DISCRIMINATION LAW AND THE WORKPLACE: A STRUCTURAL PHENOMENOLOGY

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Title:

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Summary:

In this paper, we explore the tensions between discrimination law and the practice of human resource management in the workplace. We focus on written employment court texts as a representation of the "facts" of employment matters that seek resolution beyond internal staff relations activity. We propose to undertake a structural phenomenology through a critical discourse analysis and link our analysis to critical perspectives in organization research. We conclude that the world of work and the domain of discrimination law interact to provide an apparently objective articulation of subjective interpretations. Such interaction serves to undermine the more dominant discourse of an objective manager, operating in an objective manner, in an objective world.

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Introduction

This paper seeks to illustrate the tensions between discrimination law in the United Kingdom and the practice of human resource management in the workplace. The approach taken is to outline a structural phenomenology and to introduce a critical management studies perspective regarding the denaturalization of taken for granted discourses. The authors propose a critical discourse analysis of selected employment tribunal texts to provide the vehicle for examination of a public record of the "facts" of an employment matter and the legally bound framework in which they are produced.

The aim is twofold: to unsettle the concept of an "objective industrial court" operating to strict legal rules and to show that a critical discourse analysis provides a rich and rewarding route to a structural phenomenology.

Discrimination Law

The avalanche of new employment legislation and amendments to existing statutes since the introduction of the sex and race discrimination acts in the mid 1970s has been unrelenting. With the passage of time and the opportunity to determine case law at the multiple tiers of judicial review, a student of employment law could be forgiven for making an early assumption that most of the "hard cases" would have been sorted out and that alternative interpretations would be at the margins of legal debate. As a result, application of the law would be relatively straightforward for managers and workers alike. We suggest the contrary.

The recent introduction of the Equality Act 2010, announced as an attempt to "provide a new cross-cutting legislative framework to protect the rights of individuals and advance equality of opportunity for all; to update, simplify and strengthen the previous legislation; and to deliver a simple, modern and accessible framework of discrimination law which protects individuals from unfair treatment and promotes a fair and more equal society" (Government Equalities Office: 2010) serves to add further weight to our argument. The need for such a comprehensive piece of legislation would seem to question the success of what has gone before. Interestingly, as part of this simplifying intent, the Equality Act 2010 contains two new protected characteristics: discrimination by association and discrimination by perception!

Despite the presence of lengthy and complex legislation and a multi-tiered structure of appellant courts to determine case law, the regular and respected Income Data Services Reports record that the concepts of common sense and reasonableness continue to pervade employment cases. Subjective interpretations seem at odds with the legalistic structures and processes in place and the portrayal of objective decision making. Perhaps George Carman QC was right: "The life of the law is not logic but experience" (Carmen, 2002: 65).

By way of comparison, interpretation is represented rather differently in another area of United Kingdom civil law, Human Rights legislation. In discussing the passage of the Human Rights Act 1998 through the House of Commons, Starmer (1999: 14) highlights the search for a "statutory interpretation". Section 3(1) of the Human Rights Act provides that:

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention Rights"

Starmer quotes the then Home Secretary – Jack Straw – "We want the courts to strive to find an interpretation of the legislation which is consistent with Convention rights as far as the language of the legislation allows …". Starmer (1999: 14) also notes that "the government rejected an attempt to change the wording of Section 3 so as to impose an obligation to interpret statutory provisions in accordance with the Convention only where it is "reasonable" to do so". Again quoting the Home Secretary, "…if we had used the word "reasonable" we would have created a subjective test. "Possible" is different. It means, "What is the possible interpretation?".

It seems to us that the distinction between "reasonable" and "possible" is an important one that reinforces the subjective nature of terms such as "reasonableness" and "common sense".

A structural phenomenology

By taking a critical perspective, we seek to uncover the political and power laden motivations that influence and distort communications within the defined social structure of an employment court (Johnson and Duberley, 2000). In so doing, we challenged the hegemony and illusion of objectivity that surrounds discrimination law and employment relationship processes. Adopting the language of Habermas (1970), we addressed concerns around the "systematically distorted communications" that become part of the communicative fabric of organizations and individuals (McAuley et al, 2007). Crotty (1998: 143) makes the point equally well: "It is precisely in communication that he (Habermas) hopes to find a foundation for his critical social theory". In the terms described by Forrester (1983: 235), we saw this a structural phenomenological approach: "a phenomenology because it attends to the skilled and contingent social construction and negotiation of intersubjective meanings" and "structural because it attends to the historical stage on which social actors meet, speak, conflict, listen or engage with one another".

Duberley and Johnson (2009: 349) reinforce this point when they remark that a key aspect of critical theory inspired research "is to accomplish structural phenomenologies through a modified form of verstehen… in order to investigate the nature of hegemonic regimes of truth and how they impact upon the subjectivities and behavior of the disempowered in contemporary organizational contexts". According to Schwandt (2001), the development of social constructionism and ethnomethodology were influenced by phenomenological ideas and in both cases their principles are helpful to our endeavour in that there was an intent to discover how we generate common sense knowledge through our social interactions in particular contexts. See Berger et al (1967) for a commentary on social constructionism. In respect of ethnomethodology, Garfinkel (1967: 76-77) talks about how we construct our worlds through everyday interactions and we are enriched by his views on common sense knowledge and social structures, "descriptions of a society that its members, … use and treat as known in common with other members, and with other members take for granted". To our mind, the fourth piece of this structural phenomenological jigsaw is provided by the hermeneutic search for interpretation and understanding. To support this contention, we turn to Alvesson and Sköldberg (2000: 110), "Critical theory is characterized by an interpretative approach combined with a pronounced interest in critically disputing actual social realities. It is sometimes referred to as critical hermeneutics".

Our structural phenomenology will draw on the philosophical traditions shown in Figure 1 below:

Hermeneutic understanding **Critical theory**

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Social constructionism **Ethnomethodology**

Figure 1. Philosophical underpinnings for a structural phenomenology.

Critical discourse analysis

At this point, we invite the reader to consider that a structural phenomenology can be purposefully conducted using a critical discourse analysis methodology?

The authors suggest that employment tribunal findings are more often than not founded on inference and subjective interpretation. For them, a critical discourse

analysis – as a distinctive brand of discourse analysis - opened up the potential to explore the employment tribunal discourse as one component of the employment relations environment. 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).

The step from here to a structural phenomenology appears to us to be within range and to demonstrate this we draw attention to the structural forces and power relationships at work in the environment of an employment court. The language of law is widely recognized to be power-laden and an effective camouflage against the intrusion of the non-lawyer (Holland and Webb, 2003). This has essentially led to a situation where most of this discourse has been confined to legal jurisprudence rather than organizational theory and practical workplace understanding. By denaturalizing the hegemonic discourse we can begin to appreciate how asymmetrical power relations become normalized and part of our everyday understanding.

The challenge set by Alvesson and Deetz (2000) was to articulate a relationship between the critical tradition – characterized by critical theory – and the interpretive tradition – characterized by hermeneutics – under the more generic banner of critical management research. This narrative seeks to take on that challenge and harness the disciplines and emancipatory goals of critical discourse analysis to do so.

Closing thoughts

We conclude by suggesting that the world of work and the domain of discrimination law interact to provide an apparently objective articulation of subjective interpretations based on inference, common sense and reasonableness. We also suggest that such interactions undermine the perception of objective managers, managing in an objective way, in objective worlds.

We would also agree with the contention of Johnson and Duberley (2000) that whilst work from a critical perspective is designed to have a practical utility, it is not designed to offer instant solutions to management issues. What we have presented above is, however, designed to shed light on the importance of unearthing the hidden voices and relating their stories back to the practice of human resource management. Such knowledge can influence behavior and the way in which employment cases are approached and managed.

We have sought to develop 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 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 that reinforces the structural authority of the employment law apparatus. 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 the law makers to an easy access to an 'industrial jury'

References:

Alvesson, M. and Deetz, S. (2000) *Doing Critical Management Research.* London: Sage.

Alvesson, M. and Sköldberg, K. (2000) *Reflexive Methodology: New Vistas for Qualitative Research.* London: Sage.

Berger, P. and Luckman, T. (1967) *The Social Construction of Reality.* London: Penguin.

Burr, V. (2003) *Social Constructionism.* London: Routledge.
Carman, D. (2002) *No Ordinary Man: A Life of George Carman.* London: Hodder and Stoughton.

Crotty, M. (1998) *The Foundations of Social Research; Meaning and Perspective in the Research Process.* London: Sage.

Duberley, J. and Johnson, P. (2009) "Critical Management Methodology" in Alvesson, M., Bridgman, T. and Willmott, H. (eds) (2009) *The Oxford Handbook of Critical Management Studies.* Oxford: Oxford University Press.

Forrester, J. (1983) "Critical theory and organisational analysis", in G. Morgan (ed.), *Beyond Method.* Beverley Hills, CA: Sage, p.234-246.

Garfinkel, H. (1967/2004) *Studies in Ethnomethodology.* Cambridge MA: Blackwell.

Garfinkel, H. (1986) *Ethnomethodological Studies of Work.* London: Routledge.

Government Equalities Office website (2010)

Habermas, J. (1970) "On Systematically Distorted Communication", *Inquiry* 13: 205-218.

Holland, J.A. and Webb, J.S. (2003) *Learning Legal Rules.* Oxford: Oxford University Press.

Johnson, P. and Duberley, J. (2000) *Understanding Management Research: An Introduction to Epistemology*. London: Sage.

McAuley, J., Duberley, J. and Johnson, P. (2007) *Organization Theory: Challenges and Perspectives.* Harlow: Prentice Hall.

Schwandt, T. (2001) *Dictionary of Qualitative Inquiry.* London: Sage.

Starmer, K. (1999) *European Human Rights Law.* London; LAG Education and Service Trust `Ltd.

Travers, M. (2001) *Qualitative Research Through Case Studies.* London: Sage.

Van Dijk, T.A. (2001) "Multi-disciplinary critical discourse analysis: a plea for diversity" in R. Wodak and M. Meyer *Methods of Critical Discourse Analysis.* London: Sage.