society* (2004) also provides a complex and much reported twist on the burden of proof debate since the case was initiated in employment tribunal in 2000, prior to the introduction of the Burden of Proof Regulations in 2001, but not finally determined in the Court of Appeal until July 2004. The case attracted considerable media interest and sits astride the legislative changes rather uncomfortably. This is particularly so since the EAT's decision contains a lengthy analysis of the most recent case law in respect of proving discrimination and purports to provide guidance on the correct approach to such matters. The decision is questioned almost immediately, due to the EAT's failure to recognise the impact of the Burden of Proof Regulations 2001 (Rubenstein, 2003). The centrality of drawing inferences in determining the outcome of the case appears less in doubt as the extract below illustrates.

## CONTEXT

Text shown below is an extract from the decision in the case of **Bahl (appellant) v The Law Society and others (respondents)** – Court of Appeal – 30 July 2004.

An employment tribunal had found that the applicant (Dr Bahl) had been unlawfully discriminated against in some respects, but rejected many of her allegations. The Law Society and two individuals named as respondents appealed to the EAT. Dr Bahl cross-appealed. The EAT allowed the appeal and held that the employment tribunal had failed to take account of the obvious non-discriminatory treatment. The EAT dismissed the cross-appeal. Dr Bahl appealed to the Court of Appeal and her appeal was dismissed. The Court of Appeal confirming the findings of the EAT.

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## TEXT

The employment tribunal erred in law in finding that the President of the Law Society, Robert Sayer, and its Secretary General, Jane Betts, discriminated against the applicant on grounds of her race and sex in their treatment of her when she was Vice President of the Law Society. This was a case not merely of inadequate reasons, but of inadequate reasons combined with errors of law and in particular the absence of findings of primary fact from which race or sex discrimination could properly be **inferred**, whilst at the same time the tribunal made findings which provided non-discriminatory reasons for any less favourable treatment. The EAT was right not to remit the case. There was no evidence on which the tribunal could properly have found discrimination.

As we have already seen, between 1991, when the King decision emerged, and the introduction of the Burden of Proof Regulations in 2001, the role of inference in employment tribunal decision making remained prominent, but largely consistent. In 2003, the appellant courts engage with the Burden of Proof for the first time following the introduction of the new regulations and we are immediately in receipt of new guidelines for determining the outcome of discrimination cases. *Barton v Intestec Henderson Crosthwaite Securities Ltd.* marks a watershed point in the same way that *King v Great Britain China centre* did 12 years earlier.

The 'Barton guidance' is reproduced below to illustrate how the interpretation of discrimination law developed in the 12 years since the King judgement.

### CONTEXT

Text shown below is an extract from the decision in the case of **Barton (appellant) v Investec Henderson Crosthwaite Securities Ltd.** (respondent) - Employment Appeal Tribunal - 3 April 2003. An employment tribunal had found that the respondent had not unlawfully discriminated against the applicant on the ground of her sex when it paid a male comparator a higher remuneration package than Ms Barton. The Employment Appeal Tribunal allowed the appeal and remitted the case to a differently constituted employment tribunal.

## TEXT

1. Pursuant to s.63A, it is for the applicant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondents have committed an act of discrimination which is unlawful by virtue of Part II or which by virtue of s.41 or 42 is to be treated as having been committed against the applicant. These are referred to below as “such facts”.
2. If the applicant does not prove such facts he or she will fail.
3. It is important to bear in mind in deciding whether the applicant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”.
4. In deciding whether the applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what **inferences** it is proper to draw from the primary facts found by the tribunal.
5. It is important to note the word is “could”. At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at primary facts proved by the applicant to see what **inferences** of secondary fact could be drawn from them.
6. These **inferences** can include, in appropriate cases, any **inferences** that it is just and equitable to draw in accordance with s.74(2)(B) of the Sex Discrimination Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2).
7. Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts pursuant to s.56A(10). This means that **inferences** may also be drawn from any failure to comply with any relevant code of practice.
8. Where the applicant has proved facts from which **inferences** could be drawn that the respondents have treated the applicant less favourably on the grounds of sex, then the burden of proof moves to the respondent.
9. It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act.
10. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.
11. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such **inferences** can be drawn, but further that it is adequate to discharge the burden of proof on

the balance of probabilities that sex was not any part of the reasons for the treatment in question.

12. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and / or code of practice.

Significant as the 'Barton guidelines' are to the burden of proof story, they were not to survive long without further amendment. The Court of Appeal heard three conjoined appeals in February 2005 and, as a result, set out revised guidance on the burden of proof provisions in the discrimination legislation, albeit drawing heavily on the principles laid out in Barton. They are reproduced in full below to confirm this point.

#### CONTEXT

Text shown below is an extract from the decision in the conjoined cases of **Igen Ltd. and others (appellants) v Ms Wong (respondent) and Chamberlain Solicitors and another (appellant) v Ms Emokpae (respondent) and Brunel University (appellant) v Ms Webster (respondent)** - Court of Appeal - 18 February 2005

## TEXT

1. Pursuant to section 63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as “such facts”.
2. If the claimant does not prove such facts he or she will fail.
3. It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”.
4. In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what **inferences** it is proper to draw from the primary facts found by the tribunal.
5. It is important to note the word “could” in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what **inferences** of secondary fact could be drawn from them.
6. **In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.**
7. These **inferences** can include, in appropriate cases, any **inferences** that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
8. Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to section 56A(10) of the SDA. This means that **inferences** may also be drawn from any failure to comply with any relevant code of practice.
9. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
10. It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
11. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.

12. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

13. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

14.

Notwithstanding the change in legislation around the burden of proof, the frequent references to inferences remain. However, attempts to clarify continue and point six – highlighted above – can be seen as a significant addition to the guidelines laid down in Barton. The amendments as a whole confirm that the Court of Appeal expects employment tribunals to follow a two-stage process where stage one consists of the claimant proving facts that, in the absence of an adequate explanation, the tribunal could conclude an unlawful discrimination act. Stage two requires the respondent to prove that they did not commit the unlawful act. Point six seems to suggest ‘parking’ any adequate explanations until stage one of the process has been completed. This seems to me a considerable mental challenge for a tribunal member attempting to identify proven primary facts from what could be a substantial body of material presented. An instruction which implies a delay in the opinion forming process does not appear tenable.

The extract from *Madarassy v Nomura Plc* below illustrates how employment tribunals might use the lack of potential to draw inferences to ‘disprove’ an allegation:

### CONTEXT

Text shown below is an extract from the decision in the case of **Madarassy (appellant) v Nomura Plc (respondent)** – Court of Appeal – 26 January 2007.

An employment tribunal had dismissed Ms Madarassy's claims of sex discrimination, victimisation and unfair dismissal and her appeal against these findings was dismissed by the Employment Appeal Tribunal with the exception of 2 matters which were remitted back to the employment tribunal to reconsider. The main ground of the subsequent appeal to the Court of Appeal was that the employment tribunal misdirected itself in law on the burden of proof.

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### TEXT

Although the tribunal did not in every case spell out the process of making **inferences**, it was well aware of the familiar process of drawing appropriate **inferences** from primary facts: see paragraphs 163, 164, 167 AND 169 (4) of its decision. The tribunal's approach was that, if it considered that there were no relevant facts from which **inferences** could be drawn supporting her allegations of sex discrimination, then it was entitled to dismiss her claim without shifting the burden of proof to Nomura and requiring it to provide a non-discriminatory explanation proving that it had not committed an unlawful act of discrimination.

Finally in this collection of texts about inference, the extract from *University of Huddersfield v Wolff* below merits inclusion here because it seems to suggest that facts and inferences are of equal value:

### CONTEXT

Text shown below is an extract from the decision in the case of **University of Huddersfield (appellants) v Wolff (respondent)** – Employment Appeal Tribunal – 16 July 2003. AN employment tribunal had upheld Dr Wolff's complaint of unlawful sex discrimination when a male colleague had been promoted to principal lecturer and Dr Wolff had not been promoted. The Employment Appeal Tribunal allowed the appeal and remitted the case back to the employment tribunal for rehearing.

### TEXT

Once the tribunal concludes that there is a prima facie case, it then considers the respondent's explanations. It must, if it has not already done so, make findings of fact, or draw **inferences** from findings of fact, for the purposes of concluding whether any of the explanations put forward by the respondent satisfy them, the burden being on the respondent to show that the less favourable treatment was not on the grounds of sex.

The case studies in this field suggest that the use and interpretation of inferences has been a consistent theme, but one frequently misunderstood and demanding of clarification at the CA level on more than one occasion. First in 1991 and more recently in early 2005. If that is the case, it seems to me to remove one of the 'objective layers' of legal decision making as it applies to employment legislation. A CA intervention in 1991 - 16 years after the introduction of the Sex Discrimination Act - begs the question of what was going on in the intervening period. Additionally, why was it felt necessary to introduce the Burden of Proof directive in 2001 and why was the meaning attached to its introduction so fiercely debated until the CA intervened again in February 2005? For me, the answers to these questions display an uncertainty amongst professionally qualified practitioners attempting to exercise a discretionary concept.

We have also questioned a further 'objective layer' of the decision making process around the point at which the standard of proof is reached. A balance of probability standard sits more easily with interpretation and opinion than it does with reason and logic. In consequence, the important piece of knowledge for the personnel profession is a realisation that whatever the outward impression of the employment tribunal system might be - commonly an arena for legal arbitration - it may not be so tightly defined by legal rules as we might think.

In *Zafar*, we are treated to an obvious example of inter-textuality – one text drawing explicitly on others – a practice which is integral to the extension of legal jurisprudence through case law. As Rubenstein (1998: 2) puts it: “The House of Lords now rules that the guidance set in *King* should be preferred to the earlier test in *Khanna and Chattopadhyay*....” This ‘story building’ from a broader context lies at the heart of discourse analysis and can reveal either some reinforcement of the established discourse or a move towards a new discourse. Identifying these nuances at an early stage offers an important advantage to the practitioner attempting to keep pace with changes in the employment law environment.

In the preceding paragraphs of this chapter, I have drawn attention to inference as a frequenter of the pages of my chosen employment tribunal texts and argued the centrality of the concept to the decision making process. I have also implied that it is such a difficult concept to pin down that it has led to numerous attempts to tighten the definition and add qualifying words such as proper or legitimate. All of this in an area benefiting from legal training and experience, ranging from a legally qualified employment tribunal chair to the Law Lords and their extensive supporting network. For personnel practitioners, without a deeper understanding of the legal principles underpinning inference, the challenge is perhaps even greater.

### **Implications**

In moving to the potential implications of my analysis of inference – what Dworkin terms post-interpretative and Fairclough social practice in their approaches – it is important to remember that in critical discourse analysis the findings are normally arrived at through an analysis of the relationship between discursive practice and the broader concept of social practice. In other words, does this analysis serve to reinforce the existing discourse or does it contribute to a change in social practice through a challenge to what has gone before. The *King* judgement provides a very clear example of such a challenge with the inclusion of guidance on dealing with discrimination cases which was

to become the dominant discourse in this area of employment law for many years. This change in the social order of things also reflects a retrospective element in that it confirms the unsatisfactory nature of what had gone before. As we have seen before, a main interest for the critical discourse analyst is the extent to which this change revealed underlying disparities and inequalities or, in its revised construction, put in place a whole new set of powerful discourse implications. I have argued that inference has had an enduring influence ever since employment law took a 'subjective turn' with the introduction of discrimination legislation and associated human interpretations of concepts such as fairness and equality (Turner, 2000). Just as Garfinkel (1969) found with jurors looking for evidence rather than looking at the evidence, the King guidelines direct employment tribunal members to pro-actively seek inferences from the evidence presented. In the hermeneutic sense, the appellant authorities in King - and indeed in Zafar which followed soon afterwards - were trying to describe what discrimination means to an audience well beyond those associated with these two specific cases.

I have also argued that without the sort of deeper exploration of text and the associated contextual relationship that I have conducted in this chapter, the changing personality of a key concept such as inference will evade the busy practitioner. To adopt a suspicious stance every time I read the word inference in an employment tribunal text sparks reflective consideration and opens the door to reflexivity if I have the ambition to proceed. To read and think in this way has been necessary for this research project, but applied to business and management more generally would remind us that what looks like a step change, may have been developing nuance by nuance over a period of time. Our professional bodies and the various training providers may wish to consider this challenge.

I am left with an uncomfortable feeling that years of legal argument have done little to simplify the 'workplace court' for managers, staff and the personnel practitioner. Whilst I recognise that I make this observation on the

back of the detailed analysis of only one key discrimination law concept I do so in the confidence that the story of inference alone is far from straightforward. In my experience, claimants, respondents and witnesses enter the employment tribunal bearing a range of emotions from arrogance to anger to fear, but united in the belief that the facts will emerge and that their position will be vindicated. Most do not have the energy or inclination to get to know the legal principles at play. As we have seen in the analysis in this chapter, when a case reaches an appellate court on a point of law workplace justice has already been left some distance behind. The concern here lies in confirming or setting legal procedures. Win or lose is still important – perhaps more so in view of the mounting cost – to the original protagonists, but their story has moved from workplace conflict to legal debate. All of which makes resolution of differences and reintegration more difficult rather than easier. I suspect that Miss King wanted to secure the job she had applied for, not to be originator of an employment tribunal case that would generate guidance for establishing unlawful discrimination!

My analysis and consequent implications are summarised in the table at Figure 8.4.

### ANALYSIS IN BRIEF

- Discrimination cases do not always provide the proven facts to reach a conclusion in themselves.
- Inference lies at the heart of decision making in discrimination cases.
- Repeated attempts to clarify and qualify what is meant by the drawing of inferences have only been partially successful.
- Employment tribunal members are guided to draw inferences from the primary facts of the case, but the guidance might influence them to form an opinion and then look for the facts to support such opinion.
- Inference is frequently qualified by words such as proper and legitimate.

### IMPLICATIONS IN BRIEF

- The 'objective illusion' of employment tribunals as a legal arena for the determination of legal matters, according to legal rules is undermined.
- The personnel profession need to recognise that the first point above influences the approach to handling discrimination cases accordingly.
- Understanding the storyline and nuances of the legislation and of case law is important in the formulation of policy and practice.
- The employment tribunal system is falling down between the twin goals of providing a forum for determining workplace matters and setting the legal dimension for social issues, such as discrimination at work.
- Disclosure analysis and reflexivity provide the practitioner with a social history of the development of taken for granted concepts.

**Figure 8.4:** Analysis and implications in brief.

### Summary comments on the concept of inferences

At this point, I remind the reader of Lord Justice Mummery's remarks in *Madassary v Nomura International Plc* (2006) IRLR 246 CA, one of my selected cases:

“I do not underestimate the significance of the burden of proof in discrimination cases. There is probably no other area of the civil law in which the burden of proof plays a larger part than in discrimination cases. Arguments on the burden of proof surface in almost every case. The factual content of the cases does not simply involve testing the credibility of witnesses on contested issues of fact. Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts. It is vital that, as far as possible, the law on the burden of proof applied by the fact finding body is clear and certain.”

This extract from one of the most recent cases to engage with the burden of proof in discrimination cases offers confirmation of my endeavours to put forward convincing arguments around the importance of inference in determining unlawful discrimination and to question how well this is understood, particularly in respect of those who might become involved in employment tribunal proceedings and those working in the personnel profession.

I am not suggesting that the influence space occupied by inference in legal reasoning and decision making is in any way a new phenomena. The development of a ‘corpus of knowledge’, or case, from which inferences can be drawn is a central finding of Garfinkel’s (1967) exploration of the ‘decision making rules’ adapted by jurors. However, it is not, in my experience, a concept which features heavily in human resources teachings or texts and yet the story of how it has developed reveals much about how discrimination law has been shaped over the last 30 years.

## CHAPTER NINE

### DISCOURSE ANALYSIS WITH A CRITICAL EDGE -NOTIONS OF COMMON SENSE AND REASONABLENESS

#### **Background**

My second analysis chapter considers the idea that employment tribunals seek to deliver common sense solutions that are readily accepted as such by the 'passenger on the Clapham omnibus' and that those solutions are based around the subjective concept of reasonableness. Before indulging in the analysis, I share with the reader some definitions of the two concepts drawn from both legal and more general settings, starting with common sense.

Two 'definitions' of common sense – one from organisation theory and one from legal theory – illustrate the significance of the concept, but also how the emphasis might be very different in alternative arenas. Hatch and Cunliffe (2007: 4) refer to common sense as "a theory about how to understand and negotiate life", whilst (MacCormick, 1994: 11) comments "...there is a matter of 'common sense' as well as justice. This I believe depends on an appeal to contemporary positive morality as understood by the judge". These differences and definitions merit further exploration and discussion particularly, in my view, against the backdrop of the ethnomethodological endeavour which stands astride the legal and management disciplines and focuses on how we make sense of our world. As Jenkins (2006) reminded us recently, the work of Garfinkel (1997) – the acknowledged founder of ethnomethodological approaches - is now 40 years old, but no less influential across a range of disciplines, including sociology, psychology and education studies. Garfinkel's treatise emphasised that the role of ethnomethodological studies is to explore everyday activities, practical applications and common sense knowledge.

At the broader level of understanding, Garfinkel talked about “common sense knowledge of social structures” and “ descriptions of a society that its members..... use and treat as known in common with other members, and with other members take for granted.” (Garfinkel, 1997: 76-77) This approach resonates with the Hatch and Cunliffe definition quoted above, but goes a step further by placing common sense meaning in the context of a society and its members. Rather helpfully, for this writer at least, Garfinkel’s elaboration sits comfortably with my Fairclough based approach to discourse analysis which involves textual analysis and the relationship between the text and the social practice in which it occurs.

Equally helpfully, Garfinkel extends his common sense approach to the interpretation of professional fact finding. In a legal setting, he contends that “Jurors make their decisions while maintaining a healthy respect for the routine features of the social order.” (Garfinkel, 1997:104) and that “They (jurors) decide ‘the facts’ .... by consulting the consistency of alternative claims with common sense models.” (Garfinkel, 1997: 106) Again, Garfinkel’s description is congruent with McCormick’s insight in paragraph two above. The link to the ‘contemporary positive morality of the judge’ is less evident, but in my own work I cover-off this dimension using Dworkin’s notion of law of integrity where the judge seeks to find the one right answer to a case, an answer which best fits and justifies the law as a whole.

In terms of a common sense definition of common sense across a range of social dimensions, Garfinkel stands apart. I readily sign-up to his approach in this research project.

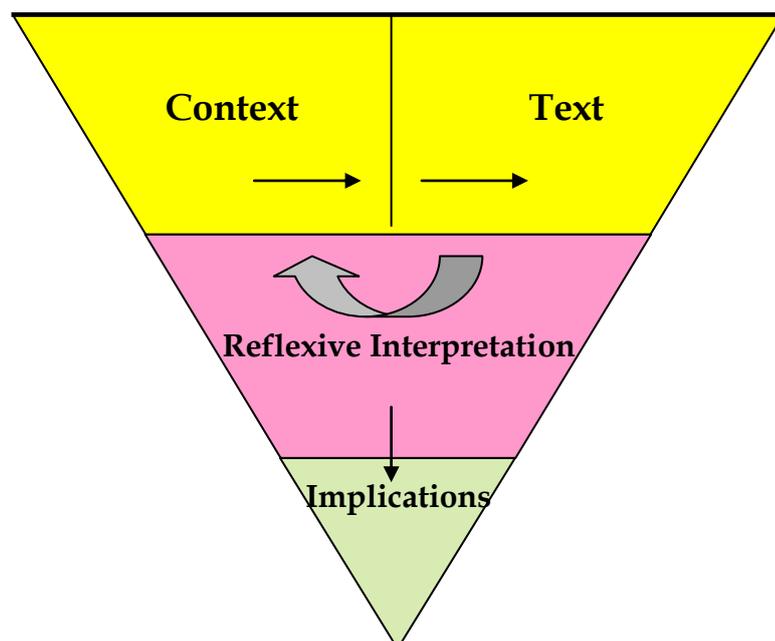
Reasonableness appears not to receive similar attention in the literature, at least in my search. Notwithstanding, it appears with frequency in employment tribunal texts and often close to suggestions around the notion of common sense. The common sense view of reasonableness might extend to a reasonable solution to a problem within the bounds of common sense and

might posit a reasonable person as capable of sound thinking based on fair and rational reasoning. As I have indicated earlier, I favour this elegant simplicity when looking for definitional support. Legal conceptions of reasonableness or the reasonable person might blur this elegant simplicity, but our legal framework – criminal and civil – places considerable emphasis on the reasonable person, reaching reasonable interpretations. Whilst the meaning of the word reasonableness is consistently questioned, the concept is widely accepted (Lucas,1963).

The notions of common sense and reasonableness in the determination of discrimination cases are my second emergent theme.

### **Analysis**

By way of reminder, my interpretative framework for analysis is summarised in Figure 9.1 below.



**Figure 9.1:** Interpretative framework for discourse analysis with a critical edge.

To illustrate the idea of common sense concepts in a legal context, consider the extracts below from King v The Great Britain Centre, Barton v Investec Henderson Crosthwaite Securities Ltd. and Webster v Brunel University reproduced below:

#### CONTEXT

Text shown below is an extract from the decision in the case of **King (appellant) v The Great Britain-China Centre (respondent)** - Court of Appeal - 11 October 1991. An industrial (employment) tribunal had found that the respondent had unlawfully discriminated against the applicant on the ground of her race when it failed to short-list her for interview for a vacant position in the respondent organisation. The Employment Appeal Tribunal allowed the appeal from the Great Britain-China Centre and remitted the case to a different employment tribunal for a rehearing. The CA allowed the further appeal by Miss King and restored the order of the industrial tribunal.

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#### TEXT

This is not a matter of law but, as May LJ put it in Noone, “almost **common sense**”.

#### CONTEXT

Text shown below is an extract from the decision in the case of **Barton (appellant) v Investec Henderson Crosthwaite Securities Ltd.** (respondent) - Employment Appeal Tribunal - 3 April 2003. An employment tribunal had found that the respondent had not unlawfully discriminated against the applicant on the ground of her sex when it paid a male comparator a higher remuneration package than Ms Barton. The Employment Appeal Tribunal allowed the appeal and remitted the case to a differently constituted employment tribunal.

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#### TEXT

In the future, we think industrial tribunals may find it easier to forget about the rather nebulous concept of “the shift in the evidential burden”. In this case, the industrial tribunal would, we suspect, have found the case **rather more straightforward** if, looking at all the evidence as a whole, they had simply decided whether the complaint had been established. No useful purpose is served by stopping to reach a conclusion on half the evidence.

## CONTEXT

Text shown below is an extract from the decision in the case of **Webster (appellant) v Brunel University (respondent)** – Employment Appeal Tribunal – 14 December 2004. An employment tribunal had dismissed Ms Webster’s race discrimination allegations on the grounds that she had failed to establish that the person complained of was an employee.

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## TEXT

It will be for a tribunal to ask itself, having found the facts as to what occurred, whether the treatment, which it, on the balance of probabilities, has established, could have been by the respondent. If it concludes that it could not have been by the respondent under any **sensible** view of a prima facie case, .....then it may well be that the tribunal would find that the necessary prima facie case is just not established.

It seems to me that in all three instances, there is an attempt to simplify the legal argument and insert a degree of everyday common sense interpretation. In all three extracts, the comments from the appellant courts are aimed at employment tribunal members rather than the contesting parties. The comments appear to convey two key messages: first, that the tribunals are over complicating their legal interpretations of the law itself and second, that their findings do not make sense to others when considered alongside the facts of the case. I will deal with each of these points in turn.

The number of claims referred to the EAT – 15 discrimination cases reported in IRLR in 2006 – suggests that employment tribunals continue to struggle with the complexities of discrimination legislation. (Rubenstein, 2007) Bearing in mind that an appeal to the EAT is only permitted on a point of law, which normally entails the identification of a potential flaw in the legal reasoning at the employment tribunal stage, the number and range of clarifications sought remains significant. EAT judgements expose such failings in legal reasoning and seek to provide further clarification and guidance for the employment tribunal community. In so doing, they create an additional storyline for a particular aspect of employment law – sometimes conflicting

with previous guidance – and could, inadvertently perhaps, reduce the potential for straightforward findings. The very fact that a number of cases – albeit a small number – continue up the appellant court hierarchy to the CA of HL would seem to reinforce this point and take us further away from easy access to workplace justice.

The choice of such words as *common sense*, *sensible* and *straightforward* also represent, in my view, an attempt to shape the understanding of the wider readership. Looked at in this way, the appellant courts could be seen as trying to move employment tribunals away from the use of legal jargon in an effort to offset some of the complexity highlighted in the previous paragraph. If this is the case, the motive is sound. Accepting that discrimination law is unlikely to be entirely free of complexity, to be able to translate legal argument into a judgement written in simple language is an attractive proposition. Articulating the judgement in such terms helps to redress the complexity balance for all parties. What it also does is reinforce one of my findings in the previous chapter. Namely, that practitioners who do want to understand the complexities of the legal argument will need to engage in reflective reading of the employment judgement to uncover the unfolding story, partially masked by everyday language.

The quote I used from Robert Turner (2002) earlier in this narrative bears repeating in this context and suggests that early discrimination law cases reveal a lack of common sense responses from employers:

“I think employers have for many years been on the back foot. I think they have been frightened of legislation and the use of legislation by employees and representatives of employees against them. I think they have tended to lose track of common sense values”.

Robert Turner’s observation sends a rather different message. His contention is that employers ran scared of employment legislation and failed to understand the implications for employment relationships. As a result,

defensive responses were prevalent concentrating on how to avoid being caught out rather than resolving workplace issues in a common sense fashion. Relating this idea back to my discussion of the psychological contract in Chapter 2, I suggest that Robert's observation also supports my proposition that the mutual expectations between employer and worker now necessarily contain a legal element. Understanding this point is a non-negotiable for the contemporary personnel practitioner.

Closely linked to the notion of common sense, there is a strong reliance on the concept of reasonableness and the hypothetical reasonable person in employment tribunal determinations. This extract from *Madarassy v Nomura Plc* provides a good example:

#### CONTEXT

Text shown below is an extract from the decision in the case of *Madarassy (appellant) v Nomura Plc (respondent)* – Court of Appeal – 26 January 2007.

An employment tribunal had dismissed Ms Madarassy's claims of sex discrimination, victimisation and unfair dismissal and her appeal against these findings was dismissed by the Employment Appeal Tribunal with the exception of 2 matters which were remitted back to the employment tribunal to reconsider. The main ground of the subsequent appeal to the Court of Appeal was that the employment tribunal misdirected itself in law on the burden of proof.

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#### TEXT

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination. "Could conclude" in s.63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it.

The second example is drawn from *Bahl v The Law Society* which in the space of one paragraph the CA judgement makes three references to 'unreasonable'. There appears to be an unqualified belief that all readers will

readily understand what the CA mean by unreasonable. In the more extreme cases, I am confident that the meaning will be clear enough, but where the dividing line between reasonable and unreasonable is much finer, our interpretations may differ. As the text above illustrates it could be a turning point in deciding a case. A finding of unreasonable behaviour demands an explanation to ensure that the behaviour was not on an unlawful ground, a finding of reasonable behaviour does not. In other words, the distinction may decide whether the burden of proof switches from the claimant to the respondent, or not. An observation which draws support in the words of Raban (2003:89) “..... the distinction between reasonable and unreasonable opinions may hinge on nothing more fundamental than whether an opinion is held among a certain elite”.

Our interpretation of reasonableness might be assisted by reference to the reasonable person who will always interpret the law in the right way. Unfortunately, as Lucas (1963) reminds us, we have yet to discover irrefutable criteria for reasonableness from deductive inference, let alone inductive inference. More positively, employment tribunal judgements are rarely majority decisions and the consensus findings are accepted by knowledgeable practitioners far more often than not. This serves to improve our confidence in the decision making process, but not the absolute certainty that some would seek. Lucas (1963:7) provides us with an encouraging thought:

“For, in the last resort, human judgement is all that we have to go by: and we can only trust that it is possible for us to be reasonable, and sometimes even to be right”.

## CONTEXT

Text shown below is an extract from the decision in the case of **Bahl (appellant) v The Law Society and others (respondents)** – Court of Appeal – 30 July 2004.

An employment tribunal had found that the applicant (Dr Bahl) had been unlawfully discriminated against in some respects, but rejected many of her allegations. The Law Society and two individuals named as respondents appealed to the EAT. Dr Bahl cross-appealed. The EAT allowed the appeal and held that the employment tribunal had failed to take account of the obvious non-discriminatory treatment. The EAT dismissed the cross-appeal. Dr Bahl appealed to the Court of Appeal and her appeal was dismissed. The Court of Appeal confirming the findings of the EAT.

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## TEXT

In our judgement, the answer to this submission is that contained in the judgment of Elias J in the present case. It is correct, as Sedley LJ said, that racial or sex discrimination may be inferred if there is no explanation for **unreasonable** treatment. This is not an inference from **unreasonable** treatment itself but from the absence of any explanation for it. However, the final words in the passage which we have quoted from Anya are not to be construed in the manner that Mr de Mello submits. That would be inconsistent with Zafar. It is not the case that an alleged discriminator can only avoid an adverse inference by proving that he behaves equally **unreasonably** to everybody.

The next example provides a more implicit suggestion of reasonableness, illustrating how it is important – and reasonable – for the employer to understand what it is that they need to justify if the burden of proof switches to them.

### CONTEXT

Text shown below is an extract from the decision in the case of **University of Huddersfield (appellants) v Wolff (respondent)** – Employment Appeal Tribunal – 16 July 2003. An employment tribunal had upheld Dr Wolff’s complaint of unlawful sex discrimination when a male colleague had been promoted to principal lecturer and Dr Wolff had not been promoted. The Employment Appeal Tribunal allowed the appeal and remitted the case back to the employment tribunal for rehearing.

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### TEXT

Once the burden is reversed, of course, the burden falls upon the respondent in the manner described by Judge Ansell in Barton, and the explanations have to be looked at. **It is the more important that there be appropriate findings on the basis of which the prima facie case of less favourable treatment on the grounds of sex are made,** and, of course, above all that there is such a prima facie finding, because it is only once there is such a finding that the respondent knows, and thus the tribunal knows, what the respondent has to justify.

Finally on the issue of reasonableness, the extract from Igen Ltd v Wong below illustrates the expectation of reasonable behaviour well before the employment tribunal hearing.

### CONTEXT

Text shown below is an extract from the decision in the conjoined cases of **Igen Ltd. and others (appellants) v Ms Wong (respondent) and Chamberlain Solicitors and another (appellant) v Ms Emokpae (respondent) and Brunel University (appellant) v Ms Webster (respondent)** – Court of Appeal – 18 February 2005.

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### TEXT

The issue of the unsigned Individual Performance Review Form and the refusal to withdraw or pursue the harassment complaint was then formalised into a disciplinary matter. **Thus, the respondents became more and more entrenched and a sensible resolution to what was, in reality, a trivial issue, became more and more remote.**

Instead she continued to adopt an inflexible and officious approach. True it is that she was not helped by the applicant or by Mr Dawes, who refused to disclose precisely what his credentials were. As however the Tribunal put to Ms Greene in the situation in which she had found herself, anybody who had the trust of the applicant and who was able to enter into sensible dialogue could, potentially, have provided a way out of this impasse.

My intention in this chapter has been to draw attention to the importance of notions of common sense and reasonableness in employment tribunal determinations. Notwithstanding the outstanding contribution of Harold Garfinkel, the notions remain tricky to define and handle within the legal arena of my study. Taken together with my thoughts on the influence of the concept of inference in the previous chapter, the ideas of common sense and reasonableness add to a picture more coloured by subjectivity and discretionary behaviour than we would recognise at first contact.

### **Implications**

Whilst applauding any attempt to introduce a degree of clarity and simplicity into legal texts, we also need to recognise that the relationship between how individuals use informal theories to make sense of their realities and the more formal theories deployed by social scientists – or lawyers – are often complex and not immediately evident (McAuley et al, 2007). Similarly, any theories advanced about the concept of reasonableness need to carry the caveat that we all interpret what is reasonable in our own way. I would venture to suggest that common sense and reasonableness are two of the most important informal theories that we use to understand our everyday worlds and social interactions. They are also good examples of theory meeting practice – at the level of social interactions – whether it be in the workplace or anywhere else.

I have, of course, looked at common sense and reasonableness in the context of employment tribunals, and I would not wish to fall into the trap of suggesting any direct transferability of my findings to other contexts. However, we should not underestimate the notions of common sense and reasonableness as key elements of our everyday sense making. When we read an employment tribunal which talks about the exercise of common sense, our own values come into play, whatever our previous life experiences.

My analysis and consequent implications are summarised in the table at Figure 9.2.

<p style="text-align: center;"><b>ANALYSIS IN BRIEF</b></p> <ul style="list-style-type: none"><li>• The concept of common sense interpretations motivates those making employment tribunal judgements and emerges explicitly in a number of the texts themselves.</li><li>• The concept of reasonableness is central to employment tribunal determinations and can be seen explicitly and implicitly in the texts themselves.</li></ul> <hr/> <p style="text-align: center;"><b>IMPLICATIONS IN BRIEF</b></p> <ul style="list-style-type: none"><li>• Two of our most frequently used informal theories – common sense and reasonableness – are engaged in the construction of employment tribunal judgements.</li><li>• We need a better understanding of how these informal theories interact with the more formal legal and social theories used to explain cause, effect and outcome.</li></ul>
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**Figure 9.2:** Analysis and implications in brief.

**Summary comments on the notions of common sense and reasonableness**

Once again, Garfinkel (1967) provides a useful reference point for the idea that, just as jurors in court cases seek common sense solutions, employment tribunal members follow a similar mental process. Garfinkel (1967: 106) put it like this:

“Jurors come to an agreement amongst themselves as to what actually happened ..... They do this by consulting the consistency of alternative claims with common sense models.”

We have seen in this chapter how the authors of employment tribunal judgements pursue a similar line by attempting to produce a text which will make sense to participants and the wider readership. Similarly, the concept of reasonableness can be taken back to the literature, where it is seen, by some commentators (Raban, 2003) as a ‘contested term’. He described it thus: “Terms like ‘fairness’ or ‘reasonableness’ ..... always apply to a particular combination of factors rather than a clearly, identifiable and potentially recurrent element.....” (Raban, 2003: 14)

The analysis conducted in this chapter reveals instances of attempts to find common sense interpretations in the context of employment tribunal proceedings and to apply reasonableness in determining such interpretations and outcomes. These attempts engage our common sense ability to make sense of a social context – in this case the employment tribunal – to evaluate similarity and difference to provide meaning and understanding in our worlds.

## CHAPTER TEN

### DISCOURSE ANALYSIS WITH A CRITICAL EDGE - LEGAL RESPONSES TO SOCIAL ISSUES

#### Background

My third analysis chapter relates to the idea that social - or workplace - issues are determined according to legal rules and then transferred back to the social environment of the workplace. Mansell et al (2004, 4) describe this transference thus: "...for a dispute to become legal the social problem must be transformed into a legal problem". Such an idea sounds relatively straightforward when described as I have done in the previous sentences. What follows is designed to question this apparent simplicity and to explore what the process involves by closer examination of three key components: the concentration on legal factors in the writing of judgements, the tension between emotion and reason in finding solutions to workplace matters and the power effects of the language used in the employment law discourse. These three elements lie not so far below the surface of employment tribunals and an understanding of their importance in this arena seems to me a worthwhile pursuit. It may then be possible to consider the potential influence on the wider employment relations audience and any read across to management more generally.

Recognition of the relationship between law and society is not a new concept (Banaker and Travers, 2002), but scholarly examination in the employment law context is, in my experience, relatively rare. Emotion as a social factor and the power effects of language are also established concepts in management studies and visited with some frequency as research topics. According to Fineman (2005, 331), "An emotion perspective has led to a new wave of research into areas such as leadership, decision making, trust and

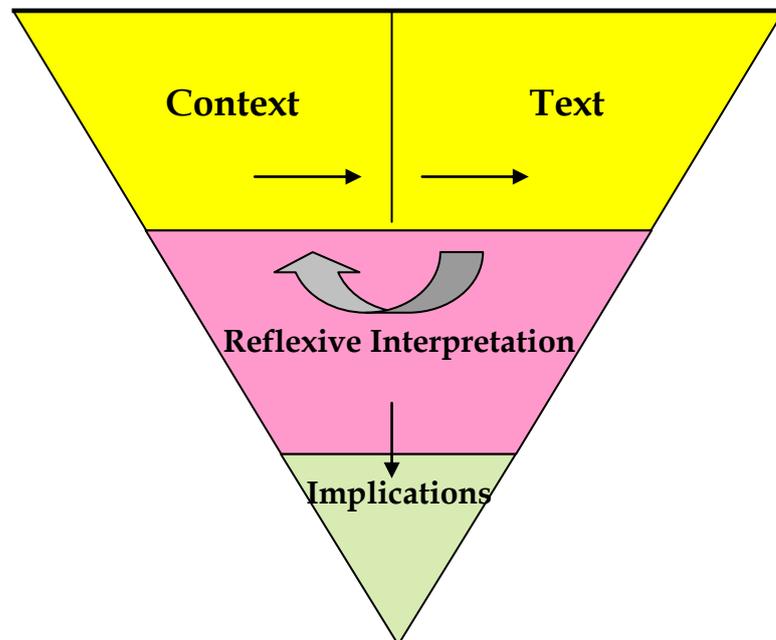
negotiation, business ethics and organizational change". Much of the early work seemed to focus on the exclusion of emotion from the workplace or at least control of emotion in the workplace, in part, to preserve the modernist narrative. Whereas more recent accounts have tended to focus on incorporating emotion within the fabric of organisational life. (Hancock and Tyler, 2001) As far as language and power are concerned, Fairclough (1989) devoted an entire work to the subject and drew an interesting distinction between power *in* discourse and power *behind* discourse. A distinction particularly pertinent to legal texts, I would suggest.

So much for a brief induction of what has gone on before, the challenge in my research project is to examine whether or not employment law determinations reflect the social perspective and provide potential social implications. The influences of emotion and power are likely to shape such examination.

Legal responses to social issues in the determination of discrimination cases is my third emergent theme.

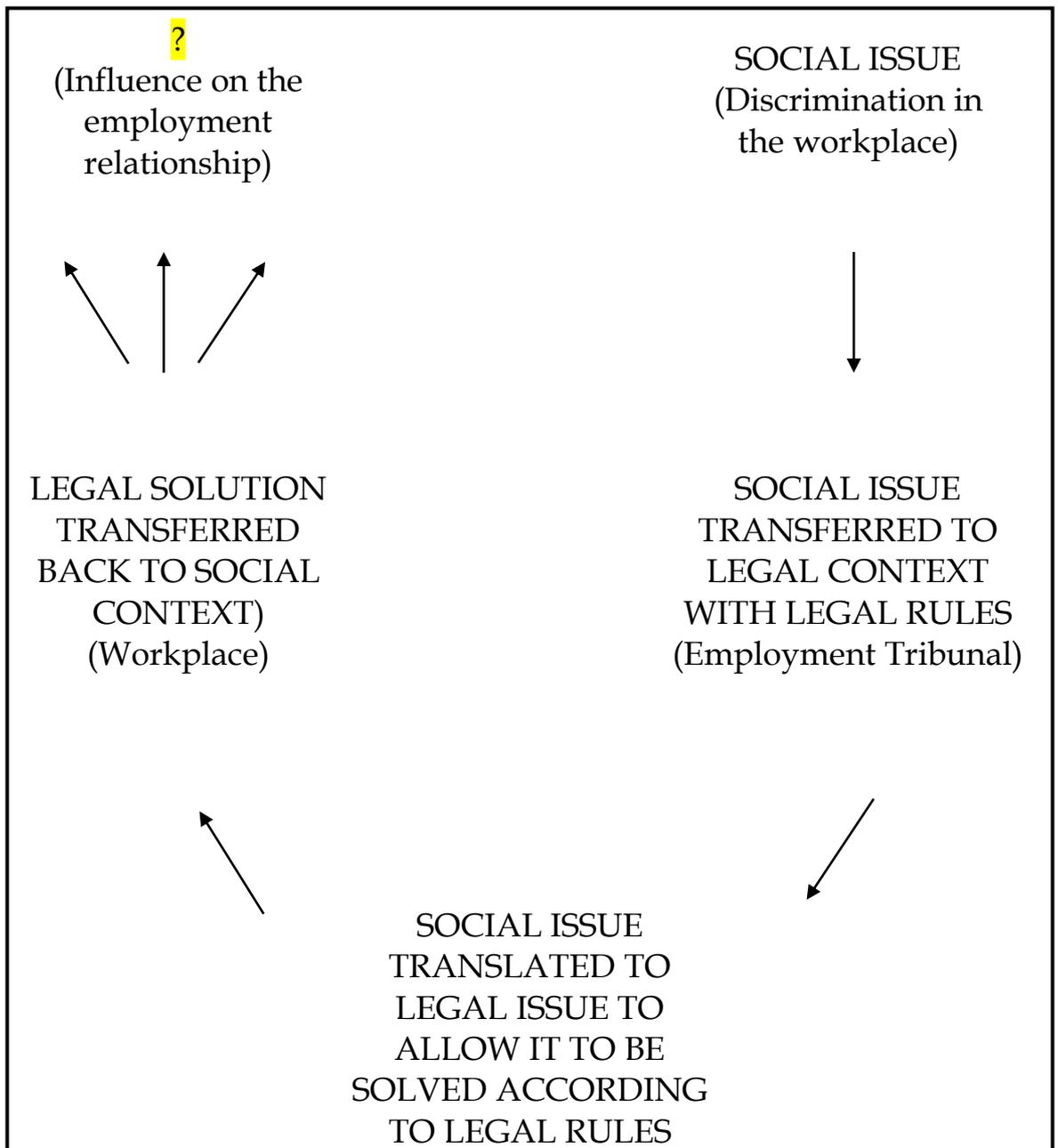
## Analysis

By way of reminder, my interpretative framework for analysis is summarised in Figure 10.1 below.



**Figure 10.1:** Interpretative framework for discourse analysis with a critical edge.

In the context of discrimination in the workplace, the transference between the workplace, the employment tribunal and back again is illustrated in Figure 10.2 below. The process hinges on a social issue – normally a workplace conflict of some sort – being translated into a legal problem – determined according to legal rules – and then the solution transferred back to the social environment of the workplace.



**Figure 10.2:** Dealing with social issues in a legal context.

Firstly under the broader heading of legal responses to social issues, I offer the reader an insight into the relative weight attached to legal factors and employment factors.

The 'Barton guidelines' were produced in 2003 as a result of the Barton v Investec Henderson Crosthwaite Securities Ltd. case and they have been referred to previously - Chapters 7 and 8. The box below includes two of the guidelines to emphasise the legal basis of their construction.

#### CONTEXT

Text shown below is an extract from the decision in the case of **Barton (appellant) v Investec Henderson Crosthwaite Securities Ltd. (respondent)** - Employment Appeal Tribunal - 3 April 2003. An employment tribunal had found that the respondent had not unlawfully discriminated against the applicant on the ground of her sex when it had paid a male comparator a higher remuneration package than Ms Barton. The Employment Appeal Tribunal allowed the appeal and remitted the case to a differently constituted employment tribunal.

#### TEXT

(10) To discharge that burden **it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex,** since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

and

(12) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, **a tribunal would normally expect cogent evidence to discharge that burden of proof.** In particular the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

The legal argument continues in the case of Chamberlain Solicitors v Emokpae - determined only 14 months after the Barton decision - where it was felt necessary to revisit guidelines 10 and 12 detailed above.

## CONTEXT

Text shown below is an extract from the decision in the case of **Chamberlain Solicitors and another (appellants) v Emokpae (respondent)** – Employment Appeal Tribunal – 15 June 2004. An employment tribunal had found that Ms Emokpae had been unlawfully discriminated against on the grounds of her sex when she was dismissed following rumours about a relationship with her manager. The Employment Appeal Tribunal dismissed the appeal by Chamberlain Solicitors and another against the decision of the employment tribunal and found that the latter had not erred in law.

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## TEXT

We do not consider the EAT in Barton was saying that account of the law was changed to require the respondent to show gender had no effect whatsoever in the decision. *Nagarajan* was cited in the skeleton arguments and is anyway the leading authority well-known to the EAT. It was not distinguished. In order to make this clear, for we accept there may be misunderstanding, we respectfully suggest that guidelines (10) in Barton should be adjusted to read as follows:

“To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was not significantly influenced, as defined in *Nagarajan v London Regional Transport* (1999) IRLR 572, by grounds of sex”.

We are also asked to consider guideline (12) which requires ‘cogent evidence’ to be adduced by a respondent shouldering the transferred burden, once a prima facie case has been made out by the applicant. The EAT in Barton justified this expression on the basis that the material facts necessary to prove this would be in the hands of the respondent. ‘Cogent’ means forceful or persuasive. Guideline (12) is the correct statement of the law, if we may respectfully say so, and so is the justification. Facts and arguments which are forceful and persuasive will discharge a burden of proof. The cogency of the evidence required depends on the standard of proof the law requires, and the nature of the allegation made. Lord Nicholls in *In Re H and others (minors) (sexual abuse: standard of proof)* (1996) AC 563, 586 (a case not cited to us but upon which our judgment does not depend) approved as neatly expressed the proposition that ‘the more serious the allegation, the more cogent the evidence required....to prove it.’ In discrimination, the (civil) standard is the balance of probability. Within that standard, the more unlikely the allegation, the more cogent must be the evidence to discharge the civil burden of proof. Once the burden has shifted, if the facts and explanation are not persuasive, the respondent will not discharge it. The respondent must prove its case on the balance of probability. To do so, it will produce evidence which persuades the

industrial jury to find for it. It is entirely appropriate, supported by high authority, to describe that evidence as 'cogent'.

Again as we have seen previously – Chapter 8 – the Chamberlain decision was questioned within eight months when the same case, together with two others, was considered by the Court of Appeal. (*Igen v Wong*) The result was further amendment of the Barton guidelines:

### CONTEXT

Text shown below is an extract from the decision in the conjoined cases of *Igen Ltd. and others (appellants) v Ms Wong (respondent) and Chamberlain Solicitors and another (appellant) v Ms Emokpae (respondent) and Brunel University (appellant) v Ms Webster (respondent)* – Court of Appeal – 18 February 2005.

### TEXT

Before us there has been no challenge to the broad outline of the Barton guidance, although suggestions have been put to us as to how it might be improved. Some criticisms have been made and suggestions put forward by the EATs in other cases. We shall return to the wording of the guidance later. However, it is important to stress at the outset that ETs must obtain their main guidance from the statutory language itself. No error of law is committed by an ET failing to set out the Barton guidance or by failing to go through it paragraph by paragraph in its decision.

and

Finally, we should refer to a dispute on whether paragraph (10) of the Barton guidance requires modification. In *Emokpae* His Honour Judge McMullen Q.C., giving the judgement of the EAT, held that the reference in paragraph (10) to the words “no discrimination whatsoever”, which are taken from the Burden of Proof Directive, was in appropriate because they concerned not the definition of or the ingredients in discrimination but merely the forms of discrimination. Instead Judge McMullen suggested that paragraph (10) be rewritten to read:

“To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was not significantly influenced, as defined in *Nagarajan v London Regional Transport (2000) 1 AC 501*, by grounds of sex.”

That was a reference to the following passage in Lord Nicholls’ judgment in *Nagarajan* at pp. 512,3:

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even through it is not the sole ground for the decision. A variety of phrases, with different shades of meaning, have been used to explain how the legislation applies in such cases: discrimination requires that racial grounds were a cause, the activating cause, a substantial and effective cause, a substantial reason, an important factor. No one phrase is obviously preferable to all others, although in the application of this legislation legalistic phrases, as well as subtle distinctions, are better avoided so far as possible. If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out.”

and

In any event we doubt if Lord Nicholls’ wording is in substance different from the “no discrimination whatsoever” formula. A “significant” influence is an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial. We would therefore support the original paragraph (10) or the Barton guidance and, consistently therewith, a minor change suggested by Mr Allen to paragraph (11) so that the latter part reads “it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.”

Note: the revised Barton guidelines are reproduced in full in chapter 8.

The ‘story’ of the Barton guidelines is an interesting one on a number of counts. First, the debate around the wording of guidelines 10 and 12 seems to me to have much more to do with legal interpretation and legal rules than it has to do with the workplace issue of unlawful discrimination itself. Second, these three cases provide a clear example of what Fairclough would refer to as intertextuality: the idea of texts drawing on earlier texts. Thirdly, a sense that the debate has been largely confined to the employment law areas with little input from personnel practitioners. I will deal with each of these points in turn.

The rather ‘detached’ consideration of the wording of two guidelines from Barton – 10 and 12 – appears purely linguistic – the difference between ‘in no sense whatsoever’ and not ‘significantly influenced.....by’ in respect of guideline 10. These two interpretations, however, convey significantly different meanings and, when it comes to arguing a case in tribunal, a very different approach. The rather rapid reversal of the ‘not significantly

influenced.....by' interpretation brings to an end this phase of the 'story'. Guideline 12 is drawn into the spotlight because of the reference to 'cogent evidence'. In *Chamberlain Solicitors v Emokpae*, the EAT found it necessary to spell out what was meant by 'cogent evidence'. The reaction to the use of the phrase pulls my 'suspicious' trigger and I wonder who would have found the interpretation of 'cogent' so demanding of detailed explanation. Perhaps it reveals a nervousness about extending the scope for interpretation in the surroundings of an employment tribunal.

In respect of points one and two, the build-up of the legal debate between cases around interpretations of the burden of proof provisions also sparks reflection. *Chamberlain Solicitors v Emokpae* draws on *Barton v Investec Henderson Crosthwaite Securities Ltd* and *Nagarajan v London Regional Transport* in a seamless fashion irrespective of the circumstances of the case and as though no other cases had been heard in the intervening period. This looks like an artificial separation of legal argument from the point where future employment tribunal cases are born; the workplace. This is the location of activity for the personnel professional and in their day to day activity where the law matters.

*Madarassy v Nomura Plc* provides a good example of the exclusion of 'peripheral factors' in the construction of an employment tribunal judgement in the interests of producing a legally sound solution:

## CONTEXT

Text shown below is an extract from the decision in the case of **Madarassy (appellant) v Nomura Plc (respondent)** – Court of Appeal – 26 January 2007.

An employment tribunal had dismissed Ms Madarassy's claims of sex discrimination, victimisation and unfair dismissal and her appeal against these findings was dismissed by the Employment Appeal Tribunal with the exception of 2 matters which were remitted back to the employment tribunal to reconsider. The main ground of the subsequent appeal to the Court of Appeal was that the employment tribunal misdirected itself in law on the burden of proof.

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## TEXT

According to this ground of appeal the employment tribunal erred in its approach to the evidence and its findings of fact by seeking corroboration of facts where none was required and by **concluding that there was no evidence, when in fact there was evidence from Ms Madarassy.** The tribunal therefore failed to direct itself properly in relation to what was evidence for the purposes of making findings of fact and the impact of s.63A(2).

There is no substance in this ground of appeal. It is reasonably clear that the tribunal sometimes used the expression 'no evidence' to cover both the situation where Ms Madarassy produced no evidence on the point either from herself or from any one else and the situation in which she gave evidence on the point, which the tribunal did not accept as establishing the allegation.

**It would have been better if the tribunal had not used the expression 'no evidence' when they meant 'no credible evidence'** but the substance of their approach to the relevant evidence and their treatment of it is reasonably clear. It discloses some rather loose use of language, but that does not amount to an error of law in the decision of an employment tribunal if the factual conclusions and reasoning of the tribunal are sufficient to explain the decision reached on the point. **These allegations failed for lack of evidence acceptable to the tribunal.**

A comment from University of Huddersfield, Wolff provides an example of how the 'human' concerns of the complainant were dismissed by the employment tribunal in favour of legal definitions and how the attempt to challenge a legal determination failed at the first hurdle:

### CONTEXT

Text shown below is an extract from the decision in the case of **University of Huddersfield (appellants) v Wolff (respondent)** - Employment Appeal Tribunal - 16 July 2003. An employment tribunal had upheld Dr Wolff's complaint of unlawful sex discrimination when a male colleague had been promoted to principal lecturer and Dr Wolff had not been promoted. The Employment Appeal Tribunal allowed the appeal and remitted the case back to the employment tribunal for rehearing..

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### TEXT

It may well be that it was that factor, quite apart from the fact that the applicant was no doubt disappointed not to be promoted herself (and she had previously been in the running for promotion in 1999, although that was a fact known to one of the assessors but which he did not reveal, either in her favour or against her, to his fellow assessors), which caused the applicant to be particularly concerned. Nevertheless, whether or not she was disappointed or concerned, of course, is not important; what matters is whether, as the tribunal indeed concluded to be the case, she was the subject of sex discrimination.

For the reasons that we have given as to the substantial areas in which facts, and indeed, available inferences were not dealt with at all by the tribunal, we are satisfied that we cannot ourselves, as we are in any event encouraged not to do, pick up pieces of a jigsaw and put them back together again, and we regret that the only possible course in this case is for the matter to be reheard.

As well as providing another example of employment tribunal texts drawing on previous legal authorities, the extract from *Webster v Brunel University* below provides a more reassuring note - from the perspective of the personnel practitioner - in emphasising the point made in the previous comment from *University of Huddersfield v Wolff* that it is not for the appellant courts to substitute their own version of the facts of the case:

### CONTEXT

Text shown below is an extract from the decision in the case of Webster (appellant) v Brunel University (respondent) - Employment Tribunal Appeal - 14 December 2004. An employment tribunal had dismissed Ms Webster's race discrimination allegations on the grounds that she had failed to establish that the person complained of was an employee.

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### TEXT

The cases in the Court of Appeal, most recently in Crofton v Yeboah (2003) IRLR 632, have made the position entirely clear, namely that this Appeal Tribunal, even if it would have reached a different decision from the Tribunal, is not entitled to substitute that view and is not entitled to say that the Tribunal was wrong. In order to establish perversity there has to be an overwhelming case either that there was no evidence upon which the Tribunal could reach the conclusion it did, or that the conclusion was so startlingly wrong that it can only be said to be totally perverse. It is emphasised again and again by the Court of appeal, and indeed by this Appeal Tribunal, that the industrial jury is the judge of the facts, and if this industrial jury reached the conclusion it did, then there is no ground upon which we would think it appropriate to interfere, on the basis of the submissions made to us by Mr Troop.

To many readers, however, the distinction between an error of law and an interpretation may not be as straightforward as the appellant courts would have us believe. Consider, for example, the extract from Bahl v The Law Society below:

## CONTEXT

Text shown below is an extract from the decision in the case of **Bahl (appellant) v The Law Society and others (respondents)** – Court of Appeal – 30 July 2004.

An employment tribunal had found that the applicant (Dr Bahl) had been unlawfully discriminated against in some respects, but rejected many of her allegations. The Law Society and two individuals named as respondents appealed to the EAT. Dr Bahl cross-appealed. The EAT allowed the appeal and held that the employment tribunal had failed to take account of the obvious non-discriminatory treatment. The EAT dismissed the cross-appeal. Dr Bahl appealed to the Court of Appeal and her appeal was dismissed. The Court of Appeal confirming the findings of the EAT.

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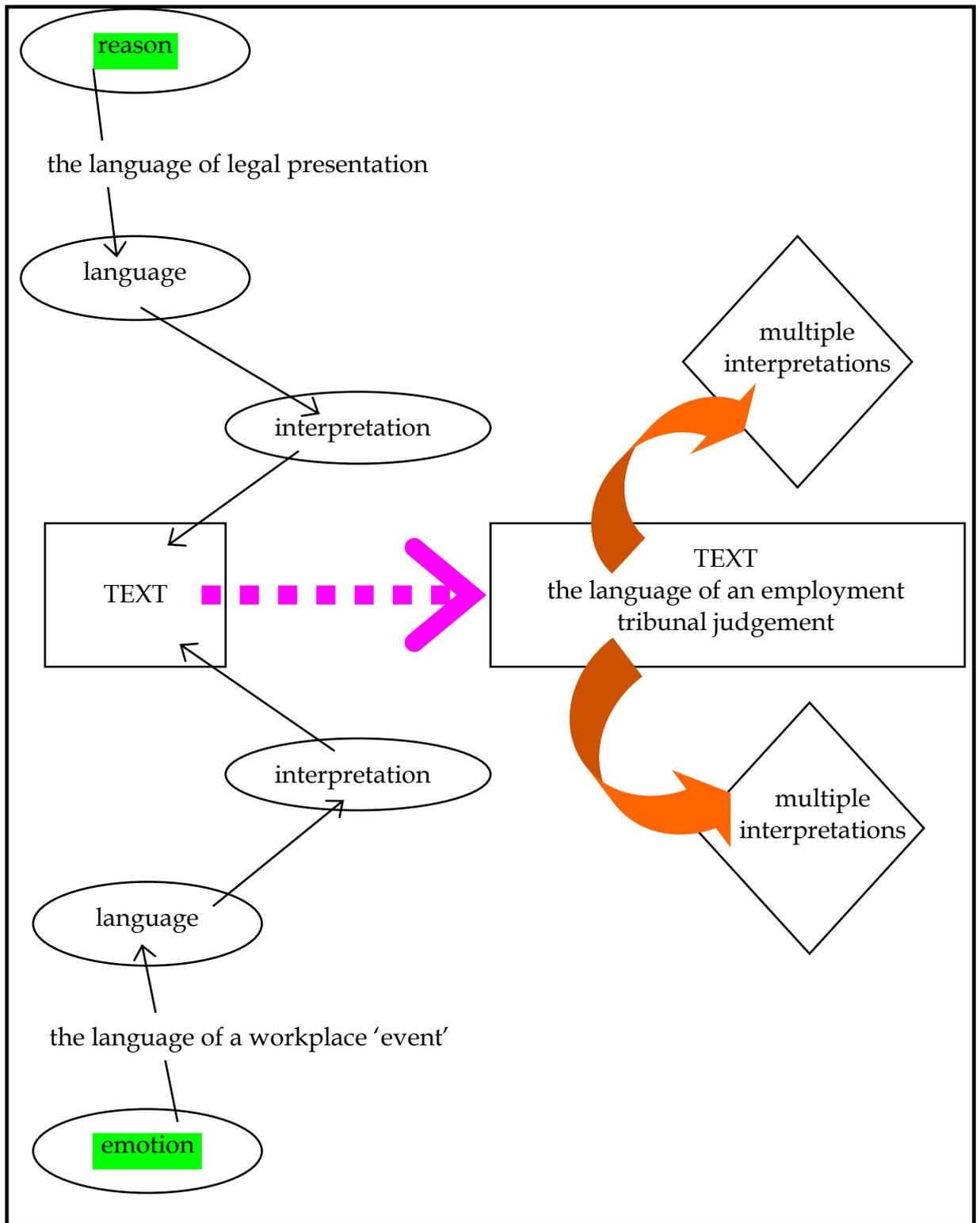
## TEXT

The EAT expressed its conclusion in this way: 239. **For all these reasons we consider that the tribunal has in a number of ways approached the issue of discrimination, both in relation to Mr Sayer and Mrs Betts, in an incorrect way. It has failed to take account of the obvious explanation for any detrimental treatment. Both Mr Sayer and Mrs Betts, for their own distinct and separate reasons, had reason to feel hostile toward Dr Bahl. On occasions they have allowed their personal animosity towards Dr Bahl to distract them from their duty to act objectively and fairly towards her. But that is a far cry from establishing the very serious allegation that they have discriminated on grounds of race and sex.** In addition, the tribunal has made findings of discrimination where no proper evidential basis for it exists: **and it has inferred in some cases that unfair and unreasonable treatment alone is evidence of discrimination.**

The extracts included in this section of my analysis reveal in me a sense of the dominance of the legal over the societal. A sense that the contested terms we examined in the previous chapter, such as fairness and reasonableness, are second order considerations when the focus is on a perceived error of law. In contrast with the issues addressed in the previous two chapters, we seem to be witnessing attempt to reinforce the letter of the law rather than recognising the societal impact.

The second idea presented in this chapter is a consideration of how acts often wrapped in high emotion are subjected to legal reasoning to produce an outcome invariably presented in legal language. Notwithstanding the relative paucity of graphic language in the decision sections of employment tribunal judgements, authors appear less reticent in the body of the text. Some examples will be discussed shortly. Figure 10.3 illustrates the various dimensions and tensions involved and attempts to put into focus the sense expressed by Fineman et al (2005: 186): "Working with our own and others' emotions is part of the unacknowledged, but fundamental, fabric of organisational life". From my own professional dealings with employment matters, I would support this contention and also suggest that attempting reason without understanding emotion is a particularly unrewarding endeavour.

Figure 10.3 demands rather more explanation than I have so far afforded it. I am trying to suggest that the language of legal presentation and the emotional language of the conflict situation are very often different. When brought together they provide a 'text of events' full of tension and fed by interpretation of alternative discourses based on the same facts. The employment tribunal need to absorb this cocktail, establish the facts, draw inferences where appropriate and produce an 'acceptable' employment tribunal judgement. As we have seen, the latter is then open itself to a range of interpretations. Even if the judgement favours the legal argument as I have suggested earlier in this chapter, emotional exchanges are not very well camouflaged.



**Figure 10.3** Reason and emotion and alternative interpretations

Consider the extract below from *Zafar v Glasgow City Council* reproduced below and the strength of language around the finding of sexual harassment.

#### CONTEXT

Text below is an extract from the decision in the case of *Zafar (appellant) v Glasgow City Council (respondents)* - House of Lords - 27 November 1997. An industrial (employment) tribunal had found that the respondents had unfairly dismissed and unlawfully discriminated against the applicant on the ground of his race when it failed to adopt a fair procedure in respect of his dismissal on disciplinary grounds. The Employment Appeal Tribunal dismissed the employers' appeal against the finding of race discrimination and unfair dismissal. The employers further appealed the finding of race discrimination to the Court of Session and their appeal was allowed on the grounds that the industrial tribunal had erred in finding that he had been treated less favourably than others and in making an inference of discrimination on racial grounds. Mr Zafar appealed to the House of Lords who dismissed the appeal.

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#### TEXT

An industrial tribunal rejected the complaint relating to promotion. In relation to the dismissal, the tribunal found that Mr Zafar had been guilty of sexual harassment "of the most distasteful and unacceptable kind". However, the tribunal held that the dismissal was unfair on procedural grounds, and that the employers' failure to adopt a fair procedure also constituted discrimination on grounds of race.

Similarly, the extract below from *Bahl v The Law Society* includes a quote from the chair of the inquiry appointed to examine complaints about Dr Bahl's behaviour from members of the Law Society staff.

## CONTEXT

Text shown below is an extract from the decision in the case of **Bahl (appellant) v The Law Society and others (respondents)** – Court of Appeal – 30 July 2004.

An employment tribunal had found that the applicant (Dr Bahl) had been unlawfully discriminated against in some respects, but rejected many of her allegations. The Law Society and two individuals named as respondents appealed to the Employment Appeal Tribunal. Dr Bahl cross-appealed. The

Employment Appeal Tribunal allowed the appeal and held that the employment tribunal had failed to take account of the obvious non-discriminatory treatment. The Employment Appeal Tribunal dismissed the cross-appeal. Dr Bahl appealed to the Court of Appeal and her appeal was dismissed. The Court of Appeal confirming the findings of the Employment Appeal Tribunal.

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## TEXT

Lord Griffiths' report was published on 10 March 2000. Complaints of bullying in relation to all five complainants were upheld. Lord Griffiths concluded as follows:

“We regret that we have been driven to the conclusion that the vice president resorted at times to **bullying tactics**. She treated the staff without due consideration demanding immediate response to her own wishes without regard to their other duties. **Her treatment of staff was at times demeaning and humiliating and at other times offensively aggressive.** In many ways, she usurped the secretary general's role as head of staff and introduced an atmosphere of fear and confusion in the line of command.”

We can only imagine the emotional intensity of the exchanges between the participants in these cases, but even within the restrained language of employment tribunal judgements we are given a pretty clear indication.

The third component of legal responses to social issues relates to the language used in some employment tribunal judgements. Sometimes we find a choice of words not familiar to most of us and sometimes we find words with a legalistic heritage and meaning. Three examples of the former – and ones that stood out on reading my selected employment tribunal texts are shown below:

### CONTEXT

Text shown below is an extract from the decision in the case of **Madarassy (appellant) v Nomura Plc (respondent)** – Court of Appeal – 26 January 2007.

An employment tribunal had dismissed Ms Madarassy's claims of sex discrimination, victimisation and unfair dismissal and her appeal against these findings was dismissed by the Employment Appeal Tribunal with the exception of 2 matters which were remitted back to the employment tribunal to reconsider. The main ground of the subsequent appeal to the Court of Appeal was that the employment tribunal misdirected itself in law on the burden of proof.

---

### TEXT

“...as will be apparent, the findings of fact as to what occurred are very **exiguous.**”

### CONTEXT

Text shown below is an extract from the decision in the case of **Webster (appellant) v Brunel University (respondent)** – Employment Appeal Tribunal – 14 December 2004. An employment tribunal had dismissed Ms Webster's race discrimination allegations on the grounds that she had failed to establish that the person complained of was an employee.

---

### TEXT

The guidelines in which Judge Ansell laid out in Barton are helpful but are no substitute for the statute and indeed it has, on occasions, been suggested that they are, in any event, too **prolix.**

## CONTEXT

Text shown below is an extract from the decision in the case of **Bahl (appellant) v The Law Society and others (respondents)** – Court of Appeal – 30 July 2004.

An employment tribunal had found that the applicant (Dr Bahl) had been unlawfully discriminated against in some respects, but rejected many of her allegations. The Law Society and two individuals named as respondents appealed to the EAT. Dr Bahl cross-appealed. The EAT allowed the appeal and held that the employment tribunal had failed to take account of the obvious non-discriminatory treatment. The EAT dismissed the cross-appeal. Dr Bahl appealed to the Court of Appeal and her appeal was dismissed. The Court of Appeal confirming the findings of the EAT.

---

## TEXT

Although it (the *Zafar v Glasgow City Council* judgement) has stood the test of time, a number of **interstitial** problems have arisen and have been resolved.

It strikes me that the authors of these comments are attempting – consciously or not – to demonstrate a degree of academic superiority. An approach which seems out of place when recording legal rulings on workplace events where one of the key aspects of the judgement is to explain why one party has won and why one party has lost. I acknowledge that appeals from the employment tribunal and beyond are limited to perceived errors in law and, as a result, some element of legal complexity is almost inevitable, but, it seems to me, such discourse should be adding to our body of knowledge through common understanding. Judgements which require further legal interpretation to explain the outcome to the parties involved leave us some distance from the easy access to workplace justice sought by the law makers and all those involved in the employment relationship.

## Implications

To my mind at least, the implications for professional practice of my analysis in this chapter are more confused than the implications expressed in the previous two chapters. In the latter, I tried to reveal an undermining of the

'objective legal arena' for the resolution of workplace disputes by exposing the influence of subjective notions of inference, common sense and reasonableness. In this chapter, I reinforce the objective position by claiming the superiority of legal points in the decision making and text writing. On the other hand, I dilute the argument somewhat by exposing the influences of emotion and power laden language.

Much of this resonates with wider management studies, exposing a grand theory - modernism for example - and the recognising that if the surface layer is stripped away, what lies beneath may not be so convincing.

### **ANALYSIS IN BRIEF**

- The transference of an issue from the social context of the workplace to the legal arena of an employment tribunal can produce a discourse somewhat detached from the point of grievance.
  - A legal solution may be difficult to integrate back into the social context of the workplace.
  - The coming together of emotion and reason can produce unpredictable outcomes.
  - The use of language in employment tribunal judgements can reinforce power structure designed to retain an element of superiority.
- 

### **IMPLICATIONS IN BRIEF**

- Employment tribunal and particularly the appellant courts may be having unintended consequences for workplace policy and practice. These could include a defensive stance from employers and employees and legal outcomes removed from the emotion of the workplace situation.
- The aim of providing easy access to an 'industrial jury' may be falling short because of language and legal complexity.

**Figure 10.4:** Analysis and implications in brief.

## **Summary comments on legal responses to a social issue**

In this chapter, I have examined legal responses to social issues as the third emergent theme from my analysis of employment tribunal judgements. To aid examination, I have looked at three ideas contributing to the theme: the balance between legal and employment factors, the relationship between emotion and reason and the use of language to reinforce powerful influences. I have also tried to persuade the reader that there is value beyond reason, that some of our societal theories may not be capable of proof through reason, but nonetheless carry the weight of our convictions. The impact of our emotions at work and the effects of the language we use may fall into this category.

## CHAPTER ELEVEN

### FINDINGS, PERSONAL REFLECTIONS AND FUTURE DIRECTIONS

At the outset of my research journey, I outlined three three potential contributions to knowledge. First, to develop a pluralistic and distinctive critical perspective drawing on aspects of reflexive approaches, hermeneutic understanding and legal theory. Second, to develop an interpretative analytical framework for discourse analysis consistent with my critical perspective. Third, to employ this perspective and framework in a themed analysis of employment tribunal texts in an effort to construct a set of ideas that add value to my professional practice. I also set out my research issue: *towards a better understanding of discrimination law as an organisational discourse and as a potential force for emancipatory change in the workplace*. It is now time to consider, in the context of my research issue, to what extent these ambitions to make a substantive contribution have been realised as this research project has progressed.

The first part of the chapter is structured around the three potential contributions to knowledge identified above and the articulation of my findings in relation to my research issue. The second part explores my personal reflections on the implications for my professional practice, role as a leader and the research journey itself. I conclude with an indication of future developments in the discrimination law field and closing thoughts on my engagement with organisation theory.

#### **A distinctive critical perspective**

The main contribution in this section has been to illustrate how social research projects demand that the researcher clearly understands their own

epistemological stance and demonstrate an ability to make this clear to the reader. Accepting that any form of research undertaken outside of the positivist tradition is likely to face calls to defend the position taken and justify any truth claims made, I contend that I have met this philosophical challenge and secured my epistemic ground. Moreover, I have taken our understanding a step further by demonstrating that social and legal approaches can be combined to provide a powerful and critical lens. To my mind, any prospect of assessing the impact of discrimination law as a force for emancipatory change in the contexts in which it operates requires such a wide angle perspective and the confidence to draw purposefully on a variety of ideas.

Whilst the synthesis of reflexivity and hermeneutic understanding is not a new or unique venture in management research, to extend the synthesis to include elements of legal theory is less prevalent. As I have said, I have sought to open this box and release the two key weapons in the armoury of the critical hermeneutic researcher on legal thinking and a legal theatre. First, by trying to undermine the power laden language and structures associated with those in professional roles, managers and management and second, by looking to excavate deeper interpretations of what is going on in employment tribunals. I am excited by the opportunities presented by such a multi-dimensional perspective and the prospect of a more liberal debate within the legal and people professional communities. In some small way, I make a claim on unsettling the established wisdom, extending the debate across the social and legal boundaries and opening up a route to a more sophisticated understanding of how the world of work and the world of employment law interact.

### **An interpretative analytical framework**

In the methodological domain, my ambition in this thesis has been to construct a 'tailor-made' interpretative analytical framework consistent with the epistemological perspective outlined above and to draw on the extensive contributions of Ronald Dworkin and Norman Fairclough. The model

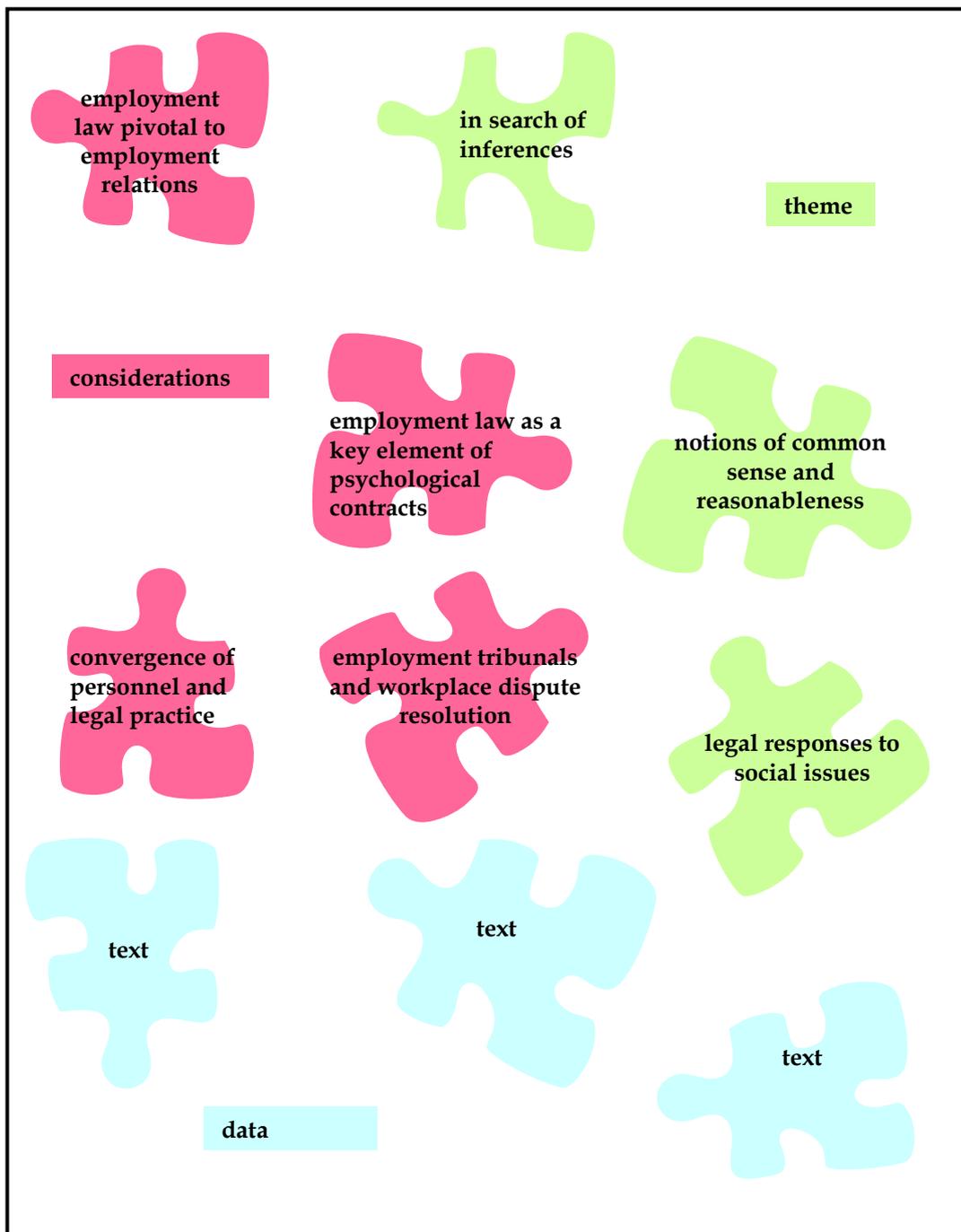
developed has allowed me to conduct a discourse analysis of employment tribunal judgements in an individual and challenging manner. Again, I have sought to adapt an inclusive approach to ideas, incorporating perspectives from more than one discipline, and make a methodological contribution with this fresh perspective.

Attempting to harness Dworkin's interpretative concept of justice and Fairclough's interest in discourse as a broader social issue has represented a considerable challenge and I recognise that I cannot do justice to their respective contributions to knowledge. I have only scratched the surface here, but I am left reassured that their work has allowed me to synthesise some of their ideas and to construct a model which goes some way to matching my ambition of providing some overlap between legal and social interpretative analysis. In essence, to consider how interpretations of particular instances – employment tribunal cases – can have a social consequence through employment relations activity. To do so, in the arena of an employment tribunal – an arena that trespasses into both domains – might just aid our understanding.

Having established that my 'research engine' seems to have some potential to run, the question of how productively is the subject of the next section.

### **Key findings from themed analysis**

Recognising the aim of bridging the gap between research and practice implicit in the DBA endeavour, I now turn to an understanding of the relationships between my research considerations, the data itself and the themes emerging from my analysis. The drawing together of these strands is represented graphically at Figure 11.1. I will summarise my key findings from the analysis recorded in Chapters 8-10 in the next few paragraphs.



**Figure 11.1** Research considerations, research data and research themes

The focus in Chapter 8 was on an examination of the role of inference in the determination of employment cases. The analysis confirmed the drawing of inferences as a key concept within discrimination law and one frequently relied upon in the absence of proven facts. The analysis also revealed regular attempts by the appellant courts to clarify what merits a justifiable inference and to provide guidance to employment tribunals. Such concentration on a

subjective concept seems to me to undermine the idea of employment tribunals as a legal arena for the determination of employment matters according to legal rules and their perceived status as an 'objective industrial court'. By implication, a responsibility is placed on personnel professionals to gain an understanding of inferences and their implications in order to follow the dynamic storyline generated by legislation and case law. Without such an understanding, employment policy and practice may run into difficulty and impact adversely on the employment relationship. The sort of reflexive discourse analysis conducted in this study allows a deeper understanding of legal and social considerations in employment to emerge and helps us to see how discrimination law impacts as an organisational discourse.

The analysis in Chapter 9 examined the notions of common sense and reasonableness in employment tribunal texts and revealed a propensity to rely on these informal theories to make sense of complex legal issues. This approach appears particularly evident when employment tribunals or the appellate courts are seeking to explain why one party has lost a discrimination case. As in the previous discussion around the role of inference in discrimination cases, we are confronted with two subjective constructions – common sense and reasonableness – at the heart of employment casework decision making. My work has highlighted the importance of a deeper reading of legal texts to identify the relationship between informal social theories and more formal legal theories as a route to a better understanding of the employment relationship.

My third emergent theme draws further on the idea of the 'clash' between subjective thought processes and the rule-bound legal environment in which they operate by considering legal solutions to social issues. The analysis conducted in Chapter 10 reveals a considerable tension between emotion and reason in employment casework. As a result, unintended consequences emerge. For example, managers are seen to adopt a more defensive stance to employment relations, particularly if a tribunal claim is threatened, whilst employers and employees alike perceive legal interpretations as detached from

the emotion and context of the original relationship breakdown. This apparent distance between the legal and the social is exacerbated by the use of complex language which reinforces the structural authority of the employment law apparatus. To my mind, it is important to penetrate this shell if we are to witness emancipatory change through the discrimination law discourse and move us closer to the stated objective of easy access to an 'industrial jury'.

At the level of the popular personnel press, there appears to be little doubt about the stifling effect of employment law and the down trodden state of the personnel profession:

"But hang on a moment, what is that noise? Is it the sound of thousands of happy feet skipping to work, where they will help the people attached to them to perform a well-rehearsed work-life balancing act? Is it hell. It's the march of a well-drilled battalion of staff off to assert their employment rights. And there is only one thing standing in their way - the personnel department. This is the reality of HR in the new millennium. It is a department sinking under ever-increasing amounts of employment legislation and corporate regulation." (Millar, 2007)

I have tried to illustrate a rather more complex relationship between discrimination law, the employment relationship and the legal and personnel professions, but the basic message above is difficult to refute. Perhaps more worryingly, my analysis points towards a lack of depth and understanding about the hidden meanings and implications of the employment discourse.

In terms of my specific research considerations and research themes, I have sought to establish a degree of synergy between the two dimensions. My analysis of employment tribunal determinations as responses to workplace conflict issues reflects the closeness of the legal and personnel professions and the difficulty of isolating legal decisions from this social context. In my view, this convergence has implications for the learning and development programmes associated with the respective professional bodies. My analysis has also revealed the value of close reading of texts and their subtleties if one is

to follow the 'story'. The drawing of inferences, notions of common sense and reasonableness demand analytic attention to understand the discourse as it develops and matures. Finally, I am left in little doubt about the influence of employment law on employment relations and the consequent absorption of employment law considerations within the psychological contract. I am less convinced that discrimination law has always had an emancipatory effect. In some ways it has taken employment relations away from the workplace and helped to create the defensive positions often adopted by workers and managers alike. Personnel professionals ignore these points at their peril.

### **Implications for professional practice**

At the point of entry to this research project, I was aware that discrimination law featured ever more frequently in my working life as a personnel professional and that regular additions or amendments to the law influenced our professional policy and practice. I was equally aware of the potential media exposure in cases likely to whet the appetite of public interest. On the other hand, I was relatively blind to the messages and nuances contained within employment tribunal judgements and their association with organisations and society more broadly. I had not detected the storylines of inference drawing, common sense interpretations and legal responses to social issues or made the connection with our every day sense making. I may have naively claimed the title of 'reflective practitioner', but I was a considerable distance from any reflexive insights that might promote new ways of acting and thinking.

I claim now to be somewhat closer to my ambition of a better understanding of discrimination law as an influential organisational discourse and as a potential force for emancipatory change. I have already outlined how a broad conceptual approach and a fresh methodological design can offer new insights. I claim to have disturbed the image of discrimination law as a sealed and singular phenomenon which can be examined in isolation and outside the

contexts in which it functions. Discrimination law contributes to the construction and operation of organisational life and what goes on in societies, including the workplace environment, contributes to the construction and operation of discrimination law. Rather belatedly, I realise that complex legal issues are, more often than not, distilled down to common sense theories to help our understanding and to provide pragmatic meaning in our lives. We should not be surprised when these sense making theories do not always resonate with organisational hierarchies or the legal establishment. Unsurprisingly, some of these findings have created personal dilemmas for me in role as a professional and senior manager. I will return to this point shortly.

### **Reflections on my role as a professional leader**

The thought that the drag effect of employment legislation has resulted in less risk taking and flexibility in an epoch dominated by the managerialist agenda which purports to demand the opposite is somewhat ironic. A thought which also leads me into reflections on the personal dilemmas surfaced during the course of this work. I am, of course, a player in this managerialist agenda; a professional senior manager in a large public sector organisation. To continue to operate in such an environment – one heavily influenced by hierarchical structures, hierarchical distribution of knowledge and the use of command and control language – and, at the same time, to retain my sceptical standing, has forced me to think about my engagement with my profession and my colleagues. At the cognitive level, I intuitively question the taken for granted and I am suspicious of the ‘obvious solution’. Whilst I accept that at the practical level, the need to contribute to the strategy of the organisation and to deliver a professional HR service, my epistemological stance surfaces in debate about how we reach an agreed position. As a result, I have found it possible to engage voices beyond the top table and to question ‘the way we do things around here’ whilst remaining a ‘company player’. I may have stopped short of the ‘rebel without a cause’ label favoured by some at the harder edge of the

subjectivist spectrum, but I am comfortable that my reflexive approach has added a richness to our corporate thinking.

Beyond the cognitive, the ethical and emotional ramifications of holding a subjectivist epistemological stance and holding a senior position in a hierarchical organisation also merit comment. Whether I am labelled critical theorist or soft postmodernist matters little to colleagues in my working life. What matters is that I can articulate my perspective, share my concerns and contribute to a more thoughtful dialogue. As a researcher, I need to be more careful with the recognition and the maintenance of my epistemological standpoint, but I find this invigorating rather than constraining. Indeed, reflexivity itself allows me to think through what might appear to some as irreconcilable dilemmas. I would argue that ethical and emotional responses are not frustrated by my subjectivism, rather, when applied in context, can disturb the surface in a very liberating manner. Berg (1989:213) reminded us that “postmodern thinking fiercely resists the very idea of representing a particular school of management” and “... the very concept of management runs counter to the deconstructive principles that appear to underline a postmodern discourse”. He does not say that postmodern thinking cannot be applied in organisations to promote change and influence the direction of travel. Similarly, Alvesson and Willmott (1992) question the overwhelming power of management in the rational dimension and offer critical theory perspectives as a means to challenge restrictive practices and communications. My stance is that it is epistemologically sustainable to challenge from within organisations as well as from the outside, notwithstanding the nature of the organisation. Rather than retreating to the position of distant or sardonic professional, it seems to me that personal ethical and emotional dilemmas need to be surfaced in the interests of developing our reflexive thinking capacity, broadening our understanding and shaping shared actions.

Finally in this section and building on the point at the end of the last paragraph, I return to the discussion in Chapter 2 about the development of HR

roles within organisations. I argued that the labelling of roles promoted by Ulrich and Brockbank (2005) carried implicit risks associated with a focus on structural authority and the potential for stifled career development opportunities. Whilst sharing the reluctance of these authors of a return to what they term 'a cacophony of HR roles', I would like to see the managerialist cloak discarded in favour of the sort of critical approach I have advocated throughout this thesis. Further, I am suggesting that a subjectivist debate 'within the objectivist model' should be encouraged with the aim of giving a degree of shared responsibility and 'operational bite' to our reflexive thinking. Shipton and McAuley (1993) provided an alternative aspect on HR role definition and extended the debate to include power relationships and organisational integration. The caution expressed by Shipton and McAuley about too close an alignment of HR professionals with senior management provides an interesting twist on the personal dilemmas expressed in this section. In substantial part, my critical voice at the table is allowing me to overcome the potential difficulties of too intimate a relationship with other senior managers whilst allowing me to maintain my position as an influential leader of the business. Perhaps there is a new synthesis of roles here for the reflexive HR leader; a role which might appear somewhat schizophrenic, but a role with the potential to make a more insightful contribution.

In sum, and as I have said earlier in this narrative, I have reached an epistemological standpoint secured by reflexivity and hermeneutic understanding which makes sense to me. Furthermore, my working life as a senior professional in a large, bureaucratic organisation and my role as a researcher within the objectivist, legal domain have been enriched by an instinctive desire to investigate what is hidden. I may still be in the minority in my professional community, but as McAuley et al (2007:341) remark, more widespread buy-in may not be a forlorn hope " ... the growth of concepts in recent years such as emotional intelligence and emotional capability suggest that there is hope for reflexive organisations".

## **Personal reflections on the research journey**

No research journey would be complete without the indulgence of some personal reflections on learning and the experience as a whole. I allowed myself a little space towards the end of chapter five to 'clear my mind' before engaging substantively with my research material and I ask the reader to view that short section and what follows here as two parts of the same story.

Most importantly, I have enjoyed myself from day one and relished the freedom of doctorate level study. The relatively straightforward concept of 'challenging the taken for granted' has really appealed to my inquisitive nature and made a difference not just to the way I approach my learning, but also to my professional working life. I have tried to stay true to the various disciplines and sub-disciplines that I have encountered along the way, but not be constrained where I have believed that multi-disciplinary angles would add value to my work. For example, I have followed one of Norman Fairclough's central arguments that discourse analysis alone is not enough and that the analysis needs to be seen in its relationship with its social environment (Phillips and Jorgensen, 2002). I recognise that this approach will not satisfy many of the proponents of alternative approaches to critical discourse analysis who have been quick to criticise Fairclough in the past. I also recognise that I may have been over ambitious in my research project in trying to go beyond linking analysis to one social context by attempting to embrace two social environments at the same time - the organisation and the tribunal. However, the challenge is there to be taken on and, in my view, merits further exploration.

At a more basic level, I have learned to value the seemingly endless flexibility of the 'post it' note and the value of translating my thinking into a picture that I can share with colleagues at work and, in the context of my research, produce the clarity to debate my thoughts with myself and the texts from which they are drawn. I have resorted to this technique consistently as I have tried to make sense of my version of a critical perspective and translate

this into an interpretative framework that I could reasonably use to analyse my data. To me, it has provided a mechanism to move between complexity and simple, elegant designs that allow me to move forward.

I sense that I have always enjoyed a reflective tendency without really understanding what this meant and how I could turn this to advantage in my professional practice. To move beyond this to a reflexive approach – thinking about my thinking – has broadened my perspective immeasurably. For this, I will always be grateful to those who have influenced me in this direction.

### **Future directions**

My research project comes to a close at a time when the world of work is facing up to a new and far-reaching piece of discrimination law. Age discrimination legislation which came into force on 1 October 2006 and has been widely touted as payback time for the ‘male, pale and stale’ (Smethurst, 2006). With a degree of anxiety, I note that in the same article the CBI are saying that it is ‘essential that tribunals take a commonsense approach’. We have seen earlier in this narrative that common sense interpretation in the employment tribunal arena does not always translate as intended when the decision is ‘returned’ to the workplace. Age legislation, and more importantly the case law which flows from it, will test this premise further.

From a policy perspective, the impact has already been considerable. Organisations – my own included – have revised their recruitment policies, examined the wording of job advertisements and adjusted retirement ages in an attempt to second guess employment tribunal determinations. Professionally, we do not want to be the test case. Secretly, many of us would relish the intellectual challenge of ‘making history’ – albeit temporary in nature.

Looking forward, the Department for Communities and Local Government (DCLG) launched a review of discrimination law in 2005 and this,

together with an Equalities Review which reported in early 2007, is now part of a wider consultation document. We have also seen in Chapter 2, the European Commission is looking hard at modernising labour law to meet the demands of a more fluid employment market. In addition, the new Commission for Equality and Human Rights opens its doors for business in Autumn 2007. All in all, there are few signs that the legal elements of the employment relationship are close to anything resembling a stable state.

The re-examination of discrimination law mentioned at the top of the previous paragraph seeks to provide a 'framework for fairness' and 'proposals for a Single Equality Bill' (DCLG, 2007). The report also contains the sort of emancipatory aspiration that I have frequently touched upon in this narrative: "to consider the opportunities for creating a clearer and more streamlined discrimination legislative framework which produces better outcomes for those who currently experience disadvantage" (DCLG, 2007:4). An aspiration which, in my view, contains an admission that the potential for emancipatory change, highlighted in my research issue as an important social consequence of discrimination law to be considered, remains firmly on the agenda. The formulation of a Single Equality Act is designed to make discrimination law more accessible for those who need to understand it and to simplify the legislation wherever possible. From my own perspective as a personnel professional coming to the close of my research project, I note with some satisfaction that the review will seek to address some of the dilemmas I have sought to expose:

"In simplifying the law, we want to make sure that:

- we do not erode existing levels of protection against discrimination;
- we adopt a common approach wherever we can;
- we have practical law which takes account of the realities of people's everyday lives and the way businesses and other organisations operate;
- we address real problems in a common sense way; and
- British discrimination law meets the requirements of European law" (DCLG, 2007:13).

The opportunities for further research on the basis of what I have uncovered so far, and in the context of a fresh look at discrimination law, represent attractive avenues for study.

From a wider social research perspective, I claim to have constructed an interpretative framework for analysis drawing heavily on the established work of Ronald Dworkin and Norman Fairclough and to have put the framework to use as a tool for discourse analysis. I accept that my research analysis was confined to a sample of employment tribunal texts and that the framework would benefit from wider exposure to alternative contexts, particularly with social and legal dimensions. Refinement of the model would undoubtedly follow alongside further development of a distinctive methodology for researching the two disciplines in a synergetic manner. I suggest that such endeavour has the potential to illuminate our understanding of the interaction between social and legal discourse.

In addition to developing the methodological aspects of my research, there seems to me to be considerable opportunity to extend our understanding of subjective interpretations reached in environments constrained by structure, legislation based rules and elitist language. It would be interesting to see how the notions of inference, common sense and reasonableness examined in this narrative are created, reinforced and changed in other social contexts. We need to look beyond our individual and everyday use of these informal theories to see how they are deployed to control and influence in our organisations.

### **Closing observations**

My final observation is reserved for two organisational theorists who have had a significant influence on my work, John McAuley and Phil Johnson. They, together with co-author Jo Duberley published the result of considerable enterprise just a few months before this thesis was submitted. They conclude by offering thoughts on the future direction for organisation theory endeavour

and I take some heart from the fact that in this narrative I have been working in the domain of two of their recommendations:

“Critical approaches to organization theory have recently increased in popularity in organization theory. This raises an important issue: how can organization theory become and remain an arena in which those typically marginalized in organizations or who lack voice become visible and in which power asymmetries are removed and democratic agendas pursued?” (McAuley et al, 2007: 460)

and

“There have been a number of calls to develop organization theory into a more transdisciplinary subject so that theorists and students can benefit from knowledge held in other disciplines. How should organization theorists engage in transdisciplinary research – or as Burrell calls it, ‘neo-disciplinary’ research – that brings in ideas from other disciplines?” (McAuley et al, 2007: 460)

Well, almost my final observation! This is my thesis after all. I sense that I have raised many more questions than I have been able to answer, but I make this admission in the knowledge that I have tried to answer some big questions. Questions about the impact of employment law on the employment relationship and questions about designing and operating an interpretative model informed by legal theory and discourse analysis. I trust that I have made a small contribution to the knowledge base in my chosen research arena. I have certainly enjoyed the venture.

## **Appendices:**

1. Synopsis of *King v Great Britain China Centre* (1991) IRLR 513 CA.
2. Synopsis of *Zafar v Glasgow City Council* (1998) IRLR 36 HL.
3. Synopsis of *Barton v Investec Crosthwaite Securities Ltd.* (2003) IRLR 332 EAT.
4. Synopsis of *University of Huddersfield v Wolff* (2004) IRLR 534 EAT.
5. Synopsis of *Chamberlain Solicitors v Emokpae* (2004) IRLR 592 EAT.
6. Synopsis of *Sinclair Roche & Temperley v Heard* (2004) IRLR 763 EAT.
7. Synopsis of *Webster v Brunel University* (2004) EAT.
8. Synopsis of *Bahl v Law Society and others* (2004) IRLR 799 CA.
9. Synopsis of *Igen Ltd v Wong, Chamberlain Solicitors and another v Emokpae, Brunel University v Webster and the Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission* (2005) IRLR 258 CA.
10. Synopsis of *Madarassy v Nomurra International Plc* (2006) IRLR 246 CA.
11. Burden of Proof Directive.

## **Bibliography**

## APPENDIX 1

### **King (appellant) v The Great Britain-China Centre (respondent) - Court of Appeal - 11 October 1991.**

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#### **Case**

In November 1987, the Great Britain - China Centre - a government sponsored organisation - advertised the vacancy of Deputy Director. Miss King applied for the post on 7 December 1987 and was sent an application form and job description by return. On 15 December 1987, the Director of the Great Britain - China Centre wrote to Miss King informing her that the post 'had now been filled from a very strong range of applicants'. Miss King responded the following day expressing surprise that she had not even been given an interview and raised the question of possible racial bias. A reply by the Director of the Great Britain - China Centre on 21 December 1987 did not satisfy her concerns and, as a result, she initiated an industrial tribunal application on 23 February 1988 claiming racial discrimination.

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#### **Decisions**

An industrial (employment) tribunal hearing held between 9 May and 27 June 1988 found that the respondent had unlawfully discriminated against the applicant on the ground of her race when it failed to short-list her for interview for a vacant position in the respondent organisation. It should be noted that this was a majority conclusion of the industrial tribunal and the chairman explained the grounds for his contrary conclusion to the majority as follows:

“..... the respondent organisation has presented evidence sufficient to persuade me that they have satisfactorily and adequately explained why the applicant was not called forward for interview.”

The Great Britain - China Centre appealed against the finding of the majority

arguing that the majority had erred in law by placing the burden of proof on the respondent to disprove what they found to be a prima facie case that the applicant had not been shortlisted on the grounds of her race.

Following a hearing held on 12 January 1990, the appeal from the Great Britain-China Centre was allowed by the Employment Appeal Tribunal and the case remitted to a different employment tribunal for a rehearing. Miss King appealed against the decision of the Employment Appeal Tribunal that the majority of the Industrial Tribunal had erred in law. Following a Court of Appeal Hearing held on 11 October 1991, the Court of Appeal allowed the further appeal by Miss King and restored the order of the industrial tribunal.

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### **Comment**

Significantly in this judgement, the Court of Appeal set out principles and guidance around the burden of proof in discrimination cases which were to become one of the most cited references in discrimination law. It was widely accepted that the law of the day had been clarified in this text. The guidance included the statement:

“It is unnecessary and unhelpful to introduce a shifting evidential burden of proof”.

## APPENDIX 2

**Zafar (appellant) v Glasgow City Council (respondent) - House of Lords - 27**

**November 1997**

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### Case

Mr Zafar was employed by Strathclyde Regional Council as a social worker from 1969. He was dismissed in March 1989 following allegations that he had been involved in incidents of sexual harassment. Mr Zafar submitted an industrial tribunal application claiming unfair dismissal and discrimination in respect of the dismissal and failure to secure promotion.

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### Decisions

An industrial (employment) tribunal hearing found that the respondents had unfairly dismissed and unlawfully discriminated against the applicant on the ground of his race when it failed to adopt a fair procedure in respect of his dismissal on disciplinary grounds. It rejected the complaint relating to promotion. The Employment Appeal Tribunal dismissed the employers' appeal against the finding of race discrimination and unfair dismissal. The employers further appealed the finding of race discrimination to the Court of Session and their appeal was allowed on the grounds that the industrial tribunal had erred in finding that he had been treated less favourably than others and in making an inference of discrimination on racial grounds. Mr Zafar appealed to the House of Lords who dismissed the appeal in a decision given on 27 November 1997.

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### Comment

Much like *King v The Great Britain - China Centre*, this judgement has been much cited in subsequent case law. Not only because it endorses the guidance set out in the *King* case, but also because it deals specifically with the point

about what inferences can be drawn in a discrimination case from an employer's unreasonable behaviour:

"it cannot be inferred...only from the fact that the employer acted unreasonably towards one employee that he would have acted reasonable if he had been dealing with another in the same circumstances."

"Unreasonable behaviour, in itself, does not equate to discriminatory behaviour, but unreasonable behaviour towards a person of one race compared with reasonable behaviour towards a person of a different race in similar circumstances should be regarded as raising a case to be explained."

## APPENDIX 3

### **Barton (appellant) v Investec Henderson Crosthwaite Securities Ltd (respondent) - Employment Appeal Tribunal - 3 April 2003**

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#### **Case**

Ms Barton was employed by Investec in June 1990 and had reached the position of Research Director by the late 1990s. By early 1991, Ms Barton became aware of the possible disparities of salary between herself and a male colleague, Mr Horsman. Investec raised Ms Barton's salary to match Mr Horsman, but did not inform her of the disparity in relation to other elements of the remuneration package. In the Spring of 2001, Mr Horsman and another male colleague, Mr Savage, were awarded higher bonuses than Ms Barton. Ms Barton submitted an equal pay claim – based on comparison with Mr Horsman – and a sex discrimination claim – based on comparison with Mr Savage.

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#### **Decisions**

An employment tribunal found that the respondent had made out a genuine material factor defence in respect of the equal pay claim. They also judged that Investec had not unlawfully discriminated against the applicant on the ground of her sex when it paid a male comparator a higher bonus payment than Ms Barton. In a decision given on 3 April 2003, the Employment Appeal Tribunal allowed the appeal in respect of the equal pay claim and remitted the case to a differently constituted employment tribunal.

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#### **Comment**

This is a significant case because it involves the Employment Appeal Tribunal engaging with the Burden of Proof Regulations (introduced 12 October 1991) for the first time.

The case also attracted considerable media interest as it involved city traders and the payment of substantial bonuses. The Employment Appeal Tribunal made this comment, clearly designed to impact on the workplace:

“no tribunal should be seen to condone a City bonus culture involving secrecy and/or lack of transparency because of the potentially large amounts involved, as a reason for avoiding equal pay obligations.”

The Employment Appeal Tribunal also produced guidance on the application of the new regulations in respect of discharging the burden of proof and included this important statement:

“it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since ‘no discrimination whatsoever’ is compatible with the Burden of Proof Directive...”

## APPENDIX 4

### University of Huddersfield (appellant) v Wolff (respondent) - Employment Appeal Tribunal - 16 July 2003

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#### Case

Dr Wolff, a senior lecturer at the University of Huddersfield, applied for promotion to principal lecturer in Summer 2000. Dr Wolff was put forward to the selection body as the preferred candidate of her parent school. Dr Roberts – a male candidate – was also put forward to the selection body. The promotion process involved a numerical marking system and resulted in Dr Roberts gaining promotion. Dr Wolff scored below the cut-off point for promotion. Dr Wolff submitted an employment tribunal application claiming unlawful sex discrimination.

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#### Decisions

An employment tribunal upheld Dr Wolff's complaint based on a finding of less favourable treatment and a difference of sex. The Employment Appeal Tribunal – in a decision given on 16 July 2003 – allowed an appeal by the University of Huddersfield on the basis that:

“...although the tribunal found that the applicant had been less favourable treated and that there was a difference of sex, at no point did the tribunal conclude that prima facie the less favourable treatment was on the grounds of sex.”

As a result of this error in law, the case was remitted to the employment tribunal for rehearing.

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#### Comment

The importance of this case lies in the Employment Appeal Tribunal's direction

that less favourable treatment and a difference of sex is, in itself, insufficient to support a move of the burden of proof from the applicant to the respondent. A deeper analysis to establish a causation between the less favourable treatment and a difference of sex:

“the burden moves where the applicant has proved facts from which inferences could be drawn that the respondents have treated the applicant less favourable on the grounds of sex.”

## APPENDIX 5

### **Chamberlain Solicitors and another (appellant) v Emokpae (respondent) - Employment Appeal Tribunal - 15 June 2004**

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#### **Case**

Ms Emokpae was employed as a part-time legal assistant from 29 November 2002 until she was dismissed on poor performance grounds on 3 February 2003.

Ms Emokpae claimed unlawful sex discrimination against her employer and her manager, Mr Emezie. Her claim suggested that the real reason for her dismissal was because of rumours of an affair between Mr Emezie and herself.

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#### **Decisions**

An employment tribunal upheld Ms Emokpae's complaint. They were not convinced that Ms Emokpae's dismissal was on poor performance grounds and considered that there was sufficient evidence to prove that she could have been dismissed unlawfully. The tribunal found that the burden of proof moved to the employer and that the latter had been unable to prove that "the treatment was in no sense whatsoever on the grounds of sex." In a decision given on 15 June 2004, the Employment Appeal Tribunal dismissed the appeal stating that the employment tribunal had correctly applied the law and the 'Barton guidelines'.

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#### **Comment**

The significance of this decision is to illustrate the remaining uncertainty around the burden of proof and to note a change to the 'Barton guidelines'.

Perhaps best summarised in the following extract from the judgement:

"The guidance on the burden of proof in a sex discrimination case laid down in Barton, with the addition of the rider provided by the EAT in University of

Huddersfield v Wolff, remains good law, subject to adjustment of one guideline so as to provide that, on transfer of the burden, a respondent's duty is to prove gender had no significant influence on the outcome. Guideline 10 in Barton, which suggested that to discharge the burden of proof "it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive", misconstrued the use of the words "no discrimination whatsoever" ....Accordingly, guideline 10 in Barton should be adjusted to read as follows: "To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was not significantly influenced as defined in Nagarajan v London Regional Transport (1999) IRLR 572, by grounds of sex."

## APPENDIX 6

### **Sinclair Roche and Temperley and others (appellants) v Heard and another (respondent) - Employment Appeal Tribunal - 22 July 2004**

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#### **Case**

Sian Heard and Sian Fellows were solicitors with Sinclair Roche and Temperley. Both became junior equity partners in May 1999, but did not progress to senior equity partner status alongside 2 male comparators, Mr Cawley and Mr Addis-Jones. As a result, Ms Heard and Ms Fellows claimed unlawful sex discrimination against their employer and 4 individual partners.

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#### **Decisions**

The employment tribunal upheld their complaint finding that they had been impeded in reaching higher partnership level. The main progression criteria was the amount of prospective partners' billings and they had been unable to achieve the same levels as their male colleagues because they had not been given the same level of referrals. The tribunal also found in favour of Ms Fellows in her complaint about a request to work part-time. The appeal to the Employment Appeal Tribunal was against the decision of an employment tribunal that the two junior partners in the law firm were discriminated against on grounds of sex by not being promoted to senior equity partners, the finding of indirect discrimination in respect of the part-time issue, the finding against the 4 individual partners for "knowingly aiding the discrimination" and the compensation award. The applicants cross-appealed on the issue of the date that the discrimination commenced. The Employment Appeal Tribunal overruled the decision of the employment tribunal, allowed the appeal and remitted the case to the same employment tribunal. The Employment Appeal Tribunal's direction was based on a failure to identify the specific unfavourable treatment and to properly address the respondents explanations.

**Comment**

In another well publicised case, this time involving a city law firm, the Employment Appeal Tribunal emphasises the need for employment tribunals to set out clearly their conclusions as to the nature and extent of the unfavourable treatment and to carefully consider the explanations of the employer. As an aside, this case attracted further attention by setting out guidance on whether successful appeals should be remitted to the same employment tribunal or a differently constituted one.

## APPENDIX 7

### **Webster (appellant) v Brunel University (respondent) - Employment Appeal**

**Tribunal - 14 December 2004**

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#### **Case**

Ms Webster claimed racial discrimination and victimisation in respect of her employment with Brunel University.

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#### **Decisions**

In a decision given on 2 August 2004, an employment tribunal dismissed all 6 of Ms Webster's race discrimination and victimisation allegations on the grounds that she had failed to establish that the person complained of was an employee. Ms Webster appealed to the Employment Appeal Tribunal against the dismissal of only one of her claims: the circumstances surrounding a telephone conversation on 27 May 2003. The allegation being that the telephone conversation was part of an unjustified series of complaints against Ms Webster. In allowing the appeal, the Employment Appeal Tribunal remitted the case to a fresh Employment tribunal to examine: what precisely occurred on 27 May 2003: was there a prima facie case of unfavourable treatment by the respondent; if so, and the burden of proof moved to the respondent, was an adequate explanation provided; if a finding were to be made against the respondent, would the statutory defence under Section 32 of the Sex Discrimination Act apply.

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#### **Comment**

Although not having the same impact on the burden of proof in discrimination debate as most of the other cases included in this series, it does decide what the Employment Appeal Tribunal term a 'novel point' on the shifting of the burden of proof in discrimination cases. The claimant was unable to prove that a

person she overheard was an employee of the respondent organisation and, therefore, the burden of proof did not move to the respondent to disprove unlawful discrimination.

Additionally, as the employment law commentator Daniel Barnett points out:

“Helpfully, the decision reviews all the recent cases on the shifting burden of proof – and so should become a key case when dealing with this tricky issue.”

(Barnett, 2005)

## APPENDIX 8

### **Bahl (appellant) v The Law Society and others (respondents) - Court of Appeal - 30 July 2004**

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#### **Case**

Ms Bahl was appointed Deputy Vice President of the Law Society in 1998 having previously held the post of chair of the Equal Opportunities Commission between 1993 and 1998. Over the next 2 years, a number of complaints were made about Ms Bahl's 'humiliating and bullying' behaviour. Lord Griffiths was appointed to investigate the allegations and his report in March 2000 resulted in Ms Bahl's censure and suspension. In consequence, Ms Bahl resigned her position and submitted an employment tribunal application claiming sex and race discrimination.

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#### **Decisions**

An employment tribunal found that the applicant (Dr Bahl) had been unlawfully discriminated against in some respects, but rejected many of her allegations. The Law Society and two individuals named as respondents appealed to the Employment Appeal Tribunal. Dr Bahl cross-appealed. The Employment Appeal Tribunal allowed the appeal and held that the employment tribunal had failed to take account of the obvious non-discriminatory treatment. The Employment Appeal Tribunal dismissed the cross-appeal. Dr Bahl appealed to the Court of Appeal and her appeal was dismissed. The Court of Appeal confirming the findings of the Employment Appeal Tribunal.

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#### **Comment**

A number of cases in this series attracted media attention, but none more so than this one. The Employment Appeal Tribunal's decision contains a lengthy

analysis of proof of discrimination case law, but was immediately undermined because it failed to take account of the Burden of Proof Regulations 2001. Perhaps the main contribution to the professional debate was contained in this comment from the judgement:

“all unlawful discriminatory treatment is unreasonable, but not all unreasonable treatment is discriminatory”.

At the Court of Appeal Stage, Ms Bahl’s appeal – on 9 grounds – was dismissed in all respects despite “Mr de Mello’s (Ms Bahl’s counsel) valiant and courteous attempts to get this appeal on its feet”.

On the issue of unreasonable treatment, the Court of Appeal made a further contribution:

“Racial or sex discrimination may be inferred if there is no explanation for unreasonable treatment. However, this is not an inference from unreasonable treatment itself but from the absence of any explanation for it”.

## APPENDIX 9

**Igen Ltd. and others (appellants) v Ms Wong (respondent) and Chamberlain Solicitors and another (appellant) v Ms Emokpae (respondent) and Brunel University (appellant) v. Ms Webster (respondent) - Court of Appeal - 18 February 2005.**

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### Case

Two of the 3 cases heard together by the Court of Appeal - Chamberlain Solicitors and another v Ms Emokpae and Brunel University v Ms Webster - have been summarised in appendices 5 and 7 respectively. By way of reminder, Ms Emokpae claimed unlawful sex discrimination in that she believed she had been dismissed on the basis of rumours about a relationship with her manager, rather than poor performance. Ms Webster claimed unlawful race discrimination on the basis of racist comments. In the third case, Ms Wong claimed unlawful race discrimination, harassment and victimisation on the basis that she had not been allowed to attend a course, an unduly critical performance review and unfair disciplinary proceedings. Although the circumstances of the 3 cases differ widely, they all raise questions about the shifting of the burden of proof in discrimination cases. All 3 appellants were appealing employment tribunal decisions and the subsequent endorsement of the decisions by the Employment Appeal Tribunal. The Equal Opportunities Commission, the Commission for Racial Equality and the Disability Rights Commission were allowed to jointly intervene, recognising the importance of clarifying the effect of the changes to the burden of proof in discrimination cases.

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### Decisions

The appeal by Igen Ltd. was dismissed by the Court of Appeal. Acknowledging that whilst the employment tribunal hearing the case may have reached conclusions that other employment tribunals may not have reached,

the Court of Appeal confirmed that they were entitled to use their industrial expertise to guide their conclusions. The Court of Appeal also found no error in law. On the contrary, they were quite clear that “it (the employment tribunal) has directed itself on the law impeccably.” The Court of Appeal considered that Ms Emokpae’s complaint of unlawful sex discrimination failed at the first stage because she had not established that her dismissal was on the grounds of her sex.

In the words of the Court of Appeal, “she is the innocent victim of an unfair dismissal, but, unfortunately for her, because she was employed for such a short period she cannot obtain redress for this from the employment tribunal”.

Finally, in respect of Ms Webster’s claim of unlawful sex discrimination, the Court of Appeal found that the Employment Appeal Tribunal did err in its interpretation of the Race Relations Act, preferring the conclusions reached by the employment tribunal. As the result, Ms Webster’s appeal was allowed, the order of the Employment Appeal Tribunal set aside and the decision of the employment tribunal restored.

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### **Comment**

In setting out to address inconsistencies in the legal authorities around the application of the Burden of Proof Regulations, the Court of Appeal makes a number of important points. First, it confirmed that the new regulations alter – rather than merely codify – the existing law and determines that the statutory amendments require employment tribunals to go through a 2-stage process:

- first stage requires the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation, that the respondent has committed the unlawful act of discrimination.
- if the requirements of the first stage are met, the second stage requires

the respondent to prove that he did not commit the unlawful act.

The Court of Appeal goes on to say that:

“.....if the second stage is reached, and the respondent’s explanation is inadequate, it will be not merely legitimate, but also necessary for the tribunal to conclude that the complaint should be upheld.” (Rubenstein 2005: 226)).

Second, the Court of Appeal returned to the Barton guidelines and particularly guideline 10 which states that to discharge the burden of proof, once a prima facie case of discrimination has been established:

“...it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex.”  
(Rubenstein (2005: 226)).

This was subsequently amended by the Employment Appeal Tribunal in Chamberlain Solicitors v Emokpae (2004) IRLR 592 EAT as follows:

“to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was not significantly influenced....by grounds of sex.” (Rubenstein (2005: 226)).

The Court of Appeal confirmed their preference for the wording in the Barton judgement and, in so doing provided some clarity around the second stage of the process outlined above. Conversely, attention may well now turn to stage one of the decision making process and the debate that will be required to establish a prima facie case and place the burden of proof on the employer.

## APPENDIX 10

**Madarassy (appellant) v Nomura International Plc (respondent) – Court of Appeal**

**- 26 January 2007**

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### **Case**

On 14 December 2001, Ms Madarassy submitted an employment tribunal application claiming unlawful sex discrimination, victimisation and unfair dismissal. Her further particulars include 33 separate allegations of unlawful sex discrimination during her period of employment with Nomura International Plc. The following extract from the Court of Appeal decision provides a useful illustration of the extent and complexity of the case:

“At a hearing lasting 21 days in November and December 2002 the tribunal heard 38 witnesses. 32 of them attended for cross examination. Ms Madarassy gave evidence for 7 days. Mr Michael Boardman, who was her line manager at Nomura, was cross examined for 4 days. There were 21 lever arch files of documents. Litigation on this scale is now typical of the increasing numbers of sex and race discrimination claims by senior members of staff against financial institutions, professional firms and public authorities.”

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### **Decisions**

The employment tribunal found in favour of Ms Madarassy on only one of the 33 sex discrimination allegations and dismissed the victimisation and unfair dismissal claims. The Employment Appeal Tribunal was confined to the unlawful sex discrimination claims and the hearing lasted a further 4 days. They dismissed the claim on all but 2 of the points dismissed by the employment tribunal and remitted these 2 matters back to the original employment tribunal. The Employment Appeal Tribunal allowed Nomura’s cross appeal against the one finding against them in employment tribunal. Ms Madarassy’s appeal against the Employment Appeal Tribunal order (including that of the award of costs against Ms Madarassy) was

determined as follows:

“I (we) would dismiss the appeal on the ground, first that there was no error of law in the decision of the employment tribunal on any of the many aspects of its decision which were appealed to this court, and, secondly, there was no error of law in the decision of the Employment Appeal Tribunal to remit three of the allegations for review by the same employment tribunal or to make the £2000 costs order against Ms Madarassy.”

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### **Comment**

The first point to note about the Madarassy decision is that it confirms the approach taken in *Igen v Wong*, particularly around what the claimant is required to establish to progress from the first to the second stage of the process. A difference of sex or race – for example – and a difference of treatment is not sufficient. The employment tribunal needs to satisfy itself that it “could conclude that, as the balance of probabilities, the respondent has committed an act of unlawful discrimination”. The Court of Appeal provides further guidance on the proposition “could conclude” with the statement that “could conclude” must mean that “a reasonable tribunal could properly conclude from the evidence”.

Perhaps the most significant and interesting facet of this judgement is that having put an emphasis on what moves the case from stage one to stage two of the process, the Court of Appeal attempt to illustrate what evidence from the respondent is relevant at this first stage. In other words, even though the burden of proof lies with the claimant to establish a prima facie case, the respondents’ evidence may come in to play before the burden of proof switches to the respondent to rebut the case.

According to Rubenstein (2007), this determination:

“totally blurs the distinction between refutation and explanation”.

and, as a result, it is hard to see how the two-stage approach set out in *Igen*, which follows the statutes and the European Union directives on which they are based, can

be reconciled with a two-stage approach which allows evidence as to the reason for the treatment at stage 1.

## APPENDIX 11

### Burden of Proof Directive

2001 No. 2660

### SEX DISCRIMINATION

#### The Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001

<i>Made</i>	<i>20th July 2001</i>
<i>Laid before Parliament</i>	<i>20th July 2001</i>
<i>Coming into force</i>	<i>12th October 2001</i>

The Secretary of State, being a Minister designated for the purposes of section 2(2) of the European Communities Act 1972[[1](#)] in relation to measures relating to sex discrimination in matters of employment, self-employment and vocational training[[2](#)], hereby makes the following regulations in exercise of the powers conferred by that section.

#### **Citation, interpretation and extent**

**1.** - (1) These regulations may be cited as the Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001.

(2) In these regulations "the 1975 Act" means the Sex Discrimination Act 1975[[3](#)].

(3) These regulations shall extend to Great Britain only.

#### **Commencement and transitional provisions**

**2.** - (1) These regulations shall come into force on 12th October 2001 (in this regulation referred to as "the commencement date").

(2) Regulations 5 and 6 apply in relation to proceedings instituted before the commencement date, as well as those instituted on or after that date, but do not affect any case in which proceedings in the employment tribunal, county court or sheriff court were determined before the commencement date.

#### **Sex discrimination**

**3.** For section 1 of the 1975 Act there is substituted –

##### **" Direct and indirect discrimination against women**

**1.** - (1) In any circumstances relevant for the purposes of any provision of this Act, other than a provision to which subsection (2) applies, a person discriminates against a woman if -

(a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but -

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.

(2) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if -

(a) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or

(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but -

(i) which is such that it would be to the detriment of a considerably larger proportion of women than of men, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment.

(3) Subsection (2) applies to -

(a) any provision of Part 2,

(b) sections 35A and 35B<sup>[4]</sup>, and

(c) any other provision of Part 3, so far as it applies to vocational training.

(4) If a person treats or would treat a man differently according to the man's marital status, his treatment of a woman is for the purposes of subsection (1)(a) or (2)(a) to be compared to his treatment of a man having the like marital status."

## **Discrimination against married persons**

4. For section 3 of the 1975 Act there is substituted -

### **" Direct and indirect discrimination against married persons in employment field**

3. - (1) In any circumstances relevant for the purposes of any provision of Part 2, a person discriminates against a married person of either sex if -

(a) on the ground of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex, or

(b) he applies to that person a provision, criterion or practice which he applies or would apply equally to an unmarried person, but -

(i) which is such that it would be to the detriment of a considerably larger proportion of married persons than of unmarried persons of the same sex, and

(ii) which he cannot show to be justifiable irrespective of the marital status of the person to whom it is applied, and

(iii) which is to that person's detriment.

(2) For the purposes of subsection (1), a provision of Part 2 framed with reference to discrimination against women shall be treated as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are requisite."

## **Burden of proof: employment tribunals**

5. After section 63 of the 1975 Act there is inserted -

### **" Burden of proof: employment tribunals**

63A. - (1) This section applies to any complaint presented under section 63 to an employment tribunal.

(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation that the respondent –

(a) has committed an act of discrimination against the complainant which is unlawful by virtue of Part 2, or

(b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the complainant,

the tribunal shall uphold the complaint unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act."

### **Burden of proof: county and sheriff courts**

6. After section 66 of the 1975 Act there is inserted -

#### **" Burden of proof: county and sheriff courts**

**66A.** - (1) This section applies to any claim brought under section 66(1) in a county court in England and Wales or a sheriff court in Scotland.

(2) Where, on the hearing of the claim, the claimant proves facts from which the court could, apart from this section, conclude in the absence of an adequate explanation that the respondent -

(a) has committed an act of discrimination against the claimant which is unlawful by virtue of -

(i) section 35A or 35B, or

(ii) any other provision of Part 3 so far as it applies to vocational training, or

(b) is by virtue of section 41 or 42 to be treated as having committed such an act of discrimination against the claimant,

the court shall uphold the claim unless the respondent proves that he did not commit, or, as the case may be, is not to be treated as having committed, that act."

### **Claims under Part 3 of the 1975 Act so far as it applies to vocational training**

7. After section 66(3) of the 1975 Act there is inserted -

" (3A) Subsection (3) does not affect the award of damages in respect of an unlawful act of discrimination falling within section 1(2)(b)."

### **Consequential amendments of 1975 Act**

8. - (1) In section 5(3)[5] of the 1975 Act, for "section 1(1)" there is substituted "section 1(1) or (2)".

(2) In section 37 of the 1975 Act, for subsection (1) there is substituted -

" (1) In this section "discriminatory practice" means –

(a) the application of a provision, criterion or practice which results in an act of discrimination which is unlawful by virtue of any provision of Part 2 or 3 taken with section 1(2)(b) or 3(1)(b) or which would be likely to result in such an act of discrimination if the persons to whom it is applied were not all of one sex, or

(b) the application of a requirement or condition which results in an act of discrimination which is unlawful by virtue of any provision of Part 3 taken with section 1(1)(b) or which would be likely to result in such an act of discrimination if the persons to whom it is applied were not all of one sex."

(3) In section 65(1B)[6] of the 1975 Act -

(a) for "section 1(1)(b)" there is substituted "section 1(2)(b)", and

(b) for "requirement or condition" there is substituted "provision, criterion or practice".

(4) In section 82(1) of the 1975 Act, after the definition of "proprietor" there is inserted -

" "provision, criterion or practice" includes "requirement or condition;".".

#### **Amendment of Employment Act 1989**

9. In section 1 of the Employment Act 1989[7] (overriding of statutory requirements which conflict with certain provisions of the 1975 Act), in subsection (3) -

(a) for "requirement or condition", wherever occurring, there is substituted "provision, criterion or practice",

(b) for "subsection (1)(b)(i) of section 1 or 3" there is substituted "section 1(2)(b)(i) or 3(1)(b)(i)",

(c) in paragraph (a), for "subsection (1)(b)(ii) of that section" there is substituted "section 1(2)(b)(ii) or 3(1)(b)(ii) of that Act", and

(d) in paragraph (b), for "subsection (1)(b)(ii)" there is substituted "section 1(2)(b)(ii) or 3(1)(b)(ii)".

*Patricia Hewitt*

Secretary of State, Department of Trade and Industry

20th July 2001

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#### **EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

These Regulations, which are made under section 2(2) of the European Communities Act 1972, implement (in Great Britain) Article 2 and Article 4(1) of Council Directive 97/80/EC of 15th December 1997 ("the Directive") concerning the burden of proof in cases of discrimination based on sex (OJ L14, 20.1.1998, p.6). The Directive has effect in relation to the United Kingdom by virtue of Council Directive 98/52/EC of 13th July 1998 (OJ L.205, 22.7.1998, p.66).

Article 2(1) of the Directive defines "the principle of equal treatment for men and women" for the purposes of Article 141 (formerly Article 119) of the EC Treaty and

other Community legislation relating to sex discrimination, including in particular Directive 76/207/EEC of 9th February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions (OJ L39, 14.3.1976, p.40).

Article 2(2) of the Directive sets out the definition of indirect discrimination for the purposes of the principle of equal treatment referred to in Article 2(1).

Article 4 requires every Member State to take such measures as are necessary, in accordance with their national judicial systems, to ensure that in complaints of sex discrimination, before a court or other competent authority, the burden is on the complainant initially to establish facts from which the court or competent authority may presume there has been direct or indirect discrimination.

Thereafter, the burden shifts to the person who has allegedly discriminated against the complainant, the respondent, to prove that there has been no such discrimination.

The Directive is only applicable to situations concerning equal treatment of men and women as regards employment and vocational training.

The Regulations amend the Sex Discrimination Act 1975 ("the 1975 Act") and the Employment Act 1989 ("the 1989 Act") in order to reflect the provisions of the Directive. The amendments come into force on 12th October 2001, subject to transitional provisions (see regulation 2).

Regulation 3 provides for the substitution of section 1 of the 1975 Act. The sole change made to subsection (1) is that it will now apply only in respect of the provisions of the Act other than -

- Part 2 (discrimination in the employment field),
- sections 35A and 35B (discrimination in relation to barristers and advocates), or
- any other provision of Part 3, so far as it relates to vocational training.

The new subsection (2) (as substituted by regulation 3) sets out what constitutes direct and indirect discrimination for the purposes of the following provisions of the 1975 Act -

- Part 2,
- sections 35A and 35B, and
- any other provision of Part 3, so far as it relates to vocational training.

Under new subsection (2)(a), direct discrimination will occur when a person treats a woman less favourably than he treats or would treat a man on the ground of her sex.

This is identical to the new subsection (1)(a) (and to the old subsection (1)(a) which regulation 3 replaces). Subsection (2)(b) provides that in circumstances relevant for the purposes of a provision to which the new subsection applies, indirect discrimination will occur where a person applies an apparently neutral provision, criterion or practice to the disadvantage of a woman and to a substantially higher proportion of women than men, unless that provision, criterion or practice can be justified by objective factors unrelated to sex.

Regulation 4 substitutes a new section 3 in the 1975 Act (discrimination against married persons in the employment field). The only change of substance is in subsection (1)(b) (which relates to indirect discrimination). This reflects the provisions of new section 1(2)(b) (as substituted by regulation 3).

Regulations 5 and 6 insert two new sections into the 1975 Act. These sections provide that the burden of proof will shift from the complainant to the respondent if the complainant can prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that discrimination has occurred. In those circumstances the burden of proof shifts to the respondent to prove that no such discrimination occurred. This only applies to proceedings by virtue of -

- Part 2,
- Sections 35A or 35B,
- any other provision of Part 3, so far as it relates to vocational training.

Regulation 7 inserts a new subsection (3A) into section 66 of the 1975 Act. The amendment makes it clear that a county court or sheriff court has power to award damages in respect of an unlawful act of discrimination which relates to vocational training and falls within the new section 1(2)(b), (as substituted by regulation 3), whether or not the discrimination is intentional.

Regulation 8 makes consequential amendments to other provisions of the 1975 Act.

Regulation 9 makes a consequential amendment to section 1 of the 1989 Act.

A copy of the Regulatory Impact Assessment relating to these Regulations has been placed in the libraries of both Houses of Parliament and can be obtained from the Women and Equality Unit, Cabinet Office, Second Floor, 10 Great George Street, London SW1P 3AE.

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*Notes:*

[1] 1972 c. 68.[back](#)

[2] See the European Communities (Designation) (No. 3) Order 1999 (S.I. 1999/2788).[back](#)

[3] 1975 c. 65.[back](#)

[4] Sections 35A and 35B were inserted by the Courts and Legal Services Act 1990 (c. 41), sections 64 and 65.[back](#)

[5] Section 5(3) was inserted by the Sex Discrimination (Gender Reassignment) Regulations 1999 (S.I. 1999/1102), reg2(2).[back](#)

[6] Section 65(1B) was inserted by the Sex Discrimination and Equal Pay (Miscellaneous Provisions) Regulations 1996 (S.I. 1996/438), regulation 2(2).[back](#)

[7] 1989 c. 38.[back](#)

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