The Evolution of Employment Rights: The North American Context

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Introduction

"As employee attitudes and actions reflect the increased public concern with social and environmental problems and the proper role of the corporation in participating in their solution, traditional doctrines of the employee's duties of loyalty and obedience and the employer's right of discharge will undergo increasing change.... The real question is to establish civilised parameters of permissible conduct that will not keep employees from expressing themselves... and at the same time will not introduce elements of breach of confidentiality and impairment of loyalty that will materially impair the functioning of the corporation itself. A balancing of interests, not a blind reiteration of traditional doctrines is required".1

The evolution of employee rights during the last quarter century has had a significant impact on the employer/employee relationship and on the way organisations function. Paternalistic, authoritarian management and personnel practices, considered appropriate for so many years, are no longer effective. Instead, managers are being forced to enhance employee involvement and empowerment, because of changing social forces, economic factors, legislative and regulatory measures and evolving case law.

This article will examine the evolution of employee rights and the factors responsible for these changes, by discussing the current workplace environment from the viewpoint of both employees and employers, together with an examination of their rights and responsibilities. Further, we will consider the advantages and the disadvantages of developing a new employment climate, again from the perspective of the employee and the employer. We will conclude with implications for practicing managers, outlining pragmatic suggestions on how to manage effectively in this new environment.

Historical Overview

The Evolution of Employment Rights

The concept of "rights", began its evolution during the transition from feudalism, in which one's station was determined at birth, to today's competitive individualistic system of the market capitalism. Rights are defined as:

"...an individual's legitimate and enforceable claims to some desired treatment, situation or resource...An individual comes to possess rights because of membership in the group or category for whom such rights are defined; nothing further, such as a promise or performance on the part of the individual is needed to establish access to or eligibility for the right....Rights may be limited to or denied altogether to certain groups or categories of members, but such limits do not prevent the claims or privileges from functioning as rights for others....Rights are exercised as opposition to or as limitations upon the ordinary exercise of..."
Rights have a central role in our conception of ourselves and others, as they are needed in very concrete ways for survival and to function in day-to-day life. Rights are not fixed; they arise out of relatively fixed basic human needs, but they take different forms and give rise to different specific rights depending on the situation. Consequently, some rights change their shape, some lapse, and new rights arise, sometimes in conflict with the old rights. Rights are also important insofar as they are legally recognised and enforced. Many rights are in fact created by legislative or regulatory measures, while others have evolved through court decisions. Some such rights would include health and safety regulations and those rights protected under the Canadian Charter of Rights and Freedoms.

"In the American panoply of rights, workplace rights are the least defined, the least understood, and the least sanctified by social consensus. It has been difficult to design a system of employee rights that adequately protects individual workers and yet respects the property rights of owners and preserves those management prerogatives needed to operate a modern enterprise in a dynamic and competitive economy. As a result workplace rights constitute a terrain long contested by employers, workers, propagandists, judges and social theorists, politicians, and diverse reformers and reactionaries."

The evolution of employment rights began to take root in the second half of the nineteenth century when social changes and organisation size made the development of new management techniques essential to safe and efficient business practices. For a great many years, however, managers directed their employees with a firm hand, allowing little opportunity for input, while providing few employee rights or benefits. Indeed, until recently, managers were permitted to utilise the "at-will" doctrine, whereby employers could retain or discharge employees for good cause, for no cause, or for bad cause, without being guilty of any unlawful act. This regime provided few rights to workers and was effectively replaced during the post-war period (the late 1940's to the late 1970's), when the arrival of unions saw the replacement of the "at-will" rule with collective bargaining agreements. Unions were successful in negotiating agreements which provided more benefits, rights and security to their members. The involvement of unions created a trade-off that provided some benefits to both employers and workers - managers were given a relatively free hand to continue to run their businesses as they saw fit, and in return, the union won for its members, a share in the productivity bonus via higher wages and some protection from arbitrary treatment.

During the early years of unionisation, most company unrest came from blue collar workers, those close to the bottom of the corporate ladder, and those most likely to be unionised. The more recent trend, however, finds more dissidence coming from among well-paid employees who work closer to management, who often have a say in decision making and who may not be unionised. Their discontent can be even more troublesome for management, as the high status and visibility of these militants makes dissidence contagious - workers become more sensitive to management's shortcomings and make more demands for benefits like flexible hours, equitable pay and a voice in decision making. Often their specialised knowledge and technical skills make them essential to the organisation. Therefore managers are willing to "bargain" to keep them content.
Indeed, the employment relationship has evolved enormously from the time when employee loyalty was considered a virtue and the ideal employee was one who spent fifty years with the same company without uttering a word of complaint. For this durability, the employee received a gold watch on retirement. This image, however, ran counter to the nature of a society which is based upon the right to be heard. Many managers, who believed previously that they were exempt from this reality have come to realise they can not continue to function in a manner that goes against the grain of broader societal norms. Their adaptation has been slow, since companies never have functioned as representative democracies, wherein employees were empowered to elect their management or to decide how the organisation will operate. Nevertheless, progressive managers have built bridges between management and employees so they can speak out without fear of reprisal, creating environments in which employee rights and benefits were developed and upheld. Those managers who did not develop employee rights, have found themselves beset by increasing numbers of disgruntled employees, who have begun to influence legislation or who have taken their concerns to the courts in order to effect change.  

**Contributing Factors in Employment Rights Evolution**

A number of factors have influenced the evolution of employee rights, including the development of legislation toward the beginning of the century, particularly during the 1930's and 40's. This concentration on rights arising out of statutory regulations, gave way to collective bargaining in the post-war era. Legislation once again played a major role in the 1960's, with the development of such American statutes as the Civil Rights Act (1964), Occupational Safety and Health Act (1970), Rehabilitation Act (1973) and The Americans with Disabilities Act (1990). Similar legislation was developed in Canada with the enactment of the Charter of Rights and Freedoms in 1981 and the Employment Equity Act in 1986.

Another major force that has altered the ambience of work in recent years, is a concern for work as a source of self-respect and non-material reward. This trend is consistent with the modern day preoccupations with healthy living, and with looking at work within the context of overall lifestyle.

A more educated workforce and the requirement for more technical skills to keep pace with rapidly changing technologies, are other factors in this evolution. These considerations have taken on added importance as modern companies strive to remain competitive in the global market place.

While unions have played a key role in the development of employee rights in the post-war era, their impact is decreasing, especially in the United States, where it has been argued that unions can no longer provide an effective framework for the establishment of worker rights as they represent too few workers. There has been a particular decline in the percentage of private sector workers who are unionised. Some of the factors involved in this decline are the compositional changes in the types of jobs workers now do, diminishing union resources devoted to organising drives, a powerful anti-union offensive by employers and declining interest in unionisation among non-union workers.

The situation in Canada is somewhat different, as in percentage terms, the
labour movement is stable at approximately 37 per cent of the non-agricultural labour force. Here too, however, there are calls for change from the adversarial mode toward a more co-operative model, under which labour and management would work together for the benefit of all stakeholders in the enterprise. Should this massive re-orientation take root, union strength might be focused away from the individual worker toward a collective that includes a variety of constituents (employers, suppliers, customers, society, interest groups and employees), the inevitable compromises that will result, could affect the evolution of employee rights in a negative manner.

In addition, much of the strength in Canadian Labour lies in the public sector. These unions have been buffeted severely by financial cutbacks. It is unlikely they will be pressing for major gains in employee rights, therefore, the major focus for the foreseeable future will be on employment security.

As a consequence, in addition to the legislative changes which have created employee rights, the courts have taken on a major role in establishing and enforcing these rights. Lack of regulation in certain aspects of employee rights (e.g., sexual harassment), together with a labour movement either in decline or under economic stress, means that rights tend to be influenced by the marketplace. This trend has in turn led to more litigation and a reliance on the courts to decide the appropriate recourse, an unfortunate development, as:

"the courts are an extremely poor mechanism for administering industrial relations. They are costly and engender long delays; they require lawyers and other expensive legal personnel; they are excessively formal and produce capricious awards. And perhaps most unfortunately, they create winners and losers rather than mediating disputes in a way that allows the parties to go back to working together."11

The Present Situation

Rights of the Employee

As indicated previously, individuals can possess rights because of membership in a group or category for whom such rights are defined - such is the case in most employment situations. Some rights may be available to some categories of workers, but not others. Workers' rights also must be distinguished from "quid pro quo benefits", which are rewards or claims that depend upon and are received in return for some promise or performance, e.g., wages. By contrast, rights can be claimed merely as a consequence of membership in a group (for example, the right to be paid for Statutory holidays). Furthermore, while benefits sometimes may be negotiated by the individual, workers' rights are usually non-negotiable.12

Enterprise rights are those not based in legislation or regulation, but rather are specific rights granted by the employer. Enterprise rights are put in writing, often in an employee handbook. They represent that part of customary practices in a company that achieves the status of explicitly affirmed guarantees, whereas workplace customs and practices are informal and implicit. Reasons that managers would establish enterprise rights include their desire to be competitive, their ability to attract and motivate employees, their attempt to pre-empt or forestall unionisation and their belief that the employee deserves certain rights.
Most enterprise rights granted by employers fall into three general categories: those that provide the employee with "voice" (the right to voice concern with someone other than the supervisor), those that promise fair dealing with the employee (a sense of fairness, having access to formalised disciplinary procedures and an appeal process), and those that establish substantive employee privileges (job bidding rights, seniority, vacation, sick leave, retirement pensions). Enterprise rights can be changed, redefined or withdrawn by unilateral management decision, although courts have recently been defining enterprise rights as implicit or implied contracts which are legally enforceable.\(^1\) For example, in a case cited in *The Canadian Employer*, the judge found that, where an employer changes the terms of an employment contract, these changes must be expressly acknowledged and agreed to by the employee. In the case where the employee expressed neither agreement nor disagreement, but rather said nothing, it could not be assumed that the employee agreed to the changes simply by continuing to do the job. Employees are entitled to "consideration". When there is a material change in working conditions, job responsibilities or other aspects of the employment relationship, each party must give something to the other. Therefore, the employer does not have the right to make a significant change in the employment contract without offering some type of compensation or consideration to the employee.\(^2\)

Another area where there has been a significant change in employee rights is in the area of public welfare and safety, ethical and moral standards and legal codes. Managers no longer have the prerogative to penalise employees whose actions are protected by federal and state/provincial statute. For example, protests against unfair labour standards, involvement in organising activities, concerns related to issues such as health and safety, discrimination or harassment all must be dealt with under government regulations. It is less and less acceptable now for managers to issue very arbitrary edicts concerning clothing, political affiliation, exercise, outside activities or other personal preferences. Where prerogatives are weak and rights are strong is the handling of disagreements over the ethics, propriety and wisdom of a management decision. Although managers are entitled to expect subordinates to comply with a superior's decision and follow through on it, they are not entitled to dictate subordinates' personal views about the matter, whether expressed inside or outside the organisation, so long as the expression is not destructive to the organisation.\(^3\)

**Rights and Responsibilities of the Employer**

Notwithstanding significant developments in the evolution of employee rights, employers have retained certain rights and prerogatives. Managers continue to have the right to make day-to-day decisions, to determine routine practices, special rules and arrangements to expedite work and to provide supervision, so long as the rules are reasonable and honest. They may also continue to make decisions concerning tasks and rewards (including the establishment of job descriptions, and reporting relationships), and the determination of salary policies and rules concerning vacation entitlement, transfers, promotions, demotions, and so forth.

Management also retains the right to determine company direction and general operations strategy. The rationale for keeping management's prerogative...
in this area strong is that managers tend to look at the overall situation and to manage within the context of long range plans. As a consequence, they should have a more detailed overview of the operation, whereas employees may consider only their immediate situation.  

Management also has the right to demand loyalty, to the extent that they can take action against employees who take personal advantage of business opportunities that rightfully belong to the corporation. In that respect, Conflict of Interest policies which are intended to protect the interests of the organisation are within the mandate of the "corporate opportunity doctrine" and as such have legal force.

**Exercising Employer Rights**

"The "good" organisation will be one that accepts tension, accommodates certain kinds and qualities of dissidence, and makes daily use of procedures and mechanisms for resolving conflict. This will not be the organisation that tolerates the chronic complainer, the lazy employee, or the gadfly who wants to debate routine decisions made by bosses. Such toleration does not enhance employee dignity. But the "good" organisation will be one in which every employee has some say in the planning and control of his or her job, in which every employee enjoys rights to privacy and freedom of activity after working hours, in which every employee has a qualified right to speak out against actions or policies that seem immoral, unethical or irresponsible, and in which every member has a right to a prompt and fair hearing when he or she feels wronged by a superior."

Given the present climate of employer/employee relationships, both employers and employees need to be aware of the environment in which they are operating. When hiring new employees, employers need to ensure they are providing appropriate and sufficient information, and employees also must be aware of their responsibilities to protect their interests. Some of these responsibilities include: providing sufficient and appropriate information to the potential employee so as to enable him/her to make important decisions regarding employment; avoiding misrepresentation of facts about the job (e.g., job duties, working conditions and expected income); efforts by the prospective employee to protect his/her own interests by asking questions and gathering enough information to make an informed decision.

The development of employment policies is critical to establish effectively and to maintain the rights and responsibilities of both the employer and the employee. Whether or not they are put in writing, policies are the guidelines that organisations follow to handle both common and uncommon employment situations. It is essential, however, to establish written policies wherever possible, as formal policy sets standards for employees and for management in dealing with workplace problems. In addition, written policies help to: increase the chances that expectations will be met; reduce conflict; maintain consistency among managers over time; foster better employee relations, with fewer complaints to outside bodies; help defend against litigation; and serve as a tool for training new employees and managers. In addition, specialised policies such as those relating to health and safety, ultimately result in fewer accidents, lower costs for the employer and also help to prove due diligence in the event of a lawsuit.

The establishment of policies by management without employee involve-
ment, however, is not considered appropriate in today's climate. Indeed, many judges seem concerned that the general application of policies and the fact that each worker is not given a chance to accept or reject them, reflects an inequality of bargaining power, or other unfairness to employees. Consequently, a policy will not automatically form part of an individual's employment contract. There must be evidence that the policy was accepted as a term of the contract. The onus of proof usually is on the employer.

Some judges are particularly reluctant to enforce policies that can be unilaterally changed by the employer. They have ruled that changes made to existing policies are not necessarily binding on current employees. Because an employee continues to work does not mean that he or she accepts a policy. It is critical when hiring, therefore, to inform new employees about policies, and to communicate that these policies form part of the employment contract. It is equally important to involve current employees in policy modification and in new policy development.

There are some policies that are legally enforceable, however, with or without the prior involvement of current employees:
1. those that are objectively reasonable;
2. those that do not deviate too far from an employee's common law rights;
3. those that are inherently favourable to the employee;
4. those that are based in law (such as anti harassment policies).

Furthermore, it is important to realise the importance of consistent policy adherence. A manager's failure to follow company policy may also be held against him/her, to the employee's advantage.21

With the gathering trend toward litigation and the reliance on the courts to resolve employment issues, however, managers must be diligent in their protection of organisational interests.

"Employers can do many things to reduce their exposure to employment practices liability. First, they should gain an understanding of the complexities of laws that govern their business. Secondly, they should establish an operating structure that responds positively to all matters related to employment practices. Next they must review all company employment policies, procedures, and practices with an eye toward spotting and correcting points of weakness or non-compliance; they should correct any that need revision, and then follow all of them exactly as written. Employers should also apply all personnel and employment policies evenly and document the specific reasoning behind all personnel and employment decisions as a matter of routine...By documenting policy, educating their workforce, and acting as an example in support of the employment practices laws, employers greatly diminish their chances of being sued by disgruntled employees."22

Advantages of the New Employment Relationship

Both employees and employers have benefited from the evolution of employee and employer rights. These benefits have been different for each group, but there is a widespread perception that employees have benefited most from these changes.
Indeed, the advantages accrued to workers have been significant. At the heart of these changes is the evolution of worker rights, through the enactment of legislation, statutes and case law. These in turn have led to the development of employment policies which are favourable to the employee, recognising the worker as an individual with the right to employment in an environment free from safety hazards and discrimination, while permitting some degree of voice in the company’s operations. The result has been improved working conditions, more protection from abusive employers and increased empowerment.23

The advantages of the new employment climate are somewhat different for the employer, but no less significant. It has been found that managers who adopt more modern employment practices make fewer personnel mistakes, have higher employee morale, benefit from the excitement and "noise" created by the new atmosphere and enjoy better external reputations.24 Further advantages of adopting the new philosophy include the recognition that employee rights form part of an effective, accepted and responsible system of industrial governance; that acceptance improves labour/management relationships so that excessive and unpredictable litigation costs are avoided; that employee rights are essential for building high morale and maintaining high productivity; and that employee co-operation may be essential for implementing new management strategies in a more competitive environment.25

Implications for Practicing Managers

Given the evolution of employee rights and the stricter controls placed on management prerogatives, the exercise of managerial authority has had to be adapted to conform with the new standards. Furthermore, given the trend toward more employee complaints to regulatory bodies and the filing of lawsuits in the courts, managers must be ever mindful of their potential liability, both for themselves and on behalf of the organisations for whom they work.

Managers need to learn about laws that may protect subordinates if they protest or criticise their decisions. As well, they should not try to "manage" the reputation of a subordinate or extend their authority and power on ethical issues.26

A major priority for managers is the analysis and the development of employment policies that reflect the new employment climate. Senior management commitment and support for policy change is imperative for successful development and implementation. As well, managers should solicit input from both supervisors and employees, at least by involving existing resources like health and safety committees. An audit of current personnel practices should be conducted to refine policies and to replace those that are obsolete. To be effective, policies should contain a philosophical statement outlining the organisation’s commitment, policy objective, a list of appropriate duties, responsibilities or actions and where necessary, a statement concerning disciplinary measures for non-compliance.27

When establishing policies, there are a number of pitfalls to avoid. Exhibit I outlines some of the mistakes that can lead to accusations of illegality, unfair labour practices, or would not be accepted by the majority of employees.28
Exhibit I
Pitfalls in Policy Development

* Barring employees from sharing wage or other compensation information on the grounds of confidentiality, violates employee rights to share information in developing plans re: union organising,

* Helping employees avoid jury duty encourages shirking of civic duty; lying about personal circumstances to avoid jury duty is illegal,

* Withholding from employees' wages any money they might owe the company for uniforms, damage to equipment or other charges could be illegal; debt repayment should be by written agreement,

* Treating maternity leave differently from other types of disability leave leads to poor employee relations and is a violation of employment standards in many jurisdictions,

* Blanket prohibitions on solicitations on company operating time or premises and requiring advance management approval for distribution of any type of literature or signature drives restricts employee rights to organise, to petition and generally to discuss their common circumstances,

* Broad statements of disapproval on policy issues related to non-tolerance of sexual harassment or racial/ethnic slurs are not effective - policy should be specific and contain detailed guidelines,

* Broad policies on job appraisal, wage reviews and intent to be fair in compensation can be misinterpreted -- policy must be specific as to timing and standards.

Adapted from Ellman (1993), pp.51-2.
As previously suggested, because management has developed and implemented employment policies does not guarantee they will be enforced by the courts. Exhibit II contains a number of suggestions for ensuring that policies are enforceable. In general, they include wide dissemination, inclusion as part of the employment contract, signature requirements, clarity, and meticulous enforcement. Indeed, the ability to enforce policy can be critical to organisational survival. In one instance, for example, a software engineer left a company with a number of diskettes containing that firm's entire output over a two-year period. Management sued for return of intellectual property. The court ruled, however, that as the ex-employee had not been told of a policy prohibiting him from taking work from company premises, he had done nothing illegal. This ruling almost bankrupted the firm.

Paramount in moulding the employment relationship is building trust and co-operation between manager and employee. "No matter how many rules you put in place, how much oversight, in the end it boils down to the nature of the relationships you build. Recognising that business self-interest is always operative, it is still possible to form relationships built on a foundation of mutual respect...Trust is not built overnight. It is rather the result of consistent actions that convince people that you have a well-earned reputation for honesty, integrity, and loyalty". 
Exhibit II
Policy Enforcement

1. Communicate policies to employees. Distribute copies widely.

2. State that policies govern the employment relationship and are intended to have contractual force.

3. Incorporate policies into offers of employment, by stating in writing that policies form part of the terms and conditions of employment. Provide copies at this point.

4. Ask new employees to read and sign a statement indicating they understand and accept that the policies will form part of their terms and conditions of employment. This process should be completed before the first day of work, since contractual terms are set as soon as the employee starts working – any change imposed thereafter may not be binding.

5. Ask employees to sign similar statements when policies change. Employees should acknowledge and accept the changes, but can not be forced to sign.

6. Ensure that policies are clear. In court, ambiguous terms likely will be interpreted in the employee’s favour, or thrown out altogether.

7. Keep policies reasonable, do not stray too far from statutory and common-law rights and duties.

8. Consistently follow policies, even at times when enforcement is not in management’s immediate interest – shows that policies are binding.31

Adapted from Enforcement of Policies (1994), pp. 7, 8.
Endnotes


18. Ewing, p.22.

