Managing Human Resources

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NELSON EDUCATION

In this chapter we discuss employee rights, workplace privacy, and employee discipline. At a general level, the rights of employees are those described in the employment contract. However, that is a very incomplete description. First, many employment contracts are not written down, but are oral contracts, so the precise terms may not be obvious to the employee or the employer. Second, many important aspects of the employment relationship appear in the form of customs or practices, rather than as noted contract terms. Third, common law judges have long shaped the scope of the employment contract by "implying" contract terms. "Implied" contract terms may not be known to either party to the contract, but are nevertheless treated by the courts as enforceable contract terms. Fourth, employment contracts may be limited, altered, or voided by a range of employment legislation through which the government intervenes in the employment relationship. The true scope of employee rights and employer obligations is therefore influenced by all of these factors.

Furthermore, managers are discovering that the right to discipline and discharge employees—a traditional responsibility of management—is more difficult to exercise in light of the growing attention to employee rights. Disciplining employees is a difficult and unpleasant task for most managers and supervisors; many of them report that taking disciplinary action against an employee is the most stressful duty they perform. Balancing employee rights and employee discipline may not be easy, but it is a universal requirement and a critical aspect of good management.

Because the growth of employee rights issues has led to an increase in the number of lawsuits filed by employees, we include in this chapter a discussion of alternative dispute resolution as a way to foster organizational justice. Because disciplinary actions are subject to challenge and possible reversal through governmental agencies or the courts, management should make a positive effort to prevent the need for such action. When disciplinary action becomes impossible to avoid, however, that action should be taken in accordance with carefully developed HR policies and practices. Because ethics is an important element of organizational justice, the chapter concludes with a discussion of organizational ethics in employee relations.

THE THREE REGIMES OF EMPLOYMENT LAW

[OUTCOME 1]

At the outset of our discussion in this chapter, it is important to understand the different sources of employee rights in the law of employment. There are three different legal regimes that govern the employment relationship: (1) the common law; (2) statutory regulation; and (3) collective bargaining and arbitration law. This chapter deals primarily with the first two, whereas Chapter 14 considers the third regime in greater detail. However, we will consider all three in this chapter, particularly in regards to how they govern the rules of employee discipline and dismissal.

THE COMMON LAW OF EMPLOYMENT

The rights and obligations of employers and employees are determined firstly by the terms of the employment contract. However, often there is no written contract, or the terms of the contract are vague or fail to address a particular situation at all. As such, it is common for disagreements to arise under employment contracts. Whenever a dispute arises about the meaning and application of an employment contract, either party to the contract may file a lawsuit in the courts and ask a judge (and sometimes a jury) to decide what the contract means or how it was intended to apply in a particular circumstance. The judges' decisions are recorded in law books, and more recently, in electronic legal databases, and considered in future disputes involving similar issues. Over time, a huge body of "case law" has been compiled that considers the meaning and application of employment contracts to an endless

array of employment scenarios. This body of law is known as the **common law of employment.**

It is crucial for HR managers to understand how the common law of employment influences the terms and conditions of employment and the interpretation of employment contracts. Common law judges have developed a long list of **implied contract terms** that are incorporated into all employment contracts, unless there is a written term in the contract that overrides the implied term. For example, probably the most well-known implied term is the requirement for both the employer and the employee to give reasonable notice that they are terminating the employment contract. If the written contract includes a clause specifying how much notice of termination is required, then the implied term requiring reasonable notice will not apply (providing the contractual notice clause complies with the notice provisions in employment standards legislation).

Important terms courts have implied into employment contracts include

- Obligation of the employer and the employee to provide reasonable notice that they are terminating the contract
- Obligation on the employer to maintain a safe workplace
- Obligation on the employer to treat employees with decency, civility, respect, and dignity
- Obligation on the employee to serve the employer with loyalty and fidelity
- Obligation on the employee to perform competently
- Obligation on the employee to advance the employer's economic interests
- Obligation on the employee to avoid insubordination and insolence

Breach of an implied term has the same effect as breach of a written term. Therefore, it is crucial that HR managers are familiar with the scope of implied terms applied by the courts to employment contracts.

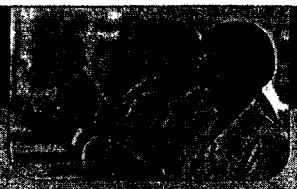
common law of employment
The body of case law in which courts interpret employment contracts, and the legal principles taken from those cases that guide the interpretation of employment contracts

implied contract terms
Terms judges read into employment contracts when the written contract does not expressly deal with the matter

STATUTORY EMPLOYMENT REGULATION

Unhappy with the outcomes of the common law model of employment, governments in Canada have over the past century intervened by passing a large variety of legislation aimed at influencing the employment relationship. As we saw in Chapter 3, employment equity legislation is intended to address systemic discrimination against women, Aboriginal people, people with disabilities, and visible minorities. Human rights legislation prohibits discrimination in employment on certain designated grounds, including sex, age, religion, and skin colour. Pay equity legislation addresses inequities in how men and women are compensated; employment standards legislation regulates the content of employment contracts by imposing minimum contract standards, such as minimum wage, maximum hours of work, and overtime pay; occupational health and safety legislation attempts to ensure safe working conditions; labour relations laws give employees the right to form and belong to unions, and to bargain for better working conditions, and restricts the right of employers to dismiss or discipline employees for exercising rights protected by the legislation (see Chapter 14). And this is only a sampling of the wide range of legislation in Canada that addresses aspects of the employment relationship.

Statutory regulation operates alongside the common law, co-existing with it, but also often modifying it. Usually, it is not permissible to contract out of protective employment legislation, with the result that regulation acts as a default minimum amount of protection required. For example, while the common law includes an implied obligation on the parties to provide reasonable notice of termination of the contract, employment standards regulation also imposes an obligation on employers to provide notice of termination. The employment standards' notice requirement is considered a "minimum" that must be provided to an employee, and a contract term providing less notice will be unenforceable (see Highlights in HRM 13.1).



Highlights in HRM 13.1

Take Notice!

What happens if the employment contract includes a notice of termination clause that provides for less notice than required by employment standards legislation? That was the issue in a case called *Machtinger v. HOJ Industries Ltd.* In this case, the contract included a written term permitting the employer to terminate the contract without notice. At the time of dismissal, the employee was entitled to four weeks' notice under the Ontario *Employment Standards Act*. The issue before the Supreme Court of Canada was what happens when a contractual notice of termination clause provides for less notice than the minimum notice required by employment standards legislation? The employer argued that the statutory minimum notice should be applied, while the employee argued that reasonable notice should be applied.

The Supreme Court ruled that reasonable notice applies since the effect of including the illegal notice clause in the contract was to void the contract term altogether. If the contract notice term is void, then it is as if there was not notice term at all, in which case, the implied term requiring reasonable notice is read into the contract. As a result, rather than receiving the four weeks statutory notice he was entitled to, the employee was awarded reasonable notice amounting to 24 months.

Source: *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

Thus, an employee may be entitled to 12 months notice of termination according to the implied contractual requirement to pay reasonable notice, but entitled to only 8 weeks' notice under employment standards legislation. An employer may opt to provide only the minimum notice under the legislation. While legally the employee is contractually entitled to the larger reasonable notice, in practice, recovering it would require the employee to file a lawsuit (known as a "wrongful dismissal" case), which is expensive and time consuming. As a result, many employees simply accept the statutory minimum notice and do not pursue their common law entitlement to reasonable notice.

COLLECTIVE BARGAINING LEGISLATION AND LABOUR ARBITRATION

Collective bargaining legislation, such as the Ontario *Labour Relations Act,* seeks to improve conditions of work by empowering workers to join together and bargain a better contract for themselves than is usually possible when an individual employee bargains with his or her employer. It does this by facilitating a right of workers to organize into unions and bargain collectively with the employer with the aid of a professional union bargainer, and by permitting workers to strike and employers to "lock out" the employees in limited circumstances in order to apply pressure to reach an agreement. This process is discussed further in Chapter 14.

collective agreement
An employment contract between an employer and a union that sets out the terms of employment of a group of the employer's employees represented by the union

For now, it is important to note some crucial differences between the rules that govern unionized and nonunionized workplaces in Canada. The contract that is bargained in a unionized workplace is known as a **collective agreement**. The common law of employment does not apply to a collective agreement. Therefore, for example, the implied term permitting an employer to terminate an employee by giving reasonable notice does not apply when the employees are unionized. This is an important difference between unionized and nonunionized workplaces. Whereas a nonunion employer can terminate an employee for any reason, or no reason at

all (subject to statutes that prevent discriminatory dismissals) by simply giving the proper notice, a unionized employer usually needs just cause to dismiss a worker, unless the dismissal is due to purely economic reasons (a permanent layoff). In other words, unlike a nonunion employer, a unionized employer usually needs a valid reason to fire an employee.

Another important difference between a collective agreement and an individual employment contract is the method of enforcement. A nonunion employee must sue the employer in a court for breach of the employment contract. That process is often costly (since the employee will usually retain a lawyer) and very time consuming. A unionized employee, on the other hand, must file a grievance alleging that the collective agreement has been violated, and that grievance, if not settled or resolved, may be referred to a **labour arbitrator** instead of a court. Arbitration is much quicker than a lawsuit, and the costs are covered by the union as part of the benefit paid for by employees in the form of union dues. Labour arbitrators have built up their own form of common law, known as "arbitration law," which helps guide the interpretation and application of collective agreements. While, on some issues, arbitration law may be the same or similar to the approach of common law judges interpreting individual employment contracts, the two bodies of law should not be confused.

labour arbitrator
A person assigned to interpret and decide disputes ("grievances") about the meaning, interpretation, and application of a collective agreement governing employees in a unionized workplace

UNDERSTANDING THE INDIVIDUAL EMPLOYMENT CONTRACT

[OUTCOME 2]

Since the individual employment contract is a type of contract, the general rules of contract law developed in the common law apply. One important rule of contract law is that a valid contract requires "mutual consideration." This means that both parties to the contract must receive some benefit in the exchange. This has important implications for HR managers. For example, it means that once an employee has commenced employment, the employer cannot unilaterally change or introduce new terms of employment, unless the employee agrees to the change and receives some new benefit in exchange. Employers frequently run into this problem when they permit an employee to start working before presenting the employment contract to the employee for his or her signature. When that happens, the employee has started work under a verbal contract. If the employer later presents a written contract that includes terms beneficial to the employer (such as a notice of termination clause that provides less than reasonable notice), those new terms will not be enforceable, even if the employee signs the contract, if the employee was not also given some new benefit (such as a raise, a new holiday, etc.) in exchange for signing the contract.

[OUTCOME 3]

The fact that the rules of contract law apply to the employment relationship has other important implications. For example, it means that the employee can insist that the employer comply with the terms of the contract. This might seem obvious, yet many HR managers mistakenly believe that the employer has the right to unilaterally make changes to the conditions of employment. If an employer unilaterally changes a term of the employment contract, it will usually have breached the contract, enabling the employee to sue for breach and, if they so choose, to claim that he or she has been constructively dismissed.

A **constructive dismissal** occurs when an employer commits a significant or fundamental breach of the contract, such as by eliminating a important benefit enjoyed by the employee, reducing compensation, or demoting an employee. In that case, the employee may treat the contract as having been terminated by the employer, quit, and sue the employer to recover either contractual notice or implied reasonable notice. This highlights the need for HR managers to be careful when attempting to make a change to employees' terms and conditions of employment.

constructive dismissal
When an employer commits a fundamental breach of the contract, such as by unilaterally changing a key term of the contract, the employee can treat the breach as a termination

The Business CASE

The Danger of Changing a Contract Term Without the Employee's Agreement

What if the employee just will not agree to a contract amendment that the employer wants? In *Wronko v. Western Inventory Service*, the employer wanted to change a term in the employment contract that required the employer to pay two years' salary to the employee in the event the employee was terminated. The employer asked Mr. Wronko to sign a revised contract that reduced the payment required from two years to 30 weeks. Wronko refused to sign and indicated he did not agree to the change. The employer then gave Wronko two years' notice that it was amending the term accordingly. After two years, the employer again gave Wronko a revised contract and told him that this new contract was now "in effect," and that if Wronko did not sign the new contract, then the company did "not have a job for [him]."

Wronko quit and sued the employer for wrongful dismissal, alleging he was entitled to two years' salary as per the original contract. The employer argued that it was permitted to give notice of the change to a term in the contract, which it had done. The Ontario Court of Appeal disagreed. It ruled that when faced with an employee who will not agree to a proposed change to the employment contract, an employer must either withdraw the proposed amendment or terminate the entire contract by giving the required notice, and then offer the employee a new contract including the revised terms. The employer here had not given notice that it was terminating the contract; it had given only notice of its intention to make a unilateral change to one term of the contract. Therefore, the court ruled that the employee was entitled to two years' salary (minus money earned by the employee during that period). The employer should seek to make the amendment palatable to the employee by offering some benefit to the employee in exchange for the benefit it seeks to obtain from the amendment. This could avoid the costs associated with having to terminate the contract in its entirety.

To make a change to the terms of an employment contract without breaching the contract, the employer should do either of the following:

1. Obtain the employee's agreement to the change and provide the employee with some new consideration (benefit); or
2. Terminate the employment contract in its entirety by giving the required notice of termination, and then offer a new contract on the revised terms. See the Business Case, above.

HR managers need to understand the terms of the employment contracts in order to appreciate the scope of their managerial authority. For example, does an employer have a contractual right to suspend an employee without pay as a form of progressive discipline or to put an employee on temporary layoff during an economic downturn? In both cases, the employer is essentially preventing the employee from performing his or her end of the bargain. That would be a breach of the contract, unless the employer can point to a contract term that empowers it to suspend or layoff. Most contracts do not confer these rights on employers, with the result that suspensions and layoffs are usually contract breaches, and the employees affected could opt to quit and sue for constructive dismissal.

Using the Internet

The Canadian Employment Lawyers Network provides a list of sites focusing on Canadian employment law and rights at

http://www.celn.org

THE RULES GOVERNING DISMISSAL

DISMISSAL OF A NONUNION EMPLOYEE: WRONGFUL DISMISSAL

Under the common law of employment, either the employer or the employee can terminate the employment contract by providing the other side with the amount of notice specified in the contract, or if the contract does not include a notice term or

includes a term requiring less notice than required by employment standards legislation, with reasonable notice. What amount of notice is "reasonable" is determined by the court, applying a variety of criteria judges have developed over the years, including the employee's age and the availability of alternative similar employment given the employee's experience and training. However, the two most important factors in assessing notice are (1) length of service with the employer and (2) the nature of the job performed by the employee. Generally, the longer an employee has worked for an employer, the longer the period of notice. In addition, the courts have developed a form of cap on the length of reasonable notice that is tied to the job performed by the employee: nonmanagerial employees are usually not entitled to more than 12 months' notice, whereas managerial employees may be entitled as much as 24 months' notice.[1]

Notably, a nonunion employer does not need a reason to dismiss an employee. It can dismiss an employee at any time, for any reason (that is not a violation of a statute, such as human rights legislation), or for no reason at all. It just needs to give the employee the proper contractual or reasonable notice. Most dismissals in Canada are done by means of the employer providing the employee with notice, which can be working notice or a payment of wages equal to what the employee would have received for working during the notice period.

However, an employer may also dismiss a nonunion employee without any notice, if the employee has committed a serious breach of the contact, such as engaging in significant dishonesty, gross incompetence, sexual harassment, or workplace bullying or violence. When a nonunion employer dismisses an employee for cause, without notice, it is called a **summary dismissal**.

summary dismissal
When a nonunion employer terminates an employee without notice because the employee has committed a serious breach of the contract

One comprehensive study of summary dismissal cases found that employers won 40 percent of the time when the charge was dishonesty, theft, substance abuse, or abusive behaviour; 54 percent of the time when the charge was insubordination; 65 percent of the time when the charge was conflict of interest or competing with the employer; and just 25 percent of the time when the charge was poor performance.[2]

Whenever an employee believes he or she should have received more notice than that provided, the employee may file a **wrongful dismissal** lawsuit. This is a claim filed in court alleging that the employer breached the employment contract by failing to provide the required notice of termination. Although in a case of summary dismissal the court will have to decide whether the employer had cause sufficient to warrant the employee forfeiting his or her entitlement to notice, it is important to note that the court will not question whether the employer had a legal right to dismiss the employee. The issue in a wrongful dismissal case is whether notice should have been given and, if so, how much. It is not whether the employer had just cause to dismiss the employee, which is the issue usually at stake in a unionized arbitration case. Therefore, the remedy in a successful wrongful dismissal case is usually money; courts do not overturn the decision to dismiss, and they virtually never order the employer to reinstate the employee.

wrongful dismissal
A lawsuit filed in a court by an employee alleging that he or she was dismissed without proper contractual or reasonable notice

Statutory Regulation of Dismissal

The common law entitlement of employers to dismiss a nonunion employee for any reason by giving proper notice has been restricted in a number of ways by government intervention. Statutes prohibit employers from dismissing employees for certain reasons. For example, human rights legislation prohibits dismissals based on discriminatory reasons. Labour relations legislation prohibits an employer from dismissing an employee involved in organizing a union. Many types of employment statutes prohibit dismissals and punishment as a reprisal against employees who exercise their **statutory rights**. For example, employment standards and occupational health and safety statutes usually prohibit employers from punishing employees in any way as a reprisal for the employee making claims under the statute. The tribunals responsible for enforcing the statutes usually have the authority to

statutory rights
Legal entitlements that derive from government legislation

order the employer to reinstate the employee, with full back pay and benefits, if they find that the reason for the dismissal was prohibited by the statute.

As noted earlier, employment standards legislation in Canada imposes a minimum amount of notice of termination required. For example, in Ontario, the amount of notice required in the *Employment Standards Act* is linked directly to years of service; one week's notice per year of service to a maximum of 8 weeks, but that amount goes up in the case of mass layoffs, to as much as 18 weeks' when 500 or more employees are terminated. In addition, the legislation imposes a separate obligation to pay "severance pay" when the employer has an annual payroll of $2.5 million or more or when 50 or more employees are being terminated in a 6-month period due to the closure of all or part of a business. Severance pay is one week's pay per year of service to a maximum of 26 weeks. Other provinces have similar requirements with variations. HR managers should be knowledgeable about the statutory provisions that govern the employment contract and dismissals in order to avoid costly and potentially embarrassing complaints by employees.

DISMISSAL OF A UNIONIZED EMPLOYEE: JUST CAUSE

Most collective agreements in unionized workplaces confer a right on employers to lay off workers, although they regulate the selection of the employees to be laid off, and the order of recalls. Therefore, a unionized employer usually has the option of laying off workers for economic reasons. In addition, collective agreements usually include a "management rights" clause that grants employers the right to impose discipline short of dismissal, such as unpaid suspensions. As we noted previously, since most individual employment contracts do not include expressed management rights to impose temporary layoffs or unpaid suspensions, these actions are usually considered breaches of the individual employment contract amounting to a constructive dismissal.

However, while unionized employers may have these additional managerial rights, they are also significantly more restrained than nonunion employers in other ways. Most notably, in stark contrast with most individual employment contracts, collective agreements usually include a term requiring that the employer have just cause to impose discipline or dismiss an employee. As a result, unlike a nonunion employer, a unionized employer usually needs a reason to dismiss an employee. That reason can then be challenged by the employee and the union through the grievance procedure in the collective agreement, rather than in the courts. The implied common law right of employers to dismiss employees for any reason by giving them reasonable notice does not apply to unionized employees. Moreover, a labour arbitrator has the statutory power to substitute a lesser penalty than the one imposed by the employer. That means that labour arbitrators can (and often do) reinstate employees when they rule that the employer did not have just cause to dismiss the employee.

As a result, it is particularly crucial in a unionized setting that HR managers keep careful records of employee misconduct. Labour arbitrators expect employers to apply progressive discipline before dismissing a unionized employee, except when the employee's misconduct is particularly serious. It is very common for arbitrators to reinstate dismissed unionized employees and to substitute an unpaid suspension of some duration. In considering the appropriate penalty for employee misconduct, arbitrators consider the entirety of the situation looking for "mitigating" factors, which include the employee's length of service and past disciplinary record, the manner in which the employer treated other similar incidents involving other employees, and even the employee's personal circumstances, such as the impact the dismissal would have the employee and his or her dependants.

We can see, therefore, that nonunion employers face similar challenges to unionized employers when they attempt to summarily dismiss an employee without providing notice. The nonunion employer must convince a court that the employee's

FIGURE **13.1**

Tips to Consider When Dismissing a Nonunion Employee with Cause or a Unionized Employee with Just Cause

- *Terminate an employee for cause only if there is a clear and articulated reason.* An employer should have clearly articulated, easily understandable reasons for discharging an employee. The reasons should be stated as objectively as possible and should reflect company rules, policies, and practices.
- *Set and follow termination rules and schedules.* Ensure every termination follows a documented set of procedures. Procedures can be from an employee handbook, a supervisory manual, or even an intra-office memorandum. Before terminating, give employees notices of unsatisfactory performance and improvement opportunities through a system of warnings and suspensions.
- *Nonunion employers should consider bargaining a contractual right to suspend an employee.* The right to suspend an employee without pay is a key component of progressive discipline in unionized workplaces, but that right rarely appears in nonunion employment contracts. Nonunion employers could include greater disciplinary rights in the contract language to give it more disciplinary options.
- *Document all performance problems.* A lack of documented problems in an employee's personnel record may be used as circumstantial evidence of pretextual discharge if the employee is "suddenly" discharged.
- *Be consistent with employees in similar situations.* Document reasons given for all disciplinary actions, even if they do not lead to termination. Terminated employees may claim that exception-to-the-rule cases are discriminatory. Detailed documentation will help employers explain why these "exceptions" did not warrant termination.

misconduct was sufficiently serious to warrant forfeiting notice of termination. A unionized employer needs to convince a labour arbitrator that it had just cause to dismiss the employee. In meeting these tests, employers face common challenges; similar advice can therefore be applied to both unionized and nonunion employers in regards to properly preparing for and implementing discipline, as outlined in Figure 13.1. (Figure 13.2 describes this process from the employee's perspective.) However, it is important to recall that the nonunion employer always has the option of dismissing the employee with notice (not asserting cause), which is an option not available to a unionized employer.

Using the Internet

A large number of arbitration and labour law–related tribunal decisions can be found at the website of the Canadian Labour Law Project:

http://www.canlii.org/en/blog/index.php?/archives/23-CanLII-Labour-Law-Project.htm

EMPLOYEE PRIVACY RIGHTS

[OUTCOME]

There are many instances in which the interests of employees can come into conflict with those of the employer. An important example relates to employee privacy rights at work and outside the workplace. To what extent should employees be entitled to privacy in their relationship with the employer?

PRIVACY ISSUES AT THE WORKPLACE

Employers have a legitimate interest in ensuring their employees work efficiently and avoid improper conduct at work, such as theft, harassment, or misuse of company computers. Surveillance of the workplace is a common method for managing these challenges. However, employer surveillance can also have the feel of "Big Brother" to employees, who may feel entitled to some measure of privacy at work. Balancing managerial rights and employee expectations about their entitlement to privacy can be a difficult job for HR managers.

A right of privacy at work has been recognized in various degrees under all three regimes of employment law. The strongest protections of employee rights are probably those recognized by labour arbitrators interpreting collective agreements.

FIGURE **13.2**

Firing Back!

Once you have received either verbal or written warnings about performance, a decision has usually been made to fire you. What can you do? If you are a unionized employee, you can file a grievance challenging the discipline. But a nonunion employee will not usually have that option. Writing back to pick holes in the accusations is the least effective defense. Using the same weapons as management, you must prove that the just cause will not hold.

Howard Levitt, a legal expert on dismissal, offers the following advice:

- Establish in writing that you were unaware of the standards of performance or conduct. You can argue that the standards are new or were not part of the initial job offer, position description, performance evaluations, or previous warnings. The company must prove that you were grossly incompetent, so any letters of praise or good performance review should be used. Any aspects of performance that may override the weak areas should be noted. For example, if you are being dismissed for poor communication skills but your productivity figures are increasing, this should be documented. As soon as you commence employment, start a file containing all performance evaluations; letters of praise from customers, coworkers, internal clients, and supervisors; and all other examples of performance achievements. Establish a paper trail of good performance.
- Argue that the company, while complaining about poor performance, has not stated specifically what is required to improve performance.
- Assert that you were not given the time, training, assistance, or learning opportunities necessary to improve performance.
- Establish, if true, that the employer hired you knowing that you did not possess the necessary skills. Note any understanding that you would receive the appropriate training.
- State, if applicable, that the skills desired now were not part of your original job description.
- Attribute your poor performance to factors outside your control, such as a decline in sales in all regions, or poorly priced products, or a temporary illness. If possible, establish that the company contributed to the performance problem by failing to respond to your (documented) suggestions for improvement.

Levitt further advises that letters and all other documentation be written with the assistance of a specialist. In the end, a nonunion employee will not get his or her job back if dismissed for performance problems, but if successful, they may receive an attractive severance package.

Source: Howard Levitt, Counsel, Lang Michener, Toronto, "How Employees Can Fight Firing for Just Cause," *Toronto Star,* August 17, 1992, C1. Reprinted by permission of the author.

Highlight in **HRM 13.2**

Overview of Regimes Governing Dismissals

HR managers are usually responsible for implementing dismissals of employees. This is a stressful part of the profession. However, it helps significantly to understand the basic legal rules governing the process. Here is a quick summary of the key issues and regimes discussed in this chapter.

Common Law (Nonunion Employees)

The common law rules of contract govern the employment relationship between individual employees and nonunion employers. Every contract includes a notice of termination clause. The clause is either expressed (written) into the contract, or the courts imply a requirement for both parties to provide reasonable notice of termination. The courts decide how much notice is "reasonable" by applying a list of criteria. An expressed notice term supercedes the implied "reasonable notice" requirement, but courts will not enforce an expressed term if requires less notice than required under employment standards legislation. A nonunion employer does

continued

not need a reason to dismiss an employee, provided it gives proper notice. Summary dismissal—dismissal without notice—is permitted only when the employee has committed a serious breach of the contract. Disputes about contracts in nonunion workplaces are resolved in courts after one of the parties files a lawsuit for breach of contract. The usual remedy is lost wages and benefits during the notice period that should have been given (not reinstatement).

Statutory Regulation (Union and Nonunion Employees)

Employment standards regulation explains the minimal notice of termination required, which usually applies only to the employer. The length of notice in employment standards regulation is often less than the common law reasonable notice. Employment standards regulations also often require "severance" pay in addition to notice, when the employer is large or there has been a mass termination. Various pieces of legislation prohibit dismissals for certain public policy reasons, such as for discriminatory reasons or as retaliation for the employee exercising statutory rights. Claims alleging a violation of a statute are decided by administrative tribunals, not courts, and the remedy can include lost wages and benefits and also reinstatement.

Collective Bargaining and Labour Arbitration

Unionized employees enjoy greater protection from dismissals. They are governed by the rules of collective agreements, not contract law; the common law does not apply to collective agreements. A unionized employer can usually lay off or dismiss an employee for economic reasons by giving at least the statutory minimum notice or a longer period in the collective agreement. But collective agreements usually require the employer to have just cause in all other situations, so that a unionized employer must have a reason to dismiss someone. A dismissed unionized employee challenging the employer's decision must filing a grievance that may be litigated before a labour arbitrator (not a court). An arbitrator has power to overturn the employer's decision and impose a lesser penalty (such as suspension) or reinstate the employee.

Arbitration law usually requires employers to establish both that there is a pressing need for surveillance and that the surveillance is conducted in a reasonable manner that balances the employee's interest in a reasonable amount of privacy with the employer's business concerns. In applying this balancing test, arbitrators have sometimes prohibited surveillance cameras; personal searches of people, bags, and clothing; and employer searches of employee e-mails and Internet usage. However, when the employer can show a strong reason justifying the surveillance, and that there was no other reasonable, less intrusive means of obtaining the information, arbitrators have tended to permit surveillance.[3]

Governments have sometimes passed legislation to protect employee privacy rights. For example, the British Columbia *Personal Information Protection Act* applies to the private sector in British Columbia and requires a similar balancing of employer and employee interests in assessing whether an employer can conduct surveillance on employees. An important recent piece of legislation is the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA), which, among other things, regulates an employer's collection and dissemination of information about employees, as well as the right of employees to access their personnel files in some circumstances. It applies to federally regulated workplaces, but also to some "commercial activities" engaged in by provincially regulated companies. (commercial activities include the selling of information, such as employee lists or information about employees.)

Organizations covered by PIPEDA must obtain an individual's consent when they collect, use, or disclose the individual's personal information. The individual has a right to access personal information held by an organization and to challenge its accuracy, if necessary. Any organization that collects personal information can use that information only for the purpose for which it was collected. If an organization wants to use it for another purpose, it must obtain the individual's consent

Using the Internet

For further information on PIPEDA, see the federal Privacy Commissions Guide for Businesses and Organizations at

http://www.priv.gc.ca/leg_c/leg_c_p_e.cfm#contenttop

The Tyranny of Work

ALIENATION AND THE LABOUR PROCESS

Second Edition

James W. Rinehart
University of Western Ontario
with the assistance of Seymour Faber

Harcourt Brace Jovanovich, Canada
Toronto Orlando San Diego London Sydney

subordination in an age of commercial capital and nascent industrialism, paternalism grew out of the necessity to justify exploitation and mediate inherently irreconcilable interests."[16] Because employer-employee relations were relatively personal and non-contractual, employees were not hired, evaluated, and dismissed in accordance with strict criteria of cost. Under such circumstances, the nature of work and the conditions under which it was performed probably varied widely.

The main argument of the above discussion is this: The undeveloped state of the division of labour, the virtual absence of advanced markets in commodities and labour, and the relatively widespread ownership of the means of production meant that a greater proportion of people in pre-industrial Canada exercised control over the means and ends of production than is the case in modern society. The way people worked and the way they defined work were quite different from what now prevails. The consequence of this set of circumstances was that there was less alienation from work than there is in Canadian society today.[17]

THE SETTING AT MID-CENTURY

After 1840 the self-contained rural economy was gradually transformed into a more sophisticated system of production and exchange. By mid-century the basis for the emergence of industrial capitalism had been laid by the construction of railways and canals. These transportation arteries stimulated the growth of cities and linked the scattered rural villages, integrating them into a national market.

By 1850 there were over 3000 manufactories in Upper Canada, and in the next two decades the number of skilled tradesmen—carpenters, bricklayers, coopers, iron-founders,

16. Bryan D. Palmer, *Working Class Experience: The Rise and Reconstitution of Canadian Labour, 1800-1980*, Toronto: Butterworth, 1983, p. 14.
17. To say that alienated labour in early Canada was less prevalent than today is not to idealize that era. On the contrary, we have pointed out that many persons were engaged in a grim struggle for subsistence. However, it should be remembered that alienation refers to the way work is controlled and organized. It does not deal, except indirectly and in relative terms, with standards of living.

and tailors—grew rapidly throughout the country. The economic crisis of the late 1850s eroded the dominant position of merchant capitalists and simultaneously hastened the decline of small-scale craft producers, who often depended on merchants' credit.[18] At the same time a new trend was emerging: steam-powered shops increased twofold, and mechanization was introduced into the iron, wool, and wood industries. That the new society was growing up in the midst of the old one was clear in a city like Hamilton where small stores, offices, artisan shops, and manufactories were still very much in evidence. In such enterprises relationships between employers and employees were often personal, and their duties and functions did not differ greatly. Production was still largely shaped by direct orders from customers.[19] Appearing alongside these pre-industrial institutions were larger, more capital-intensive enterprises. "Before the end of the fifties, Hamilton, besides its locomotives and railroad cars and foundry products, was turning out ready-made clothing, tobacco products, and sewing machines. The expansion was geared to investment in labour-saving machinery, involving growth of the cities at the expense of village handicraft."[20] Between 1851 and 1871, the number of machinists in Hamilton increased by 800 percent. During this same period the percentage of the city's labour force working in firms employing ten or more persons rose from 24% to 83%.[21]

But overall, the process of change was slow and uneven. At the time of Confederation, Canada remained a basically rural nation (50 percent of the labour force was engaged in agricul-

18. Bryan D. Palmer, *A Culture in Conflict: Skilled Workers and Industrial Capitalism in Hamilton, Ontario, 1860-1914*, Montreal: McGill-Queen's University Press, 1979.
19. *Cf.* Michael Katz, "The People of a Canadian City: 1851-2," *Canadian Historical Review*, 53, 1972, pp. 402-426.
20. H.C. Pentland, "The Development of a Capitalistic Labour Market in Canada," *Canadian Journal of Economics and Political Science*, 25, 1959, p. 469. The same uneven development in Toronto has been described by Gregory S. Kealey in *Toronto Workers Respond to Industrial Capitalism, 1867-1892*, Toronto: University of Toronto Press, 1980.
21. Palmer, *op. cit.*, pp. 16, 17.

tural pursuits).[22] The future shape of the Canadian economy was most clearly visible in the presence of factories located in metropolises like Hamilton and Toronto, and particularly Montreal, which, by the 1870s, accounted for approximately three-quarters of all production in the nation.[23] A set of forces were actively at work in these urban centres rendering craft skills redundant by the substitution of factories for the craftsman's shop and the small manufactory. We can regard the decades of the fifties and sixties, then, as the prelude to the industrial revolution in Canada. And while the take-off point for industrialization had not yet arrived, this period was important, for during it the village economy was slowly being eroded. Ryerson emphasizes the significance of the gradual dissolution of the local economy:

> *The "division of labour" between owner and non-owner, between industrialist and factory hand, became possible only with the break-up of the old, self-sufficient, "natural economy" and with the spread of trade, the universalizing of commodity production to embrace labour power itself as a marketable item.*[24]

THE EMERGENCE OF INDUSTRIAL CAPITALISM

Although the date is an arbitrary one, 1870 can be considered as the year when large scale production first began to dominate productive activity in Canada. Between 1870 and 1890, stimulated by a protective tariff, investment in machines increased,

22. Agricultural production was also being transformed under the impact of enlarged markets. Pentland argues that farmers did not turn potential surpluses into real surpluses until there was someone to purchase them. He maintains that "with the solution to the market problem in the forties and fifties the farmer became fully capitalistic and acquisitive. Increasing emphasis fell on improvement and mechanization, hard work and the dignity of labour, thrift and temperance." See *op. cit.*, p. 462. These passages not only illustrate the extension of market forces to agriculture, they also support our earlier claim that prior to around 1840 Upper Canadian farmers, despite having been exposed to the capitalistic tenets of the Protestant ethic, did not regulate production in accordance with purely market objectives.
23. Palmer, *Working Class Experience, op. cit.*, p. 63.
24. Ryerson, *op. cit.* p. 36.

and more and larger factories emerged. In 1870 there were about 38 000 manufacturing units in Canada. By 1890 the figure had swollen to 70 000. And during these two decades the number of firms with a capital of $50 000 or more nearly doubled. Manufacturing output increased rapidly, especially in agricultural equipment, furniture, foundry products, tobacco, wood products, and textiles.[25] While the major cities of Ontario and Quebec were the locus of this growth, the Maritime provinces also enjoyed substantial industrial development.[26]

The Factory System

Canadian industry arose in a competitive, market-oriented context under the aegis of capitalist ownership. Since the driving force of a capitalist economic system is the necessity to generate profits and accumulate capital, workers are treated as "costs" and it is to the competitive advantage of employers to keep costs at a minimum. Employers also seek to exercise maximum control over workers, for when workers regulate the labour process their activities reflect their own interests and inclinations, not those of employers. Before the factory system came to dominate production, Canadian skilled workers customarily regulated modes of wage payment, the methods, pace, scheduling, and allocation of work, and the recruitment and training of workers. Employers regarded these craft regulations as inimical to their drive for profits and sought to transfer power from the shop floor to the front office. To cheapen and subordinate labour, employers specialized and rationalized the work process, installing machines that replaced workers and reduced the need for skilled labour, and constructing a hierarchy of authority ranging from top executives to supervisors. These measures were used in varying degrees in all spheres of production, but the organization that epitomized the new order was the factory.

A factory is a large scale production unit that uses machinery and a central source of power, such as steam or electricity.

25. Michael Cross and Gregory Kealey, eds., *Canada's Age of Industry 1849–1896*, Toronto: McClelland and Stewart, 1982, p. 11.
26. T.W. Acheson, "The National Policy and the Industrialization of the Maritimes," in Cross and Kealey, *ibid.*, pp. 62–94.

Power-driven machinery offered multiple advantages to the capitalist. It reduced the production time per unit as well as the "value" of commodities. Machines with fixed motion paths or those whose speed could be regulated by management, intensified the pace of work and eroded workers' capacity to govern the labour process. In contrast to handicraft technology, machines generally required less skilled, more easily replaceable, and hence cheaper workers. As a result, the number of unskilled and semiskilled workers—including women and children—grew rapidly. In fact, capitalist employers often preferred to hire women because they were viewed as docile, quick, sober, and above all, cheap.[27] An early twentieth century article in *Canadian Machinery* extolled the virtues of the machine, which

> *can work the whole twenty-four hours without stopping, knows no distinctions between Sundays, holidays and any ordinary day, requires as its only lubricant a little oil, being in fact abstinent in all other matters, has no near relatives dying at awkward moments, has no athletic propensities, belongs to no labour organization, knows nothing about limitation of output, never thinks of wasting its owner's time in conversation with its fellow machines. Wars, rumours of war and baseball scores, have no interest for it and its only ambition in life is to do the best possible work in the greatest possible quantity.*[28]

While employers were keenly aware of these benefits, skill degradation via mechanization was a lengthy and uneven process. Some machines generated a demand for skilled workers, and some traditional crafts managed to escape the degrading impact of the new technology. For example, the successes of technological innovation in the metal-working industry enabled Canadian iron moulders to retain a considerable degree of control over the work process and conditions of employment

27. Susan Trofimenkoff, "One Hundred and Two Muffled Voices: Canada's Industrial Women in the 1880's," in Cross and Kealey, *op. cit.*, pp. 212–229.
28. Cited in Craig Heron, "The Crisis of the Craftsman: Hamilton's Metal Workers in the Early Twentieth Century," *Labour/Le Travailleur*, 6, Autumn, 1980, p. 23.

until the 1920s. Printers also held on to craft prerogatives despite the introduction of the linotype machine, because their organizational strength compelled employers to use skilled workers to operate the new equipment. But the experience of coopers was more common: their inability to regulate the introduction of machine tenders led to the virtual extinction of the coopers' craft by the 1880s.[29]

While we correctly associate the factory with machines and a central source of power, another of its prominent features involves techniques of human co-ordination, supervision, and discipline used by employers to shape the work process to their own ends.[30] A nineteenth century chronicler of the factory system in England, Andrew Ure, recognized this fact, attributing the success of the factory to human rather than technical factors. Writing of Richard Arkwright, who was recognized as the first successful English industrialist, Ure says:

> *The main difficulty (faced by Arkwright) did not, to my apprehension, lie so much in the invention of a proper self-acting mechanism for drawing out and twisting cotton into a continuous thread, as in . . . training human beings to renounce their desultory habits of work, and to identify themselves with the unvarying regularity of the complex automaton. To devise and administer a successful code of factory discipline, suited to the necessities of factory diligence, was the Herculean enterprise, the noble achievement of Arkwright.*[31]

29. *Ibid.*; Gregory Kealey, "The 'Honest Workingman' and Workers' Control: The Experiences of Toronto Skilled Workers, 1860–1892," *Labour/Le Travailleur*, 1, 1976, pp. 32–68.
30. In a much-cited article, Stephen Marglin argues that it was just such techniques of human control that established the productive superiority of the factory system over more randomly organized work systems. "The key to the success of the factory," Marglin writes, "as well as its inspiration, was the substitution of capitalist for workers' control of the production process: discipline and supervision could and did reduce costs without being technologically superior." See "What Do Bosses Do? The Origins and Functions of Hierarchy in Capitalist Production," *Review of Radical Political Economics*, 6, Summer, 1974, p. 84.
31. Andrew Ure, *The Philosophy of Manufacturers*, London: Charles Knight, 1835, p. 15.

Paul Mantoux, in his classic work on the industrial revolution in England, provides a lucid description of conditions of early factory life, and one which could be applied equally well to the Canadian factory system over a century later.

> *Hard and fast rules replaced the freedom of the small workshops. Work started, meals were eaten and work stopped at fixed hours, notified by the ringing of a bell. Within the factory each had his allotted place and his strictly defined and invariable duty. Everyone had to work steadily and without stopping, under the vigilant eye of a foreman who secured obedience by means of fines or dismissals, and sometimes by more brutal forms of coercion.*[32]

Wherever it has occurred, the change from pre-industrial to industrial modes of work has been harsh, and the Canadian experience was no exception. We emphasized conditions of work in the factory because it was the prototypical organization of industrial capitalism. Labourers in construction camps and wage earners in the extractive industries—fishermen, loggers, and miners—were also exposed to miserable working and living conditions. Women, as well as being paid far less than men, experienced working environments as domestics, seamstresses, and laundresses that were at least equally oppressive. So intolerable were these "feminine" jobs that many women working at them preferred employment in factories. In some cases, for example, in the textiles and garment industries, the work forces were predominantly female.[33]

32. Paul Mantoux, *The Industrial Revolution in the Eighteenth Century*, London: Jonathon Cape, 1961, p. 375. How closely this resembles the depiction by the economic historian, David Landes: Factory work was done "at a pace set by tireless, inanimate equipment, as part of a large team that had to begin, pause, and stop in unison—all under the close eye of overseers, enforcing assiduity by moral, pecuniary, occasionally even physical means of compulsion. The factory was a new kind of prison; the clock a new kind of jailor." See his *The Unbound Prometheus*, Cambridge: University Press, 1969, p. 43.
33. *Cf.*, D. Suzanne Cross, "The Neglected Majority: The Changing Role of Women in 19th Century Montreal," in Susan Mann Trofimenkoff and Alison Prentice, eds., *The Neglected Majority: Essays in Canadian Women's History*, Toronto: McClelland and Stewart, 1977, pp. 66-86; Leo Johnson, "The Political Economy of Ontario Women in the Nineteenth Century," in Janice Acton, Penny Goldsmith, and Bonnie Shepard, eds., *Women at Work: Ontario, 1850-1930*, Toronto: Canadian Women's Educational Press, 1974, pp. 13-31; Wayne Roberts, *Honest Womenhood: Feminism, Femininity and Class Consciousness Among Toronto Working Women, 1893 to 1914*, Toronto: New Hogtown Press, 1976.
34. The commissioners questioned 1800 witnesses, whose testimony filled five volumes. Excerpts from the report may be found in Greg Kealey, *Canada Investigates Industrialism*, Toronto: University of Toronto Press, 1973.

In both the primary and secondary sectors of the Canadian economy workers were driven to toil diligently by a series of punitive measures, which were later supplemented by the more refined techniques of persuasion, manipulation, and economic incentives. Among the early measures were oppressive work rules forbidding talking, leaving one's work station, lateness, absenteeism, laxness, and spoilage. Rules were enforced through fines, dismissals, and physical coercion.

Spurred by unrest among the nascent working class, factory acts were repeatedly introduced at sessions of the Canadian Federal Parliament during the 1880s—though none were passed. In the latter years of the decade the federal government launched an investigation of working conditions faced by factory workers, longshoremen, miners, and construction hands. The inquiry documented the exploitation and brutality of the new system—child labour, long hours, appalling working conditions, authoritarian discipline, and low wages.[34]

The testimony of those interviewed and the summary reports of the commissioners unmasked the full meaning of the industrial revolution in Canada. The chairman of the commission bemoaned the growth of the profit motive, which drove the new employers to hire and exploit women and children. Another member of the committee, criticized in labour circles for his anti-labour sentiments, could conclude from the hearings that:

> *Many children of tender age, some of them not more than nine years old, were employed in cotton, glass, tobacco and cigar factories . . . Some of them worked from six o'clock in the morning till six in the evening, with less*

than an hour for dinner, others worked from seven in the evening till six in the morning.[35]

He then added:

The darkest pages in the testimony . . . are those recording the beating and imprisonment of children employed in factories. Your Commissioners earnestly hope that these barbarous practices may be removed, and such treatment made a penal offence, so that Canadians may no longer rest under the reproach that the lash and the dungeon are accompaniments of manufacturing industry in the Dominion.[36]

Reactions to the Industrial System

We have seen how the new industrial order intensified structural alienation among Canadian workers. But was there a subjective counterpart to this structural powerlessness? And if working people were in fact psychologically estranged from their work, how can this be demonstrated?

Initial information on the extent to which structural alienation penetrated the consciousness of Canadian working people can be inferred from the known disparity of work styles typical of pre-industrial and industrial societies and the major adjustments in work habits and culture necessitated by the latter. Wherever it has arisen, industrial capitalism and its work requirements have clashed with pre-industrial cultural values and practices. E.P. Thompson informs us that "the transition to mature industrial society entailed a severe restructuring of working habits—new disciplines, new incentives, and a new human nature upon which these incentives could bite effectively."[37]

As in England and other societies that experienced an industrial revolution, early Canadian capitalists had to call on people from non-industrial backgrounds to form their work forces. The bankruptcy of small farms and the shrinkage of

35. *Ibid.*, p. 22.
36. *Ibid.*, p. 14.
37. Thompson, *op. cit.*, p. 57.

land available for settlement forced individuals with agricultural interests and work habits to search for jobs in industry. It takes no special imaginative powers to understand why these "men and women fresh from Canadian farms and Old World fields did not adjust easily to the new discipline of machines and factories."[38] Tradesmen accustomed to the more irregular pace of work typical of small manufactories [illegible] were being forced to close because of their inability to compete with larger, mechanized units) and independent artisans [illegible] obliged to join the ranks of the industrial proletariat. With the exception of Irish labourers who worked as navvies on the construction of Canadian canals and railways, all the others who made up the new working class had been accustomed to patterns of work and life far different from what they were exposed to in industrial settings.[39] Given the dramatic disruption of work patterns induced by the emergence of industrial capitalism, a solid *prima facie* case can be advanced for the presence of widespread and intense feelings of alienation among the early Canadian working class.

More direct evidence of alienated mental states can be inferred from behavioural expressions of discontent among Canadian workers. The most obvious of these were the formation of trade unions, strikes, picketing, demonstrations, and other easily recorded manifestations of unrest. These easily identified expressions of restiveness can be construed as efforts to reduce or overcome alienation by striking at its

38. Kealey, *op. cit.*, p. xxi.
39. How much skilled tradesmen had to modify their traditionally irregular work patterns depended both on their cohesion and organization as a group and on the degree to which their skills were in demand. A scarcity of skills would force the industrialist to think twice before imposing a strict regimen of toil on the skilled tradesmen. Moreover, by their very complexity, skilled jobs entailed a degree of worker discretion and control not easily penetrated by employers. One could reasonably estimate that the degree of control over work exercised by skilled Canadian industrial workers fell somewhere between that of artisans in small manufactories and unskilled factory hands. For a discussion of work among skilled tradesmen of this era see Kealey, *Toronto Workers Respond to Industrial Capitalism, 1867–1892, op. cit.*, and Palmer, *A Culture in Conflict, op. cit.*

S3

CHAPTER 1

Labor Markets and Employment Regulation: The View of the "Old" Institutionalists

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Labor Problems

The beginning point for discussion of the institutional perspective on employment regulation is the concept of *labor problems* (Kaufman 1993). In the Preface to the first edition of their *Principles of Labor Legislation* (1920:xii), for example, Commons and Andrews state that the purpose of the book is "to sketch the historical background of the various labor problems, indicate the nature and extent of each, and describe the *legislative remedies* which have been applied" (emphasis added).

Labor problems, as a concept, were typically defined as a maladjustment or lack of harmonious balance in the employment relationship (Daugherty 1933). This maladjustment or lack of harmonious balance took a number of concrete forms (typically labeled "evils") that adversely affected employers and/or employees. Prominent examples from the early decades of the century are the following (for a general overview, see Fitch 1924; Andrews 1932):

- Employee turnover. Slichter (1918) found the majority of companies in the 1910s experienced annual employee turnover of 100% or more. It was not unusual at a number of companies for average length of job tenure among production workers to be three months or less (Lescohier 1919).
- Long hours. In 1909 three-quarters of employees in manufacturing firms worked 54 or more hours per week (Lauck and Sydenstricker

1917:183). The institutionalists considered the steel industry to be the most egregious case of excessive work hours. Until 1924 most of the industry worked its employees 12 hours a day, 7 days a week (Fitch 1924).

- Industrial accidents. Over 25,000 American workers were killed in workplace accidents each year in the early 1910s, and another 700,000 were disabled for four weeks or more. The industry with one of the worst safety records was coal mining. Each year 1 of every 300 miners was killed in a work-related accident (Lauck and Sydenstricker 1917:195).
- Poverty incomes. It was judged that in the early 1910s the ordinary wage-earning family (two adults and three children) needed an annual family income of $800 for "a reasonable minimum" standard of living. Two-thirds of families earned less than this amount, even though the wife and one or more children often were gainfully employed (Lauch and Sydenstricker 1917:249, 376).
- Excessive work speed. Assembly lines, semiautomatic machine production, and piece rate compensation plans led to a steady increase in the pace of work in a number of industries to the point where many workers were "old before their day" due to the physical and mental strain. Industries such as steel, autos, and meat packing were particularly noted for the grueling pace of work, and many employees were worn-out by the age of 40-45. Often companies used seasonal layoffs as an opportunity to cull older employees from their work force, and it was widely recognized that many companies refused to hire new workers past the age of 40 (Commons and Andrews 1936; Millis and Montgomery 1938a).
- Irregular work. Each year the average worker was unemployed between one-sixth and one-third of the time (Lauck and Sydenstricker 1917:360). Reasons included frequent job changing and haphazard search for work, large seasonal swings in production and employment, large numbers of employee discharges, personal sickness and disability, and generalized unemployment during business downturns.
- Workplace autocracy. The common law of that day termed the relationship between employer and employee as one of "master and servant." The employer (master) had an almost unrestricted right to administer whatever personnel policies were deemed appropriate with regard to hiring, firing, pay, discipline, and work speed. Employment was "at will" and workers could be summarily fired for any reason. Formal grievance systems were nearly nonexistent outside unionized establishments, and thus quitting work was the employee's major source of protection (Fitch 1924).

- Conflict. American society witnessed a growing crescendo of strikes and workplace violence between 1880 and 1920. A number of strikes (e.g., the Pullman Strike, the Ludlow Massacre) turned into large scale "labor wars" with mass destruction of property, pitched battles in which numerous people were killed and injured, and use of federal troops to restore order (Lens 1974). Numerous acts of violence were also practiced by employers and workers in efforts to unionize or remain nonunion, including dynamite bombings, lynchings, and beatings.