

Safeguarding the Workplace: Hr's Role in Data Protection and Preventing Harassment in Ghana's Modern Workplace

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ABSTRACT

Ghanaian workplaces are now governed by two bodies of law that were drafted in different decades, are administered by different regulators, and are taught in our faculties as unrelated subjects, yet which converge every working day upon the same file, the same decision, and the same human resource officer. This article argues that the settled practice of treating data protection as a registration formality to be discharged once a year, and of treating harassment as a grievance to be managed after it has been reported, inverts the structure that Ghanaian law in fact establishes. Reading the Labour Act, 2003 (Act 651) alongside the Data Protection Act, 2012 (Act 843), the Constitution of the Republic of Ghana, 1992, and the more recent enactments on affirmative action and cybersecurity, the article demonstrates that the obligations resting upon an employer in both fields are anticipatory rather than reactive, that they are owed to persons who have not yet become employees as much as to those already engaged, and that they are enforceable through provisions which the profession has very largely passed over in silence. From that reading the article develops a Doctrine of Integrated Workplace Safeguarding, resting upon four duties of anticipation, lawful custody, proportionate response and demonstrable account, and it identifies what it calls the convergence problem, which arises at the precise moment a complaint of harassment is received, when the employer's obligations as investigator and its obligations as data controller begin to pull against one another with no statutory instrument to reconcile them. The article closes with a programme of reform tiered by drafting cost rather than by gravity, on the view that the measures most likely to be adopted are those which require no amendment at all.

KEYWORDS: Workplace Governance, Data Protection, Sexual Harassment, Labour Act 2003, Data Protection Act 2012, Human Resource Management, Ghana.

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1. INTRODUCTION

The human resource function in Ghana continues to be organised, in most undertakings of any size, around a model of personnel administration inherited from a period in which the principal hazards of working life were physical, the principal records were kept on paper in a locked steel cabinet, and the principal legal risk to which an employer was exposed arose at the point of dismissal rather than at any earlier stage of the relationship. That model has not been abolished by anything so dramatic as a repeal, and it survives in the shape of departmental structures, in the design of the standard employment file, and in the intuitions of experienced practitioners who learned their trade before the Data Protection Act, 2012 (Act 843) had been assented to. What has happened instead is that the substance of the function has migrated underneath the structure, so that a modern human resource department in Accra now operates biometric attendance systems, administers psychometric and integrity testing at recruitment, retains video footage of common areas, processes health information in connection with sick leave and insurance schemes, monitors electronic communications for reasons it rarely articulates with precision, and receives complaints of conduct that occurred on a messaging application at eleven o'clock at night between two employees who were nowhere near the employer's premises.

The argument advanced in this article is that Ghanaian law has already addressed much of this, and that the profession has not noticed. The deficiency, in other words, is very substantially one of interpretation and of institutional design rather than one of legislative provision, and a scholar who begins from the assumption that Ghana lacks the law and must therefore borrow it will not look carefully enough at what the statute book already contains. Section 9 of the Labour Act, 2003 (Act 651) imposes upon every

employer a set of positive duties which are framed in language broad enough to reach psychosocial injury, disciplinary architecture and the communication channels through which a complaint travels, and it does so without any of the qualifications a reader schooled in the contractual tradition would expect to find. Section 14 of the same Act extends its protection to any person seeking employment, which disposes at a stroke of the standing objection that has hampered candidates elsewhere. Sections 17 to 33 of Act 843 establish a scheme of principles, lawful bases, purpose limitation, minimality and security which applies to the employment file with the same force as it applies to a customer database, and article 18(2) of the Constitution supplies a constitutional ceiling above which no employer justification, however commercially attractive, is permitted to rise.

None of that has been assembled into a coherent account of what a human resource department is actually required to do, and the practical consequence is a pattern of institutional behaviour which is defensible on none of the available theories. Undertakings collect far more personal data than any articulated purpose requires, retain it for periods that nobody has ever fixed, secure it against external intrusion while leaving it open to internal browsing, and then, when a complaint of harassment arrives, conduct an investigation which is itself an act of processing without once asking under which lawful basis it is being carried out. The same undertakings write harassment policies which reproduce the definition in section 175 of Act 651 and then stop, as though the reproduction of a definition were the discharge of a duty, and they are frequently astonished to discover that the only remedy the Act specifies for a worker who has been harassed requires that worker first to resign.

The argument that follows is developed across nine further sections of this article. Section 2 locates the human resource function within a theory of conferred authority, which is offered here as a better account of the Ghanaian employment relationship than either the contractual model or the model of ascribed status, and which matters because it determines whether the duties discussed later are read as exceptions to a managerial prerogative or as the conditions upon which authority was granted in the first place. Section 3 sets out the statutory and constitutional architecture, taking care to state what is genuinely there and what is not. Sections 4 and 5 treat the two substantive fields in turn: the first addresses the human resources department in its capacity as a data controller, and the second addresses harassment prevention. Section 6 develops the convergence problem, which is the central original contribution of the article and which arises where the two fields meet. Section 7 sets out the Doctrine of Integrated Workplace Safeguarding and its four constituent duties, and sections 8 and 9 address implementation and reform, respectively, before section 10 concludes.

2. THE HUMAN RESOURCE FUNCTION AS A SITE OF CONFERRED AUTHORITY

Before the specific duties can be examined, it is necessary to settle a prior question about the character of the authority that a human resource department exercises, because the answer determines how every subsequent provision is read. On the orthodox contractual account, which continues to dominate practitioner thinking in Ghana and which the pleadings in most of our reported employment litigation quietly assume, the employer possesses a general managerial prerogative arising from the contract and from its ownership of the undertaking, and statutory duties operate as discrete exceptions carved out of that prerogative. On such an account, the interpretive default favours the employer, since anything the statute has not expressly forbidden remains within the residue of managerial freedom, and a novel practice such as continuous keystroke logging or emotion analytics is lawful until some provision is found to prohibit it.

The opening words of section 8 of Act 651 are difficult to reconcile with that account. The section, which enumerates the rights of an employer, is expressed to operate subject to the Act and to any other enactment, which is to say that the rights of an employer under Ghanaian law are not residual at all but are conferred, and are conferred upon terms. The structural evidence is stronger still when the section is read in its immediate context, because the Act proceeds to enumerate, in four consecutive sections, the rights of the employer, the duties of the employer, the rights of the worker and the duties of the worker. No contractual theory would predict that arrangement, since a contract between equals does not require a statute to list the obligations of the parties, and the symmetry of the enumeration is precisely what a theory of conferred and reciprocally bounded authority would lead one to expect. The point has an ancestry in the wider literature on the purposes of labour legislation, where the argument that the subject exists to address a structural asymmetry of power rather than to police the terms of a bargain has been developed at length (Davidov, 2016; Collins, 1992; Freedland, 2003), but the Ghanaian materials support it on their own terms and do not depend upon the comparative argument. Constitutional doctrine points in precisely the same direction as the statutory drafting. Article 12(1) of the Constitution of the Republic of Ghana, 1992 states expressly that the fundamental human rights and freedoms enshrined in Chapter Five are to be respected and upheld by the Executive, Legislature and Judiciary and by all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana. The closing words settle the question of horizontal application in Ghana in a manner that jurisdictions which have had to construct horizontality out of general reasoning would envy, and the Supreme Court's willingness in *Awuni v West African Examinations Council* to apply the requirements of administrative justice to a body that was not a department of state confirms that the constitutional standards do not stop at the door of a private institution. It follows that a human resource officer taking a decision which determines whether a person keeps a livelihood is not merely performing a private commercial act, and that the values which govern the exercise of public power are not wholly foreign to the exercise.

There is an African philosophical dimension to this which is worth stating rather than leaving implicit, because it explains why the statutory arrangement of reciprocal duties feels natural in a Ghanaian setting in a way it might not elsewhere. Gyekye's account of moderate communitarianism, in which the person is constituted in part by relationships without being dissolved into the community and without retaining the wholly atomistic separateness assumed by the liberal contractual tradition, corresponds far more closely to the picture drawn by sections 9 to 11 of Act 651 than does either of the extremes (Gyekye, 1997). Wiredu's treatment of consensual deliberation, in which decisions are legitimated by a process of accommodation rather than by the mere counting of preferences, explains the persistent Ghanaian structural preference for settlement machinery and for tripartite consultation which runs from the earliest labour legislation through to the Tripartite Committee established under Part XVII of the present Act (Wiredu, 1996). A human resource function understood in these terms is not an administrative overhead attached to the employer, and it is not the employee's advocate either. It is the institutional location at which conferred authority is exercised and at which an account for its exercise must be capable of being given.

3. THE STATUTORY AND CONSTITUTIONAL ARCHITECTURE

3.1 The constitutional layer

Four provisions of the Constitution do the heaviest work in this field, and they are best considered together because their combined effect is greater than the sum of their separate operations. Article 15(1) declares the dignity of all persons to be inviolable, and it is the provision from which the prohibition upon degrading treatment in article 15(2) descends. Article 17 establishes equality before the law and prohibits discrimination on the enumerated grounds, which include gender, and it supplies the constitutional foundation upon which the Affirmative Action (Gender Equity) Act, 2024 (Act 1121) was subsequently built. Article 24(1) guarantees to every person the right to work under satisfactory, safe and healthy conditions, and it is a provision of quite remarkable potential which our courts have scarcely been invited to develop, since conditions in which a worker is subjected to sustained hostility are not, on any ordinary understanding of the words, either satisfactory or healthy.

Article 18(2) is the provision upon which the data protection analysis ultimately turns, and it repays careful reading because its structure is frequently misdescribed. It guarantees to every person the right to privacy of home, correspondence, communication and other property, and it then permits interference with that right only in accordance with law and as may be necessary in a free and democratic society for public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime, or for the protection of the rights or freedoms of others. The enumeration is exhaustive, and what is conspicuously absent from it is any reference to the commercial interest of a private undertaking. An employer that monitors its workforce to increase productivity, or to satisfy a client that its personnel are being supervised, or to generate management information about who is working and how quickly, is not pursuing any of the listed justifications, and the practice accordingly has no constitutional warrant at all unless it can be brought within the protection of the rights or freedoms of others, which will be difficult where the only rights in question are the employer's own contractual expectations. The point is not merely academic, because article 33(2) empowers the High Court to issue such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the protected rights, and the provision is expressed by reference to the purpose of securing enforcement rather than by reference to the applicant's personal position.

The Supreme Court's decision in *Civil Servants Association of Ghana v Attorney-General* is the domestic anchor for the proportionality reasoning that all of this requires, since the Court there conducted a structured analysis of necessity and proportionality under articles 12(2) and 21(3) in an employment setting, drawing upon the Canadian jurisprudence without adopting its conclusion. A Ghanaian practitioner arguing that a monitoring practice is disproportionate is therefore not required to import a foreign test, and the argument that our courts lack a proportionality methodology is no longer available.

3.2 The Labour Act, 2003 (Act 651)

Four distinct clusters of provision within Act 651 matter for the present argument. The first is the enumeration in sections 8 to 11 already discussed, of which section 9 is the operative source of the preventive duties examined below. The second is section 14, which prohibits an employer from imposing restrictive conditions in relation to employment and which is expressed to protect any person seeking employment, thereby extending the Act's reach backwards into the recruitment process and, as will be argued, into the algorithmic screening that increasingly constitutes it. The third is Part VIII, comprising sections 62 to 66, which governs the fairness of termination, and within which subsection (4) of section 63 is the single most valuable procedural provision available to a Ghanaian worker, since it places upon the employer the burden of proving both the reason for the termination and the procedure by which it was effected. The fourth is the interpretation section, section 175, which contains the statutory definition of sexual harassment and which is the point from which the analysis in section 5 of this article begins.

3.3 The Data Protection Act, 2012 (Act 843)

Act 843 was assented to on 10 May 2012 and came into operation on 16 October 2012, and it establishes the Data Protection Commission together with a scheme of eight principles set out in section 17, covering accountability, lawfulness of processing,

specification of purpose, compatibility of further processing, quality of information, openness, data security safeguards and data subject participation. Section 18 requires that processing be lawful and that personal data be processed in a reasonable manner that does not infringe the privacy rights of the data subject, and section 19 imposes the requirement of minimality. Section 20(1) supplies six lawful bases for processing, of which consent is only one, and subsections (2) and (3) confer upon the data subject a right to object and impose upon the controller a corresponding duty to stop. Sections 22, 23 and 25 govern purpose specification, awareness and further processing respectively, section 27(1) requires registration, section 28 imposes security obligations, section 29 governs the position of processors, section 33(1)(b) provides for erasure, sections 35 and 36 provide for access, correction and compensation, and sections 37 to 45 establish the more demanding regime that applies to special personal data.

Two features of this scheme deserve emphasis at the outset because they are routinely misunderstood in practice. The first is that the Act contains no employment exemption of any kind, so that the human resource department of a Ghanaian undertaking is a data controller in respect of the personal data of its own workforce in the same sense that a bank is a data controller in respect of its customers. The second is that section 58 provides only permissively for the designation of a data protection supervisor, so that the internal officer upon whom the whole architecture of compliance depends in practice is an officer whom the statute does not require any undertaking to appoint. That is a structural weakness to which section 9 of this article returns.

3.4 The adjacent enactments

Four further enactments complete the picture, and each contributes something the others do not. The Persons with Disability Act, 2006 (Act 715) contains in section 11 an obligation to provide the tools and appropriate facilities that enable efficient performance, which is an accommodation duty in substance even though the Act supplies no definition of disability anywhere in its text and even though the doctrine of reasonable accommodation as such is nowhere articulated. The Whistleblower Act, 2006 (Act 720) supplies the protective framework within which internal disclosure of impropriety is made, and it interacts with the harassment reporting channel in ways that are considered below. The Electronic Communications Act, 2008 (Act 775) makes unlawful interception a criminal offence under section 73(1)(f) and separately criminalizes the use of unlawfully intercepted content under section 73(1)(g), a distinction of considerable practical importance to a human resource officer who has been handed a recording by a third party. The Cybersecurity Act, 2020 (Act 1038) reserves lawful interception to law enforcement acting under judicial warrant by virtue of sections 71 to 75, imposes obligations relating to critical information infrastructure under sections 35 to 40, and contains in section 1(2) a direction that it be read together with the Evidence Act, the Electronic Transactions Act, the Electronic Communications Act and Act 843, which is as close as Ghanaian legislation comes to acknowledging that these regimes were meant to be operated as one.

The Affirmative Action (Gender Equity) Act, 2024 (Act 1121) deserves separate mention because its significance for the private sector has been underestimated. The Act binds private as well as public employers, addresses private employment in sections 21 to 24, and creates in section 28(2) an offence for private sector non-compliance carrying a fine of between five hundred and one thousand penalty units or a term of imprisonment of between six and twelve months or both. Whatever view one takes of the wisdom of criminalizing a compliance failure of this kind, the presence of a criminal sanction transforms the risk calculus that a board is entitled to make, and any human resource professional who has treated gender equity obligations as aspirational will need to revise that assessment.

3.5 The international layer and the limits of dualism

Ghana is a dualist jurisdiction, and article 75 of the Constitution requires that a treaty be ratified by an Act of Parliament or by a resolution of Parliament supported by more than one half of all its members. The consequence, established in *New Patriotic Party v Inspector-General of Police*, is that an unincorporated treaty does not of its own force create rights enforceable in a Ghanaian court, although the same case makes clear that international instruments are not thereby rendered irrelevant to constitutional interpretation. That qualified position matters here because the international instruments most directly on point in the harassment field are of uneven domestic status.

The Convention on the Elimination of All Forms of Discrimination Against Women, and in particular General Recommendation No 19 of the Committee established under it, treats sexual harassment at work as a form of gender-based discrimination, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa addresses the economic and social welfare rights of women including protection from harassment in the workplace. Convention No 111 of the International Labour Organization prohibits discrimination in employment and occupation, defining it in terms of effect rather than of intention, and Convention No 158 supplies the structure of valid reason, opportunity to defend and adequate compensation upon which much of Part VIII of Act 651 is modelled. The most directly relevant instrument, however, is the Violence and Harassment Convention, 2019 (No 190), whose definition is materially wider than that in section 175 of Act 651 in four respects, since it covers psychological and economic harm as well as physical and sexual harm, it is satisfied by a single occurrence and does not require a course of conduct, it extends to conduct by and against third parties including clients and customers, and it expressly reaches communications enabled by information and communication technologies (International Labour Organization, 2019). Whether or not Ghana proceeds to

ratification, and the position should be verified before any submission that relies upon it, the definition supplies a benchmark against which the adequacy of a domestic policy can be measured, and a Ghanaian employer that drafts to the Convention standard rather than to the statutory minimum acquires a defensive advantage that costs it nothing.

4. THE HUMAN RESOURCE DEPARTMENT AS DATA CONTROLLER

4.1 The misconception of custodianship

The most consequential error in Ghanaian human resource practice is the belief that the department holds employee data as a custodian on behalf of the undertaking, rather than exercising the determinative functions that make it, in law, the controlling mind of the processing. A custodian keeps what he is given and answers for its safekeeping alone, whereas a controller determines the purposes for which and the manner in which personal data are processed, and it is the controller upon whom the whole weight of Act 843 descends. The distinction is not merely semantic, because the custodial self-understanding produces a characteristic pattern of failure in which the department accepts without inquiry every collection request that reaches it, defers to the information technology function on questions of retention and access, and regards the eventual security of the data as somebody else's responsibility. A department that understood itself as a controller would ask, before any new field was added to any form, under which of the six bases in section 20(1) the collection was to be justified, for which specified purpose under section 22 it was being collected, and how the minimality requirement of section 19 was to be satisfied given the purpose so specified.

The theoretical literature offers a useful vocabulary for what has gone wrong here. Nissenbaum's account of contextual integrity, under which the wrong in an information practice consists not in disclosure as such but in the movement of information across the norms of the context in which it was generated, describes the employment file with some precision, since data furnished for payroll administration acquire an entirely different character when they are reused to construct a performance profile (Nissenbaum, 2010). Solove's taxonomy performs a similar service by disaggregating a monolithic idea of privacy into distinct harms of aggregation, secondary use and exclusion, each of which has a recognizable counterpart in Act 843 (Solove, 2008). Neither writer is an authority in a Ghanaian court, and neither is needed to reach the statutory conclusions that follow, but both explain why those conclusions are correct.

4.2 Recruitment and the disposal of the standing objection

Recruitment is where the modern difficulties are most acute and where the Ghanaian position is unexpectedly strong. In jurisdictions whose employment legislation protects only employees, a rejected candidate who suspects that an automated screening tool discarded the application on an impermissible basis faces an immediate difficulty of standing, because the statutory protections have not yet attached. Section 14 of Act 651 avoids that difficulty by extending its prohibition to conduct in relation to any person seeking employment, and the drafting is deliberate rather than accidental. A candidate who has never entered the employer's premises is therefore within the Act's protection, and is simultaneously a data subject under Act 843 with the full complement of rights of awareness, access and correction under sections 23, 35 and 36.

It assists analysis to separate the recruitment process into its functions rather than treating it as an undifferentiated whole, because different provisions attach to each. The advertisement and sourcing function determines who ever learns that a vacancy exists, and where distribution is mediated by a platform whose targeting parameters the employer has selected, the employer has decided about the class of persons who will be permitted to apply. The screening function reduces a pool by reference to criteria, and where those criteria are inferred by a model rather than stated by a person, the employer may be unable to say what the criteria were. The assessment function generates new personal data about the candidate through testing, and psychometric and integrity instruments frequently generate inferences about temperament, stability and honesty which the candidate has never disclosed and cannot correct. The verification function reaches outward to referees, educational institutions and, increasingly, to publicly accessible social media. The decision function selects, and where selection is the output of a composite score, the reason for rejection may exist in no human mind at all.

Two conclusions follow from that separation of the recruitment process into its constituent functions. The first is that attributes inferred by a model from proxy data are personal data within the meaning of Act 843, and where the inferred attribute falls within the categories protected by sections 37 to 45, such as an inference about health, about religious affiliation drawn from a name or an address, or about ethnic origin drawn from a school attended, the processing attracts the special regime notwithstanding that the candidate never supplied the underlying attribute. That the model inferred rather than received the attribute cannot lower the standard, since to hold otherwise would be to make the protection available to a controller that asks the question directly and unavailable to one that deduces the answer. The second is that the vendor defence, by which an employer asserts that it merely purchased a screening tool and cannot be answerable for its internal operation, fails on at least three grounds. It fails because section 29 of Act 843 places the responsibility for a processor squarely upon the controller who engaged it, it fails because the employer determined the purpose for which the tool was deployed and therefore satisfies the definition of a controller regardless of who wrote the code, and it fails because the decision to deploy a tool whose operation cannot be explained is itself a decision for which an

account is owed. The point that opacity is a reason against deployment rather than a defence to its consequences is one that the American literature on people analytics and algorithmic disparate impact reached some time ago (Barocas & Selbst, 2016; Bodie et al., 2017), and there is no reason for a Ghanaian tribunal to arrive at a weaker conclusion under a statute whose accountability principle is stated in terms as broad as those of section 17.

4.3 The lawful basis and the poverty of consent

Ghanaian employers rely upon consent to a degree that is very difficult to justify, typically by inserting into the contract of employment a clause by which the worker is taken to consent to the processing of personal data for all purposes connected with the employment. Section 20(1) supplies six bases, and consent is merely the first among them, yet the practice proceeds as though the others did not exist. There are three reasons why the reliance is unwise even on a view of the employer's own interest. The first is that consent obtained at the point of hiring, from a candidate who is not in a position to withhold it and who has no realistic alternative, is consent in name only, and a tribunal invited to examine whether it was freely given will not have to reason very hard. The second is that section 20(2) and (3) permit the data subject to object and oblige the controller to stop, so that a controller which has built its entire lawful basis upon consent has built it upon a foundation the worker may withdraw at any moment, leaving the processing without justification and the undertaking without a payroll system it may lawfully operate. The third is that the alternative bases are in most cases plainly available and considerably more robust, since the processing necessary for the performance of the contract, the processing necessary for compliance with a legal obligation and the processing necessary for the legitimate interests pursued by the controller between them cover the overwhelming majority of ordinary employment processing without any dependence upon the worker's permission.

A word of caution is required about the legitimate interest's basis, which is the one to which employers gravitate once the weakness of consent has been explained to them. That basis is qualified in its own terms and, more importantly, it cannot be used to accomplish what article 18(2) forbids. A statutory basis for processing is not a constitutional justification for interference with privacy, and where the processing constitutes an interference with the privacy of correspondence or communication the constitutional enumeration must independently be satisfied. The relationship between the two instruments is hierarchical rather than alternative, and an employer which has identified a lawful basis under section 20(1) has answered the statutory question and not the constitutional one.

4.4 Purpose, minimality, retention and erasure

The provisions on purpose are the most neglected in the whole of Act 843 and the most useful to a claimant. Section 22 requires that personal data be collected for a specific, explicitly defined and lawful purpose related to the functions or activity of the controller, and section 19 requires that the data be adequate, relevant and not excessive having regard to that purpose. The two provisions operate together as a discipline, because minimality is meaningless in the abstract and can only be assessed against a purpose that has been stated with enough precision to make the assessment possible. An employer which states its purpose as human resource management has stated nothing, since every conceivable collection is relevant to a purpose defined that broadly, and the vice of such a formulation is that it converts a limiting principle into an authorization. The correct discipline is what may be called purpose discipline, under which no field is collected until the specific purpose it serves has been written down, and any field which cannot be matched to such a purpose is not collected at all.

Retention follows from the same logic even though Act 843 does not prescribe periods, since data retained after the purpose for which they were collected has been exhausted are by definition excessive, and section 33(1)(b) contemplates erasure. The practical difficulty in Ghanaian undertakings is not that anyone has decided to retain employee records indefinitely but that nobody has ever decided anything at all, so that the file of a worker who left in 2011 sits in the same system as the file of a worker engaged last month, complete with medical certificates, disciplinary correspondence and the results of a psychometric assessment nobody has looked at since. A retention schedule which fixes a period for each category of record, states the reason for the period, and provides for review is not an onerous document to produce, and its absence is the single easiest failure for a regulator or a claimant to establish.

4.5 Security, processors and the interior threat

Section 28 requires the controller to secure the integrity of personal data by adopting appropriate, reasonable, technical and organizational measures, and section 29 extends the controller's responsibility to processing carried out by a processor on its behalf. Ghanaian undertakings have on the whole improved their external security posture, partly under the discipline of the Cybersecurity Act, 2020 (Act 1038) and partly because external intrusion is the risk that attracts attention. The interior threat has received far less attention and is, in the employment context, considerably more likely to materialize. Where every officer in a human resource department can open every file, the department has failed to adopt organizational measures within the meaning of section 28, however impressive its firewall may be, and the harm that follows from a colleague reading a medical certificate is not diminished by the fact that no external attacker was involved.

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Access control by role, logging of access to sensitive categories, and separation of the harassment investigation file from the general personnel file are therefore not refinements to be adopted when resources permit. They are the organizational measures the section contemplates, and their absence is a breach whether or not any harm has yet occurred.

4.6 Monitoring and the constitutional ceiling

The monitoring of workers is the point at which the constitutional analysis becomes decisive rather than supplementary. An employer contemplating the interception of electronic communications must reckon with three distinct prohibitions rather than one. Article 18(2) permits interference with the privacy of correspondence and communication only in accordance with law and only for the enumerated purposes, none of which is the commercial convenience of an employer. Section 73(1)(f) of the Electronic Communications Act, 2008 (Act 775) makes unlawful interception a criminal offence, and section 73(1)(g) creates a separate offence of using content so obtained, which means that an employer which receives a recording from a third party and deploys it in a disciplinary process may commit an offence even though it took no part in the interception. Sections 71 to 75 of Act 1038 reserve lawful interception to law enforcement officers acting upon an ex parte application to the High Court by a senior investigative officer, and the reservation is instructive precisely because it demonstrates that the legislature knew how to authorise interception and chose to authorise it only for that purpose and only through that procedure.

A workable distinction can be drawn between security monitoring and surveillance by asking four questions of any proposed measure. The first is whether the measure is directed at the integrity of a system or at the conduct of a person, since a tool that examines outbound traffic for exfiltration of confidential material is directed at the former while a tool that reports how long each employee spent in each application is directed at the latter. The second is whether the output is aggregate or individuated, since the security purpose is generally served by aggregate anomaly detection and rarely requires a per-person ledger. The third is whether the retention period matches the security purpose, since data retained for two years is not being retained in order to detect an intrusion in progress. The fourth is whether the measure was disclosed in advance with sufficient particularity for a worker to understand what was being observed, which is the requirement that section 23 of Act 843 imposes and which covert monitoring by definition fails. A measure that answers all four questions in favour of the security characterization may be defensible. A measure that fails them is surveillance, and surveillance conducted for a commercial purpose has no place within the article 18(2) enumeration.

4.7 Further processing and the disciplinary use of data

Section 25 governs further processing and requires compatibility with the purpose of collection, and it is the provision most likely to be breached in the ordinary operation of a disciplinary process. Data collected for access control are used to establish that a worker was in the building at a particular hour. Data collected for the operation of a fleet telematics system are used to establish that a driver departed from an authorized route. Data collected under a security monitoring programme are used to establish that a worker sent a message. In each case the employer has taken data collected for one purpose and deployed it in a proceeding that may cost the worker a livelihood, and in each case the compatibility question under section 25 has to be answered rather than assumed. The honest position is that section 25 does not obviously cover the internal disciplinary use of data collected for an operational purpose, and an employer which wishes to reserve the ability to make such use must say so at the point of collection with sufficient clarity that the statement forms part of the specified purpose rather than a subsequent extension of it.

5. PREVENTING HARASSMENT: AN ARCHITECTURE BUILT THE WRONG WAY ROUND

5.1 What Ghanaian law actually provides

It is frequently asserted, in conference papers and in the general press, that Ghana has no law against workplace harassment. The assertion is inaccurate, and it does a good deal of damage, because it directs reform energy towards the enactment of provisions that already exist while leaving untouched the defect from which the difficulty actually arises. Section 175 of the Labour Act, 2003 (Act 651) defines sexual harassment, in terms which cover unwelcome, offensive or importunate sexual advances or requests made by an employer, by a superior officer or by a co-worker, and which are expressed to apply whether the worker concerned is a man or a woman. Section 15 of the same Act permits a worker to terminate the contract where the worker has been treated in the relevant manner, and Part VIII contains the machinery by which the fairness of a termination is tested, including the burden placed upon the employer by section 63(4). Article 24(1) of the Constitution guarantees conditions of work that are satisfactory, safe and healthy. The Affirmative Action (Gender Equity) Act, 2024 (Act 1121) binds private employers with criminal sanction. The Criminal Offences Act, 1960 (Act 29) reaches the more serious physical conduct as assault.

The defect, once it is properly identified, is architectural in character rather than a matter of absence. Ghanaian law has assembled its harassment protection around the moment of departure, so that the specified statutory remedy becomes available to a worker who has already resigned and is not available, or is not obviously available, to a worker who wishes to remain in employment and simply to be left alone. That is close to the opposite of what a victim of harassment usually wants, and it produces the perverse result that the law rewards the employer whose conduct is severe enough to drive the worker out while offering comparatively little to the worker who endures. Fredman's observation that a discrimination regime organised exclusively around individual complaint after

the event will systematically under-enforce, because the persons best placed to complain are the persons least able to bear the cost of complaining, applies with particular force to a regime in which the cost of complaining is the loss of the job itself (Fredman, 2011; see also Hepple, 2014).

5.2 Section 9 as the answer

The answer to the architectural defect lies in a provision that is not about harassment at all. Section 9 of Act 651 imposes upon every employer a series of duties which include the duty to take practicable steps to ensure that the worker is free from risk of personal injury or damage to health during and in the course of the worker's employment, the duty to provide and ensure the operation of an adequate procedure for discipline, the duty to develop the human resources by way of training and retraining, the duty to keep open the channels of communication with the worker, and the duty to protect the interests of the worker. Each of these has a direct application to harassment which the profession has failed to draw.

The formulation regarding damage to health is the most important, and it is materially stronger for present purposes than the general occupational safety provisions in sections 118 to 121, which are framed around the conditions of the workplace rather than around the state of the worker. Damage to health, in a provision that does not confine itself to physical injury, comfortably includes psychological harm, and the epidemiological connection between sustained workplace hostility and anxiety, depression and cardiovascular consequence is not seriously contested. The obligation to take practicable steps is anticipatory in its grammar and cannot be satisfied by a response after the harm has occurred, since steps taken after an injury are not steps taken to ensure freedom from the risk of it. It follows that a Ghanaian employer which has taken no step to prevent harassment is in breach of section 9 whether or not any harassment has yet been reported, and that the breach is independent of any question about the position of an individual complainant.

The duty to provide and ensure the operation of an adequate procedure for discipline is the second element, and the word ensure carries a good deal of weight. A procedure that exists on paper and is not operated does not satisfy the section, and an employer whose written policy provides for an investigation panel that has never been convened has failed on the terms of the provision itself. The duty to keep open the channels of communication is the third, and it is the statutory foundation for a reporting mechanism, since a channel which requires a complainant to report to the person complained of is not open in any sense the section can be understood to intend. The training duty is the fourth, and it is best understood as a shield rather than an exposure, because an employer which has trained its supervisors on the boundaries of acceptable conduct and can produce the records is in a materially stronger evidential position when it comes to discharging the burden imposed by section 63(4).

Read together, these four elements amount to a preventive duty which is enforceable, which does not depend upon the worker resigning, and which was on the statute book in 2003. The human resource function is the organ through which the duty is discharged, and the failure to discharge it is a failure of that function.

5.3 Third parties, customers and the conversion of hostility into detriment

The definition in section 175 is confined to conduct by an employer, a superior officer or a co-worker, and it therefore does not reach a client, a customer, a patient or a member of the public. That is a genuine gap by comparison with Convention No 190, which extends to third parties, and it is a gap which matters increasingly in a service economy where a substantial part of the workforce spends its day in contact with persons who are not employed by the undertaking at all. The gap is not, however, fatal, because the section 9 duty is not defined by reference to the identity of the person creating the risk. An employer which knows that its front-of-house staff is routinely subjected to sexual comment by customers and which has taken no practicable step in response has failed to take practicable steps to ensure freedom from risk of damage to health, and the identity of the person creating the risk is immaterial to that analysis.

A related and more modern difficulty arises from customer rating systems, which have spread from ride-hailing and delivery platforms into hospitality, retail and increasingly into internal service functions. Where a worker's remuneration, allocation of work or continued engagement depends upon a score generated by persons outside the undertaking, the employer has constructed a mechanism which converts customer hostility into employer-administered detriment. The employer does not become liable for the customer's prejudice, but it does become answerable for the design decision by which that prejudice was given operative effect within the employment relationship, and a design decision that determines how an entire class of workers is treated is itself an exercise of the authority conferred by section 8. Where the aggregate scores of workers of one gender, or of workers with a visible disability, are systematically lower than those of their colleagues, the employer that continues to allocate work by reference to the score has adopted the discrimination as its own.

5.4 Digital harassment and the dissolution of the workplace

The most difficult of the contemporary questions in this area is the question of where the workplace may now be said to end. Conduct which would plainly be harassment if it occurred in a corridor at two in the afternoon does not change its character because it occurred in a messaging group at eleven at night, and yet the employer's standing to act is less obvious in the second case.

Convention No 190 resolves the question by extending expressly to communications enabled by information and communication technologies, and by reaching conduct occurring in the course of, linked with or arising out of work rather than conduct occurring at a place of work. Ghanaian law has no equivalent formula, and the analysis has to be constructed from the general provisions.

The analysis can nevertheless be constructed from the materials that Ghanaian law already supplies. The section 9 duty attaches to risk arising during and in the course of the employment, and a messaging group constituted for work purposes, populated by reference to the employment relationship and administered by a supervisor, is an instrument of the employment, however late in the evening it is used. The employer which created the channel has created the conditions of the risk, and the practicable steps it is obliged to take include steps directed at conduct within a channel of its own construction. The position is genuinely more difficult where the channel is a private one which employee happen to use, and an employer that reaches into such a channel encounter both article 18(2) and section 73 of Act 775. The line to be drawn is between conduct within an instrument of the employment, where the employer may and must act, and conduct within a private space which happens to involve colleagues, where the employer's standing is limited to the consequences that manifest at work. The comparative jurisprudence on off-duty expression, developed principally in the European Court of Human Rights, has approached the problem in similar terms without reaching a settled formula, and there is no reason to pretend that a Ghanaian court would find it easy.

5.5 Bullying by system

A final category deserves notice because it falls outside every existing definition. Where the pace of work is set by an algorithm, where the allocation of shifts is determined by a scoring model, and where the consequence of a marginal score is a gradual and unexplained reduction in hours, a worker may experience the whole of the phenomenology of bullying without any individual having done anything to that worker at all. There is no harasser, there is no course of conduct attributable to a person, and the section 175 definition has nothing to say. The section 9 duty is again the answer, because the question it poses is whether the employer has taken practicable steps to ensure the worker is free from risk of damage to health, and a system which produces sustained anxiety in the persons subject to it presents exactly such a risk. The employer that designed or procured the system made the decision from which the risk flows, and the account is owed for that decision rather than for any interpersonal act.

6. THE CONVERGENCE PROBLEM

The two fields treated separately above meet at a single point, and it is a point which no Ghanaian instrument addresses. The moment a complaint of harassment is received, the employer becomes obliged to investigate, and every step of the investigation is processing of personal data within the meaning of Act 843. The obligations then begin to work against one another in at least five ways, and a human resource department which has not thought about the conflict in advance will resolve it badly under pressure.

6.1 The lawful basis for an investigation

The first difficulty is the most basic and the most frequently overlooked. Under which of the six bases in section 20(1) is a harassment investigation conducted? It cannot be consent, because the respondent will not give it and the complainant's consent cannot authorise processing about a third party. It is not straightforwardly the performance of a contract, since the investigation is conducted in relation to the complainant's contract but processes the respondent's data. The available answers are compliance with a legal obligation, the obligation in question being the section 9 duty, and the legitimate interests of the controller, and the better view is that the first is the stronger because it converts the investigation from something the employer has chosen to do into something the employer is obliged to do. That characterization has a practical consequence, because a respondent who objects to the processing under section 20(2) is on much weaker ground against a controller acting under a legal obligation than against one relying upon its own interests.

6.2 Confidentiality against the right to answer the case

The second difficulty is the sharpest of the five and admits of no wholly satisfactory answer. The complainant is ordinarily assured of confidentiality, and the assurance is what makes reporting possible at all. The respondent is entitled, on the plainest requirements of natural justice as applied in Ghana by *Awuni v West African Examinations Council* and as reflected in the procedural burden imposed by section 63(4), to know the case that is made and to answer it. In a small department, the disclosure of the substance of an allegation identifies its author, whatever assurance has been given, and the employer which withholds the substance to honour the assurance conducts a process which will not survive scrutiny. There is no clean resolution, and an honest treatment should say so. What can be said is that the assurance given at the outset must be accurate rather than comforting, so that a complainant is told that identity will be disclosed only so far as is necessary to enable a fair process and never for any other purpose, and that the employer which promises absolute confidentiality has made a promise it cannot keep and has thereby guaranteed that either the complainant or the process will be betrayed.

6.3 Special personal data in the investigation file

The third difficulty concerns the legal character of the material that an investigation of this kind generates. An investigation into sexual harassment generates records concerning the sexual life of identifiable persons, frequently generates records concerning mental and physical health where the complainant has sought medical attention, and may generate records concerning the commission of an offence. Each of these falls within the special categories governed by sections 37 to 45 of Act 843, and the file therefore attracts the more demanding regime notwithstanding that it sits in an ordinary human resource cabinet. It follows that the investigation file should be physically and logically separated from the personnel file, that access to it should be restricted by name rather than by role, that its retention should be fixed by reference to the limitation periods applicable to the causes of action that might be brought rather than by reference to the employer's general retention schedule, and that its eventual destruction should be recorded.

6.4 Evidential integrity and the problem of the recording

The fourth difficulty is evidential in nature and is becoming acute with each passing year. A complainant frequently arrives with a screenshot, a photograph or an audio recording, and the human resource officer receiving it faces two distinct questions which are habitually collapsed into one. The first is whether the material may lawfully be received and used at all, and here section 73(1)(g) of Act 775 requires real caution, since the use of unlawfully intercepted content is a separate offence and an employer that builds a dismissal upon a recording of a conversation to which the recorder was not a party may find that the process has generated a criminal exposure rather than a defensible outcome. The second is whether the material can be relied upon as authentic, and here the Evidence Act, 1975 (NRCD 323) supplies the answer that the profession has not yet absorbed. The traditional authentication provisions in sections 139 to 146 rest upon human recognition, which is the very faculty that synthetic media defeats, whereas section 147 permits authentication by evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result. That provision aligns exactly with the four factors governing evidential weight under section 7 of the Electronic Transactions Act, 2008 (Act 772), and together they indicate that a human resource department which wishes its digital evidence to survive challenge should be able to describe the system that produced it rather than merely to produce a witness who says it looks right.

6.5 The burden and the value of a good record

The fifth point is not a difficulty but an opportunity, and it explains why the discipline advocated in this article is in the employer's own interest. Section 63(4) of Act 651 places upon the employer the burden of proving the reason for a termination and the procedure by which it was effected. An employer which has conducted its investigation under a stated lawful basis, kept the special category material separately, restricted access by name, described the system that produced its digital evidence, and recorded each decision and the reason for it, will discharge that burden without difficulty. An employer which has done none of these things will be asked, in cross-examination, why the complainant's medical certificate was visible to eleven people, and there is no satisfactory answer to that question.

7. THE DOCTRINE OF INTEGRATED WORKPLACE SAFEGUARDING

The preceding analysis can be stated as a single doctrine, and it is offered here not as a code of best practice but as a proposition about what Ghanaian law already requires. The doctrine holds that the employer's obligations in respect of the personal data of its workforce and its obligations in respect of the prevention of harassment are not two compliance regimes which happen to be administered by the same department, but two expressions of one duty arising from the authority conferred by section 8 of Act 651 and bounded by the Constitution. Four distinct duties follow from that unified conception of the employer's obligation.

The duty of anticipation requires the employer to act before the harm rather than after the report. Its statutory source is the language of section 9 concerning practicable steps to ensure freedom from risk, reinforced by the requirement in section 22 of Act 843 that the purpose be specified before the data are collected. Its operative test is whether the employer can identify a step taken before any complaint arose which was directed at the risk that later materialized. An employer which can point only to what it did after learning of the incident has failed the test, however impressive the subsequent response.

The duty of lawful custody requires that every item of personal data held about a worker be traceable to a stated purpose, a lawful basis and a retention period, and that the more sensitive the category, the more restricted the custody. Its statutory sources are sections 17 to 29 and 37 to 45 of Act 843. Its operative test is whether the employer, asked about any field in any system, can state why it was collected, on what basis, and when it will be destroyed. The test is deliberately simple, because the great majority of Ghanaian undertakings would fail it in respect of the first field examined.

The duty of proportionate response requires that intrusion into the worker's private sphere be permitted only upon a gradient, so that the least intrusive measure capable of achieving a legitimate purpose is adopted, and that above a certain point no employer purpose is sufficient at all. Its statutory sources are the minimality requirement of section 19 and the enumerated justifications in article 18(2), and its domestic methodological anchor is the proportionality reasoning in Civil Servants Association of Ghana v

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Attorney-General. Its operative test has two limbs, the first asking whether a less intrusive measure would have achieved the same purpose and the second asking whether the purpose is one of those the Constitution recognizes at all. The second limb is a ceiling rather than a balance, and commercial advantage does not reach it.

The duty of demonstrable account requires that the employer be able to show, by record made at the time rather than by reconstruction afterwards, how each of the foregoing duties was discharged. Its statutory sources are the accountability principle in section 17 of Act 843, the procedural burden in section 63(4) of Act 651, and, in its evidential expression, section 147 of NRCD 323. Its operative test is whether the account can be given without asking anybody to remember anything.

The doctrine is not offered as complete, and three limits should be stated plainly. It does not claim that the employment relationship has no contractual element, since plainly it has. It does not claim that monitoring or automated assessment should be prohibited, since the argument is about the conditions upon which they may be used rather than about their permissibility as such. It does not claim to be the only reading of the Ghanaian materials consistent with them, and a court might reach the same practical outcomes by a route that owed nothing to the theory of conferred authority. What it does claim is that the four duties are supported by provisions presently in force, that they cohere, and that an employer which discharges them is protected against the great majority of the legal risk which this field generates.

8. IMPLEMENTATION WITHIN THE HUMAN RESOURCE FUNCTION

A doctrine which cannot be operated is of limited value to a practitioner, and the measures which follow are set out in ascending order of institutional cost so that an undertaking may begin with those it can adopt immediately. The first is the designation of a data protection supervisor under section 58 of Act 843. The section is permissive rather than mandatory, which is a weakness in the statute, but the designation costs an undertaking nothing beyond the allocation of a role, and it produces the single most useful change in institutional behaviour available, because it creates a person whose function is to ask the questions that nobody presently asks. The second is a written record of processing which lists, for each system holding employee personal data, the categories held, the purpose, the lawful basis, the persons with access and the retention period. The document is unglamorous, and it is the first thing a regulator or a claimant will ask to see.

The third measure is an assessment carried out before any new monitoring or assessment technology is deployed, addressing the four questions set out in section 4.6 of this article and the two limbs of the proportionality test in section 7. Ghanaian law does not require such an assessment, and the absence of a statutory impact assessment requirement is among the more obvious deficiencies of Act 843, but nothing prevents an undertaking from conducting one and a great deal recommends it. The fourth is a reporting channel for harassment which does not require the complainant to report to a supervisor, which is available in more than one modality, and which is documented in a manner that permits the employer to demonstrate that it was operating rather than merely available. The fifth is a training programme with recorded attendance, directed at supervisors in particular, since the training duty in section 9 is a shield and an untrained supervisor is the mechanism through which most institutional liability is created.

The sixth measure is separation of the investigation file, addressed in section 6.3 above. The seventh is a retention schedule of the kind described in section 4.4 above. The eighth, and the one that requires the most institutional courage, is a periodic internal audit which tests whether the policies are operated rather than whether they exist, and which reports to the board rather than to the department it examines. An undertaking which adopts these eight measures will have discharged a very substantial part of the Doctrine of Integrated Workplace Safeguarding without waiting for any amendment to any statute, and that is the point of ordering them in this way.

One institutional measure lies beyond the individual undertaking and deserves mention because it requires no legislation either. Section 113(1) of Act 651 confers upon the National Tripartite Committee an advisory mandate which is already wide enough to embrace workplace technology and the governance of employee data, and the Committee could accordingly develop a national tripartite code of practice on workplace data and harassment prevention without any amendment to its constituting provision. A joint statement by the Data Protection Commission, the Labour Department and the Cyber Security Authority setting out their common understanding of how the three statutes interact in the employment setting would be cheaper still, and would resolve a great deal of the uncertainty in which employers presently operate. Ghana's institutional difficulty in this field is not the absence of institutions but the absence of connections between them.

9. REFORM

The reform proposals which follow are ordered by drafting cost rather than by gravity, on the frankly instrumental view that a proposal requiring a short amendment to an existing instrument has a materially better prospect of adoption than one requiring a new principal enactment. Four of the proposals advanced here require no more than a single subsection each. The first is an amendment to section 175 of Act 651 extending the definition of harassment beyond the sexual, so as to cover conduct causing psychological harm, and extending it to conduct by third parties in the course of the employment. The second is the insertion into Part VIII of a free-standing right to complain of harassment and to obtain a remedy without resigning, which would repair the

architectural defect identified in section 5.1 above at the cost of a single new section. The third is the conversion of the permissive designation of a data protection supervisor under section 58 of Act 843 into a mandatory requirement for controllers above a threshold of size. The fourth is the insertion into Act 843 of a requirement to conduct and retain an assessment before deploying processing likely to result in a high risk to the rights of data subjects.

Two further proposals require considerably more substantial drafting work than the four just described. The first is a provision addressing decisions taken about a worker wholly or mainly by automated means, since Ghanaian law presently contains nothing at all on the subject and the analysis in section 4.2 above had to be constructed entirely from provisions drafted around authority rather than around technology. The second is a burden-shifting provision in discrimination claims, the absence of which from Ghanaian law is a genuine and underappreciated defect, since a claimant who must prove the employer's reason without access to the employer's records is being asked to prove something that only the employer can know.

Three matters are deliberately omitted from this reform docket, and the omissions should be stated with reasons rather than passed over. No proposal is made for a specialized tribunal for employment technology disputes, because the Industrial and Labour Division of the High Court already exists and the correct investment is in the capacity of the judges who staff it rather than in a new institution. No proposal is made for a statutory tariff of compensation, because the discretion presently exercised is a better instrument than a schedule would be. No proposal is made for the prohibition of any particular technology, because prohibition invites circumvention through relabelling and because the four duties stated in section 7 apply to a technology that has not yet been invented, which no schedule of prohibited devices can do.

It should finally be conceded that legislation cannot supply what this field most lacks. It cannot supply institutional competence within the regulators, it cannot supply decided authority where our courts have not yet been asked the questions, and it cannot supply capacity within the profession and within the trade unions, which is the deficiency that an article is least able to remedy. The most useful thing a scholar can do about the last of these is to state the arguments in a form in which a practitioner can plead them, and that has been the ambition of the analysis above.

10. CONCLUSION

The Ghanaian human resource professional occupies a position which the law has quietly transformed while the professional literature was looking elsewhere. The department that once kept files now determines the purposes and manner of processing personal data about hundreds of people, deploys instruments that generate inferences about temperament and honesty which no candidate ever disclosed, receives complaints about conduct occurring in channels that did not exist when the governing statute was drafted, and conducts investigations in which the duty to be fair to one person and the duty to protect the information of another point in opposite directions. That transformation has occurred under a body of law which is very much better equipped to govern it than the profession has recognized.

What the analysis in this article has attempted to show is that the necessary materials are present. Section 9 of Act 651 contains an anticipatory preventive duty which does not require a worker to resign before it becomes useful, section 14 disposes of the standing objection at the recruitment stage, section 63(4) places the procedural burden where it belongs, article 18(2) supplies a ceiling above which no commercial justification may rise, sections 17 to 45 of Act 843 govern the employment file with the same rigour they apply to any other holding of personal data, and section 147 of NRCD 323 supplies the evidential route by which a properly kept record proves itself. What is missing is not provision but assembly, and the Doctrine of Integrated Workplace Safeguarding is offered as one way of performing the assembly.

The underlying proposition is simple enough to state in a sentence, though it has taken this article some length to establish. The authority a Ghanaian employer exercises over the persons who work for it is conferred rather than residual; it is conferred upon terms which the Constitution and the statutes set, and it is conferred subject to an obligation to give an account of its exercise to those over whom it is exercised. Whether that authority is exercised by a supervisor in a corridor, by a policy in a handbook, or by a scoring model in a system that nobody in the undertaking can fully explain, the account is owed, and the human resource function is where it must be given.

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