

Rights to Employment under the Workers' Compensation Acts and Other Statutes

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RIGHTS TO EMPLOYMENT UNDER THE WORKERS' COMPENSATION ACTS AND OTHER STATUTES^o

BY TERENCE G. ISON^{*}

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I. WORKERS' COMPENSATION ACTS

A. *Introduction*

The main focus of this article is on rights to continuing employment that have been or that may be legislated in Workers' Compensation Acts. For such "rights" to be seen in context, however, mention will also be made of the positions at common law and under other statutes.

For many years, it has been suggested that a worker who has sustained a compensable disability should have a statutory right to continuing employment with the injury employer.¹ Legislation on those lines has been enacted in Quebec,² Ontario,³ and New Brunswick.⁴ There are pressures for similar legislation in other jurisdictions. This article, however, will focus on the general principle rather than on the details of those statutes.

In any assessment of such a statutory right, it is crucial to distinguish between:

- (1) cases of temporary disability followed by a total recovery; and
- (2) cases involving some significant residual disability.

B. *Temporary Disabilities*

It is unlikely that a statutory right to continuing employment has any broad significance when a worker has made a total recovery from a temporary disability. Usually such a worker simply returns to work. Both parties generally want to continue the employment

¹ For example, *Re the Future Employment of a Worker Disabled by a Compensable Injury or Industrial Disease*, Item No. 105, (1975) 2 Workers' Compensation Rep. 33 (B.C.).

² *Industrial Accidents and Occupational Diseases Act*, S.Q. 1985, c. 6, ss 234-249.

³ *Workers' Compensation Act*, R.S.O. 1980, c. 539, s.54b, as am. S.O. 1989, c. 47.

⁴ *Workers' Compensation Act*, R.S.N.B. 1973, c. W-13, ss 42.1 and 42.2, as am. N.B. Acts 1989, c. 65.

relationship, and if the employer does not, it would usually be for a reason that is unrelated to the compensable disability.

The position at common law is that in such situations, the employment relationship continues. A temporary absence from work because of a disability (whether compensable or not) may (depending on the contract of employment) suspend an employer's obligation to pay wages and other benefits; but it does not usually terminate or otherwise suspend an employment relationship. Nor is it cause for dismissal. Usually this is also the position under a collective agreement.

Because statutory rights are often more noticeable than common law rights, a statutory right to continuing employment can be beneficial in some cases, especially if the statute includes a more effective remedial structure than the common law. However, there are several grounds for concern about the legislation that has been passed so far.

(1) The drafting has been unfortunate. The terms "reinstate" (used in Quebec) or "re-employ" (used in Ontario) imply that the employment relationship has been terminated or suspended. That misrepresents the legal position and is almost bound to cause confusion.

(2) In at least one respect, and at least in the unorganized sector, the legislation reduces rather than enhances the rights of a worker who is returning to work from a compensable disability. It confers upon the employer a right to assign the worker to different duties. Depending on the terms of the employment contract, an employer may not have that right at common law.

(3) The placing of a right to continuing employment in a workers' compensation statute implies that a worker has no such right when returning to work from a non-compensable disability. Thus, if a right to continuing employment is to be enacted without reducing or threatening the common law rights of injured workers, it should be contained in employment standards legislation and applied to all cases of temporary disability, regardless of eligibility for compensation. The only distinction that it might be useful to make is that where a disability is compensable, it may be desirable to include a provision for additional enforcement by the compensation board.

C. *Permanent Disabilities*

More difficult situations occur where a worker has recovered to the extent of being fit for some types of work, but there will be some ongoing residual disability that precludes a return to the worker's former duties. It is in these cases that most of the problems arise. At common law, an employment relationship is not terminated automatically by the occurrence of a permanent disability; and this is also typically the case under collective agreements. However, a permanent incapacity of a worker to perform the essential duties of the occupation is cause for dismissal;⁵ and in some cases, it is arguable that the employment relationship is terminated by frustration.⁶ Also, of course, at common law an employer has the right to terminate the employment by notice. This position is, however, now modified in those jurisdictions where human rights legislation requires an employer to avoid dismissal if continued employment of the disabled worker can be achieved by reasonable accommodation.

In the organized sector, a worker with a permanent disability who would be able to return to work with some change of duties may have a right to continuing employment under the terms of a collective agreement.⁷ For the reasons explained below, however, it is counter-productive to confer such a right in a Workers' Compensation Act.

⁵ For more precise definition of the employer's right to dismiss in the organized sector, see, for example, *Re Domglas Inc. and Aluminum, Brick and Glass Workers* (1988), 33 L.A.C. (3d) 88; *Pacific Western Airlines and Flight Attendants Assoc.* (1987), 28 L.A.C. (3d) 291.

⁶ For a discussion of termination by frustration, see, for example, *Marshall v. Harland & Wolff*, [1972] 1 W.L.R. 899.

⁷ Where a worker is unable to carry out the duties that were performed by that worker prior to injury, the employer may be under some obligation to offer alternative employment even where there is no express clause to that effect in the collective agreement. See, for example, *MT&T and Int'l Brotherhood of Electrical Workers*, (1984) 16 L.A.C. (3d) 318. This would seem to follow logically from the terms of any collective agreement where the management's rights clause includes a right to assign the worker to other types of work and there is other work available within the residual capacity of the worker.

1. The fragility of the "right"

It is unrealistic to expect that any "right" to continuing employment will be legislated for the lifetime of a disabled worker. In practice, there are fairly short time limits, one year in some cases and two years in others. Bearing in mind that the statutory "right" will only be relevant where the employer would not otherwise want to continue the employment of the disabled worker, it is difficult to see much benefit in a worker with a *permanent* disability having a right to continuing employment that expires in a relatively short time. The obvious risk is that, at the expiration of this period, the employment will be terminated.⁸ This occurrence is all the more likely if the influence of experience rating has already created an adversarial tone in the relationship between the employer and the worker.⁹ Moreover, since reasons other than the disability are likely to be given for the termination, it may be very difficult at that stage for the worker to re-establish any right to compensation benefits or to rehabilitation services.

Enforcement of the employer's obligation is also fraught with potential difficulties. Enforcing the employment of a disabled worker is different from most reinstatements following a labour arbitration because the reason the employer wants the disabled worker out of the employment is ongoing. Apart from the risk of dismissal or termination by notice, an employer might be tempted to create sufficient irritations that the worker is persuaded to quit. The eligibility of the worker for further compensation benefits and rehabilitation assistance would then depend upon enquiries and moral value judgments about the behaviour over time of the worker and the employer. Adjudication on issues of that type is extremely difficult.

This problem, coupled with the brevity of the "right," is likely to undermine the incentive to enforcement to such an extent that in practice, the "right" is unenforceable against the countervailing

⁸ There is anecdotal evidence of this happening in Quebec, but I am not aware of any survey work from which any quantitative estimate could be produced.

⁹ See T.G. Ison, "The Significance of Experience Rating" (1986) 24 Osgoode Hall L.J. 723.

pressures. In the meantime, the exercise of the "right," or any refusal of the worker to exercise it, are grounds for the termination of compensation benefits. Moreover, the existence of the "right" to continuing employment may have diverted the worker, a rehabilitation counsellor and others from considering whether retraining or other skill developments may have placed the worker in a better position in the open labour market. For these reasons, the risk that the continuing employment may not last for very long is serious.

Again, an employer who offers alternative employment only in response to legal pressure may be unwilling to consider in any thoughtful or sensitive way the suitability of the alternative employment in relation to the residual disability of the worker. Acceptance by the worker of any offer of unsuitable employment may create a risk of further disablement, and to decline such an offer may create a risk of controversy.

One aspect of the problem is that legislation of this type requires the use of difficult and unrealistic classifications. For example, the Ontario legislation¹⁰ requires the Board to determine whether the worker is:

- (a) "medically able to perform the essential duties of the worker's pre-injury employment"
- (b) "medically able to perform suitable work" or (presumably)
- (c) neither of the above.

The use of such classifications can be very difficult, particularly for disabilities (such as bad backs) that can vary from month to month in their impact upon the capacity of the worker.

The use of such classifications also tends to create expectations of certain levels of performance. For this reason, the use of such classifications can be threatening to the worker and thereby undermine the confidence that is needed for rehabilitation. The use of such classifications also militates against allowing a worker to discover his own working capacity by a graduated return to work.

Such classifications are also fraught with adjudicative difficulties. One problem is that those who are most familiar with the medical condition of the worker are least likely to be familiar with the

¹⁰ See *supra*, note 3.

demands of alternative jobs in the work environment. Similarly, those who are most familiar with the demands of alternative jobs in that environment are likely to be unfamiliar with the details of the worker's medical condition and its occupational significance. This problem is not solved by making the decision the responsibility of a board that has first-hand knowledge of neither and only second-hand knowledge of each. It is largely for this reason that the determination of "suitable employment" in workers' compensation systems has always been a cause of injustice, contention, complaint and waste. It is also largely for this reason that, for cases of permanent disability, the need to determine "suitable employment" has been abolished in the past in favour of pensions calculated by reference to the degree of impairment.

Even where a worker wants to continue the employment and an unwilling employer strives to fulfil the statutory obligation in good faith, it still does not follow that all will be well. The worker could be laid-off subsequently along with others for redundancy, perhaps because of a plant closure, possibly due to changing technology or to changing political or market conditions. The disability may then have a negative impact when the worker seeks employment on the open labour market. If the worker then applies for a renewal of compensation benefits and rehabilitation assistance, there is an obvious risk of controversy about whether the current unemployment of the worker is due to the economic lay-off or to the compensable disablement.

Further problems of adjudication are likely to arise when issues of continuing employment are taken to an external appeal tribunal. The delays that occur in such appellate processes are likely to make the right of appeal in these cases almost useless. Also issues relating to continuing employment are likely to be inseparable from issues relating to entitlement to compensation. Yet the appeal tribunal may find that, because of the way in which matters have been handled at the board, it has jurisdiction to deal only with one of those issues and not the other.

2. Impact on compensation

There is no prospect of a statutory "right" to continuing employment existing concurrently with a realistic right to compensation. For most of the history of workers' compensation in Canada, it has been traditional that in serious cases of permanent disability, the compensation has consisted of a pension payable for life and measured by reference to the degree of impairment. In Quebec and Ontario, such pensions were abolished as part of a trade-off that involved a reversion to some variation of the actual loss of earnings method of calculating compensation benefits, together with the statutory "right" to continuing employment. In New Brunswick, such pensions had already been abolished when the statutory "right" was enacted. In all of these provinces, the result is that a relatively well-defined right to monetary compensation is replaced by a more nebulous and illusory "right" to continuing employment, coupled with the possibility of future compensation benefits assessed on a much more discretionary or judgmental basis. If the pensions were being assessed under the former system by an inappropriate formula, a more just solution could have been found in a new formula for their calculation.

Moreover, where the enactment of a statutory "right" to continuing employment is part of a trade-off for a reduction in compensation rights, there are large categories of workers who will only be affected by the downside of the trade-off. These categories include construction workers, temporary employees, those employed in the unorganized sector, and the self-employed. Such workers are typically excluded from the statutory "right," but even to the extent that any of them may be covered, the "right" is likely to be of little value. Similarly, a provincial "right" to continuing employment will not apply to workers engaged in federally-regulated industries; but the reduction in compensation rights does apply to those workers.

3. Impact on rehabilitation at places of employment

Another negative impact of the "right" is the extent to which it generates a regime of social control over injured workers. An array of para-professional "rehabilitation" companies has sprung into

existence, offering their services to employers to reduce compensation costs by the rehabilitation of disabled workers. Compensation claims and claimants are "managed" by "professionals" to achieve "rehabilitation." Some larger employers have internal staff performing similar functions. Thus, in addition to the difficulties mentioned above, disabled workers may be subjected to a regime of "management" by para-professional personnel, not selected by themselves, but by an employer who may, at least to some extent, be adverse in interest. While the result in many cases may be the provision of a needed service for a disabled worker, this structure is still one that is offensive to traditional notions of civil liberties and professional ethics, as well as being a likely cause of anxiety, other forms of therapeutic harm, and injustice.

It is axiomatic that the extent to which workers, collectively and individually, are able to control their own work environments is a very significant variable in relation to health.¹¹ Individual control is even more important for a worker who has sustained a permanent disability or who has other health problems. That control is facilitated by a regime under which permanent disabilities are compensated by a pension and rehabilitation is voluntary. That control is minimized by a regime under which permanent disabilities are compensated (if at all) by the actual loss of earnings method, and "rehabilitation" is, in effect, compulsory. For this reason, the new regimes of social control are likely to have a negative effect on the future health of disabled workers.

These problems with the statutory "right" are not confined to cases which would have involved difficulties with rehabilitation in any event. They can apply also to cases in which rehabilitation would otherwise have gone smoothly. A related concern is that, at least in Ontario, the Board now sends a routine notice informing an injury employer of the worker's "right" and of the employer's obligations in relation to continuing employment. This is done without knowing whether there would otherwise be a problem in the particular case. It may, therefore, create problems which would not otherwise exist. At least, it can tend to create an unfortunate

¹¹ For example, see R. Labonte, "Point of View 1: Towards a New Occupational Health Science" (1990) 12:5 *At The Centre* at 15.

image of the disabled worker as a burden that the employer has to bear.

4. Impact on board rehabilitation programs

A statutory "right" to continuing employment creates a notion of rehabilitation that is incompatible with the provision of a sound rehabilitation service. A problem of rehabilitation in the past has been that a return to the former employment has been too automatic. Indeed, many of the boards have commonly prescribed the return of a worker to the former employment as a primary goal of rehabilitation. Of course, it is a desirable goal in most cases, though they are not usually the cases for which rehabilitation services are most needed. The problem is that what is usually a good thing tends to become a universal prescription for *all* cases. Thus, a statutory right to return to the former employment seems to make such a return even more automatic. If the injury employer has an obligation to continue the employment of a disabled worker, it seems to follow almost automatically that this is perceived at the board as what ought to happen.

There are two difficulties with this. First, there is a pervasive tendency for rehabilitation to be seen as a process of recovery from a past injury. It is usually seen as the post-acute phase of recovery. It is less often seen as a process for avoiding the next injury.

Preventive rehabilitation has received attention in recent years, but its development has been set back very seriously by the enactment of a statutory "right" to return to the former employment. A necessary ingredient of any good rehabilitation program, and something which has been done by some boards some of the time, is the preventive screening of disabled workers, particularly those who have suffered repeated back injuries. The purpose of this screening should be, and sometimes has been, to identify those who should be advised *not* to return to their former employment, and who should be offered other forms of rehabilitation. When a statutory structure is created that tends to make a return to the former employment automatic, such programs of preventive rehabilitation may be lost in the shuffle, with the result that people may remain in damaging occupations even after the damaging impact

has become apparent. A predictable result is that workers in this situation may sustain a further disablement when they are too old for retraining and yet still too young to retire.

Where an injury employer has a statutory obligation to find a job for a disabled worker, it is unrealistic to expect that a compensation board will consider whether retraining or other services may be necessary for alternative employment. The practical result may well be to return workers to jobs that are medically unsound for them, or that are economically unsound in the long run.

The second difficulty with any program of returning disabled workers automatically to their former employment is that it strips them of the basic human right to change one's occupation or lifestyle. A sound rehabilitation service is not one that has any stereotyped approach, or any stereotyped perception of what constitutes a successful rehabilitation. A sound rehabilitation service will be one that strives to understand and to meet the needs of each worker, and that helps each worker to achieve his or her own goals and aspirations. Obviously there is scope for debate about how far a compensation board should go in this respect in any particular case, but a sound rehabilitation service must be one that begins by trying to understand the needs and aspirations of each candidate for rehabilitation. In many cases, these needs will be met by a return to the former occupation; but in some other cases, the need may be for a change in occupation, a change in place of residence, a switch to a domestic life, early retirement, relocation in a foreign country, *et cetera*.

A statutory "right" to continue the former employment does not preclude a compensation board from offering assistance with other forms of rehabilitation, but it makes it less likely that other forms of rehabilitation will be offered. Indeed, the mere existence of the statutory "right" to continuing employment makes it less likely that a disabled worker will even come to the attention of a rehabilitation consultant.

Related to this, ordinary bureaucratic and budgeting pressures within a compensation board are likely to militate against rehabilitation planning. If a worker has a "right" to continue the former employment, and if a rehabilitation consultant has a heavy case load, returning the worker to the former employment may be the easiest thing to do. It may then be done without any assessment

of any risks to the future health of the worker, and without serious discussion of any preference that the worker may have for some other form of rehabilitation.

In the result, a nominal statutory "right" to return to the injury employment means that in practice, the worker will lose the right not to go back. While the statutory language purports to confer a right upon the worker and an obligation upon the employer, the reality is likely to be the other way around. The statutory "right" becomes a euphemism for a form of directed labour. It is an invasion of basic civil liberties. Under this regime, rehabilitation is not a service that is *offered* to disabled workers but a euphemism for controlling and curtailing their choices about what they want to do.

Even the constitutional right of a Canadian citizen to leave the jurisdiction is impaired by this statutory right to continuing employment. A worker who elects to leave the jurisdiction may be "deemed" to be earning what could have been earned by the exercise of the statutory "right," and therefore be disqualified from future compensation benefits for loss of earnings.

Moreover, when the statutory "right" to continuing employment is coupled with the abolition of pensions and a reversion to the actual loss of earnings method of calculating benefits for permanent disability, "rehabilitation" is almost bound to become a euphemism for benefit control, both at places of employment and at the compensation boards. This, in turn, is a negative influence on the calibre of people who can be attracted to serve as rehabilitation consultants. For this reason too, the statutory "right" is incompatible with the provision of a genuine rehabilitation service.

For all of these reasons, a statutory "right" of a worker with a permanent disability to continuing employment with the injury employer is not in the interests of workers. It is incompatible with the healthier notions of rehabilitation. Nor is it in the interests of employers, except as a device for reducing the apparent cost of compensation benefits.

II. OTHER STATUTES

A. Occupational Health and Safety Legislation

In several jurisdictions, occupational health and safety legislation recognizes the right of a worker to decline the performance of work that may be injurious to himself or to another worker. When a worker does so decline, the employer has, at least in some circumstances, an obligation to assign the worker to other duties.¹² While this legislation is aimed primarily at prevention, it may also serve a purpose in remedial rehabilitation. In some cases, the hazardous nature of the worker's duties may result from the combined impact of the work or the work environment and an existing (perhaps recent) disability.

For the cases to which they apply, rights under occupational health and safety legislation can have several advantages over the ostensible "right" under *Workers' Compensation Acts*. One is that when the right is being asserted under an occupational health and safety statute, the attention of all concern is more likely to focus on finding a job and a work environment that will not be injurious to the worker. Secondly, such rights are more independent of the compensation system and therefore less likely to produce legislative changes for the reduction of compensation benefits.

B. Human Rights and Employment Equity Legislation

Human rights statutes have been amended to include disablement among the prohibited grounds of discrimination, and a substantial proportion of the complaints to human rights commissions now relate to alleged discrimination in employment because of a disability.¹³ However, human rights legislation only creates an

¹² If an employer dismisses such a worker instead of following the statutory procedure, an action may lie for damages for wrongful dismissal. See, for example, *Crossman v. Scotia Textiles* (1989), [1990] 27 C.C.E.L. 302.

¹³ See annual reports of the federal and provincial human rights commissions in Canada.

obligation not to discriminate against the disabled; it does not generally create any obligation to employ them.

Within the context of human rights legislation, there are basically two ways in which a positive obligation to employ the disabled might come about. First, it might be alleged, particularly in relation to a large enterprise with a high proportion of light jobs, that the failure to employ disabled people is so extensive and systematic that the statistics alone are evidence of discrimination. The remedy sought may be an affirmative action program. Secondly, obligations to employ the disabled might be created under newer types of employment equity legislation.¹⁴

A development on these lines would have some advantages. First, because such legislation covers sex and racial equality, as well as the disabled, the community of disabled people would have allies in promoting its success on the political scene. Secondly, because such programs are part of a broader policy of promoting human equality, there might be less risk that they would become an excuse for reducing or refusing to implement any program of income insurance, or any other form of income security relating to disablement. Thirdly, "employment equity" is a term that might be seen to embody an inspirational theme that is a part of the political hype of the age. Enforcement by socio-political pressures and the media might therefore be feasible, and the weaknesses of the legal techniques available for enforcement may be less significant.

There are, however, some downside risks with affirmative action programs. One relates to the lack of even-handed enforcement of a predetermined general obligation. If certain places of employment are targeted for affirmative action programmes before others, there may be complaints from the employers concerned that the enforcement is arbitrarily selective, and therefore inequitable.

There are also well-known problems with the nature and structure of human rights commissions. They generally proceed at a ponderously slow pace, and they do not generally have the expertise or the budget to cope in a responsive way with ergonomic arguments.

¹⁴ For a good discussion of this, see D. Baker, *Anticipating the Next Generation of Equality Issues in Employment for Disabled People in Canada* (Toronto: Advocacy Resource Centre for the Handicapped, 1989).

A primary concern is that because "employment equity" is a catch-phrase that is part of the political hype of the age and because political opposition to the notion is very powerful, legislative changes might be made impulsively and without any adequate study. Legal and administrative structures may then be created that do not produce any output comparable to the input. The introduction of such legislative changes without adequate study is also likely to produce unforeseen and possibly damaging side effects, perhaps for disabled people, and perhaps for other sections of the population.

C. *Quota Systems*

Another type of statutory provision for the employment of disabled people is one that would place upon employers an obligation to engage the disabled so that they constitute a specified percentage of each workforce. This idea has been used in Britain, Europe and Japan, and it is commonly known as a "quota" system. While each employer above a specified size has an obligation to employ a percentage of disabled people, this system has the advantage that the employer is under no obligation to employ any particular person; nor is any worker under any pressure to work for any particular employer. To this extent, the employment relationship in respect of any particular worker remains voluntary, both for the employer and the employee.

There is another respect, too, in which this system is better than a statutory "right" to continuing employment under the *Workers' Compensation Acts*. Many of the serious disabilities that result from employment occur in the high hazard industries, such as mining, forestry, fishing, construction, and transport. These are also the heavy industries in which the opportunities for rehabilitation are limited. These are, therefore, also the industries in which a right to available and "suitable" employment with the injury employer is least likely to be of any use. Under a quota system, the obligation to employ the disabled is more evenly spread, thus creating greater obligations to employ the disabled in light industry, in office occupations, and in the service industries where the obligation is more likely to be realistic.

There are, however, serious concerns about quota systems. First, there is the problem of definition and identification. Candidates for employment do not divide neatly and obviously between those who are disabled and those who are not. If the definition used in the scheme is a fairly narrow one, it might exclude the bad back cases, and if it does, it would probably exclude most of the problem cases in rehabilitation. On the other hand, if the bad back cases are included, there would be an obvious difficulty in defining any workable perimeter to the category of people covered by the scheme. This problem can be mitigated by a registration system so that the classification of a person as disabled becomes largely a matter of self-selection; but the problem would still remain to some extent.

In this connection, I recall an interview some years ago with the company doctor at a major industrial plant in England. I asked what they would do if they discovered that the proportion of registered disabled people employed at the plant had fallen below the quota. His reply was to the effect that "That's no problem. We just go round the plant and ask a few more of our workers to register as disabled."

Second, there may be problems of stigma and of image associated with such a scheme, particularly in cases of mental illness. For example, in Britain, it has been said that a majority of disabled people did not register themselves as disabled because of the stigma that this would imply. If they wanted to be employed, it was in the open labour market, rather than through a mechanism which would imply that they were less desirable employees.

A more subtle form of stigma can attach to those who are not readily employable at all, perhaps because of a combination of disability and natural aging. A quota system might create the impression that all disabled people are potentially employable, and that, therefore, a disabled person who remains unemployed must have made a choice in favour of idleness.

Third, there are the problems of enforcement. Even if enforcement was unnecessary to achieve rehabilitation goals, it would still be important to achieve equity among employers. The State surely has a moral duty to ensure that the most law-abiding employers do not suffer a competitive disadvantage because of their compliance with the law. One problem with enforcement is again

the difficulty of definition and identification. Another is that the incidence of political power would normally militate against any thorough and effective program of enforcement. Partly for this reason, any kind of quota system might be more effective if it is supported by financial incentives and tax penalties rather than by any attempt to use criminal law.

Fourth, if the scheme creates a perception that all disabled people have employment opportunities, the result could be to undermine existing or potential systems for income support. Since rights to money payments are generally more readily defined and more readily enforceable than rights to employment, disabled people might lose realistic rights only to gain rights that are less viable. Related to this, such a scheme may reflect an unnecessary enlargement of the work ethic. Given the technological changes of recent years and the continuing levels of unemployment, there is no societal need for all disabled people to be in the work-force.

It is commonly said that disabled people want to work. Many and probably most of them do; but what people want to do is partly conditioned by what they see as their alternatives. If we had adequate insurance coverage that provided good pensions for disabled people without any means test,¹⁵ employment would become more realistically an option rather than a compelling imperative. Moreover, a good pension system is the best way to ensure that disabled people can find satisfying types of work. If they want employment for reasons of self-fulfilment, or to augment their standards of living, they are more likely to find satisfying jobs than if they must work to provide for their basic income needs.

Finally, it is difficult to assess whether the achievement of a quota system would be enough to justify the opportunity cost. Placing obligations upon employers is never cost-free. The more burdens that are placed upon employers in the regulation of employment, the more difficult it becomes to comply with the total package. Additional obligations can also increase the incentive to find ways of doing business that do not involve an employment relationship. For these reasons, it is important to be sure that the

¹⁵ See T.G. Ison, "Human Disability and Personal Income" in L. Klar, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1977) 425.

achievement is going to be worth it before creating any new obligation.

These arguments are presented not as reasons for rejecting any proposal for a quota system, but as reasons for caution. The idea of a quota system could benefit from a more detailed study in the Canadian context.

D. *Facilitative Legislation*

Apart from any obligation to hire the disabled, there are other statutory duties that could be placed upon employers, or upon certain types of employers, to facilitate their employment; particularly legislation relating to the design of the work environment. Such requirements can be very beneficial with little downside risk. Of course, some disabilities can only be accommodated by work station adjustments that are specific for an individual; but there are many types of disabilities (including paraplegia, blindness, deafness, and bad backs) for which the employment of significant numbers can be assisted by ergonomic requirements of a more general nature.

The proportion of the total work force that is employed in office occupations and in the service industries is constantly increasing. Moreover, it is in these occupations that the employment of a disabled person is least likely to be adversely affected by aging. Thus, the development of employment opportunities in office jobs and in the service industries could be the most beneficial as well as the easiest achievement, though admittedly, such jobs will not be suitable for a proportion of disabled people. Yet we still do not have adequate requirements for even new places of employment to be accessible to the disabled. Similarly, in spite of all that is known about office furniture and environments, we still do not have basic ergonomic requirements, such as a prescription that all new office desks must be of an adjustable height. Legislated ergonomic requirements of this type are desirable not only to facilitate the employment of those with permanent disabilities, but also for the prevention of disablement, and for the rehabilitation of those who are temporarily disabled. Some ergonomic requirements, such as desks of adjustable height, could also facilitate the achievement of sex and racial equality.

Perhaps more might be achieved by regulating the design of places of employment than by the regulation of hiring. If, in the establishment of any new place of employment, an employer is required to make the work environment accessible to and suitable for the disabled, the recruitment of disabled people may then seem more natural. At least some of the traditional arguments for not hiring the disabled (such as the washroom argument) would then disappear.

III. CONCLUSION

A "right" to continuing employment enacted in a workers' compensation statute for cases of permanent disability is counter-productive, illusory, and damaging at least to the interests of disabled workers. If there is to be any statutory obligation upon employers to hire the disabled, a quota system is probably the most viable. At least the idea could benefit from further study in the Canadian context.

In support of statutory rights to employment, it is commonly said that the opportunity to work is a basic human need, one that is a part of human nature. It is also a part of the conventional rhetoric of "rehabilitation professionals" that work is necessary to maintain human dignity and a sense of self-worth. Yet one has only to visit a fashionable recreational club in one of our major cities to discover that there are numbers of people leading a life of leisure with apparent dignity and certainly with a high sense of self-worth. Disabled people commonly proclaim their desire to work, but this is not the result of any natural human need. It reflects a desire of particular people for jobs in which they find, or would find, self-fulfilment; it reflects the need for income and the lack of alternative sources of income; and it reflects also the political cultivation of the work ethic. The political posture of disabled people's organizations may sometimes also reflect an element of modesty and self-denial; a reluctance to press any demand for what might seem like unearned income.

A legislative development that is clearly desirable, with a minimum of downside risk, is facilitative legislation to promote the

employment of the disabled, particularly ergonomic regulation, at least in relation to new places of employment and new equipment.

Lastly, the development that would be the most clearly beneficial for disabled people is a comprehensive social insurance system that would provide regular pension income for those with permanent disabilities.¹⁶ Incidentally, and perhaps paradoxically, such legislation is more likely to result in disabled people finding self-fulfilment in jobs that are congenial to them than any legislation that purports to create rights to work.

¹⁶ *Ibid.*