

# Performance appraisal and disciplinary action: The case for control of abuses<sup>1</sup>

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Performance appraisal (PA) is not just a system designed to enable workers to achieve their full potential. It is also a system designed to enable employers to apply negative sanctions to those who fail to achieve a (sometimes arbitrary) level of performance, satisfactory to the employer. More consideration, therefore, needs to be given to this disciplinary aspect of appraisal systems.<sup>2</sup> This article seeks, precisely, to examine this aspect of performance appraisal and to consider a number of dimensions of possible legal control over abusive behaviour on the part of employers in relation to this system.

The term performance appraisal is used in this article to refer to systems for the evaluation by employing enterprises of the performance of individual workers in their jobs, and of their general career development. Such systems may be used for a number of different purposes:<sup>3</sup> they may be used to determine or influence decisions about promotion, or performance-related pay, or re-training, or even dismissal. On the other hand they may be used in a less specific way as a starting-point for counselling individual workers about their career development, or advising them about the more efficient performance of their work or how they can contribute to the achievement of the goals of the enterprise. Indeed, it is important to realize that enterprises may set up PA systems with the general aim of improving management, but without any commitment to using the system for defined specific purposes to the exclusion of other purposes.

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<sup>1</sup> This article arises out of a paper prepared for the ILO concerning workplace disciplinary rules and procedures in the United Kingdom – M. R. Freedland: *Workplace disciplinary rules and procedures: National paper on the situation in the UK* (Geneva, ILO, unpublished, May 1991).

<sup>2</sup> *Ibid.*, para. 9.2.

<sup>3</sup> Compare, for instance, the section on Appraisal Schemes in the *Employment handbook* of the UK Advisory, Conciliation and Arbitration Service (London, ACAS, 1990) on p. 6, especially the passage headed “Why have an appraisal scheme?”.

Moreover, a PA system changes in the course of time – for example, from a counselling function to a pay-determining function. The concept of PA is thus not a function-specific one and we shall see that this creates ambiguities which can be the source of abusive behaviour.

## Disciplinary systems?

To understand the ways in which PA systems can give rise to abusive behaviour it is useful and revealing to think about many PA systems as disciplinary systems. The term “disciplinary” is here used to mean, “concerned with the securing and maintaining of control over behaviour, especially with a view to achieving an ordered pattern of behaviour”.<sup>4</sup> To characterize PA systems as disciplinary is, of course, to issue something of a challenge to the way that those systems are normally presented by their proponents. Indeed, PA systems are often presented as liberating for the workers who are subject to them, in that they help those workers understand and fulfil their hidden potential. There may be truth in this way of looking at things; it may even be systematically true of all reputable PA systems. Nevertheless, this mode of presentation does understate or even hide the characteristic of PA as system through which employing enterprises exert control over members of the workforce.

The potential of PA systems to operate as control systems is clearly indicated when they are used to assess performance-related pay. It is also implicitly indicated when they provide a basis for decisions about promotion, about renewal of fixed-term employment, or about requirements for continuing training. It may be thought bold to assign a disciplinary function to such control systems; but in so far as PA systems provide for taking decisions (sometimes against the interests of the employee) on the basis of close surveillance and continuing evaluation of the employee’s performance or behaviour, they are precisely disciplinary in character. This is especially true given that PA systems, in practice, often evolve from “soft” self-developmental or counselling functions towards increasingly “hard” and ultimately coercive functions – such as that of restricting pay, withholding career advancement, or denying renewal of employment – on the grounds of adverse appraisal results.

By thus identifying PA systems as having a distinct disciplinary dimension, we can advance towards an understanding of how they may give rise to abusive behaviour on the part of the employer. A disciplinary decision or practice may be defective in terms of:

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<sup>4</sup> Cf. the following definitions of “discipline” in the second edition of the *Oxford English Dictionary*: “a. The order maintained and observed among pupils, or other persons under control or command [...] b. A system or method for the maintenance of order; a system of rules for conduct.”

- (a) the criteria used; or
- (b) the process employed; or
- (c) the sanctions applied.

Given that the disciplinary dimension of PA systems is generally overlooked, and usually concealed behind a discourse of self-development, it can readily be seen how abusive behaviour can result from the ambiguities of PA systems and from unclear thinking about them. This might be the case, for instance, if a PA system used criteria and employed a process which would be quite appropriate on the assumption that there were no sanctions associated with a negative appraisal, but which would become inappropriate as soon as sanctions came into play – if, for example, the PA system compelled the employee to identify and point out his or her own shortcomings in a way that he or she would be unwilling to do if it prejudiced chances of promotion or enhanced pay.

## **Dimensions of control**

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Thus far, we have identified what PA systems are, in what sense they have a disciplinary dimension, and how in a general sense they may give rise to abusive behaviour on the part of employers. We can focus more clearly on those three sets of issues by considering actual and possible bases for the legal control of abuses of power exercised through PA systems. It will be found useful to group these bases of legal control in the following way:

- (a) controls based upon individual rights and the contract of employment;
- (b) controls based on collective rights and freedom of association; and
- (c) controls upon discrimination in employment.

### **Individual rights and the contract of employment**

The argument here is that insufficient attention has been given to the need to control PA systems with regard to their impact upon workers' individual rights and the individual contract of employment. In terms of our earlier analysis we can see that the introduction or modification of a PA system may affect the criteria, the process, or the sanctions of the employer's disciplinary system. In that sense, the PA system has a direct bearing upon the employee's individual rights and upon the individual contract of employment. Yet, because PA systems are, as we have observed, often introduced without their functions being precisely identified or defined, this impact is often concealed. It must be relatively uncommon for the introduction of a PA system to be presented by the employer (or indeed contested by the employee) as a modification of the individual contract of employment. Yet that, in substance, is precisely what it may be. For instance, an employer introducing a PA system which is immediately or subsequently

used as a basis for performance-related pay awards is clearly engaged in contractual norm-making at the point where the criteria and process of the system are formulated.

There is an associated issue concerning the confidentiality of the assessments produced by the PA system. Very often, as a natural consequence of the ambiguity or non-specificity of a PA system, there is a failure to identify or resolve the confidentiality issues which will inevitably present themselves once the PA system emerges as having a disciplinary role. Those issues should, it is suggested, be addressed from the outset. National legislation concerned with data protection may be helpful in restricting outside access to appraisal information and giving individual employees legal rights of access to that information. But such legislation is likely to relate only to information held on computers, and is also likely to be oriented towards the problems of computer data-storage of personal information, rather than towards the more specific problems of confidentiality and access to appraisal data. In general, it is crucial to the interests of employees that it should be clear from the outset what they are accepting in terms of the purposes for which appraisal evaluations can be used, to whom the information contained in them can be disclosed, and for how long it remains accessible for those purposes and to those persons. There is a real risk that the presentation of PA systems as processes for the self-development of the employee may obscure their operation as a process of confidential evaluation of the employee, capable of contributing to substantive or disciplinary decisions affecting the employee.

It is similarly important to draw attention to the, generally unremarked, continuous contracting function which PA systems may have. That is to say, a performance appraisal often operates as a partial renegotiation of the contract of employment, or as the imposition of a partially reformulated contract of employment. This can readily be demonstrated in relation to the PA method which operates through the setting of objectives and comparison with their outcome. Under this system, the employee and his or her manager agree objectives at the beginning of the appraisal period. The subsequent appraisal is based on how far these objectives have been met.<sup>5</sup> The establishment of objectives is a kind of contract-making, and the appraisal is thus a monitoring of contract-compliance. Even in PA systems which are not overtly designed in terms of management by objectives, there is generally a strong element of job description, which has a similar normative function.<sup>6</sup>

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<sup>5</sup> Advisory, Conciliation and Arbitration Service, *Advisory booklet on employee appraisal* (London, ACAS, 1988), p. 14.

<sup>6</sup> Thus, for instance, the ACAS *Advisory handbook on employee appraisal*: "A job title and a brief description of the main objectives and duties of the job should feature at the beginning of the employee appraisal form. The job description should be agreed between the manager and the employee and should estimate the percentage of time taken up with each of the duties. The job description should help appraisers to focus attention on the employee's performance at work and to avoid assessing character" (op. cit., p. 13).

These potentially adverse effects upon the rights and contractual position of the individual employee are matters requiring legal control. The question which arises is what form should or might that control take? Procedures for the interpretation and enforcement of the individual contract of employment are likely to offer only weak and partial controls. Remedies for unjust dismissal may be important, but even when the concepts of dismissal or discharge are extended by concepts of constructive dismissal or of non-renewal of fixed-term employment, control by these means is dependent upon there having been a termination of the employment relationship in question. Perhaps the best way forward in this area would consist in recognizing that PA systems come within the policy, though not usually within the specific requirements of, the employees' right to receive information on the conditions applicable to their contract or employment relationship, such as that laid down under the recent European Community Directive on "An employer's obligation to inform employees of the conditions applicable to the contract or employment relationship".<sup>7</sup> In relation to PA systems, the right to information needs to be sufficiently well-developed and specific to ensure that employees are not misled by the equivocal or evasive presentation of those systems which may conceal their normative and disciplinary effects.

## **Collective rights and freedom of association**

Any discussion of the legal control of PA systems in terms of individual contracts, individual rights and the need for information to individual employees would be incomplete if it did not also consider the parallel issues arising at the collective level. Firstly, just as it has been argued that the introduction of, or assumption of, a new function for a PA system may amount to a change in the terms of an individual contract of employment, so it may also depart from the terms of a collective agreement or a replace certain collective bargaining structures (e.g. for pay determination or for taking decisions about promotion, training or redundancy). Secondly, the need for employees to receive clear information about the criteria, process and functions of a PA system arises at the collective as well as the individual level. Where national legislation requires employers who recognize trade unions to disclose information to them for the purposes of collective bargaining, that requirement might extend to information about the criteria and operation of a PA system if that system is used in connection with pay determination or other decisions which are the subject of, or directly relevant to, the collective bargaining process.<sup>8</sup>

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<sup>7</sup> Directive 91/533/EC: OJ No. L 288/32, 18.10.91; see also Jon Clark and Mark Hall: "The Cinderella directive? Employee rights to information about conditions applicable to their contract or employment relationship", in *Industrial Law Journal* (London), Vol. 21, No. 2, June 1992, pp. 106-118.

<sup>8</sup> Compare ACAS (1988), *op. cit.*, p. 33.

The value and effectiveness of such controls may, however, be limited. The introduction or upgrading of a PA system may itself form part of a process of individuation of the employment relationship and of marginalization of collective bargaining or consultation mechanisms. Such a process may go as far as encroaching upon the freedom of the individual worker to belong to a trade union or to be covered by the collective bargaining process. This freedom of association dimension of the individuation of the employment relationship has been under consideration recently in the United Kingdom courts in the linked appeals in the cases of *Associated British Ports v. Palmer* and *Associated Newspapers Ltd. v. Wilson*<sup>9</sup> where it was held that existing UK legislation protecting the freedom of association of the individual employee was violated where an employer offered pay increases to individual employees as incentives to sign new personal contracts of employment under which they would no longer have the right to union representation or the benefit of collective bargaining (although these decisions have now, in effect, been overturned as a result of an amendment to the Trade Union Reform and Employee Rights Act 1993).

It is to be expected that PA systems will figure prominently in this sort of move to personal contracting, and where they do so, there may be difficult issues to resolve as to how far the actual aim of the PA system is the de-collectivization of the employment relationship. In the *Associated British Ports* case, for instance, the employers argued that their purpose was to give management the opportunity to discriminate over terms of pay, in favour of those who were outstandingly dedicated. If, as might well be the case, a PA system was created with a view to deciding which employees were outstandingly dedicated, those issues of the relationship between personal contracting and freedom of association would certainly focus upon the PA system in question. This discussion of the collective dimension of legal control of PA systems is to a considerable extent speculative; we move on to an area where there has been significant actual legal impact upon PA systems.

## PA systems and discrimination law

Discrimination law, whether concerned with sex discrimination or with racial discrimination, has in general provided much the most significant control upon the operation of PA systems (in the United States, age discrimination arguments have also been deployed in cases concerning PA systems).<sup>10</sup> Textbooks on how to ensure the legality of PA systems generally

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<sup>9</sup> United Kingdom Court of Appeal, 30 Apr. 1993.

<sup>10</sup> See, for instance, *EEOC v. Sandia Corporation* 639 F.2d 600 (10th Cir. 1980); *Misretta v. Sandia Corporation* 649 F.2d 1383 (10th Cir. 1981). The author is indebted for these examples, and for many other insights, to an extremely informative article by Caryn Beck-Dudley and Glenn McEvoy: "Performance appraisals and discrimination suits: Do courts pay attention to validity?", in *Employee Responsibilities and Rights Journal* (London), No. 4, 1991, p. 149.

turn out to be concerned with making sure that their operation will be held to be non-discriminatory.<sup>11</sup> It is important to be clear about what is being controlled here. The primary objective is to control the decision to which the PA system contributes, rather than the PA system itself. That is to say, the employee's complaint will relate primarily to the denial of promotion, or the termination of employment, or the withholding of merit pay, and only secondarily to the PA system which provided some or all of the data upon which such a decision was reached. The complaint will allege, for instance, that the denial of promotion represented an act of discrimination against the employee denied promotion, either on the basis of sex or of ethnicity. Good examples are provided by two US cases involving PA systems: *Nord v. United States Steel Corporation*,<sup>12</sup> where a female sales-service employee challenged her denial of promotion on the ground of sex discrimination, and *Watson v. Fort Worth Bank and Trust*,<sup>13</sup> where a black bank teller challenged her denial of promotion on the ground of racial discrimination.

However, although the complaint may not be directed towards the PA system, it may be that where such a system has been used, it moves straight to the centre of the argument, to the point where it becomes, in a sense, the primary focus of the complaint. This comes about in the following way: in a developed system of anti-discrimination law, particularly in systems which have adopted or followed the US approach, discrimination tends to be identified either in terms of direct discrimination on the ground of "the prescribed factor" (i.e. sex or race), or in terms of indirect discrimination (i.e. practices having an adverse impact on a group identified by reference to the prescribed factor and not being justifiable on grounds not related to the prescribed factor). Employers generally respond to the existence of anti-discrimination legislation by ensuring that they cannot be accused of direct discrimination; they eschew criteria directly based on, or related to, the prescribed factor. In these circumstances, discrimination claims have to be framed in terms of indirect discrimination. They therefore depend upon identifying practices having adverse impact and lacking non-discriminatory justification. PA systems may well be identifiable in those terms and so become the focus of discrimination claims.

There is a difficulty in this analysis which it is important to resolve for the further development of the argument. This is that the analysis in the previous paragraph could result in an employer being penalized for adopting a formal PA system instead of taking the relevant decisions on such things as promotions on the basis of wholly informal and unsystematized procedures. This penalization would occur if the courts concluded that there was nothing

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<sup>11</sup> Compare, for example, T. A. Basnight, and B. W. Wolkinson: "Evaluating managerial performance: Is your appraisal system legal?", in *Employee Relations Law Journal* (New York), No. 3, 1977, p. 240; Martin and Bertol: "The legal ramifications of performance appraisal: An up-date", in *ibid.* No. 17, 1991, p. 257.

<sup>12</sup> 758 F.2d 1462 (11th Cir. 1985).

<sup>13</sup> 108 S.Ct. 2777 (US Supreme Court, 1988).

which they could identify as a discriminatory practice in the absence of a PA system with formally identified criteria of operation. This could mean that unsystematic, subjective and even arbitrary decision-making became easier to defend against allegations of sex or race discrimination than systematic decision-making based on identified criteria.

This difficulty was to some extent addressed, though not entirely dispelled, in the decision of the US Supreme Court in the *Fort Worth Bank* case referred to above. The employer's promotion decisions were based on an informal and subjective PA system; reliance was placed on supervisors' recommendations which, although systematized to the extent of being made on appraisal forms, were organized according to subjective criteria of assessment such as friendliness and supervisor/co-worker relations. The Supreme Court addressed the difficulty referred to above by rejecting the contention that a disparate impact or indirect discrimination claim could not be brought against a subjective and informal system in the way that it could be made against a formal and objective system.

At the same time, the Supreme Court was concerned to avoid giving what it regarded as incentives to employers to modify normal and legitimate practices by introducing quotas or preferential treatment in favour of particular groups. In pursuit of that concern, the Court emphasized the high standards of proof necessary to make out a disparate impact claim. Even more significantly, it affirmed that the policy of leaving promotion decisions to the unchecked discretion of lower-level supervisors should not itself give rise to any inference of discriminatory conduct contrary to Title VII of the Civil Rights Act 1964. It is not necessary or appropriate to pursue here the question of whether that is an appropriate restriction upon the scope of anti-discrimination legislation. It is, however, important to appreciate that such a doctrine does effectively limit the extent to which anti-discrimination legislation, being so construed, really gets to the core of the problem of controlling PA systems.

Nevertheless, even if significant restrictions remain upon the ability of discrimination legislation to deal with the legal control of PA systems, it is clear that it has been the most successful point of entry into the whole set of issues surrounding their control. In fact, discrimination legislation has had a sufficient impact upon PA systems to raise the question: what are the fundamental principles according to which those systems should be controlled?

## **The principles of control over the disciplinary functions of PA systems**

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The present discussion of legal controls over PA systems suggests certain principles according to which that control might be exercised, such as the principles of: (a) transparency; and (b) objectivity. Although their



application is in some degree useful and constructive, further principles need to be articulated if adequate control is to be exercised over PA systems from a disciplinary perspective. This can best be done under the heading of: (c) the dignity and autonomy of the employee.

## The principle of transparency

The case-law of the European Court of Justice concerning the application of the EC Equal Pay Directive provides a most interesting illustration of the control of the working of a PA system according to the principle of transparency.<sup>14</sup> It is worth examining it in a little detail. The *Danfoss* case concerned the interpretation of the Equal Pay Directive on certain questions referred to the European Court of Justice by a Danish industrial arbitration tribunal adjudicating under Danish law on whether the pay system at the Danfoss undertaking was discriminatory against women.<sup>15</sup> The pay system in question was constructed on the basis of pay grading determined by job classification. Within each grade, there was provision for additional payments to individuals to be awarded on the bases of the employee's vocational training, seniority and "flexibility". The application of the criterion of "flexibility" in the operation of the PA system was used to determine the award of merit- or performance-related pay.

The European Court resorted to the principle of transparency to control the discriminatory operation of the Danfoss payment system according to the following reasoning: a statistical survey relating to a reasonably large number of Danfoss employees showed a significant difference between the average pay of male and of female workers within the relevant pay grades. The Court ruled that where the application of a payment system is characterized by a total lack of transparency, and where lower average pay for female workers has been established, the burden of proof is on the employer to show that the pay practice is not discriminatory. If this particular payment system lacked transparency – and the Danish industrial arbitration court ultimately held that it did<sup>16</sup> – that lack of transparency was in part due to the "flexibility" criterion, the lawfulness of which the European Court went on to consider more fully according to reasoning which is very significant for our present argument.

In order to decide upon the lawfulness – that is the freedom from unlawful discrimination – of the flexibility criterion, the Court identified an ambiguity at the heart of that criterion as it was being used in this case. The Court noted that: "In order to apply the criterion of flexibility the employer

<sup>14</sup> EC Council Directive 75/117, OJ 45 19, 10.2.75

<sup>15</sup> *Handels-og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening*, in *Industrial Relations Law Reports* (London) 532 (1989).

<sup>16</sup> See Kirsten Precht: "*Danfoss* in the Danish Courts", in *Industrial Law Journal* (London), Vol 21, No. 4, Dec. 1992, p. 323.

would make an overall assessment of the quality of work carried out by his employees. For this purpose, he would take into account, in particular, their zeal at work, their sense of initiative and the amount of work done.”<sup>17</sup> In the view of the Court there were two possibilities as to the way in which the flexibility criterion was thus being applied:

- (1) that the flexibility criterion was being used to reward the quality of work carried out by the employee; and
- (2) that it was being used to reward the adaptability of the employee to variable work schedules and places of work.

The outcome differed according to which of those two alternatives applied. In the view of the Court, the first use of the flexibility criterion had to be unlawfully discriminatory if its application was systematically unfavourable to women because it was inconceivable that the work carried out by female workers would generally be of a lower quality than that carried out by male workers. Since a quality test, fairly applied, could not conceivably yield a result which was globally unfavourable to women, the existence of such a result could only be because the test had been applied in an abusive manner. The second use might or might not be unlawfully discriminatory, according to whether the employer could objectively justify its use by showing that adaptability was of importance to the performance of the specific duties entrusted to the worker concerned. The lack of transparency of this payment system consisted, in large measure, in the fact that the employee had no way of establishing which of those two alternatives applied and therefore whether there was unlawful discrimination going on or not.

This analysis suggests that the principle of transparency, while valuable in exposing some crucial ambiguities in the PA system being used in that case, depended for its effectiveness upon the further principle that unequal treatment of men and women must be abusive unless it can be objectively justified. This suggests that the principle of transparency as used here was more closely tied to the control of a certain type of group discrimination, namely sex discrimination, than might on the face of it appear. This indicates that if we are to make headway in our examination of PA systems from the different perspective of their control as disciplinary systems, we must pursue further the notion of “objectivity” as a principle which may be of more direct utility for our purposes.

## The principle of objectivity

Throughout the discussion of PA systems and discrimination law we find that objectivity is put forward as a major goal or requirement, and therefore as a test of their control. Preoccupation with objectivity as a

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<sup>17</sup> *Industrial Relations Law Reports*, No. 532, 1989, p. 536, para. 18.

criterion of legitimacy for PA systems is also evident in writings on the subject in personnel management, industrial relations or, latterly, human resource management. The following section is concerned with the questions: What does objectivity mean? Is it enforceable, or even attainable in relation to PA systems viewed from a disciplinary perspective? It will be argued that objectivity may be unattainable and, even if it were, it might not be as adequate a principle for the control of PA systems as is often supposed.

There is an extensive literature of criticism of PA systems.<sup>18</sup> One of the major starting points is an article, now regarded as a classic of its kind, published by Douglas McGregor in 1957 entitled "An uneasy look at performance appraisal".<sup>19</sup> One of the major concerns of much of the literature on appraisal systems is to identify and stigmatize the non-objective characteristics of particular PA systems and to suggest superior ones. A very useful catalogue of the main appraisal techniques whose relative merits are thus debated is provided by the ACAS Advisory Booklet on Employee Appraisal:<sup>20</sup>

*Rating:* a number of employee characteristics are rated on a scale which may range from "outstanding" to "unacceptable".

*Comparison with objectives:* employees and their managers agree objectives. The appraisal is based on how far those objectives have been met.

*Critical incidents:* the appraiser records incidents of employees' positive and negative behaviour during a given period.

*Narrative report:* the appraiser describes the individual's work performance in his or her own words.

*Behaviourally anchored rating scales (BARS):* a group of rating scales are developed which are custom-made for each job.

Not surprisingly perhaps, the simple rating method would generally be perceived as the most subjective of these, while the BARS method would be seen as the most objective and precise.<sup>21</sup>

The search for objectivity in PA systems has also led to the identification of a number of well-known "distortions" in the appraisal process<sup>22</sup> such as the "halo effect"<sup>23</sup> which occurs where an assessment on

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<sup>18</sup> See especially Keith Grint: "What's wrong with performance appraisals? A critique and a suggestion", in *Human Resource Management Journal* (London), Vol. 3, No. 3, Spring 1993, pp. 61-77, and the materials there cited.

<sup>19</sup> *Harvard Business Review* (Harvard, Connecticut), May-June 1957, pp. 89-94.

<sup>20</sup> ACAS (1988), op. cit., p. 12. The extract quoted here is a summary of a fuller analysis which appears elsewhere in the book.

<sup>21</sup> Cf. *ibid.*, pp. 12-16.

<sup>22</sup> See Keith Grint, op. cit., at p. 63.

<sup>23</sup> This is attributed to J. P. Guilford: *Psychometric methods* (New York, McGraw Hill, 1954).

one criterion influences assessments on other criteria; or the *Doppelgänger effect*<sup>24</sup> whereby the appraiser responds favourably to perceived similarities with the appraisee. Those who have identified such "distortions" have no doubt hoped to achieve greater objectivity in appraisal by eliminating these subjective factors. Furthermore, there has been elaborate consideration, especially in the context of discrimination issues, of how to validate performance appraisals by demonstrating their compliance with external criteria of objectivity such as those derived from job analysis.<sup>25</sup>

In a powerful argument developed in his recent article,<sup>26</sup> Keith Grint challenged the whole notion that PA systems can be made objective by techniques of these kinds. His argument is that, at a fundamental level, the identity of the individual person, and therefore of the individual worker, is not a single objective fact but a series of images differently constructed by different spectators. So he contends that:

The impossibility of being able to reduce the complex nature of any individual to a series of scales on a tick list of characteristics or behaviours strongly suggests that the quest should be abandoned rather than refined yet more.<sup>27</sup>

He seeks to show not merely that the search for objectivity is fruitless, but that it can have adverse consequences; for, he argues, in situations where rival constructions of the identity of the individual (in other words rival ways of appraising the individual) compete with each other, it is not that everyone's interpretations are as good as everyone else's, but that "the most powerfully resourced rendering of reality is the one that prevails [...] and delegitimizes all alternatives". This means, he says, that:

Essentially, it is not usually what the appraised thinks has transpired which accounts for his or her subsequent reward package, it is what the appraiser thinks that normally carries more weight – and with the weight the reward or the punishment.<sup>28</sup>

So we start to see how a PA system which might, by conventional standards, be judged an "objective" one may in fact provide the basis for a subjective disciplinary system sustained by superiority of resources rather than by the superiority of the evaluations which it produces.

Keith Grint goes on to conclude that many of the problems of PA systems might be reduced or even eliminated if downward appraisal of

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<sup>24</sup> This is attributed to K. N. Wexley and G. A. Yukl: *Organisational behaviour and personnel psychology*, (Homewood, Illinois, Richard D. Irwin, 1977).

<sup>25</sup> See Beck-Dudley and McEvoy, op. cit. at pp. 154-5.

<sup>26</sup> "What's wrong with performance appraisals?" (op. cit.).

<sup>27</sup> Ibid., p. 65.

<sup>28</sup> Keith Grint, op. cit., p. 69.

subordinates by superordinates were combined with upward appraisal of superordinates by subordinates.<sup>29</sup> He puts forward upward appraisal not as being more "objective" than downward appraisal – for in his view objectivity is an illusory goal anyway – but as being, at least, more democratic or participative, and so a better way of making PA systems work in an integrative way. As an argument about industrial democracy, that view perhaps goes beyond the scope of the present paper, though it does serve to point up the disciplinary connotations of downward appraisal systems by contrasting them with the more empowering effects of upward appraisals. It also leads to the question of the inadequacy of "objectivity" as a basis for the control of PA systems, which we shall now seek to advance one stage further.

Thus far we have looked at arguments suggesting that objectivity may be an unattainable goal for PA systems, and that the illusion of objectivity may, at the extremes, even help to sustain arbitrary behaviour by employers. One can also argue for a deeper set of misgivings about the claims of PA systems to be inherently objective. In a famous work of industrial sociology published in 1974, Alan Fox developed a notion of trust dynamics in work relations.<sup>30</sup> He contrasted two types of work role patterns, the low-discretion syndrome and the high-discretion syndrome, and sought to draw attention to the dangers of a low-trust dynamic in work relations: that is a dynamic towards highly prescribed, low-discretion work roles played out in an atmosphere of growing mutual distrust between subordinates and superordinates.<sup>31</sup>

It is very interesting from our present point of view that Alan Fox describes the fundamental feature of the low-discretion syndrome as being that:

The role occupant perceives superordinates as behaving as if they believe he cannot be trusted, of his own volition, to deliver a work performance which fully accords with the goals they wish to see pursued or the values they wish to see observed. Their "behaviour", in this context, refers to the ways in which they design, for example, his task rules and the supervisory, inspection, and other control systems which govern him.

Where that syndrome prevails, he goes on to say, "Not only are the job activities themselves specifically defined: the incumbent is also subjected to close supervision and/or hedged about with impersonal rules or procedures designed to check and monitor his performance".<sup>32</sup> In his argument, the low-discretion syndrome tends to bring about the de-professionalisation of

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<sup>29</sup> Ibid., pp. 70-75.

<sup>30</sup> Alan Fox: *Beyond contract: Work, power and trust relations* (London, Faber and Faber, 1974).

<sup>31</sup> Ibid.: see especially Chapter 1: "Discretion, status and rewards in work".

<sup>32</sup> Ibid., p. 26.

professional work roles, approximating them to the work roles of rank and file production workers.<sup>33</sup>

In reading this description of the low-discretion syndrome and of the mechanisms associated with that syndrome, it is hard not to see some performance appraisal systems being portrayed. It is important, however, not to overstate this point. Most PA systems are articulated or presented in such a way as to suggest that they aim to create a high-trust, not a low-trust, syndrome. No doubt many of those formulating and operating such systems are genuinely concerned with the empowerment and self-development of the individual worker, and may be successful in using the systems to those ends. Nevertheless, Alan Fox's line of argument does show how a PA system may, in practice, have a disciplinary function and a repressive effect. Moreover, his argument suggests that the more a PA system attempts to be "objective", the more it may approximate to the *impersonal* procedures which characterise the low-discretion syndrome – as where crude numerical performance indicators are preferred to more evaluative criteria because they are easier to apply.

There are, then, real limitations upon the adequacy of the principle of objectivity as a basis for controlling the disciplinary effects of PA systems. However, the foregoing discussion also suggests the possibility of other principles of control based upon the dignity and autonomy of the individual worker. These will be examined in the next subsection.

## The principles of the dignity and autonomy of the individual worker

It has been argued in the preceding subsections that the principles of transparency and of objectivity do not offer a panacea for the ills of PA systems. It would clearly be overambitious to argue that principles as general as "the dignity and autonomy of the individual worker" might succeed where others appear to fail. Nevertheless, the dignity and autonomy principles may at least identify, more accurately than other principles, the real problems of controlling the disciplinary dimensions of PA systems, and may begin to suggest ways forward to the legal regulation of PA systems.

An excellent account of the principles of the dignity and autonomy of the individual worker is given by Hugh Collins in the context of the law of termination of employment, where he argues that these principles provide a basis for understanding the sense in which the law should be seeking to uphold job security, and hence to bring about justice in dismissal.<sup>34</sup> In his argument, the right to dignity is infringed by acts or omissions which fail to treat individuals with concern and respect, for example by failing to comply

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<sup>33</sup> Ibid., pp. 29-30.

<sup>34</sup> Hugh Collins: *Justice in dismissal* (Oxford, Clarendon Press, 1992), esp. Chapter 1: "Harsh but fair".

with standards of procedural fairness. On the other hand, there is no disrespect for the individual where the employer's action is a rational exercise of disciplinary power which is necessary to support efficient production.<sup>35</sup>

Pursuing a similar approach with regard to the idea of autonomy, Hugh Collins argues that it "suggests a role for the law to promote social structures at work through which the opportunities for people to bring meaning to their lives through work are enhanced." For him, the value of autonomy lies in its ability to introduce the rule of law into the workplace disciplinary code. He insists, for example, that the code should be published and made available to employees and that it should be impartially applied. The right to autonomy is infringed, he maintains, by disciplinary rules or actions which are not justified by the need to secure efficient coordination of work. On the other hand, like the idea of dignity at work, the idea of autonomy does not extend to giving the individual worker a property right in his or her job.<sup>36</sup>

As thus articulated, these ideas of "dignity" and "autonomy" are very helpful in identifying the goals which employment law might appropriately pursue in relation to performance appraisal systems. The ideas also indicate ways in which performance appraisal may be said to be abusively employed – where it fails to respect and uphold the dignity and autonomy of the individual worker without any adequate justification for so doing. In fact, many of the actual or potential abuses of PA systems which we have examined in the course of this paper can usefully be regarded as encroachments upon the dignity and autonomy of the individual worker. This would be the case, for instance, where PA systems operate to alter the contractual rights or expectations of individual employees without it being clear that this is what is happening; or where the use of a PA system involves a failure to respect the confidentiality of information about the employee; or fails to allow the employee access to information held about him or her; or where PA is part of a pattern of employment relations which restricts the freedom of the individual employee to associate in a trade union or to enjoy the protection of collective bargaining; or where a PA system fails to respect the individuality of the employee by treating her or him as simply a member of a group which is disfavoured, whether that group is denoted by gender, age or ethnicity.

The principles of respect for the dignity and autonomy of the individual worker also help the scrutiny of PA systems from a perspective which sees them as disciplinary systems. This is important since the abuse of disciplinary powers is a crucial case of failure to respect individual dignity and autonomy. The ideas of dignity and autonomy work well, moreover, as principles of control over the different dimensions of PA systems, seen in their

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<sup>35</sup> *Ibid.*, pp. 16-17.

<sup>36</sup> *Ibid.*, pp. 19-21.

disciplinary aspect, which we distinguished earlier on in this article as "criteria", "process" and "sanctions". Thus the principles of dignity and autonomy assert the importance in turn of clearly declared criteria, due process and proportionality of sanctions.

Finally, however, the key contribution which those principles can make to our understanding of the need for legal control over abuses of performance appraisal is to illuminate the central irony or paradox that PA systems, which claim to empower and develop the individual employee, may at times operate so as to undermine the dignity and curtail the autonomy of the individual at work. Anyone concerned with the establishment of the proper role of employment law who wishes to see employment law operating in the context of a broad general concern with human rights at the workplace would see this as a matter requiring serious and sustained attention.