

On the Necessity of a Just Peer Review Process

Parshant Mittal

Professor Waheed Hussain

Legal Studies 210-006 Final Paper

The relationship between employees and employers becomes a complicated issue when one of them wants to break that relationship. The employer might believe that ending the relationship is justified but the employee might not. From a moral standpoint, is the employer justified in his action towards the employee? Shamrock-Diamond Corporation has tried to address this question through its peer review process. Before I can argue for the modification of Shamrock-Diamond's process, it is important to address the various models that lay the groundwork for employer and employee relationship.

The most popular model used to structure the relationship is the Employment at Will (EAW) model. Under this model, it is not required that the employer nor the employee have a good reason to end the relationship. There are, however, certain guidelines such that one cannot fire on basis of race, sex, religion, etc. Thus, the employer does not need a reason to fire as long as certain guidelines are followed. I find this to be a flaw in the model. For example, if I am a manager with an Indian employee in my group who I do not like because of his ethnicity, I can successfully fire him from my group without a reason. One can argue that I cannot fire him because I am firing based on ethnicity. However, it is nearly impossible to establish that I am firing him because of his ethnicity since I need not give a reason for my decision. Therefore, if this model is implemented in a real firm, I feel the employers will have a greater control over their employee. One might argue that because of symmetry in the model, employees have the same power over employers. I will prove, later on in this essay, that this model is not symmetrical.

Procedural due process is another model that can be used. It requires that both employees and employers go through a certain process before they make decisions. This puts constraints on both, which limits their ability to violate each other's rights.

Furthermore, this model stipulates that good reasons are not required for decisions. The mere fact that good reasons are not required becomes a flaw in this model. An employer can follow a certain process and still fire an employee without a good reason, which does not justify the firing. This model is similar in flaw to EAW. The only advantage is that the procedure in place reduces the power that managers can exercise over their employees.

Another model worth considering is the substantive due process, which requires that managers and employees have a good reason behind their decision. This process does not require any procedures to be followed in making the decision. This model seems to be an improvement over EAW because a good reason is present behind the decision and therefore the decisions can be considered rational. The biggest flaw in this model is disagreement over what constitutes a good decision. An employer might think that firing a white employee because he cannot get customers in the black neighborhood is good reason. However, the employee might object stating he still gets other customers. If the firm uses a body to determine what is a good decision based on common social and moral values, then this model might be justified in its use.

Now that I have presented the three relevant models, I will use them to assess Shamrock-Diamond's peer review process by looking at the strengths and weaknesses of the models. Richard Epstein argues for the EAW model by stating that people have the freedom of contract and thus they can form contracts on any terms to end the relationship¹. This type of argument fails to address the complexity of employer and employee relationship. For example, an employee has been working for IBM for the last thirty years, and then one-day IBM fires him for no reason. It seems unfair to fire him because over the

¹ Richard A. Epstein, "In Defense of the Contract at Will"

thirty years, the employee has formed a complex relationship with the IBM and IBM should not destroy that relationship without giving the employee something to fall back on. One might counter my argument by stating that when the EAW model was used to lay the foundation for the relationship, the employee assumed the risk of being fired for no reason. This assumption of risk is an unfair expectation from the employee. The thought of being fired at anytime might not have occurred to the employee because the EAW contract does not spell out the details for either party. Thus, there might be different expectations on both sides.

Epstein also argues that EAW is mutually advantageous to the employer and the employee. He argues that an employer can monitor and administer rules more effectively. This thus reduces administration costs for the firm. At the same time, there exists a threat that the employee might leave which forces the employer to consider the employee's interest. Epstein's mutual advantage argument would only be valid if EAW was symmetric, but it is not symmetric. It is easy for the employer to fire his employee. But, it is not easy for employee to quit because finding another job is harder for the employee than finding another employee for the employer. Furthermore, employees run the risk of being unemployed for a longer time if they quit. Thus, this asymmetry in the model tips the balance of advantage in the favor of the employer.

Unlike Epstein, Tara Radin and Patricia Werhane support a model that combines elements from EAW model and procedural and substantive due process models². They justify the EAW model using property rights argument. Since an employer owns his business, he can buy labor from an employee. He can stop buying that labor anytime he

² Tara Radin and Patricia Werhane, "Employment At Will and Due Process"

wants. However, there is a need for procedural and substantive due processes here because employees are people and thus terminating their services requires that the employer treat the employee as a person. Through the procedural and substantive due processes, the employer can treat the employee as a person. One might argue that EAW and the due processes seem to contradict each other. If an employee wants to quit anytime *without a reason* (EAW) he must give a reason (substantive due procedure). However, it is important to understand that the model being proposed here is a combination of EAW and due processes, an employee can quite anytime (EAW) with a valid reason (substantive due procedure) restricted to a decision process (procedural due process).

Looking at the models that I have discussed, certain characteristics must be present in Shamrock-Diamond's procedures for handling employee and employer relationship. An important characteristic is based on the Kantian argument that employees are people and therefore they should not be treated like objects. In other words, employers need to add a "personal touch" when dealing with employees. I believe that if a procedural due process is in place, employees are being treated as people because their interests can be addressed. Furthermore, because employees are people, they have the right to autonomy but an employer can affect the employee's level of well-being by firing him or placing other constraints upon him. Nevertheless, an employer can limit the violation of employee's autonomy by providing a reason behind the decision (substantive due process). Though one might argue that giving a reason does not eliminate the violation of autonomy, it is important to realize that having a valid reason decreases the amount of violation because the reason justifies the employer's action to the employee. Finally, because of the right to autonomy, employees and employers have the right to make the decisions they want to

make. However, because their decision can affect others' well-being, the decision needs to be supervised using the procedural and substantive due process.

The current peer review process at Shamrock-Diamond, which consists of four employees and three managers who listen to the case, provides both a substantive and procedural due process. This peer review process is thus a step towards treating employees as people. However, one might object to the four to three split that tips the balance in favor of employees. I feel the same way. The board should consist of three employees, three managers, and one outsider. The outsider's main role would be to break ties that occur between the employee and the employer board members. Another flaw in this particular process is that it addresses only employee grievances. This process should also address employer grievances. Only then, would there be balance between the influence the employee can exert on the employer and vice-versa. Another reason that balance is created in this model and not in the EAW is because any decision made by either side that creates an unfair balance of influence, will likely be overturned by an objective board that listens to the case. The peer review model used at Shamrock-Diamond will thus become morally justified to a greater degree if the changes that I have mentioned are made to the current process.

From a moral standpoint, the peer review process I have described is fair to all. However, few problems can arise when the model is implemented in real life. A level of hostility might exist if a manager fires an employee but the employee is reinstated under the same manager. This type of hostility is bound to happen in any peer review model but it will be rare. We expect that firms will hire rational managers who will have valid reasons behind their actions. In such a case, the peer review process would uphold the manager's

rational behavior. In the rare case of hostility, the firm should mediate the dispute so that both parties can come to an understanding and acceptance of each other. Nonetheless, these rare cases are acceptable in this process because overall this model creates more justice for all.

Another problem in the Shamrock-Diamond's case is that managers are reluctant to fire employees. In the modified peer review process I suggested, managers would not have this reluctance because the peer review board consists of equal number of employees and managers. Therefore, the balance of power does not rest within one group and managers would feel comfortable taking part in the grievance hearings. Additionally, certain amount of responsibility falls on the firm to hire good managers who are willing to stand by their decisions. If managers have such a quality, they should not be reluctant to defend their actions. Overall, the problem of managers' reluctance is not necessarily a weakness in the peer review system; rather it is a weakness in the manager.

Moreover, many managers might object to my model stating that they were hired by the firm to make day-to-day decisions and this peer review process inhibits them from making those decisions. Such an objection is invalid because if the manager's decisions are rational and represent the interest of the firm then the peer review board will allow these decisions. If the reasons are irrational, the peer review board will step in and prevent injustices that might occur as result of irrational actions. Therefore, it is wrong to argue that managers cannot make day-to-day decisions under my model because they can make the decisions as long as the decisions are rational.

Up to this point, I have focused on the details of various models and presented the objections to the model I recommend. It is important at this point that I also focus on the

benefits of having a peer review process. The main benefit is that employees are treated like people and I have already explained this benefit. Yet another benefit is that it protects good managers as well as good employees. To understand, let's consider Jack's case. Jack works on the production team for Microsoft's Windows XP. He points out various areas where the software can be improved to his manager. However, his manager decides to fire him because implementing Jack's recommendations would delay the release of Windows XP. Without any peer review process, Microsoft would lose a great employee and would market buggy software. However, if Microsoft had a peer review process, the board can analyze the situation and see that Jack's recommendations would make for a better product. Thus, Microsoft would retain a great employee and market better software. Yet another example to justify my model is from Shamrock-Diamond's implementation of a similar model. At Shamrock-Diamond, a female employee was not being offered the same promotions as her male counterparts. When the case was reviewed by peer review board, it was established that the manager had been sexist. Even the manager realized that he was being unfair. Such an example illustrates that a higher level of equality in the workplace is possible through this process. Looking at these benefits and comparing them with benefits of other models I have mentioned, there is no doubt that my modified version of Shamrock-Diamond's peer review model will be the best to use.

At this point, it is obvious that a peer review process is needed. Without such a system, employees' and employers' rights would be violated. Now the question remains, what kind of system is the best? I have presented various models for employee and employer relations: EAW, procedural due process, substantive due process, Shamrock-Diamond's, and my modified model. Of all these models, I argued my modified model for

Shamrock-Diamond is the best because it equally represents the interests of employees and employers. In addition, I argued that my model has many benefits that lead to social benefits like equality for the sexes. Furthermore, I will admit that my model might still have some unseen injustices, however, serious injustices exist in other models as I have illustrated through the examples. Shamrock-Diamond should therefore adopt my model to eliminate the injustices that are currently being incurred.