

Employment Law vs Democracy: How Suma is Governed and How this May be Threatened by Statutory Employee Rights

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In all organisations there is a hidden top level of management - governance, by which I mean how the direction of the business and its business culture is decided. In a capitalist business the answers to these questions are given, the objectives are to increase share value, to make profits, and to do whatever is necessary to achieve these aims. In co-operatives, and especially worker co-operatives, these answers are either decided by the co-operative members, or arise by default.

The dominant type of corporate governance is the unitary board, a cascade of authority from a single chief executive officer (CEO) and board of directors down through the levels of management. The CEO and board act for the shareholders to maximise the value of their investments, their sole responsibility as defined in company law. (Although debate continues about Corporate Social Responsibility and its relevance to firms operating in an investor economy.) Unitary governance is so dominant, it is often taken for granted as the only sensible way to organise a business (for example, by sources of finance such as banks). It is so dominant that people often fail to recognise that it even exists.

The unitary board requires absolute power to hire and fire in order to manage the business. It has major disadvantages, the most significant being that as the organisation grows the CEO increasingly fails to cope with the amount of information going across their desk. To cope, the board concentrate on finances alone because they cannot cope with, and lose any experience of, people or operations. Directors run the business, taking big commercial and financial risks, for their own short term benefit whether these come in the form of increased levels of pension, share options, or golden handshakes. There has been no shortage, in the recent history of capitalism, of the shortcomings of this form of governance. The shareholder abuses demonstrated by ENRON, and WorldCom being only the most celebrated.

Unitary boards demand 'the right to manage' which means they stamp on any threat to their authority, such as cross communication and networking between staff in different departments, or even the sharing of salary

details. They use people management tactics based on the principle of divide and rule, backed up by a restriction on access to business information. To protect shareholder interests, governments have imposed a series of reforms on the use of non-executive directors (directors who are not employees and supposed to solely represent shareholder interests). The fact that boardroom remuneration packages are averaging 28% per year increases would suggest these reforms are having little effect in practice.

The consumer co-operative societies have developed their own *Co-operative Code of Corporate Governance* to try to control the power of their employed managers to run the businesses in their own short-term interests. The *Code* seeks to ensure that boards of elected directors have the authority to effectively instruct managers. Worker owned businesses that try to copy the unitary model tend to either become director-controlled businesses or descend into a war of attrition and stalemate where neither the managers nor the worker owners can effectively run the business. Given the dominance of the unitary model and ignorance of other forms this should not be a surprise. Successful worker-owned and managed businesses tend to develop an alternative model, sometimes called 'network governance' (Turnbull, 2003). The model is often similar in different co-operatives even where they have had no communications with each other, as in the case if you compare the governance structure of Suma workers co-operative in the UK with that of the Mondragon group in Euskadi, the Basque region of Spain.

Superficially, the organisational structures of Suma and Mondragon appear little different from ordinary businesses. At Suma an observer would see a General Meeting (GM) of member/shareholders who appoint company officers (Treasurer and Company secretary) and a board of directors (Management Committee). The board appear to run the business using appointed managers who use delegated authority to instruct the employees.

However, because there is collective 'on site' ownership there are key differences from the

unitary model. At Suma we separate the board from the executive: the Management Committee, as the elected (non-executive) directors, have authority over the Function Area Coordinators (FAC), who are the executive managers (effectively the executive directors). But there is a dynamic dialogue between the two. Neither can operate without the other.

There is an ongoing relationship between the MC and the general meeting of member shareholders so that, in contrast to the single AGM of most companies, Suma has six GMs a year. The MC can only operate with impunity for a maximum period of three months, should they wish to. Executive managers at Suma are answerable at least on a weekly basis to MC. Managers are also called Facilitators to emphasise their role as leaders of teams of empowered owner workers and not as the agents of absent investor owners.

In practice both the MC and FACs operate within their areas of GM authorised authority but they do test the boundaries and they do have the space and time to present proposals to the membership which they believe will benefit the co-operative business but which may disbenefit individuals' self-interest, cost cutting being the most obvious example. In a GM, eloquent self-interested individuals can carry the meeting unless they are opposed by a collective opinion. So, at Suma there is collective consideration of proposals for authorisation and we do not rely on single individuals coming up with solutions and ideas. This is a major advantage compared to unitary boards where the CEO is relied upon for all future direction ideas.

Mondragon has a similar compound board structure, multiple boards of governance with overlapping remits but all unable to operate without the co operation of each other. To the orthodox theorist this appears a recipe for chaotic governance blockage. There is no 'right to manage', nowhere for the 'buck to stop', no single chief to take decisive decisions. It should not work but it does. Mondragon employs 66,000 people and is the sixth largest business group in Spain with 50 years of uninterrupted growth.

So why not total democracy? Some strands of worker co-operative thought say that organisation emerges from the freedom of members as individuals to do whatever they want at any time. Why not allow the employees or members to do as they like? Unlike this type of openness, which would be more typical of a collective, at Suma there is a separation between

the democratic governance of the co-operative and the executive management of the business. The authority of members is clearly defined and it is only operational when they sit together as a GM. In normal daily activities they relate to the business as employees (though obviously highly empowered employees) subject to the executive management culture they have chosen democratically. Management has a defined but limited right to manage.

In true collectives there is no separation. Member employees refuse instructions from colleagues who have a nominal right to manage, giving rise to a 'stop-go-stop' style of management unless the collective can communicate sufficiently to reach consensus on such matters. In practice, most collectives suffer from the problems of most small partnerships of equals – the tyranny of the individual veto.

Network-governed co-operatives such as Suma feature empowered members with a right to access management functions. At Suma all board meetings have an Open Forum section at the start of the agenda where any member or employee or group of members or employees, can state their case to the MC. This, and the MC's response, must be recorded in the minutes.

GM agendas are open to any proposal by any member and also open with an Open Forum. This appears to be a 'hostage to fortune' strategy (giving carpetbagger current members an opportunity to propose asset stripping the business, in theory) but in practice with the confidence of open democracy, there are fewer attempts to 'raid' Suma GMs than in a normal company Annual General Meeting.

Members have rights - to be heard, to vote - but also responsibilities to carry out their duties as a collective owner of the business. Suma has a member job description with annual 360-degree appraisal for all members and full peer review of a member's performance. All coordinators and company officers and even the MC are subject to the same 360-degree peer review which can result in new recruits criticising the performance of members with decades of experience and personal authority. Giving 'feedback' is a key performance indicator for the member function.

To reinforce the purely functional nature of management at Suma we have equal pay rates for all workers. This enables highly efficient (in terms of human resource use) multi-skilling and job rotation whereby members will perform multiple roles during a single week, sometimes

at the same time to take advantage of marginal benefits for example the accounts can be written on the reception desk in between visitors, if the receptionist is a trained management accountant.

Once again freedom from the normal capitalist employer/employee relationship where labour and specialist skill is a commodity to be bought and sold at market rates, enables extraordinarily radical labour planning. At Suma we chop up any expert roles (whether that be writing the software to run a barcode driven warehouse stock control system or high level financial or strategic management) into more easily learned pieces and avoid being held to ransom by scarce expert specialists. Research by CECOP indicates that a primary cause of decay of democracy in worker co-operatives across Europe is the growing power of technical and managerial experts as the co-operative grows.

For members to be able to fulfil their role, they must have the information. Suma operates Open Book Management in an advanced form. All business information is open access on the ICT system. All employees have a log on. The only confidential information is personal details covered by the Data Protection Act and sometimes details of sensitive commercial negotiations. Our management reports and Business Plans are available in the canteen in printed form and are obligatory reading for members. We sometimes joke that delivery drivers from competitors borrow our plans but only we can operate them.

In practice Suma members have an organic relationship:

- With their co-operative as a whole.
- With their day job teams where they operate in co-operative teams as semi-autonomous workers without direct supervision.
- With their elected and appointed representatives the Management Committee and Function Area Coordinators.

Many impromptu gatherings and much informal networking take place. Suma has a tradition of a free hot canteen lunch. Considerable debate about business issues takes place over the vegetarian chilli. All workers have email accounts and members are expected to use theirs regularly. Unlike a 'normal' business, communication and undirected networking is not merely encouraged and enabled, it is expected of members.

The development of the network governance via compound boards and more informal interventions such as Open Forum and free lunches and specific aspects underpinning this

type of governance such as equal pay, multi-skilling and job rotations has been evolutionary. Which of these aspects are crucial to effective network governance has not been determined. Would it all work as well with differential pay rates and much less multi-skilling and job-rotation?

The flow of influence and dynamics is a web, a network of real time governance which cannot be represented on a traditional organogram - but it works, as a co-operative and as a business. Suma is a very successful commercial operation generating financial surpluses comparable to the best in the distribution industry.

So how is this democratic, networked governance structure supported by employment legislation? One would have to say, not very well: in fact, many aspects of employment legislation directly challenge and undermine the genuinely democratic workplace. This is not to undermine their importance in protecting the individual worker faced with a hostile employer. But this is the working structure much of the legislation assumes, and it is simply alien to the operation of a worker co-operative.

Employment legislation assumes a wage labourer/employer relationship which is a poor fit with employee-owned workplaces. It leads to bizarre role-playing for co-operatives: colleagues being forced to assume the role of employer's agent (manager) to defend claims against the Employee Ownership (EO) workers co-operative when this role (employer's agent) does not exist within an EO. Claims are brought using employment legislation which assumes the existence of this role and the wage labourer/employer relationship. A flat hierarchy equal status EO does not have employer's agents. It may well be a partnership in function but will be recognised as an employer at the Employment Tribunal (ET).

Freed from the constraints of the employer/employee structure, worker co-operatives reinvent management, often 'doing' management as a function and not as a status position. Status authority to take decisions is absent. Legislation and ETs require an individual with status authority to take specific decisions within an assumed structure, for example appeals to be heard by 'a more senior manager'. This is often absent in worker co-operatives where individual members 'act up' as a senior manager at times of need and then go back to being an ordinary member. Attempting to explain the concept of delegated collective authority to an ET that only wants to know if the person taking the dismissal

decision had the authority to do it is very difficult.

Trade unions disregard the partnership relationship of worker co-operatives and treat members as simple employees. They use employment legislation against fair and ethical (EO) employers which is more appropriate for normal employer against whom employees need the collective power of a trades union. Unions are historically hostile to worker co-operatives in practice, though in modern times often sympathetic in theory. It is confusing for a Union officer to be confronted by a group of union members who are both employees (comrades) and employers (the enemy). Suma's union - the Bakers Food and Allied Workers Union - has a pragmatic agreement with us: in between disputes we are on the same side of the table; when a union member raises a dispute we go to opposite sides until the dispute is resolved.

Collective agreements are a significant element of employment legislation whereby an agreement between the employer and a recognised trade union on terms and conditions is binding on all employees. In a worker co-operative where this relationship does not exist, a vote by members is not normally considered to be a collective agreement binding on individuals. So despite the collective nature of a worker co-operative, an ET will look for individually agreed terms and conditions. If it is not in the individual's contract restrictions or obligations are difficult to prove. Worker co-operatives do not usually operate with this level of written bureaucracy.

EOs and worker co-operatives are soft targets when it comes to the application of employment legislation so that employers who are actually far more pernicious in terms of their employees' interests are better able to cover their tracks and perform better at tribunals. Open book management means that all the loopholes in personnel management processes are obvious. Much personnel management in worker co-operatives relies on self-initiative and responsibility, goodwill and evolving custom and practice. The law requires pre-agreed contractual agreements for terms, conditions and personnel management processes. This is not possible in most worker co-operatives, which then means that they are lambs to the slaughter when employment legislation is enforced.

In terms of individual job descriptions, employment legislation is again unhelpful to workplaces trying to introduce empowered working practices, such as task rotation and multi-skilling. Members of worker co-operatives,

like partners in partnerships, often prioritise multi-skilling and job rotation to improve the working experience.

In orthodox employer/employee relationships a simple specific single job description is still the norm and this is expected by employment tribunals, where a mix of manual, office and development work is seen as three separate sets of contractual duties rather than a single basket of jobs done by a self-managing member. This makes any dismissal of a member or trainee member for lack of capability immensely difficult compared to a simple single job description. "If he was not adequate as one of your members, why could you not let him simply be a lorry driver? You judged him capable in that job." When faced with this sort of statement there is little defence that can be offered by the representative of the co-operative.

Tribunals fail to see the difference between being an employee lorry driver, merely doing the driving job description as an alienated employee, and being a member lorry driver, acting as a business partner in all aspects of the job. The latter is essential for the good management of a worker co-operative where there is little supervisory management and little hierarchical authority to enforce compliance with good practice.

Health and Safety legislation also assumes a simple (powerless) employee and (powerful) employer relationship in which the victim employee needs to be protected from the autocratic employer. HASAW law requires formal consultation and reporting structures which are irrelevant in an equal status partnership but worker co-operatives which do not jump through these hoops are breaking the law.

The assumed governance structure that underlies employment protection legislation also generates a series of anomalies when applied to worker co-operatives. Partnerships of self-employed partners are recognised in law and employment tribunals readily understand the director/company relationship or the self-employed partner/partnership relationship. Expelling a partner is not recognised as a dismissal under employment legislation. However, the rights of collectives of members and individual worker members under Industrial & Provident Society legislation conflict with the rights of those workers under employment legislation.

EOs and particularly worker collectives cannot simply vote to dismiss a member without committing an unfair dismissal under the Statutory Disciplinary and Dismissal Procedure

(SDDP) of the 2002 Employment Act. It seems strange to a collective of members that even a unanimous vote to expel a member for a heinous crime is only advisory. They can remove membership but the individual can only be fairly dismissed as an employee by undertaking the three stage SDDP which assumes an employer/employee relationship. A 100% member worker co-operative can therefore have employees forced upon it by an Employment Tribunal making a reinstatement order on the basis of an unfair dismissal for some technical procedural failure in the disciplinary process. The ET disregards member status.

An EO which votes to have fully equal pay may also find itself in conflict with the Part Time Work (Equal Pay) regulations. If, for example, it decides to pay a flat net rate (after tax) for each day worked to permit the greatest flexibility for its worker members, part-time workers may be able to claim they are being discriminated against. In effect they will be being paid a lower gross rate than full-time workers although they will be receiving the same net rate. These regulations were designed to protect weaker part-time employees but they do not fit employment structures which are designed for maximum fairness and flexibility.

At the level of EU legislation, the Working Time Directive also fails to recognise the partnership nature of co-operatives. The regulations specifically say it is illegal for an employer to require any employee to work more than 48 hours per week. Employees with 'semi-autonomous' decision-making powers, such as executives or other salaried posts, are excluded. Surely this describes a member of a worker co-operative? Not so, because employees who are 'hourly paid' are specifically covered by the regulations. A worker co-operative member paid by time worked rather than a flat salary and who has greater say over working conditions than most senior executives is assumed to be a mere wage labourer by these regulations.

So what is the way forward? What are the

reasons businesses such as worker co-operatives and employee ownerships find their democratic management processes are undermined by employment law?

One reason is the lack of a legal definition of a worker co-operative in UK law. Companies (of various kinds), partnerships, limited liability partnerships and even industrial and provident societies are all recognised as legal entities but in every case (except partnerships) an employer/employee relationship is assumed.

In other countries, such as Spain, with a more advanced worker co-operative sector, the employment relationship between a worker member and their co-operative is more properly described. In Spain, worker co-operative members are defined as self-employed and therefore partners, selling their services not their labour.

The International Co-operative Alliance/ILO statement on worker co-operative identity agreed in 2004 calls on member states to recognise this third form of employment relationship as a distinct and separate from simple employee or independent self-employed. To date there is no sign of the UK government responding.

Whilst worker co-operatives are at the leading edge of democratic employment relationships, there is a general tendency towards greater democracy in employment which is likely to be enhanced by the same revolution in communications technology and capability which underpins the operation of successful worker co-operatives. Thomas Malone Professor of Management; Director of the Center for Coordination Science, MIT, in his research *Inventing the Organization of the 21st Century*. says "There will be a new way of working in the 21st century made possible by advances in communications and information technology. The future is the democratic corporation."

A failure by legislators to enable democracy in employment relationships by clinging to an increasingly obsolete command and control model will inhibit more than just the development of worker co-operatives.

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Notes

Malone, T W, Laubacher, T and ScottMorton, M S (2005) *Inventing the Organizations of the Twenty-First Century* (Cambridge, Mass: MIT Press).

Turnbull, S (2003) 'Network Governance', *Corporate Governance International*, 6/3: 4-14.