

“The law imposes a technical, legalistic influence on the employment relationship which too often places greater emphasis on compliance with the law, and risk minimisation, than it does on justice. This often leads to processes and outcomes which meet the letter, rather than the spirit, of the law.” Discuss.

I. Introduction

There is a disparity between the application and function of the law and its underpinnings on the employment relationship when examining an employee’s perception of fair treatment and humility in the context of the organisational environment. The positivistic tendency of organisations to shelter behind the mask of the law often creates an imbalance between altruistic workplace mediation and a fair process to which organisational justice should apply. It is this organic deficiency by organisations and human resource managers in over applying the law when dealing with employees, which often leads to the law being viewed as a technical means of risk mitigation as opposed to an impartial mechanism which focuses on achieving justice above and beyond any associated organisational benefit.

It is apparent that the role of fairness as it directly relates to justice in the workplace ‘is concerned with the ways in which employees determine if they have been treated fairly in their jobs and the ways in which those determinations influence other work-related variables’.¹ Consequently, organisational justice research has indicated that employee’s who believe they are being treated fairly and equitably within an organisation will tend to engage in acts which are pro-social and entirely beneficial to the organisation, while those who feel the opposite will engage in acts that are entirely detrimental.² This indicates that the management of fairness and justice impressionism in an organisational context is critical to an employee’s decision-making cortex in determining whether these factors are consistently presented to them in the workplace. While organisations must balance fairness and justice with the statutory requirements of the law – it is the overzealous application and use of the latter which tends to create the pessimistic and cynical view that the law imposes a greater emphasis on compliance and risk mitigation than it does on justice and equality.

Thus, it is evident that either the law or the attitudes of those dealing with it in the employment relationship need to change in order to achieve a more balanced and rational outcome which endeavours to focus on the spirit, and not on the letter, of the law. While this paper does not attempt to define a clear solution to solving this problem – it does seek to draw systemic comparisons between the legalistic influence on the employment relationship and whether the perception of justice and fairness is actually achieved. It endeavours to analyse the views of Sitkin and Bies³ and compare their opinions to the ways in which organisations are shaped by statutory obligations and legislative requirements. This paper will also seek to explore the different factors involved in analysing the perception of justice and mediation in the

¹ Moorman, R. H. *Relationship between organizational justice and organizational citizenship behaviors: Do fairness perceptions influence employee citizenship?*, Journal of Applied Psychology, 1991, Vol 76, Pg 846.

² Barling, J. & Phillips, M., *Interactional, formal and distributive justice in the workplace: An exploratory study.* Journal of Psychology, 1993, Vol 127, Pg. 649-657

³ Sitkin, S.B., & Bies R.J. 1994, *The legalization of organisations: A multi-theoretical perspective*, 1994, In S.B. Sitkin & R.J. Bies (Eds), *The legalistic organizations*, Thousand Oaks, CA: Sage

organisational environment and determine which is most effective. Finally, an investigation into the impact of the HR Practitioner on the employment relationship will be explored, and the degree to which they encourage or resist justice and fairness in the management of this relationship.

II. A Rational View

The imbalance between organisational justice and fairness in respect to the employment relationship is motivated, according to Sitkin and Bies, 'by the fear of litigation that drives the inner dynamics of legalization in organisations'.⁴ They propose that a litigious model of conflict resolution 'heavily influences administrator's approaches to their duties and responsibilities' because a strong emphasis is placed on formality through the correct application of structured rules, procedures and decision making which does not allow for elastic managerial discretion. Furthermore, they suggest that organisations tend to focus wholeheartedly on what is '[l]egally defensible rather than sincerely attempting to resolve employee's complaints'.⁵ This consequently undermines the social and economic goals of the organisation and 'damages its performance and legitimacy'.⁶

In Sitkin and Bies view, the inherent paradox in the justification of formalising and rationalising organisational rules and policies is intriguing.⁷ On the positive side, they argue that the formalisation of organisational rules and policies through a rational introduction is done in order to mitigate the risk of litigation, and to ensure that all employees have a clear and coherent view of their legal rights and obligations. While on the negative side, they claim that formalisation cannot be rational since it presents organisations with employees that question the complexity and need for such policies, and they further argue that it can override and destabilize the social trust relationships which are created with upper management. Unmistakably, the paradoxes created through formalising and rationalising rules and policies establishes a difficult position for organisations in attempting to balance internal justice and fairness mechanisms within the employment relationship. While this paradox argument presented by Sitkin and Bies is definitively true, it is in author's opinion that the key disparity lies not in the formalisation and rationalisation paradox of organisational rules and policies, but rather in an organisations ability to adequately ensure that all employees understand and grasp the nature of any such legal or quasi-legal frameworks that attempting to be legitimised. In the context of work place justice and organisational fairness, consistent and transparent communication of rules and policies is a critical aspect to ensuring that humanistic and social considerations are measured and adequately balanced⁸. It is argued that the formalisation and rationalisation paradox is created because employees simply do not understand the fundamental reasoning for the introduction of such rules and policies within an organisation, and this degrades the trust relationship and creates innate tension between managerial employees and their subordinates.

⁴ W. Haraway, 'Rediscovering Process Values in Employee Grievance Procedures', *Administration & Society*, 2002, Vol.34, No.5, Page 502.

⁵ Ibid, Page 502.

⁶ Ibid.

⁷ Ibid 4, Page 503

⁸ Gallie D, Felstead A, Green F, *Employer policies and organisational commitment in Britain 1992-97*, *Journal of Management*, 2001, Vol 38 (8), Page 1083

By demystifying the complex legal jargon often associated with such organisational policies and frameworks, and by providing a greater level of information dissemination to all employees through training and intensive education courses, it is possible to substantially reduce the innate tension and degradation of trust illustrated by Sitkin and Bies⁹ in the employment relationship. While it is clear that any decentralisation of organisational rules and policies is nonsensical since it would substantially increase organisational costs and augment risk from an operational perspective, in addition to considerably increasing managerial pressures and adversely affecting social goals and workplace justice – a clearer and more transparent explanation of such rules and policies would allow for legal formalisation and rationalisation to amicably coexist in the employment relationship. Furthermore, Sitkin and Bies make it definitively clear¹⁰ that employees typically grieve when there is an unfair application or misapplication of any policy in respect to management prerogatives such as a reduction of wages or a restructuring of jobs. While it is realistic to assume that such prerogatives are always going to cause apprehension in the organisational employment relationship, simple and transparent communication would greatly assist in ensuring that employees understand the reasoning behind the decision making of management – instead of being left uninformed and feeling that organisational justice and fairness is insignificant.

In the vast majority of employment relationship litigation cases reviewed by the author, the most consistent underlying issue was a breakdown between the organisation and the employee over an inconsistent or misunderstood term of employment¹¹. This misunderstanding led to gross confusion between what was expected by the employee and what was required by the organisation. For example, in *Ridders v Department of Family and Children Services*¹², Ridders, the plaintiff, was dismissed for his inherent failure to ‘obey lawful written instructions’. Ridders defended these allegations by alleging that he was not adequately supervised and was not provided performance feedback or given supervision or training. The Commission ruled in favour of Ridders due to an overwhelming amount of evidence provided by him and the inherent failure of employer to provide any relevant substantive evidence to the contrary. Additionally, in *Hivac Ltd v Park Royal Scientific Instruments Ltd*¹³ the importance of effectively communicating organisational rules and policies became paramount in respect to confidential information. In this case, five engineers employed to Hivac to produce hearing aids were also contracting themselves out in their spare time to produce hearing aids for Park Royal – Hivacs competitor. The Court ruled that this was a breach of an employee’s fiduciary duties to their first employer and authorised an injunction for Hivac. Consequently, the ruling suggested that an employee’s fiduciary duty also extended to time devoted outside the employee’s core work when there is a connection between the employment and the outside activity.

Clearly, in both these instances, organisational justice and fairness broke down because of an inherent failure by the relevant organisations to effectively communicate the organisational rules and policies to their employees and foster the interactive nature of the employment

⁹ W. Haraway, ‘Rediscovering Process Values in Employee Grievance Procedures’, *Administration & Society*, 2002, Vol.34, No.5, Page 505.

¹⁰ Ibid

¹¹ Andrew Stewart, *Stewards Guide to Employment Law*, The Federation Press, 2008, Pg. 156

¹² *Ridders v Department of Family and Children Services* [1996] WAIRComm 245.

¹³ *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] Ch 169

relationship¹⁴. It is contended that if this information dissemination break down was resolved consistently through a reiterative education process internally within an organisation, then not only would the organisation reduce its systemic litigation risks but it would also be able to maintain a strong focus on justice and fairness in the employment relationship. Thus, it is evident that the central role an organisation must play in resolving conflict in the employment relationship is a communicative one. The balance between the strict and inelastic application of organisational rules and policies in respect to the law, and a fostering of the employment relationship through open and transparent communication is paramount to ensuring that any employee grievances are resolved internally within an organisation¹⁵.

III. Justice and Mediation

If organisations managed conflict resolution and mediation through the immediate application of structured rules and policies, it would not only negate the spirit of the working environment but also have severe impacts on the ability for managers to adequately and reasonably supervise their employees. While it can be argued¹⁶ that the routine use of such rules and policies creates a fair, equitable and balanced employee relationship¹⁷ – the author contends that such use does not only break down the interpersonal relationships that managers enjoy with their subordinates, but it also creates and highlights the managerial power divide within the organisation. The strict application of any organisational rules and policies in their entirety not only has a detrimental impact on the social connection of the employment relationship, but it also creates innate tension between managers and employees by altering the employee's view of the organisational ethos. This view¹⁸ is supported by Sitkin and Bies such that '[t]he strict use of legal rules and procedures to resolve employee grievances tends to displace substantive aims of justice'.¹⁹

In a comprehensive quantitative and qualitative review of organisational justice literature²⁰, a four-factor model has been proposed which attempts to explain the concepts of organisational justice and fairness in a modern context. These four factors are empirically distinct from each other and include distributive justice, procedural justice and two classes of interactional justice – namely, interpersonal and informational justice. The distributive justice element suggests that social behaviour within an organisation is increased when the resolution of a dispute is fair and transparent to the employment relationship. Procedural justice refers to employee perceptions about the fairness of policies and procedures that regulate a process within an organisation. While distributive justice attempts to measure satisfaction as a function of an outcome, procedural justice determines satisfaction as a function of a process.²¹ That is, the steps taken in

¹⁴ Baker, H.B., *The unwritten contract: Job Perceptions*, Personnel Journal, 1985, 64, Pg 36-41

¹⁵ Creed, W.E.D., & Miles R.E., *Trust in organizations, a conceptual framework linking organizational forms, managerial philosophies and the opportunity costs of controls*, Thousand Oaks: Sage, 1996, Pg 16-38

¹⁶ Harley B, *Employee responses to 'high performance work system' practices: an analysis of the AWIRS95 data*, Journal of Industrial Relations, 2002, Vol 44 (3), Pg 418-434

¹⁷ The argument being that a measurable climate is created within an organisation which allows an employee to understand the key performance indicators and relevant legal processes and procedures required of them.

¹⁸ W. Haraway, *'Rediscovering Process Values in Employee Grievance Procedures'*, Administration & Society, 2002, Vol.34, No.5, Page 510

¹⁹ Ibid

²⁰ Colquitt, J. A., Conlon, D. E., Wesson, M. J. Porter, C. O. L. H., & Ng, K. Y., *Justice at the millennium: A meta-analytic review of 25 years of organizational justice research*, Journal of Applied Psychology, 2001, 86: 425-445.

²¹ Ibid, Page 426

the resolution of an internal organisational dispute. Procedural justice focuses on an employee's neutrality and their opportunity to be heard during a conflict, and the justification the organisation provides for its consequential decision. In general, empirical research conducted²² suggests that if the processes and procedures are perceived to be fair, then employees will be more satisfied and more willing to accept the resolution provided. This, in turn, leads to employees forming a positive attitude about the fairness and transparency of internal organisational resolution policies and typically encourages employees to engage in social actions which lead to a net positive benefit to the organisation.

Interactional justice is the notion that the quality of interpersonal treatment received during the enactment of organisational procedures is fair and comprehensible.²³ It differs substantially from distributive and procedural justice in that it is an entirely qualitative measure - driven by a managers relationship with an employee during a dispute or mediation process. Typically, interactional justice reflects an employee's concerns about the fairness of the social iterative aspects of the employment relationship. Research conducted by Colquitt and his peers,²⁴ has suggested that interactional justice is split into two subcategories – namely, an informational and interpersonal justice overlap. Informational justice focuses entirely on the enactment of decision-making procedures within an organisation and the subsequent reactions to these procedures by employees. This is distinctly different from interpersonal justice which concentrates entirely on the degree to which employees are treated with politeness, dignity and respect by management. It is evident, in the context of informational justice, that for policies and rules to be perceived as fair and just, they must be communicated to employees in a clear and transparent manner without any ulterior organisational intent.²⁵ The sentiment regarding these rules and policies is reflected in the interpersonal justice mechanism expressed by employees in their performance and in their social behaviour towards the organisation.

The author has reviewed ample evidence which suggests that a positive correlation exists between employee perceptions of fairness and justice within an organization and their subsequent behaviour.²⁶ Equivalently, a number of studies examined²⁷ have illustrated that when organisational decisions and managerial actions are perceived to be unfair or unjust, employees become increasingly pessimistic in their opinion of the organisation and engage in socially negative actions. Clearly, the key outcome from this research is the indication that perceptions and organisational impressionism in respect to organisational justice and fairness are fundamental to the transparent communication of organisational policies, rules and procedures. The perception of justice, fairness and equality in workplace dispute resolution and mediation processes should be of key importance to organisations from both an operational and risk

²² Colquitt, J. A., Conlon, D. E., Wesson, M. J. Porter, C. O. L. H., & Ng, K. Y., *Justice at the millennium: A meta-analytic review of 25 years of organizational justice research*, Journal of Applied Psychology, 2001, 86, Pg 426

²³ Bies, R. J. & Moag, J. S, *Interactional justice: Communication criteria of fairness*, In R. J. Lewicki, B. H. Sheppard & M. H. Bazerman (Eds.), *Research on negotiation in organizations*: 43-55. 1986, Greenwich, CT: JAI Press

²⁴ Ibid 21, Pg 426

²⁵ Bies, R. J. & Shapiro, D.L, *Voice and justification: Their influence on procedural fairness judgments*. Academy of Management Journal, 1988, 31, Pg 676-685

²⁶ Cropanzano, R. & Greenberg, J., *Progress in organizational justice: Tunneling through the maze* in C. L. Cooper & I. T. Robertson (Eds.), *International review of industrial and organizational psychology*, 1997, 12: 317-372.

²⁷ Ibid 24

management perspective. This is due to the potential impact on the organisation if the informational and interactional justice overlap is perceived to be imbalanced in the employment relationship, and employee sentiment towards the organisational diminishes.

IV. Role of HR Practitioners

While a discussion of the distributive, procedural and interactional justice mechanisms does provide clear insight into the importance organisations must place in providing clear and transparent information to employees – the function and methodology in implementing such information dissemination actions has yet to be explored. It is the author's opinion that the function of managerial staff in any organisation should be one that is elastic, flexible and socially encouraging and one which promotes, not discourages, organisational justice and fairness. This function should be reinforced and supported by the human resource management (HRM) department and its officials wherever possible. Consequently, the fundamental purpose of the HRM department is to drive the most efficient allocation of human resources by recommending strategic opportunities which are cost orientated and in line with organisational goals and existing employee relationships.²⁸

HRM's should provide managerial staff with structured employee support and regular organisational rule, policy and procedural training to ensure that they can flexibility resolve internal conflict situations as they arises.²⁹ As such, it is not a function of HRM's to immediately intervene in all associated organisational conflict immediately – rather HRM's should provide assistance and support as required. Furthermore, it would be operationally impossible for HRM's to be involved in every conflict and mediation situation within an organisation – primarily, because not all conflict situations require HRM involvement, but also more realistically because it would reduce the fundamental purpose of managers in directing normal business operations.

Thus, the HRM department should provide assistance to the managers and supervisors if they do not understand the legal, technical or procedural complexities of organisational rules and policies when dealing with employees. Often, a deficiency in managerial competency can lead to '[H]RM officials interceding and controlling employee grievance actions and responses in an effort to develop the best possible legal strategy for defending the organisation from conceivable legal liabilities'.³⁰ While it is clear that the utility of the HRM department is to assist managerial staff in understanding organisational issues and proactively facilitating dispute resolution and conflict mediation in a supporting capacity – the realistic deficiency in managerial knowledge can lead to HRM's attaining and resolving the entire conflict themselves. Evidently, this can disrupt the employment relationship power balance and the ideologies of justice and fairness within the organisation, due to a breakdown between the aggrieved employee and the trust and confidence established with their manager. Thus, HRM's must carefully balance the interactional and interpersonal relationships created through the employment relationship, with the external

²⁸ Grant, David and Shields, John, *In search of the subject: researching employee reactions to human resource management*, The Journal of Industrial Relations, Vol 44 (3), 2002, Pg 313-334

²⁹ Ibid, Page 318

³⁰ W. Haraway, '*Rediscovering Process Values in Employee Grievance Procedures*', Administration & Society, 2002, Vol.34, No.5, Page 512

influence they inject on any associated conflict resolution and mediation situation to ensure that organisational legal risks are minimised and that justice and fairness is evident.

In the author's experience, the management of this balance has been the greatest single problem in dealing with the HRM department in a large public organisation. Often there is a significant disconnect between managerial intention and the HRM departments operational and business understanding. In addition, managerial staff are typically time poor and do not make any associated effort to understand the complex organisational rules, policies and procedures required by them as part of internal risk mitigation practices.³¹ As a result, managers often find themselves in situations of limited technical and legal knowledge when conflicts do arise and rapidly engage with HRM's in an attempt to mediate and resolve the conflict quickly. This inherent organisational failure stems primarily from the lack of regular communication between managerial and HRM staff in non-conflict situations.

For example, during an off shoring process that the author was involved which required a large amount of human capital restructuring – the HRM department was not formally engaged in the process until all relevant employees were informed of the impending restructure by management. This consequentially led to an information breakdown between managerial staff and the HRM department in effectively and clearly communicating employment entitlement information to aggrieved staff. As a result, the HRM department was pressured to respond quickly and immediately to requests by management to provide legal and procedural support to avoid subsequent litigation action. The inherent lack of regular and timely communication between management and the HRM department before, during and after the restructuring announcement led to a clear breakdown of organisational rules and policies which substantially increased the level of legal and cost risk. Furthermore, managerial staff subsequently had a high volume of aggrieved employee stress claims relating to the suddenness of the restructuring announcement which they were unable to technical or legally deal with – resulting in further HRM departmental pressure. In a differing example, the author has also been engaged in a retrenchment and redeployment process at the same organisation stemming from the completion of a major infrastructure project. In this instance, it was made clear from the outset by senior management that at project completion, all project assigned staff would be required to find redeployment within the organisation or face retrenchment. Throughout the project implementation, the HRM department remained actively involved in communicating information to project employee's regarding internal job opportunities and regularly engaged in educational and policy training. This high level of participatory action by HRM's provided a substantial increase in the employee sentiment and resulted in all employees being successfully redeployed on project completion.

It is clearly evident to see the differing outcomes of the above two organisational circumstances, and how adequately the later situation was managed and handled. In the first circumstance, a lack of managerial and HRM communication led to a breakdown in organisational rules and procedures, and an inherent failure of organisational justice and fairness in the employment relationship. The imbalance produced by a lack of timely, open and transparent information to employees resulted in an extreme level of conflict and a degradation of trust and mutual respect by employees in the organisation. The cost and operational goals clearly outweighed the organisational justice and fairness prerogatives that should have been more adequately balanced

³¹ Grant, David and Shields, John, *In search of the subject: researching employee reactions to human resource management*, The Journal of Industrial Relations, Vol 44 (3), 2002, Pg 323

by managerial staff during the planning and execution of the restructuring project. This consequently led to a number of work related stress claims and a substantial increase in organisational operational costs resulting directly from the projects failure to effectively inform employees about the nature of the restructure and the decision making prerogatives behind it. In contrast to this, the second situation clearly demonstrates that timely, open and transparent communication between managerial staff, HRM's and employees results in positive net benefit to the organisation. Additionally, the retention of all specialised project employees provided an organisational outcome that met the spirit, as opposed the letter of the law. HRM's did not have a legal or procedural obligation to provide project employees with regular internal job updates, but did so in order to ensure that a future net benefit to the organisation would be achieved. A potential conflict was avoided in the organisation and an adequate resolution was achieved through non-legal means.

V. Conclusion

It is clear from the arguments presented in this paper that the key to effectively ensuring that organisations meet the spirit - in addition to the letter of the law - is to regularly, openly and transparently communicate all relevant organisational rules, procedures and policies to employees. By streamlining the information dissemination process, both managerial and HRM staff can ensure all employees are consistently educated and informed about their legal rights in a timely and efficient manner. This could be achieved through the implementation of adequate training and education, and by demystifying rules and policies where applicable. As a result, the organisation would be able to significantly mitigate legal risks and reduce the likelihood of internal conflict while equivalently, establishing a social and procedural environment which is comfortable for all employees to operate in. Furthermore, as stated by Sitkin and Bies, the managerial and HRM focus on legalisation within organisations is due to '[t]he fear of litigation'.³² Thus, it is contended that by effectively managing organisational rules and policies - managers and HRM's would be able reduce their reliance on internal legalisation during the decision making process and ensure that justice and fairness is visibly apparent in the employment relationship.

Additionally, it has been stated throughout this paper that the object and function of the HRM department is to efficiency and effectively allocate human capital. The author has clearly emphasised the importance of HRM's to remain as a supportive mechanism during internal conflict and mediation processes, as opposed to one that interferes with managerial discretion and attempts to resolve disputes through legalised rhetoric. Evidently, the function of the HRM department is to provide assistance to the managers and supervisors if they do not understand the legal, technical or procedural complexities of organisational rules and policies when dealing with employees, and only become more proactively involved in the conflict resolution and mediation process if situation becomes unmanageable. Consequently, it is apparent that HRM's must carefully balance the interactional and interpersonal relationships created through the employment relationship with the external influence they inject when dealing with both managerial staff and subordinates. Evidently, this balance must be then measured with the

³² W. Haraway, '*Rediscovering Process Values in Employee Grievance Procedures*', *Administration & Society*, 2002, Vol.34, No.5, Page 502.

internal and external organisational legal risks that may be present in any situations of conflict or mediation, and a satisfactory solution must be consequently established.

Finally, the author of this paper concludes that the key outcome to balancing the legalisation responsibilities within an organisation is by ensuring that employee perceptions and organisational impressionism in respect to justice and fairness are effectively and proactively managed. Through the implementation of increased education and training of employees in respect to organisational rules, policies and procedures - an organisation can satisfy all of the distributive, procedural and interactional justices while still ensuring that legalisation risks are mitigated. The perception of justice, fairness and equality in workplace dispute resolution and mediation processes should be of key importance to organisational management from both an operational and risk management perspective. This is due the potential impact on the organisation if a breakdown in this relationship is perceived to be imbalanced by employees.³³ As a result, and in agreement with Sitkin and Bies, it is through the application of open, honest and transparency organisational rules, policies and processes that organisations can '[s]trengthen interpersonal sensitivity, responsibility, and interactive justice while enhancing organisational effectiveness and institutional legitimacy'.³⁴ Through this application, organisations will ensure that they meet the spirit, as opposed to the letter of the law when dealing with organisational conflict and mediation situations and adequately balance justice and fairness in the employment relationship.

Word Count: 4,004

³³ Bingham, Lisa Blomgren, Hallberlin, Cynthia J. and Walker, Denise, *Dispute System Design and Justice in Mediation at the Workplace: Purpose Drives Practice*, Working Paper, Indiana University, July 5, 2006, Page 76

³⁴ W. Haraway, 'Rediscovering Process Values in Employee Grievance Procedures', *Administration & Society*, 2002, Vol.34, No.5, Page 517

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