Royal Canadian Mounted Police External Review Committee

Medical Discharge -
A Police Perspective

DISCUSSION PAPER 3

Medical Discharge -

A Police Perspective

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Royal Canadian Mounted Police
External Review Committee

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The Committee publishes a series of discussion papers to elicit public comment to assist the Committee in the formulation of recommendations pursuant to the Royal Canadian Mounted Police Act (1986). The views expressed in this paper are not necessarily the views of the Committee.

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Royal Canadian Mounted Police
External Review Committee

Discussion Paper Series

Number 3: Medical Discharge

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FOREWORD

This research paper is the third in a series produced by the Research Directorate of the Committee for discussion purposes. It seeks to address the issues encountered by organizations and their employees in the matter of medical discharge.

The information it contains on medical discharge policies and practices has been obtained from several sources:

(a) private sector organizations including Imperial Oil Limited, Am-Tech Electrical Services; and the International Brotherhood of Electrical Workers;
(b) the Public Service Commission of Canada;
(c) the Department of National Defence; and
(d) through discussions with police forces and associations including the Ottawa Police Force, the Ottawa Police Association, the Metropolitan Toronto Police, the Metropolitan Toronto Police Association, the Sûreté du Québec, and the Royal Canadian Mounted Police.

The paper does not seek to resolve the issues raised regarding medical discharge but rather to circulate and discuss the various considerations. This consultation process assists the Committee in its review responsibilities by enhancing its understanding of grievance and appeal matters.

Finally, the paper could not have been produced without the cooperation and assistance of the organizations and individuals listed in Annex A. The Committee acknowledges their contribution and expresses its gratitude for this assistance.

Robert F. Benson
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I. INTRODUCTION

Dismissal or discharge has been called the "capital punishment" of labour relations. Not only is the employee's relationship with the employer abruptly brought to an end, but for some employees, it may also signal the beginning of a number of related hardships including the end of productive and gainful employment in a chosen career. The problems may be especially severe in times of economic recession when little if any alternative employment is available.

When an employee is discharged or dismissed[1] for medical reasons, whether for physical or mental incapacity, the hardships on the employee and family, if applicable, may be even more onerous. The discharged employee's financial obligations and costs for food, shelter, transportation and possibly medical treatment continue while at the same time uncertainty and reduced income are experienced. once discharged, the former employee may become involved in a lengthy process of review of medical status, ability to work and benefit or insurance entitlements. Inadequacy or uncertainty of insurance or pension benefits may have a further impact on the employee's well-being. At least one province (Ontario, Bill 162) has proposed legislation which may change the eligibility of an injured worker to continued compensation.

1 Discharge and dismissal are both used in legislation, collective agreements and regulations relating to termination of employment for medical reasons. In this paper, discharge will be used throughout but refers also to dismissal.

The employer faced with an employee who is incapacitated for medical reasons is also affected. The employment relationship is based on the provision of services on the part of the employee, for which the employer pays wages.

When the employee is no longer providing these services, continued remuneration by the employer is not profitable. In addition, the employer may have less flexibility for the assignment of work and a greater workload may have to be borne by other employees with associated overtime or other costs.

When the medical status of an employee is left undetermined for a length of time, the employer's resourcing difficulties may be compounded by the fact that the employee's position must be maintained, tying up the associated person-year (also called man-year or staff-year by some employers). Depending on the size and nature of the organization, such a situation may have a significant impact on the employer's ability to deliver goods or services.

The medical discharge of an employee may also represent a loss of valuable experience and skills for the employer. This is particularly so when the training and development of this employee represents a significant investment on the part of the employer over time.

Both employers and employees therefore have a vested interest in the establishment of policies and practices regarding medical discharge. This paper examines some of the social considerations as well as the legal principles that courts and labour boards have formulated regarding this matter. The paper also provides an overview of the medical discharge policies and procedures of eight different organizations, including a number of police forces.

II. SOCIAL CONSIDERATIONS

Employer-employee relationships, whether they are cast in a collective agreement, a letter of understanding or a handshake, are based on the principle that both the employer and the employee are acting in "good faith". Thus, an expectation that both parties will be fair and reasonable in their dealings with each other is an essential element of this relationship.

When employees become incapacitated for medical reasons and can no longer perform the duties for which they were hired, whether in whole or in part, the employer is expected to demonstrate this "fair and reasonable" approach in the treatment afforded these employees. Consequently, many employers have developed policies and procedures regarding medically incapacitated employees, which include some or all of the following:

i) a review of the employee's medical condition;

ii) a determination of the employee's abilities and employment potential in the short and the long term;

iii) a review of the employment possibilities within the organization which could accommodate the employee;

iv) re-training programs to facilitate alternative employment;

v) assistance in the search for employment opportunities outside the organization;

vi) benefit and insurance programs;

vii) discharge of the employee as a last consideration; and

viii) consistent application of the established policy.

On the surface it would seem that such an approach would satisfy the concerns of most managers and employees in this matter. Unfortunately, some employees and their families have experienced considerable hardship despite the best intentions of employers.

One major difficulty is that of assessing the status and duration of the medical incapacity. Often employees are subjected to medical examination and the results are inconclusive or contradictory. An employer who decides to discharge an employee based solely on this information sets in motion a chain of events from which all may suffer.

The employee may experience an immediate financial loss because disability or Workers' Compensation benefits usually represent only a percentage of the salary previously earned. For some, the shortcomings of disability insurance plans are discovered only too late. A loss of self-esteem and security may also result. The employee may have to invest significant time and money to disprove the information used by the employer in the discharge decision. Whether appealing a medical discharge before a labour arbitration board, police board, police commission or a court, the employee faces legal expenses at a time when income is usually reduced.

The employer on the other hand loses the employee's knowledge, skills and experience. If employees perceive a colleague to have been dealt with unfairly by the employer, employee morale may be affected and hence the employer may be faced with lower productivity.

Many employers, because of the impact of this issue on the employee's future, adopt where operationally feasible a medical discharge policy which provides for their employees to make a full and complete representation with respect to their incapacity and its effect on their ability to perform their duties. This may include medical assessments provided by a physician chosen by the employee.

The confidentiality with which the employee's medical information is treated by the employer can also affect the process of determining the appropriate course of action with respect to an employee. This is particularly important in organizations such as the police, where "seeing a psychologist" may still result in concern on the part of some managers and colleagues whether the employee can "handle" the job. An employee, concerned with the possibility of disclosure that treatment was sought or obtained for certain emotional difficulties, may not seek such treatment or disclose fully the nature of his/her medical condition. The result may in the long run be detrimental to both the employee and the employer. While such a situation may still occur regardless of the employer's application of strict measures for confidentiality of medical information, most employees seek and expect that "need to know" will be a basic tenet of the review of their medical information.

For the police, as for other employers who deal with the public, there is the added dimension of weighing the member's right to confidentiality regarding medical treatment against disclosure in the public interest. There are some compelling reasons why managers in such organizations should be aware of any psychological or physical condition of an employee that may have an impact on the public in the performance of duties. While the loss of privacy for certain medical treatment may be warranted by public safety, it also opens the door for abuses in the use of this information.

Often, the review of an employee's medical status takes considerable time. Although perhaps unavoidable, this is difficult for both the employer and the employee who would prefer an early determination. Employees have complained that one of the most difficult aspects of this delay has been the lack of information provided by the employer regarding the progress of their case. This is usually quite stressful for the employee and family.

Once the employee's medical incapacity is determined, many employers offer the employee alternative employment. Police forces generally refer to these as "light duty" positions. Such an approach seems to satisfy a number of concerns: the organization's continued access to the services of a valued employee, the employee's sense of being cared for, particularly when the incapacity is the direct result of work duties, the employer's expression of corporate responsibility, and the employee's continued livelihood, to name only a few. While this approach seems to satisfy a number of employer and employee concerns, it has its problems.

For the employer there is a loss of flexibility in assigning workload because the employee is now limited to only certain types of duties. If co-workers are unconvinced of the employee's incapacity, the employer may also be faced with morale problems when these co-workers are given additional duties as a result of the accommodation of the incapacitated employee. The employer may even find it difficult to fulfill the organization's mandate.

The employer may also face a loss of value for the salary paid. An example of this occurs when an incapacitated police constable is reassigned to duties which would normally be performed by a clerk. If the employer continues to pay the member the salary of a constable (assuming a clerk's salary is less than that of a constable), there is a loss in value for the employer as the salary paid is no longer commensurate with the duties performed.

The employer may have only a limited number of positions that can accommodate incapacitated employees. The employer who attempts to reassign may be criticized if perceived to be arbitrary or inconsistent in the application of that policy. Employees expect their employer to treat them in an equal manner in equal circumstances. This applies also to an employer's approach to medical discharge. In fact, consistency of treatment may well be as important as the nature of that treatment.

For the police, as in other high risk occupations, a number of additional factors come to bear in the medical discharge issue. In these types of occupations, physical and mental fitness are usually required as a condition of employment, both at the time of recruitment and throughout the period of employment. Employees often perceive that if they become incapacitated for medical reasons as a result of performing their duties, the community they serve should recognize the value of their loss by providing full financial support either by continued employment or by disability insurance for the duration of the incapacity. A common complaint of police officers is that the treatment in some cases falls far short of expectations. Disability benefits and pensions may be inadequate to allow them and their families to continue to live in the lifestyle to which they were accustomed prior to the incapacity. In fact, the quality of life for such persons is often diminished as a result of the incapacity itself, such as the loss of a limb, in addition to inadequate disability or pension entitlements.

Community members, on the other hand, have on occasion expressed concern that police officers seem to want it both ways: they argue for higher wages based on the factor of risk in the performance of their duties and then, if an incident occurs which affects their continued ability to perform police duties, they also insist on full compensation. The extent to which the community may be prepared to meet the expectations of police members regarding disability benefits and pensions depends to some extent on whether there is a perception of higher social responsibility for the police than for other public service employees.

Under many long-term disability plans, including those of many police forces, employees discharged for medical reasons are assured of disability benefits for a period of up to two years. After this period, they must be incapable of performing any type of work to be eligible for further benefits. Accordingly, a police officer unable to perform police duties could be without

either a job or benefits after the expiration of the two-year period. It may be difficult for a disabled officer to find alternative employment with policing as the only previous work experience.

III. LEGAL CONSIDERATIONS

Judges and labour arbitrators have recognized the serious consequences of a medical discharge and have developed legal principles to ensure that fairness prevails.

They have sought to balance the interests of the employer and the discharged employee. While recognizing that an employer is entitled to employees who can perform the work for which they have been hired and are being paid, they have also attempted to protect employees from discharge where the circumstances did not justify such an extreme response by the employer. This fundamental balancing of interests is best explained by arbitrator Weiler in a frequently quoted massage:

> The first basic principle is that innocent absenteeism cannot be grounds for discipline, in the sense of punishment for blameworthy conduct. It is obviously unfair to punish someone for conduct which is beyond his control and thus not his fault. However, arbitrators have agreed that, in certain very serious situations extremely excessive absenteeism may warrant termination of the employment relationship, thus discharge in a non-punitive sense. Because the relationship is contractual, and the employer should have the right to the performance he is paying for, the employer should have the power to replace an employee on a job, notwithstanding the blamelessness of the latter. If an employee cannot report to work for reasons which are not his fault, he imposes losses on an employer who is also not at fault. To a certain extent, these kinds of losses due to innocent absenteeism must be borne by the employer. However, after a certain stage is reached, the accommodation of the legitimate interests of both employer and employee requires a power of justifiable termination in the former[2].

2 Re United Automobile Workers and Massey-Ferguson Ltd. (1969), 20 L.A.C. 370 (Weiler), at p. 371.

A. At Common Law

At common law, the employment contract between an employer and an employee contains all the rights and obligations between the parties. When the employee can no longer fulfill the obligations of the contract, the contract is frustrated and the employer may terminate the agreement. The employer is deemed to have agreed to pay wages for work performed and if the employee is unable to do that work, the employer is no longer obliged to pay the employee or to provide alternative tasks[3]. In the absence of a term in the contract to the contrary, when an employee becomes permanently incapacitated the employer may end the contractual obligations toward the employee, thus bringing the employment relationship itself to an end[4]. The employer may, of course, choose to accommodate the disabled employee but is under no obligation to do so.

3 Condor v. Barron Knights, Ltd., [1966] 1 W.L.R. 87 (Ass).
4 Dartmouth Ferry Commission v. Marks (1904), 34 S.C.R. 366; Marshall v. Harland & Wolff Ltd., [1972] I.C.R. 101.

An employer who decides to dismiss an incapacitated employee must show that the employee cannot fulfil the obligations under the contract. Otherwise, the discharge is unjustified and the employer is liable for damages in an action for wrongful dismissal.

At common law, a temporary disability does not necessarily frustrate the contract[5]. Before deciding whether the employer was justified in terminating the contract of employment[6], the court considers several factors including the length of the illness, the nature of the employment, the prognosis for recovery and the employment history.

5 Marshall v. Harland & Wolff Ltd., supra, note 4; Yeager v. R.J. Hastings Agencies (1985), 5 C.C.E.L. 266 (B.C.S.C.); Zelisko v. "99" Truck Parts & Equipment Ltd. (1986), 8 C.C.E.L. 201 (B.C.S.C.).

6 Yeager v. Hastings Agencies, ibid., pp. 289-90.

The common law courts generally do not reinstate an employee who has been unjustly discharged. Rather, damages are awarded in lieu of notice sufficient to bring the contract to an end. The quantum of damages is based on an evaluation of several factors, including the employee's age, occupation, prospects of finding another position and years of service. Awards can be significant, in some cases exceeding two years of wages[7].

7 Suttie v. Metro Transit (1983), 1 C.C.E.L. 123 (B.C.S.C.) (award: $148,000, equivalent to 2 years' salary); Lyonde v. Canadian Acceptance Corp. Ltd. (1984), 3 C.C.E.L. 220 (Ont. High Ct.) (award: $91,000, equivalent to 21 months' salary); Sorel v. Tomenson Saunders Whitehead Ltd. (October, 1985) unreported (B.C.S.C.) (award: approx. $200,000, equivalent to 30 months' salary).

B. Regulated Employment/Collective Agreements

Collective agreements and the application of the rules of natural justice have given unionized employees and employees holding a position regulated by statute greater rights than those enjoyed by employees who are in a master-servant relationship under a contract of employment. In general, however, neither collective agreements nor statutes provide a right to remain employed when permanently incapacitated.

The common law principle that the employer has the right to his/her part of the employment bargain in return for wages has usually been respected by arbitrators and boards reviewing discharges on medical grounds[8]. In Re Canada Post Corp., arbitrator Burkett explained:

8 Re Canada Post Corp. (1983), 6 L.A.C. (3d) 385 (Burkett); Re Atomic Energy of Canada Ltd. (Chalk River Nuclear Laboratories) (1982), 5 L.A.C. (3d) 248 (Saltman). For other examples, see Re Canada Post Corp, at p. 397.

> It is well established in arbitral jurisprudence that an employer is entitled to terminate the employment relationship if an employee is incapable of regular attendance at work even if the absenteeism is blameless .... An employee who is not capable of regular attendance at work cannot uphold his end of the

employment relationship thereby allowing the employer to exercise his power of justifiable termination[9].

9 Ibid., p. 397-98.

Though prepared to accept the employer's right to discharge employees who are incapable of performing the work for which they were hired, boards have closely scrutinized the exercise of this right to ensure that the interests of employees were protected. This close scrutiny has led to the establishment of a series of principles now generally recognized as applicable to medical discharges. A sound medical discharge policy would reflect these principles.

Medical discharge cases can be divided into two categories excessive innocent absenteeism and permanent incapacity. different principles apply to each category, they will be examined separately.

C. Excessive Innocent Absenteeism

An employee cannot be disciplined or discharged for being innocently absent from work[10]. However, when an employee's absences become excessive, even when they are for valid medical reasons, the employer can bring the employment relationship to an end. Arbitrators have recognized that at a certain point the interests of the employer take precedence over those of the absent employee[11].

10 Re Atomic Energy of Canada (Chalk River Nuclear Laboratories), supra, note 8.
11 Supra, note 8.

In assessing whether an employee's absences justify discharge, a board will look at the record of absenteeism and attendance forecast. The employer must demonstrate to the board that the employee's record establishes excessive absenteeism and that the person is, on the balance of probabilities, incapable of regular attendance in the future.

An employer is certainly entitled to consider past record when deciding whether to retain or discharge an employee. A medical discharge is non-disciplinary, though, and an employer cannot rely on past disciplinary actions taken against the employee when making such a decision[12].

12 Re Atomic Energy of Canada (Chalk River Nuclear Laboratories), supra, note 8.

Arbitrators have also generally held that an employer cannot discharge an employee who has been frequently absent unless some new, final or culminating incident occurs. Most arbitrators have been of the opinion that an additional absence is required before the employer is entitled to open the employee's file and evaluate the attendance record[13]. This final, culminating absence must also be linked or similar to past absences to justify an examination of the employee's dossier[14].

13 Re Plouffe and Treasury Board (Public Archives) (1980), 22 L.A.C. (2d) 80 (Kates), Re Atomic Energy of Canada Ltd. (Chalk River Nuclear Laboratories), supra, note 8. Some arbitrators have been more flexible with respect to this requirement. For example, in Re Victoria Hospital, London (1980), 24 L.A.C. (2d) 172 (Weatherhill), arbitrator Weatherhill suggested that any appropriate occasion to review the employee's record would suffice.

14 Re Crown in Right of Ontario (1986), 21 L.A.C. (3d) 432 (Verity).

There are no fixed criteria for what is deemed to be excessive absenteeism[15]. Arbitrators will examine the employee's attendance record[16] and compare it to the rate of absences of employees in similar positions[17]. The nature of the illness or injury which caused the absences is also relevant as not all absences should be given equal weight[18]. Arbitrators have usually refrained from describing with any precision the rate of absenteeism that justifies discharge. Instead, they have tended to express their decisions in general terms, using phrases such as "the absenteeism was excessive to the point of jeopardizing the employment relationship"[19], or "the employment relationship has been undermined"[20].

15 In most reported cases, the employees had been absent for a considerable number of days. Some examples:
Massey-Ferguson Ltd. CLV 91-1 (February 17, 1972, Brown);
employee was absent 37.5% of the 8 years he had been employed;
Columbus McKinnon Ltd. CLV 77-6 (September 17, 1970, Metzler);
employee was absent 55.43% of the time;
Barber-Ellis of Canada Ltd. CLV 63-7 (May 23, 1969, Metzler);
employee was absent 70% of the time;
Re Canada Post Corp., supra, note 8;
employee was absent 16.4% and 19.7% of the time during the two periods considered.

16 See, for example, Re Dominion Stores Ltd. (1979), 20 L.A.C. (2d) 298 (Brown).

17 Re Canada Post Corp., supra, note 8.

18 For example, absences caused by industrial accidents where the injured employee was totally blameless should not be taken into consideration when deciding whether the employee's absences were excessive. See Re Falconbridge Nickel Mines Ltd. (1979), 21 L.A.C. (2d) 280 (Brunner).

19 Re Canada Post Corp., supra, note 8, at p. 402.

20 Re Borough of Scarborough (1977), 15 L.A.C. (2d) 71 (Burkett).

More important than the employee's attendance record is the attendance forecast. An employer cannot discharge an employee for excessive innocent absenteeism on past record only. It must also be established that the absences will continue. If the cause for the absence is not likely to recur or if the employee is now cured, a discharge is unjustified[21]. As explained by arbitrator Burkett in Re American Standard, Division of Wabco-Standard Ltd:

21 Re Multi Fillings Ltd. (1985), 19 L.A.C. (3d) 251 (Palmer); Re American Standard, Division of Wabco-Standard Ltd. (1977), 14 L.A.C. (2d) 139 (Burkett); Re Canada Post Corp., supra, note 8.

The arbitral jurisprudence accepts the existence of a power of justifiable termination when it is established that the involuntary employee shortcomings are such as to undermine the employment relationship and when it is also established that the situation is not likely to improve....The rationale for this dual requirement flows from the fact that it would not be fair or just to permit the termination of an employee for reasons which he is powerless to

control (i.e. mental or physical disorders) if the prognosis is that the disorder precipitating the termination has been corrected or is likely to disappear in the foreseeable future[22].

22 Ibid., p. 146.

Though there is some disagreement on the question, most boards have placed on the employer the onus of proving that employees are unlikely to be able to improve their attendance record[23]. Should the employer fail to adduce persuasive medical evidence to the effect that the employee will not be able to resume work in the foreseeable future, an arbitrator would in all likelihood allow the grievance and reinstate the discharged employee[24].

23 Re Atomic Energy of Canada Ltd. (Chalk River Nuclear Laboratories), supra, note 8; Re Dominion Stores Ltd., supra, note 16; Re International Association of Machinist and Perfect Circle - Victor Division, VNG Auto Parts Ltd. (1972), 24 L.A.C. 380 (Weiler); Re Corporation of the City of Mississauga (1979), 21 L.A.C. (2d) 64 (Brown). In some cases, arbitrators have accepted that employers may draw an adverse inference from the employee's poor attendance record that the pattern is likely to continue. See Re Canada Post Corp., supra, note 8, at p. 401; Re Hayes Dana Inc. (1986), 3 C.L.A.S. 27 (Picher). The onus then falls upon the employee to rebut the inference.

24 Re Dominion Stores, ibid.; Re Corporation of the City of Mississauga, ibid.; Re Steinberg Inc. (1986), 23 L.A.C. (3d) 193 (Springate).

Arbitrators have upheld the right of employers to demand an independent medical examination of employees returning from sick leave[25]. An employer is entitled to be satisfied that the employee is fit to return to work[26]. However, the employer cannot insist that the employee see the employer's own doctor or a doctor of the employer's choosing[27]. The employer also cannot challenge the validity of a qualified medical opinion unless there are reasonable grounds to doubt the opinion rendered[28].

25 Re Firestone Tire & Rubber Co. of Canada Ltd. (1973), 3 L.A.C. (2d) 12 (Weatherhill).
26 Re Brewers' Warehousing Co. Ltd. (1982), 4 L.A.C. (3d) 257 (Knopf).
27 Re Air Canada (1983), 8 L.A.C. (3d) 82 (Simmons).
28 Re Government of B.C. (1986), 21 L.A.C. (3d) 193 (Kelleher).

When the medical evidence of the employee's ability to resume full-time duties appears inconclusive, arbitrators have often ordered a conditional reinstatement. Normally, such a reinstatement is for a trial period during which the employee must demonstrate regular attendance[29].

29 Supra, note 23.

Discharges founded on excessive absenteeism have also been overturned when it was shown that the employer had not treated the griever in a manner consistent with the treatment given other employees[30]. Arbitrators generally require employers to treat employees in a uniform manner. Accordingly, when it can be shown that the employer took no action with respect to another employee with a similar or worse absenteeism record, the arbitrator may conclude that the employer does not consider the degree of absenteeism excessive[31].

30 Re Int'l Ass'n of Machinists, Lodge 890, and S.K.D. Mfg, Ltd. (1969), 20 L.A.C. 231 (Weiler); Re United Rubber Workers and Seiberling Rubber Co. of Canada Ltd. (1969), 20 L.A.C. 267 (Weiler); Re International Association of Machinist and Perfect Circle - Victor Division, VNG Auto Parts Ltd., supra, note 23.

31 Re International Association of Machinist and Perfect Division, VNG Auto Parts Ltd., ibid.

There is some dispute in the case law as to the appropriate time for assessing the employee's attendance forecast. Some arbitrators consider their role to be limited to reviewing the employer's decision and do not consider evidence that is not before the employer at the time of the discharge[32]. However, the majority of arbitrators appear willing to consider the likelihood of regular attendance in light of all the medical evidence submitted to the board, including evidence obtained after the dismissal[33]. This latter group of arbitrators has found that it would be unfair not to reinstate employees whose absences are for reasons beyond their control when the outlook is favourable. As arbitrator Burkett explained in Re Canada Post Corp.[34]:

32 Re Canada Post Corp. (1986), 22 L.A.C. (3d) 236 (Hinnegan); Re Ottawa General Hospital (1986), 20 L.A.C. (3d) 24 (Brown); Re City of Sudbury (1982), 2 L.A.C. (3d) 161 (Picher).

33 Re Canada Post Corp., supra, note 8; Re British Columbia Telephone Co. (1979), 19 L.A.C. (2d) 98 (Gall); Re Board of Education for City of North York (Dec. 1, 1980) unreported (Carter).

34 Re Canada Post Corp., supra, note 8, at p. 400.

> If it is proven at an arbitration hearing that an employee who has been terminated for blameless absenteeism is likely to be regular in attendance in the future, it seems to me that the proper balancing of interests requires that the employee be returned to his employment. The prejudice to an employee who is capable of regular attendance in the future but is nevertheless terminated is substantial. On the other hand, it is difficult to understand how it is that an employer is prejudiced by maintaining in employment an employee, of possible long standing, who is capable of regular attendance in the future.

D. Permanent Incapacity

Employees may be discharged when they suffer from an illness or injury that renders them incapable of performing the work for which they are employed[35]. No distinction is made between physical or mental incapacity[36].

35 Several cases affirm this general principle. See, for example, Re City of Brampton (1979), 20 L.A.C. (2d) 12 (O'Connor); Re Niagara Regional Board of commissioners of Police (1975), 9 L.A.C. (2d) 272 (Swan); Re Motor Transport Industrial Relations Bureau of Ontario (1973), 3 L.A.C. 275 (Palmer); Re Gates Rubber of Canada Ltd. (1977), 14 L.A.C. (2d) 407 (Brown).

36 See, for example, Re General Motors of Canada (1973), 1 L.A.C. (2d) 401 (Palmer) where the arbitrator overturned the dismissal of an employee whose psychiatric disorder had caused him to assault his foreman.

As in all cases of medical discharges, the employer is justified in releasing the employee when it is clear that the employment contract has been frustrated because of the employee's incapacity[37].

When that point is reached depends on the facts and circumstances of each case. If all available evidence indicates that there is a reasonable likelihood that the employee will be unable to resume employment, then clearly the employer is entitled to terminate the services of this employee[38]. Similarly, the employer is justified in discharging an employee with an incapacity that threatens the safety of the employee in question, fellow workers or the public[39]. The mere possibility that there is an increased risk because of the incapacity is sufficient to justify discharge[40].

37 Supra, note 4.
38 Re Russelsteel (1982), 8 L.A.C. (3d) 264 (Davis); Re Canadian Safety Fuse Ltd. (1973), 3 L.A.C. (2d) 77 (Moalli).
39 Re Crown Zellerbach Canada Ltd., Elk Falls Mill (1984), 12 L.A.C. (3d) 159 (Morrison); Re Corporation of the City of Brampton (1979), 20 L.A.C. (2d) 12 (O'Connor); Re Robertson Irwin Ltd. (1974), 6 L.A.C. (2d) 410 (Brown).
40 Re University Hospital of London (1974), 4 L.A.C. (2d) 16 (Simmons).

Recent decisions limit the right of the employer to discharge an employee who can perform most, if not all, of the tasks associated with his/her position[41]. Similarly, arbitrators increasingly appear to require employers to make efforts at finding alternative work in the enterprise which the disabled employee could perform.[42] The employer is not, however, obliged to create a position for the employee[43]. An employer can adopt a general policy regarding the degree of fitness required of the work-force. However, this policy must be reasonable and justifiable in light of medical authority[44]. In addition, despite the existence of a general policy, each case must be evaluated individually by the employer. As arbitrator Ellis stated in Re Kingsway Transport[45]:

41 Re Norton Canada Inc. (1986), 1 C.L.A.S. 27 (Boscariol); See also Re Borough of Scarborough, supra, note 20.
42 Re Maritime Telegraph & Telephone Co., Ltd. (1985), 16 L.A.C. (3d) 318 (Cotter). In this case, the arbitrator imports into a medical discharge grievance this principle normally associated with other forms of nonculpable incapacity. Not all arbitrators are prepared to impose this obligation upon employers. As arbitrator Mason stated in Re Suncor (1982), 3 L.A.C. (3d) 256, at p. 263:

> There is no obligation on the company contained within the collective agreement to provide light duties for injured workers, nor is there an obligation on the company to continue to retain employees whose physical incapacity makes them incapable of performing the. duties for which they were hired.

In contrast, in Re Tec Syn Canada Ltd. (1986), 2 C.L.A.S. 59 (Hoefling), the evidence indicated that though the disabled employee could not perform his regular duties, he could perform light duties. As well, at the time of the discharge, there was an opening for a sweeper at the plant. The arbitrator reinstated the griever in the sweeper position.
43 Re Suncor, ibid.; Re Canadian Safety Fuse Co. Ltd., supra, note 38.
44 Re Kingsway Transport (1979), 19 L.A.C. (2d) 180 (Ellis); Re Consumers' Gas (1976), 12 L.A.C. (2d) 285 (Brown).
45 Ibid. p. 193.

> We are not satisfied, however, that a blanket application of the general rule that results in an employee being removed from a driving job he already holds is reasonable. Indeed, we conclude that it is not reasonable. Such cases must be

> dealt with on an individual basis having due regard to all the circumstances including medical evidence concerning the individual's particular prognosis.

As in cases of excessive innocent absenteeism, the onus is on the employer to prove that the employee will be incapable of performing the work in the future[46]. The mere possibility that in the future the employee may not be able to perform assigned tasks is not sufficient[47]. One arbitrator has held recently that an employee infected with the AIDS virus and who could perform all of his assigned duties could not be discharged on the basis of the remote possibility that he could transmit the virus or that other employees would be afraid to work with him[48].

46 Re Alta. Lictuor Control Board (1982), 6 L.A.C. (3d) 184 (Owen); Re Kingsway Transport, supra, note 44 Re Pacific Western Airlines Ltd. (1987), 28 L.A.C. (3d) 291 (Hope).
47 Re Alta. Lictuor Control Board, ibid.; Re Int'l Nickel Co. of Canada Ltd. (1975), 7 L.A.C. (2d) 196 (Rayner).
48 Re Pacific Western Airlines Ltd., supra, note 46.

These legal principles pertaining to medical discharges have all evolved in the context of collective agreements and specific statutes. The collective agreements and statutes have defined the jurisdiction of boards to make awards. The Royal Canadian Mounted Police Act[49] does not place any limit on the power of the External Review Committee to make recommendations with respect to grievances referred[50]. Accordingly, the Committee may fashion its own approach to medical discharge.

49 S.C. 1986, c. 11.
50 Subsection 35(13) states:
On completion of a hearing, the Committee shall prepare and send to the parties and the Commissioner a report in writing setting out such findings and recommendations with respect to the grievance as the Committee sees fit.

Labour boards and tribunals have, over time, clarified the principles that ought to apply to medical discharge. In structuring a fair and reasonable system, wide latitude is given to the employer. It is the overall fairness and reasonableness of the system which is important, rather than whether every single procedure independently meets that test.

For the purpose of a comparative review of how some employers have approached the issue of medical discharge, an overview of the medical discharge policies of eight employers follows.

IV. COMPARATIVE PERSPECTIVE

A. The Ottawa Police Force

The Ottawa Police Force has adopted and applies a "full-fitness" policy for its members. Every police officer, whether a constable or a higher ranking officer, must be capable of doing the work of a constable on the street. The Force does not transfer or find alternative work for an injured or medically unfit officer, irrespective of the nature of the injury or the manner in which it was occasioned. Accordingly, even if an officer is hurt while on duty, the officer is not retained by the Force if the injury renders the officer incapable of performing the full range of duties required of an average healthy constable.

The Ottawa Police Force cites three reasons for the policy:

1. Management flexibility: because all officers can perform all the tasks which could be required of them, the Force retains a great deal of flexibility in the manner in which it can assign its personnel.

2. Costs: police members receive salaries that are based in part on certain factors of danger and risk in their duties. For the most part, these salaries tend to be higher than those of civilian employees engaged in police support positions where such factors are not of concern. The reassignment of a police member to a civilian classified position creates a disparity between the classification of the position and the corresponding salary. As the police member must also be replaced, the Force's salary costs tend to be higher with reassignment.

3. Pay equity requirements: the Ontario Pay Equity Act at section 6 requires that male and female employees doing work of comparable value be paid equal salaries. Currently, many police support positions are staffed by women while the majority of police members of the Force are men. The salary disparity resulting from the assignment of a police member to a police support position may inadvertently create difficulties regarding pay equity requirements of the Act[51].

51 An Act to Provide for Pay Equity, S.O. 1987, c.34.

A further justification given by the Force for its policy can be found in section 57 of the Ontario Police Act[52] which defines the duties of a police officer including preserving the peace, preventing robberies and apprehending offenders[53]. The Force argues that the Police Act implies that an officer must be physically and psychologically fit to perform these duties. The Ottawa Police Force's policy is consequently consistent with that interpretation of the Police Act. The Ontario Police Commission has confirmed that a Force can maintain such a policy. In a 1977 decision, the Commission stated that an assignment to light duty "is not a right of the police officer, but a privilege bestowed by his Force"[54].

52 R.S.O. 1980, c.381.

53 Section 57 reads:
57. The members of police forces appointed under part II except assistant and civilian employees, are charged with the duty of preserving the peace, preventing robberies and other crime and offences, including offences against by-laws of the municipality, and apprehending offenders, and commencing proceedings before the proper tribunal, and prosecuting and aiding in the prosecution of offenders and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables.

54 In Re Creamer and the Board of Commissioners of the Police of Metropolitan Toronto, Ontario Police Commission, August 11, 1977, unreported, at p.18.

The Ottawa Police Force is aware that a "no light duty" policy must be applied consistently. In Ontario, a Force cannot offer light duty to some of its members while refusing the privilege to others who could perform the work. In a recent decision of the Ontario Police Commission, it was held that a Force which had in the past accommodated some disabled officers could be in

violation of the Ontario Human Rights Code if it failed to transfer a disabled officer when there was a suitable, less demanding position available[55].

55 In Re Basset and Hamilton-Wentworth Regional Police, Ontario Police Commission, October 7, 1987, unreported.

Medical discharges from police forces in Ontario are governed by section 27 of the General Regulations[56] under the Police Act[57]. Section 27 gives the Board of Commissioners of Police the power to discharge for medical reasons[58]. The decision to discharge an employee can only be made when, in the opinion of two doctors, the officer is physically or mentally incapable of performing his/her duties.

56 R.R.O. 1980, Reg. 791, s.27.
57 Supra, note 52.
58 Section 27 reads:

> 27. No chief of police, constable or other police officer is subject to any penalty under this Part except after a hearing and final disposition of a charge on appeal as provided by this Part, or after the time for appeal has expired, but nothing herein affects the authority of a board or council
> ...
> (e) to discharge or place on retirement, if he is entitled thereto, any member of the force who, on the evidence of two legally qualified medical practitioners is, due to mental or physical disability, incapable of performing his duties in a manner fitted to satisfy the requirements of his position but any decision of the board or council made pursuant to this clause may be appealed to the Commission.

This section also provides for a full hearing before the board. Such a hearing must be in accordance with the principles of natural justice, which require that the dismissed employee be allowed to adduce medical evidence challenging the medical opinions led to justify the dismissal[59]. The decision of the Board can be appealed to the Ontario Police Commission, and subsequently, to the Ontario Divisional Court[60]. The procedure envisaged by the Police Act ensures, therefore, that a dismissed officer has full and ample opportunity to challenge the decision to dismiss and the evidence upon which the decision is based.

59 See Re Cardinal and Board of Commissioners of Police of Cornwall, [1974] 2 O.R. 183; Nicholson v. Hardimand-Norfolk, [1979] 1 S.C.R. 311.
60 Judicial Review Procedure Act, R.S.O. 1980, c.224, s.6.

The conditions of employment of the members of the Ottawa Police Force are outlined in the collective agreement reached between the Board of Commissioners of Police of the City of Ottawa and the Ottawa Police Association. Article 27 of the Agreement entitles the Force to require the members to submit to an annual medical examination[61]. The Force does not invoke Article 27 to oblige every member to undergo a yearly examination. However, it uses the power conferred by Article 27 to justify the policy that officers who have been absent for medical reasons pass a medical examination before they can resume their work with the Force. Should

this or other medical examinations reveal that an officer is unable to perform the regular duties of a police constable, the Force may then invoke the medical discharge procedures.

61 Article 27 states:

> All members of the force shall, if required, have an annual medical examination by a qualified medical practitioner of their choice, and each member who attends for an examination shall obtain a copy of the medical report and a copy shall be sent to the Board. If the Board is not satisfied, the Board, at their own expense, may have the officer attend for an examination before a qualified medical practitioner of the Board's choice. However, if the member objects to the medical practitioner selected by the Board, he/she shall have the option of naming three (3) medical practitioners, one of whom shall be selected by the Board.

Frequently, medical problems come to light in the course of disciplinary proceedings. Schedule 1 of the Police Regulations[62] lists the offences for which an officer may be disciplined[63]. A member who is subject to disciplinary proceedings and who has a valid medical justification for the improper conduct may raise the justification during these proceedings. If the medical problem is one which prevents the officer from performing regular duties, the Force initiates discharge proceedings.

62 R.R.O. 1980, Reg. 791, Sch. 1.

63 The offences listed in the Schedule include insubordination, neglect of duty and consuming intoxicating liquor.

Despite its "no light duty" policy, the Ottawa Police Force is flexible in its evaluation of the capabilities of officers. It has in the past stayed dismissal proceedings or reinstated dismissed officers who had provided evidence that their incapacity had been wrongly diagnosed. As well, if there is evidence that the prognosis for improvement is encouraging, the Force places the member on sick leave rather than proceeding with medical discharge.

Though the Force does not distinguish between incapacities resulting from an on-duty incident and those which have off-duty causes, the distinction may be relevant in the determination of the officer's benefits entitlement. An officer injured while on duty is entitled to benefits under the Ontario Workers' Compensation Act[64]. In its collective agreement with the Ottawa Police Association, the Force agrees to pay an officer who is temporarily disabled full salary for the duration of the disability. This provision does not apply to a member who is diagnosed as permanently disabled[65].

64 R.S.O. 1980, C. 539.

65 Article 7.01 of the collective agreement states:

> (a) All members shall be covered by the Workers' Compensation Act regardless of rank or assigned duties.
>
> (b) Where a member is absent from duty as a result of personal illness or injury arising out of and in the course of their duties within the meaning of the Workers' Compensation Act, the member shall be provided with free hospitalization and medical care. The Board agrees that the member will continue to receive

> full salary for the period of temporary disablement as determined by the Workers' Compensation.

Workers' Compensation provides benefits for a worker who has become permanently disabled as a result of a work-related incident[66]. Such a worker is entitled to benefits equalling 75% of average weekly wages during the 12 months prior to the incident[67].

66 Supra, note 64, s. 43.
67 Ibid.

Because of the Ottawa Police Force's "no light duty" policy, an officer with that Force could be permanently disabled for the purposes of the Force, yet not be permanently disabled within the definition of the Workers' Compensation Act. That officer may not meet the standards set by the Force, but nonetheless be capable of other work. In such a case, the Workers' Compensation Board could refuse the claimant full compensation. The Act provides for benefits adjusted to the reduced earning capacity of the worker[68].

68 Ibid., subsection 43(3).

An officer whose incapacity is not work-related is not eligible for Workers' Compensation. The collective agreement between the Ottawa Police Association and the Board of Commissioners of Police for the City of Ottawa provides for long-term disability benefits equalling 60% a member's monthly salary.

B. Metropolitan Toronto Police

The Metropolitan Toronto Police is governed by the Ontario Police Act[69]. Accordingly, it must follow the procedure outlined in paragraph 27(e) of the regulations under the Act[70]. The Force has invoked paragraph 27(e) only once.

69 Supra, note 52.
70 The procedure is described in the section which outlines the policy adopted by the Ottawa Police Force. See note 58, supra.

The Force attempts to find alternative employment within its ranks for incapacitated officers, thus the need to discharge an officer for medical reasons rarely presents itself.

Should an officer become ill or incapacitated, the Force retains the services of the officer who can perform the tasks involved in a less demanding position. There are approximately 5,500 officers employed by the Force. Of these, approximately loo (0.6%) have been assigned light duty after being diagnosed medically unfit to do the work normally required of a police officer.

In deciding whether an incapacitated officer can be retained, the Force does not distinguish between incapacities incurred while on duty and those resulting from off duty injuries or illnesses. It acknowledges that there is more emotional pressure and incentive to try to accommodate an officer injured while on duty. However, an officer is only retained if able to

perform the duties of a vacant position[71].

71 In the one case of dismissal for medical reasons which was contested by the officer and which therefore went first to the Board of Commissioners of Police of Metropolitan Toronto, and later to the Ontario Police Commission, the Force had tried assigning the officer to the Court Bureau, a light duty assignment. The dispute between the officer and the Force centered on the officer's fitness to perform this work. See Re Creamer, Board of Commissioners of Police of Metropolitan Toronto, May 12, 1977, unreported; Re Creamer and the Board of Commissioners of Police of Metropolitan Toronto, Ontario Police Commission, August 11, 1977, unreported. The Commission upheld the Board's decision to place Officer Creamer on early retirement.

There are currently ten (10) officers who are on long-term disability benefits as a result of being declared unfit for any of the positions available in the Force. These officers did not challenge the Force's decision to release them from duty and place them on disability benefits.

The collective agreement negotiated between the Metropolitan Board of Commissioners of Police and the Metropolitan Toronto Police Association provides for a mechanism to determine if and when a disabled officer can return to work[72]. The Force's medical officer makes the first evaluation of the member's capability to return to work. If the Force's doctor and the member's own physician disagree, the case is referred to an independent physician whose opinion on the matter shall govern.

72 Article 12:10 (a) & (b) address this question.
Article 12:10 (a) provides:

> The Director of Medical Services shall have medical charge of every member who, on account of illness, injury or other physical or mental disability, is unable to do his/her police duties, provided that any member who wishes to attend to his/her family physician may do so at his/her own expense. ...[T]he Director of Medical Services or a physician appointed to assist him/her shall have the sole right to determine when the member shall resume duty.

Article 12:10 (b) provides:

> If, after examining medical reports and making such investigations including consultation with the member's physician as the Director of Medical Services deems appropriate, the Director of Medical Services disagrees with the member's physician on the medical diagnosis or prognosis of the member, the member shall be referred to an independent medical consultant (as may be agreed by the parties from time to time) whose opinion on the diagnosis or prognosis of the member's condition shall govern....

The benefits an incapacitated worker receives depend on whether the injury or illness is work-related. Toronto police officers are entitled to Workers' Compensation for injuries incurred while at work[73]. Under the collective agreement, the Force supplements the benefits received by an officer from the Workers' Compensation Board so that the total amount received equals the officer's salary[74].

73 For entitlements under the Ontario Workers' Compensation Act, see notes 64-68, supra.

74 Article 13.01 of the collective agreement states:
When a member is absent by reason of an illness or injury occasioned by or as a result of his/her duty and where an award is made by the Workers' Compensation Board:

> (a) He/she shall, in addition to the Workers' Compensation Award(s), receive such further amount so as to provide that the total payment to the member shall approximate but not exceed the net pay such member might otherwise have received had he/she not been absent.

An officer who becomes permanently unable to perform work as a consequence of a work-related injury or illness could receive full salary until retirement age.

Benefit entitlement for an officer whose permanent disability was incurred off-duty is not as generous. An officer suffering from a permanent incapacity which is not duty-related is entitled to long-term disability benefits under the collective agreement. Under the plan in the agreement, that officer must first exhaust personal sick leave credits during which time full salary continues[75]. Once sick leave credits are depleted, the officer receives payments equalling 75% of salary at the time of the disability[76]. The collective agreement provides that the benefits will continue until retirement age.

75 Article 12.06 of the collective agreement reads:
Every member, on the first of the month following completion of six months of service shall be eligible to receive sick pay, at full salary, for any time lost by reason of illness or injury to the full extent of sick pay credits available to him/her at the time of each absence, except where an award is made under the Workers' Compensation Act.

76 Article 12:11 (a) of the collective agreement provides:

> A member is eligible for benefits under the plan where:
> (1) The member is absent due to disability which would entitle the member to sick leave but his/her sick leave credits are exhausted and credits remain available under this Bank.
>
> Article 12:11 (b) (1) (iii) adds:
> ... in any year payment to an eligible member under the Bank shall be made on a bi-weekly basis and shall be the greater of a 75% benefit of the officer's salary at the time of the disability or a 60% benefit based on the salary for the rank held by the officer at the time of the disability as it is increased from time to time.

The Force is aware that its policy of offering light duty to disabled officers may lead to some difficulties. Like most police forces in Ontario, it has in recent years staffed an increasing number of its positions with civilians. These measures have reduced the number of positions available for disabled members. At the time of writing this report, the Force has not staffed all the positions to which a disabled member could be assigned. If and when the Force does find itself without a suitable position for a disabled officer, it will have to choose whether to:

1) place the officer on long term disability benefits, (which may include Workers' Compensation entitlements);

2) create a job, or

3) take back a position it had allocated to a civilian employee.

Though the Force would not be obligated to accommodate a disabled officer in these circumstances[77], it has, through its policy, created the expectation among the members that they will be retained at full salary if a disability does not prevent them from performing some work with the Force. It may therefore be difficult for the Force to change the policy.

77 In Re Basset and Hamilton-Wentworth Regional Police, supra, note 55, the Ontario Police Commission ruled that a police force which had in the past accommodated disabled officers could not subsequently refuse to accommodate similar members. After stating this principle, the Commission added, at p. 18:

> This is not to say that the fact that this Police Force has accommodated other disabled officers in the past who are unable to patrol, means that it must accommodate every such member in the future. There is no obligation to take away a job already held by someone else, nor is there an obligation to create a new job classification. Civilianization is a well accepted objective of policing in the future and it must be allowed to continue.

The Metropolitan Toronto Police also realizes that the policy may create minor training problems. One of the positions now filled by disabled officers is that of the station duty clerk. The duty clerk must know in detail how the station operates. Trainees have been assigned to this position to allow them to become familiar with the many facets of police work. The Force recognizes that their policy may limit their ability to use the position for training purposes.

C. Sûreté du Québec

An officer who completes the probationary period with the Sûreté du Québec is guaranteed 25 years of full salary regardless of health. An officer who is ill or incapacitated receives a full salary even if permanently disabled.

In 1969, the Government of Québec and the Association des policiers provinciaux du Québec negotiated a new sick leave system for the members of the Sûreté du Québec.

Under the current system, officers do not accumulate individual sick leave. Each officer's sick leave entitlement (1 1/4 day per month) is placed in a central sick leave bank. In return, each officer has access to all leave in this bank for the duration of the incapacity. Should the officer suffer permanent and total incapacity, full salary is paid until retirement[78]. As retirement from the Sûreté is available after 25 years of service, the sick leave plan in effect at the Sûreté guarantees each officer entering the Sûreté 25 years of full salary.

78 Article I, Annex "C", of the Agreement states:

> Le système de congés de maladie en vigueur jusqu'au 31 mars 1969, est remplacé à compter du 1er avril 1969 par une banque

> collective de congés de maladie dans laquelle sont versés tous les congés de maladie accumulés par chaque membre de la Sûreté.

Article 1.03 states:

> Le membre de la Sûreté incapable de travailler pour causes de maladie ou blessures subies au cours d'un accident, a droit à un congé de maladie sans perte de gains et autres avantages sociaux conformément aux stipulations du présent article.

This plan covers both duty-related and non-duty-related incapacities. If the illness or injury is duty-related, the Force covers the difference between the officer's salary and the benefits provided by Québec's Commission de la santé et de la sûreté's du travail. An officer whose incapacity is not work-related draws directly from the collective sick leave bank.

In order to have the right to draw from the bank, an officer must satisfy the Sûreté that she/he is ill or injured. That determination is first made by the Sûreté's physician. If the diagnosis of the Sûreté's physician differs from that of the member's own physician, the officer is seen by an independent physician whose opinion is binding[79].

79 Article 2.05 of Annex "C" of the Agreement states:

> Dans tous les cas, le Directeur général de la Sûreté ou son représentant peut faire examiner un membre par un médecin désigné par le Directeur général ou son représentant. Ce médecin décide si l'absence est motivée et il peut déterminer la date à laquelle le membre peut reprendre son travail. S'il y a divergence d'opinion entre le médecin désigné par le Directeur général ou son représentant et le médecin personnel du membre de la Sûreté, ces deux médecins désignent d'un accord commun un troisième médecin, dont la décision est finale.

The collective agreement gives the Sûreté the right to require that partially disabled officers perform other tasks in the Force[80]. Light duty, far from being a privilege accorded by the Sûreté, becomes, under this system, obligatory for an officer who is not totally disabled. An employee who refuses to perform work which he/she has been diagnosed as being capable of doing risks dismissal. such a dismissal would not be for medical reasons but for refusing to obey a reasonable command. An officer dismissed for this or any other reason would have the right to grieve the decision to an arbitrator[81].

80 Article 1.10 of the Agreement states:

> Cependant, il est entendu que, dans le cas d'invalidité, le Gouvernement, tout en assumant l'entière sécurité au sens de ladite banque à ce ou ces membres, se réserve le droit de l'employer dans une autre occupation.

81 Article 31 of the collective agreement deals with the right to grieve management decisions and the grievance procedure

Similarly, the Sûreté transfers a partially disabled officer to another city or region when there is no light duty available in the community in which the officer worked prior to the accident or illness[82].

82 The right to transfer an employee is generally recognized as a management right in labour law. Unless the collective agreement specifically limits the power of the employer to transfer an employee for valid management reasons, the employer is deemed to have the right to insist that an employee accept a reasonable transfer. See Brown & Beatty, Canadian Labour Arbitration, 3rd edition, 1988, Canada Law Book Ltd., page 5-25.
The collective agreement between the Sûreté and the Police Association implies that the Force has the right to transfer officers. For example, Article 22 deals with compensation for moving costs of an officer who has been transferred.

In the event of a disagreement between the Sûreté and a member regarding the nature of the work which can be performed, the collective agreement provides a dispute resolution mechanism. The medical evaluation of the officer's ability to work is made by the Sûreté's doctor, or an independent physician in the case of a disagreement between the Sûreté's physician and the member's own doctor[83]. If, as a result of that determination, the officer would be transferred or assigned to different duties, including light duty, the matter is sent to a permanent joint committee formed of delegates from both the Association and the Sûreté. This committee has the power to decide where the officer will be assigned as well as the nature of the work to be performed[84]. If the assignment recommended by the committee is refused, the member risks dismissal for disobedience.

83 supra, note 79.

84 Article 2 of Annex "C-1" reads:

> Le membre affecté d'une invalidité partielle permanente est soumis au mécanisme suivant, en ce qui trait à son retour au travail:
>
> a) le processus d'évaluation médicale prévu à la banque de maladie, y compris, le cas échéant, l'intervention d'un tiers sert d'abord à déterminer l'aptitude du membre à reprendre ses fonctions habituelles ou d'autres tâches normalement effectuées par des membres de la Sûreté;
>
> b) dans le cas où cette détermination implique pour le membre un changement de lieu où il travaillait lors de son accident ou maladie et soulève un désaccord entre le membre et la Sûreté quant à sa réaffectation, le litige est soumis à un souscomité permanent du comité paritaire et conjoint formé à cette fin;
>
> c) ce sous-comité a pour but d'étudier et de décider du retour au travail de ce membre à tel endroit et selon telles modalités qu'il détermine ...

The Sûreté has succeeded in finding suitable work for all disabled officers. It has designated certain positions as appropriate for such employees. These positions include conducting investigations required before certain permits can be issued, serving subpoenas, performing electronic surveillance and computer work. Disabled officers have priority over their colleagues for this work. The Sûreté retrains an officer for a new position when required. Approximately 250 officers out of a total force of 4,300 (approximately 6%) have been assigned to this type of work because of a partial disability. The Force does not have the person-year allocation to cover these positions.

The Sûreté does not foresee any difficulty in finding suitable work for disabled officers. It believes that there is a sufficient number of designated positions available to ensure that these officers can be retained. The collective agreement allows the Sûreté to transfer disabled officers to other Ministries in the Québec government[85]. The officer thus affected would continue to benefit from the central sick leave bank and be paid the salary of a Sûreté member. The provision does, however, give the Sûreté flexibility to place disabled officers in suitable occupations.

85 Supra, note 82.

The Sûreté believes that their method of dealing with ill or injured officers has several important advantages:

1. Being employed in a suitable and valued occupation helps disabled employees retain their sense of self-worth;

2. The Sûreté competes with other forces in Québec for recruits. The guarantee of 25 years of salary helps the Sûreté attract applicants; and

3. Its policy helps maintain morale.

D. Royal Canadian Mounted Police

The Royal Canadian Mounted Police (R.C.M.P.) has approximately 16,000 officers stationed throughout Canada. In 1986-87, only 16 officers (0.001% of the Force) were medically discharged from the Force. One of the reasons so few members are released is that the Force has a policy of attempting to place disabled members in alternative positions whenever possible.

The procedure to be followed in cases of medical discharge is governed by the Royal Canadian Mounted Police Act[86] (the Act) and the Royal Canadian Mounted Police Regulations[87] (the Regulations). To be valid, all discharges must conform to the Act, the regulations and the Commissioner's Standing Orders[88].

86 S.C. 1986, c.11.

87 SOR/88-360 and SOR/88-361.
Prior to the enactment of these regulations, the procedure was governed by the Force's Administrative (Admin.) Manual II.19. At the time that this report was prepared, the Force had not yet completed the amendments to the Manual required for conformity with the new regulations. For the purpose of this report, it will be assumed that those procedures not affected by the new regulations will remain unchanged.
The procedure outlined applies to members other than officers. The criteria for officers is similar to those which apply to members. For officers, however, the Commissioner can only recommend, the final determination with respect to the discharge being made by the Governor in Council (SOR/88-361, s.23).

88 SOR/88-361, subsection 13(2).

The Regulations allow the Force to discharge a member who suffers from a physical or mental disability[89]. The Regulations do not distinguish between an incapacity that is work-related and one which is not. There are two ways that medical discharge procedures may be set in motion.

89 Ibid., subsection 19(a).

First, RCMP policy requires each regular member to undergo a medical examination by the Division's Health Services Officer or designated physician during the member's birth month according to the following scheduled intervals:

five years:	at age 25, 30, 35;
three years:	at age 38, 41, 44;
two years:	at age 46, 48;
one year:	at age 50 and up.

A report is prepared and the member's "medical profile"[90] is updated. Similarly, should a member be medically examined for any reason, other than for the periodic medical review, the member's medical profile is again updated. If this profile is below that required for the member's current position or duties, the Staffing and Personnel Officer of the Division is advised. A review process will then begin.

90 A medical profile is prepared for every member of the Force. An evaluation is made of the member's sight, colour perception, hearing, geographical limitations, occupational limitations and driving limitations.

Members are given periodic medical examinations by the R.C.M.P. physicians who provide the Division's Health Services Officer with a copy of the results of the examinations. Using these results, the Health Services Officer prepares the member's medical profile.

Secondly, should a member suffer a serious injury or an injury that may cause permanent ill effects, an injury board is convened. The board investigates the circumstances surrounding the injury and reports its findings to the Commanding Officer of the Division. The Commanding Officer may then decide to commence discharge procedures, should the circumstances of the particular case so warrant.

If the Commanding Officer is unable to place the member in a position within the Division, Force headquarters is notified and the Directorate of Personnel attempts to find a suitable position for the member elsewhere within the Force[91].

91 Admin. Manual II.19.H.2.c.
The Force will attempt to find a posting which is acceptable to the member. However, this is not always possible. For example, the Force might not be able to keep a partially disabled member in a municipality which requires and pays for a very small number of able-bodied members. If the Force does find a suitable posting for the member elsewhere in Canada, the member will have to decide to accept the posting or the possibility of a medical discharge.

If no suitable position can be found for the member, or if the Health Services officer concludes that the member is permanently unfit to serve in the Force, a medical board must be convened[92]. A medical board is composed of three qualified doctors, one of whom may be chosen by the member. The Division's Health Services Officer acts as president of the board and selects a third doctor[93]. One of the medical board doctors examines the member in order to provide the board with up-to-date medical information upon which it can base its decision[94].

92 SOR/88-361, subsections 20(4), 28(1).
93 Admin. Manual II.19.H.3.a.
While these procedures remain in the Admin. Manual, they may be discordant with the provisions of Regulations SOR/88-361.
94 Admin. Manual II.19.H.3.b.

Prior to the meeting of the medical board, the member must be notified of the Force's intention to discharge[95]. The notice must inform the member of the particulars of the grounds of the intended discharge, of the right to examine the material relied upon and of the right to make written representations and to submit documentation within fourteen days of the service of the notice[96].

95 SOR/88-361, subsection 20(1).
96 Ibid., subsection 20(2).

The medical discharge board must consider the material provided by the "appropriate officer" as well as the written representations and the documentation submitted by the member who is subject of the proceedings[97]. The member whose case is being considered does not appear before

the board unless the board decides to hold a hearing. The board has the discretion to hold a hearing where it finds that the case involves a serious issue of credibility[98].

97 Ibid., subsection 20(5)
98 Ibid., subsection 20(6).

Once the board decides to hold a hearing, it must abide by the rules of natural justice, which may include the right to call, examine and cross-examine witnesses as well as the right to present oral arguments[99]. The proceedings of the hearing must be recorded and a record must be kept of all of the evidence as well as the findings and recommendations of the board[100].

99 Ibid., subsection 20(8).
100 Ibid., subsection 20(7).

The board must determine the degree of the member's disability[101]. Its findings and recommendations must be in writing and must be submitted to the member as well as to the "appropriate officer" who makes the final decision[102]. The medical board has the power to make findings regarding the member's disabilities and to make recommendations[103]. It does not have the power to determine whether to retain or discharge the member who was the subject of their inquiry. The decision to discharge or retain the member is made by the member's appropriate officer[104]. In reaching a decision, the appropriate officer must consider the findings and recommendations of the medical board[105]. The reasons for the decision must be in writing and must be served on the member[106]. The notice of the decision must also advise the member that the decision may be grieved under Part III of the Act[107].

101 Ibid., subsection 28(1).
102 Ibid., subsection 20(5).
103 Ibid., subsections 20(5), 28(1).
104 Ibid., subsection 20(9).

> Neither the Act nor the Regulations expressly define "appropriate officer" for the purposes of medical discharges. SOR/88-361 does not define the term. subsection 2(1) the Act defines "appropriate officer" as:
> in respect to members, such officer as is designated pursuant to subsection (3).
> Subsection (3) merely states that "the Commissioner may, by rule, designate an officer to be the appropriate officer in respect of a member either for the purposes of this Act generally or for the purposes of any provision thereof in particular."
> In practice, the "appropriate officer" is usually the member's Division Commanding Officer.

105 Ibid.
106 Ibid., s. 22. For the rules respecting the service of the decision, see supra, note 95.
107 Ibid., subsections 22(a), 36(e).

The Act and the Regulations provide for a two-tier grievance procedure[108]. Should the member choose to grieve in the decision of the appropriate officer, the grievance must be filed within thirty days of receiving notice of the decision[109]. The grievance is filed with the member's

Commanding officer if the member is in a Division commanded by a Commanding Officer, or with the Director if the member is in a Directorate[110].

108 The Act, subsections 31(3), 32(1); SOR/88-363, s.2.
109 The Act, paragraph 31(2)(a).
110 SOR/88-363, subsections 3(a) and (b).

The Commanding Officer or Director constitutes the first tier of the grievance procedure. At this first level, all representations are in writing[111]. Upon receiving the grievance, the Commanding Officer or Director must convene a grievance advisory board[112] consisting of two officers and one Division Staff Relations Representative[113]. The member or the member's representative is notified of the names of the board members and may object to the appointment of any of the members of the board[114]. The member or designated representative must also be granted access to all information under the control of the Force and relevant to the grievance[115].

111 Ibid., s.7.
112 Ibid., subsection 10(1).
113 Ibid., section 9.
114 Ibid., subsections 10(1) and (2).
115 The Act, subsection 31(4); SOR/88-363, ss. 8, 15.

The grievance advisory board does not have the power to adjudicate on the grievance. The board prepares a report in writing setting out its findings and recommendations. This is submitted to the Commanding Officer or Director[116] who, Though not bound by the board's findings and recommendations[117], must consider the report as well as all other matters relating to the grievance[118]. The decision of the Commanding Officer or Director must be in writing and must include the reasons for the decision[119]. Should the Commanding Officer or Director choose not to act in accordance with the findings and recommendations of the board, the reasons therefore must be specified[120].

116 SOR/88-363, s. 11.
117 Ibid., subsection 35(2).
118 Ibid., ss.13, 14.
119 The Act, Subsection 31(6).
120 Ibid., s.14.

The member must be served with a copy of the decision as well as a copy of the grievance advisory board's report[121]. A member who is dissatisfied with the decision may submit the grievance to the Commissioner, the second and final level of the grievance procedure[122]. Before considering the grievance, the Commissioner must refer it to the R.C.M.P. External Review Committee unless the member requests, and the Commissioner agrees, not to do so[123]. The committee is provided with all of the written submissions of the parties to the first level of the process, the decisions and all relevant information under the control of the Force[124].

121 Ibid.; SOR/88-363, subsection 15(b).
122 The Act, subsection 32(1); SOR/88-363, s. 2.
123 The Act, subsections 33(1) and (2).
124 Ibid., paragraph 33 (3)

The Committee Chairman reviews every grievance and where satisfied with the disposition of the grievance, sends a report in writing to that effect to the Commissioner and the member who filed the grievance[125]. Should the Chairman not be satisfied with the disposition of the grievance or, upon review, should it be determined that a further inquiry is warranted, the Chairman may either send a report in writing to the Commissioner and the member setting out the Chairman's findings and recommendations or convene a hearing to inquire into the matter[126].

125 Ibid., subsection 34(1) and (2).
126 Ibid., subsection 34(3).

If a hearing is instituted, the parties are notified of the time and place of the proceedings[127]. The hearing is conducted in accordance with the principles of natural justice[128], and the member and the appropriate officer have the right to be represented by counsel, to call evidence, to cross-examine witnesses and to make representations[129].

127 Ibid., subsection 35(2).
128 Ibid., subsections 35(4) and (5).
129 Ibid., subsection 35(5).

The Committee does not have the power to adjudicate upon the grievance. It prepares a report in writing in which it sets out its findings and recommendations[130]. The report is sent to the Commissioner, the griever and the appropriate officer[131]. The Commissioner is not bound to act upon the findings and recommendations in the report[132]. If, however, the Commissioner chooses not to act upon the recommendations, the reasons for not adopting them must be included in the final decision[133]. The Commissioner's decision is final and binding subject to the presentation of new facts or the determination that an error was made in reaching the decision[134]. The member may, however, seek judicial review of the Commissioner's decision in accordance with section 28 of the Federal Court Act[135].

130 Ibid., subsection 35(13).
131 Ibid.
132 Ibid., subsection 32(2).
133 Ibid.
134 Ibid., subsections 32(1) and (3).
135 Ibid., The Federal Court Act, R.S.C. 1985, c. F-7, s. 28.

The Force has a long-term disability insurance plan. A member discharged for medical reasons may receive 75% of average salary for a period of up to two years. At the end of this first period, the former member's incapacity is reviewed. In order to be eligible for continued long-term disability benefits, the former member must be incapable of performing any reasonable occupation taking into consideration education, training and experience. Should the person be deemed capable of performing other work, the disability benefits cease. In case of a disagreement between the insurance company's physician and the former member's physician, the insurance company may seek an independent medical evaluation. The majority of members (69%) who qualify for long-term disability benefits continue to receive these benefits after the initial two year period.

Members whose disability is related to their work on the Force may also be eligible for a non-taxable pension from the Canada Pension Commission. Members must meet procedural requirements for this benefit.

E. Canadian Armed Forces

In combat, members of the Canadian Armed Forces must act as a team and be able to rely on the ability of team members to perform the task assigned. Consequently, the Canadian Armed Forces place a great deal of importance on each member's capacity to do the work assigned.

Every position in the Forces has a medical rating. Five different assessments are made establishing criteria in the following categories: eyesight, hearing, occupational factors, geographic factors and air factor. A member of the Forces must meet the standards set in order to be assigned and to remain in a position.

Members of the Forces receive regular medical check-ups. The frequency varies with the age and occupation of the member. Members of some categories must undergo a thorough physical examination prior to each promotion. The Forces can also order a member to consult a physician. Accordingly, it is probable that any medical problem will be quickly detected. When a member becomes ill, injured or otherwise disabled such that the minimum standards in any of the applicable five categories are no longer met, the member's ability to perform the duties assigned is reviewed. A first determination that a member's health no longer meets the norms established for the position held is made by the member's Regional Medical Officer. once a decision has been made that the member can no longer perform regularly assigned tasks, the member's file is sent for review by a Career Medical Review Board.

Prior to the Board being convened to review the case, three different reports are prepared on the individual. Military personnel prepare a report on the member's career. The member's Personnel Selection Officer meets with the member and then prepares a psychological and personality profile. The member may also submit to the Personnel Selection Officer a report containing information for the consideration of the Board. The Directorate of Medical Treatment Services prepares a medical report.

The three reports are placed before the Board when it reviews the case. A physician from the Directorate of Medical Treatment Services is in attendance to present the case to the Board and answer any questions. The member whose case is being reviewed is not present. The reports are the only documents the Board considers in reaching its decision.

The Board then determines whether the member is retained and if so, in which position. The Board is composed of officers from the various classifications in the Forces. Consequently, when the case is discussed, there is a Board member who is familiar with the type of work which the member was performing prior to the medical determination. The Board determines if there is another position available which the member has the ability and the medical profile to perform. Should the member's state of health meet the five criteria established for another position, the member is considered for the position.

The Forces do not, however, create a position for a disabled member. A member is only retained if there is a need for his/her services at the time of the decision. If no suitable position is found for the member, a medical discharge from the Forces is initiated.

Members of the Armed Forces must be mobile and accept transfers in order to meet the Force's requirements. If a suitable position is available in another part of Canada, a member must move to that location.

A member who disagrees with the Board's determination may file a grievance. The member may support the grievance with independent medical evidence. A grievance is first sent to the member's Commanding Officer. If the Commanding Officer does not uphold the grievance, the member can send the grievance to the next level, in most cases the regional commander. This process can repeat itself up to and including the Governor in Council.

When a grievance arising from a medical decision is filed, the case is reviewed again by the Directorate of Medical Treatment Services. If the member includes new medical evidence in the grievance, the Directorate considers it while re-evaluating the file. The Directorate's assessment is considered in the final determination of the case. Accordingly, if the Directorate concludes that the member's capacities were wrongly assessed to the member's detriment, the griever could be successful in having the Board's original determination overturned.

The Forces prefer to retain the services of their members. However, because of its mandate, the Forces' needs always come first. An incapacitated member is retained only if the Forces can accommodate him/her.

A member of the Armed Forces who is given a medical discharge receives benefits similar to those given to the members of the Royal Canadian Mounted Police.

F. The Federal Public Service

Dismissal from the federal public service for medical reasons is governed by section 31 of the Public Service Employment Act which reads:

> (1) Where an employee, in the opinion of the deputy head, is incompetent in performing the duties of the position he occupies or is incapable of performing those duties and should be appointed to a position at a lower maximum rate of pay, or released, the deputy head may recommend to the Commission that the employee be so appointed or released, in which case the deputy head shall give notice in writing to an employee of the recommendation.
>
> (2) Within such a period after receiving-a notice under subsection (1) as the Commission prescribes, the employee may appeal against the recommendation of the deputy head, to a board established by the Commission to conduct an inquiry at which the employee and the deputy head, or their representatives, shall be given an opportunity of being heard.
>
> (3) The Commission, on being notified of the decision of the board on the inquiry into a recommendation conducted pursuant to subsection(2), shall, in accordance with the decision,
>
> (a) notify the deputy head concerned that his recommendation will not be acted upon; or
>
> (b) appoint the employee to a position at a lower maximum rate of pay, or release the employee.
>
> (4) If no appeal is made against a recommendation of a deputy head under subsection (1), the Commission may take such action with regard to the recommendation as the Commission sees fit.
>
> (5) The Commission may release an employee pursuant to a recommendation under this section and the employee thereupon ceases to be an employee[136].

136 R.S.C. 1985 c. P-33, s. 31.

Section 31 prescribes the procedure which the Public Service Commission must follow before it can release an employee.

As subsection 31(1)[137] specifies, the original decision to release an employee is made by the deputy head of the Department where the individual concerned is employed. This subsection places no limit on the discretion of the deputy head who elects to proceed to dismiss an employee for incapacity[138]. However, the deputy head's decision is only a recommendation to the

Public Service Commission which is the body with the authority under the Act to dismiss an employee for incapacity[139].

137 Ibid.
138 See A.-G. Can. v. Loiselle, [1981] 2 F.C. 203 (C.A.).
139 Supra, note 136, subsection 31(5).

The employee must be informed in writing of the recommendation[140], and may appeal the decision within a prescribed period. Currently this period is set at 14 days[141].

140 Ibid., subsection 31(2).
141 Public Service Employment Regulations, C.R.C. 1978, C.1337, s. 41.

If the employee appeals the decision, the Commission must establish an appeal board which conducts a hearing prior to deciding whether to accept the deputy head's recommendation[142]. The Public Service Employment Act gives both the employee and the deputy head the right to be heard[143]. The Act also gives the parties the right to be represented[144]. The Commission is bound by the decision of the board[145]. An employee who is dissatisfied with the outcome of the hearing may appeal the decision to the Federal Court of Appeal[146].

142 Supra, note 136 subsection 31(3).
143 Ibid.
144 Supra, note 136, subsection 31(3).
145 Ibid.
146 Federal Court Act, R.S.C. 1985, c. F-7, s.28.

It has been argued that paragraph 31(3)(b) of the Act[147] gives the board hearing the employee's appeal the right to substitute a transfer to an alternative position at a lower rate of pay in lieu of a dismissal. The argument was raised before the Federal Court of Appeal in R. v. Larsen[148]. Larsen, a former employee appealed his dismissal for reasons of incompetence. Section 31 treats dismissals for incapacity and incompetence in similar ways, hence the reasoning in Larsen applies equally to dismissals for reasons of incapacity. In Larsen, the Federal Court of Appeal found that under subsection 31(3) the board has the power to make one decision only, whether to allow or reject the appeal[149].

147 Supra, note 136.
148 [1981] 2 F.C. 199 (C.A.).
149 Ibid., p. 201.

An employee who does not appeal the recommendation is not automatically dismissed. The Executive Secretariat of the Public Service Commission reviews each file to ensure that the notice provisions have been respected and that the file contains sufficient medical evidence to justify the dismissal. If it determines that evidence is lacking, the Secretariat will inquire into the case to ensure that the recommendation is justified. If the recommendation is rejected, the employee is retained. It is only through the process of appeal that the employee has the opportunity to present evidence which could challenge the medical evidence supporting the

dismissal. Employees are under no obligation to submit to an examination by a designated physician nor to disclose medical information.

An employee facing dismissal for reasons other than incapacity, for example, undue absenteeism, may invoke medical reasons. An employee may submit to a medical examination by physicians of the Department of Health and Welfare. When that department does not have a medical officer with the required expertise in the field, it may refer the employee to a specialist in the community. The Department of Health and Welfare publishes a physician's guide for use by a physician in determining an employee's fitness.

If the appropriate authority of the Department of Health and Welfare concludes that the employee can perform alternative employment, the person is deemed "fit with limitations". Health and Welfare's determination is only a recommendation and it is up to the employing Department to decide whether to retain, redeploy or dismiss the employee.

In Loiselle[150], the Federal Court of Appeal affirmed that neither the department nor the Commission had an obligation to transfer or consider transferring an incapacitated employee to another position. Departments, in practice, do attempt to find alternative employment for incapacitated employees and the commission encourages this practice. The Public Service does not, however, create positions for this purpose. The Commission has also, in the past, requested that the employing department put the decision to recommend dismissal "on hold" for up to six months in order to find the employee a suitable alternative position.

150 Supra, note 138.

An employee injured on the job is entitled to worker's compensation under the Government Employees Compensation Act[151]. Those whose incapacity is not work-related receive long-term disability benefits if they have subscribed to the insurance plan. The insurance plan is voluntary for most employment categories. Participants receive up to 70% of salary in the case of disability. An incapacitated employee may also be eligible for early retirement under the Public Service Superannuation Act[152].

151 R.S.C. 1985, c. G-5, s. 4 transfers jurisdiction for worker's compensation to the Workers' Compensation Board of the province in which the employee normally works.

152 R.S.C. 1985, c. P-36.

G. Imperial Oil Limited

Many Imperial Oil employees are in potentially dangerous occupations and the company is conscious of the need for healthy employees. All applicants must satisfy established health requirements. All employees are required to be checked on a regular basis, depending on age and the nature of the work performed. The company does not hesitate to deal with employees who are deemed to be a potential danger to themselves or to fellow employees.

The majority of employees at Imperial Oil Limited are not unionized; industrial relations between the employer and the employees are not governed by a collective agreement.

Imperial Oil has adopted a policy whereby it does not discharge employees who have become incapacitated. A comprehensive benefit package is available to incapacitated employees. These include temporary disability benefits, extended disability benefits, enhanced protection and a disability pension.

Temporary disability benefits

Should an employee be unable to perform regular duties, the employee is initially entitled to temporary disability benefits. Participation in this programme is sponsored by Imperial Oil and every employee becomes eligible on the first day of work with the company. The amount received as well as the length of coverage depends on the employee's length of service with Imperial Oil.

The following table demonstrates the benefits available under this program:

Years of service	Weeks at full pay	Weeks at 2/3 pay
less than 1	3	14
1	5	14
2	7	14
3	10	20
4	13	28
5	15	37
6	17	35
7	19	33
8	21	31
9	24	28
10 or more	26	26

The plan guarantees these benefits whether or not the injury is work-related. If the injury is work-related, an employee is also eligible for Workers' Compensation benefits. The company supplements these payments so that the total amount received conforms to the temporary disability benefits schedule. If Workers' Compensation payments exceed the company's coverage, the company does not contribute to the employee's benefits.

Extended disability benefits

Imperial Oil also offers extended disability benefits. This program, paid for by the company, guarantees employees at least 60% of their salaries until age 65 should they be unable to perform any work for which they are qualified. Normally, employees first exhaust their temporary disability benefits before claiming benefits under the extended disability plan. At the end of their temporary disability benefits entitlement, employees are given a medical examination to determine the extent of the disability. Should the result confirm that the employee is totally disabled, (as defined above) extended disability benefits are available as an entitlement.

The guarantee of 60% of the employee's salary takes into consideration Workers' Compensation and other possible government benefits. Should payments from other sources equal or exceed 60% of the employee's salary, Imperial Oil does not contribute.

Enhanced protection

After one year of service with Imperial oil, an employee can enhance disability protection through voluntary participation in the company's insurance plan. The cost to the employee is 0.15% of earnings. Participation increases the benefits to 75% of the employee's salary. All of the other terms and conditions of this plan are identical to the extended disability plan described above.

Disability pension

The company has a third disability benefits plan for some employees. Should employees exhaust their temporary disability benefits but not qualify as disabled under the extended disability packages, they are entitled to a disability pension if they have 10 years of service with the company. The amount of pension benefits is calculated according to the following formula which considers salary and years of service with the company:

None of these plans operated by the company differentiates between injuries which are work-related and those which are not, except that in the case of the former, the disabled employee may also be entitled to Workers' Compensation. The company also attempts to find other suitable employment for an employee before it concludes that the employee is incapacitated and therefore eligible for disability benefits. This attempt to find alternative work is generally limited to the normal workplace of the disabled employee. In the past, Imperial Oil has not transferred employees from one location to another in order to keep the person in suitable employment. However, according to Imperial Oil, there has never been a case where an employee

1.6% x years of service x average monthly income = monthly pension

Example:

1.6% x 15 years of service x $2,500 average monthly income = $1,000 monthly disability

pension

None of these plans operated by the company differentiates between injuries which are work-related and those which are not, except that in the case of the former, the disabled employee may also be entitles to Workers' Compensation. The company also attempts to find other suitable employment for an employee before it concludes that the employee is incapacitated and therefore eligible for disability benefits. This attempt to find alternative work is generally limited to the normal workplace of the disabled employee. In the past, Imperial Oil has not transferred employees from one location to another in order to keep the person in suitable employment. However, according to Imperial Oil, there has never been a case where an employee has been forced to accept disability benefits when capable of doing some work with the company.

According to the company, its medical discharge policy has never been challenged in court. An employee whom the company considers disabled always receives temporary disability benefits and if necessary, disability pension benefits. Consequently, if employees believe they are capable of working, it would be to their advantage to take the benefits offered by the company and work elsewhere.

H. Am-Tech Electrical Services/ International Brotherhood of Electrical Workers Am-Tech

Electrical services is a private sector electrical contractor engaged primarily in large construction projects in the Ottawa region. It employs between 100 and 160 electricians, depending on the season and contracts. All of its employees are members of the International Brotherhood of Electrical Workers.

In Ontario, the construction industry negotiates on a province-wide basis[153]. All of the contractors and the union locals are bound by the collective agreement negotiated at the provincial level.

153 Labour Relations Act, R.S.O. 1980, c.228, ss. 137-151.

AM-Tech's policy regarding injured or disabled employees is to attempt to find alternative work for them. If there are no suitable positions available at Am-Tech, the trade union then tries to find the member another position. The union supplies electricians for every major contractor in the Ottawa region, so it frequently is able to find some employment for the employee.

Not all members who are injured or ill can be relocated by the company or the union. If the injury occurred at work, the employee is entitled to Workers' Compensation. Neither the union nor Am-Tech provide additional benefits to an employee receiving Workers' Compensation.

The union has purchased an insurance plan for members who are ineligible for Workers' Compensation. Every employer pays the union $3.02 for every hour it employs an electrician. This sum covers all of the benefits negotiated by the union with the electrical contractors in the province. Of the $3.02, $0.04 pays for the long-term disability insurance plan. An electrician on long-term disability benefits receives $1,250 per month, which is approximately one-third of the average salary of electricians working in the Ottawa region. Because the benefits are very low, most electricians carry private disability insurance.

The union has never grieved a dismissal for medical reasons. Because the contractors seek to retain their experienced electricians and considering that the union and the contractors co-operate to find suitable employment for partially disabled members, an employee is placed on disability benefits only in extreme cases where it is clear that the employee is unable to do any work in the industry.

Conclusion

An injury or illness which incapacitates an employee from the performance of duties for any length of time generally has some impact on that employee's career, and in some cases, may permanently affect that employee's career or employment opportunities. For the employer, the services of an employee with valuable skills, knowledge and experience may be lost. If the incapacity is long-term, or severe in nature, the loss may in fact be permanent and total.

In all cases, the consequences for both the employer and the employee are such that the approach in dealing with the incapacitated employee must attempt not only to balance the interests of both, but also to minimize their losses.

To examine how certain employers have dealt with this challenge, this paper has reviewed the medical discharge policies and practices of eight different organizations, covering both the public and private sectors.

The organizations have been canvassed on the basis that they represent a cross section of employers small and large, unionized and non-unionized, organizations with company sponsored disability insurance plans and others which are publicly funded. A sampling of municipal, provincial and federal police organizations was also sought.

While the eight organizations identified in this review may not represent the total range of approaches available, they nevertheless present a broad and informative selection of medical discharge options, each with their own strengths and weaknesses.

Where the medical incapacity is temporary in nature, sick leave provisions may be available and sufficient. Some employers provide incapacitated employees with the opportunity of performing alternative work or "light duties".

Although these measures are recognized as important elements in the employer's exercise of

corporate and social responsibility, this paper is concerned with the more extreme solution, that of medical discharge.

Employers approach the medical discharge issue based on their own specific circumstances. There does not appear to be a medical discharge policy which meets all of those circumstances. When dealing with medical discharge, however, employers, employees, medical boards, courts and tribunals have focussed on certain principles of decision-making. These are:

(1) the impact of the medical discharge on the employer, including direct costs in resources and salary, employee morale, ability to attract good candidates in a competitive labour market, ability to remain flexible in assigning resources;

(2) the impact of the medical discharge on the employee, including loss of salary, sense of self-esteem, the availability and length of disability benefits, and pensions;

(3) the consistency of treatment between employees under similar circumstances; and

(4) the application of the principles of natural justice, both procedurally and substantively, in determining whether or not to discharge the employee. This includes an obligation to hear both the employer and employee. For the parties this may also mean reasonable notice of a hearing, the right to be represented, to tender evidence and cross-examine on the evidence. The parties may also be entitled to be informed of anything which may be prejudicial and to answer thereto, and the opportunity for adjournment where essential to either party's interest. Natural justice requires that the decision-maker be impartial, have no bias or appearance of bias, and no conflict of interest.

The extent to which these considerations are elements of an employer's decision-making process is an indication of that employer's ability to balance the competing interests in this matter. Benefit packages must reflect these considerations. This is a significant challenge, particularly where enhanced disability protection may be costly for both the employer and the employee. Employers and employees must weigh these matters carefully for the consequence is long lasting for the discharged employee.

ANNEX A

CONTACT PERSONS

Am-Tech Electrical Services	Gillian Marston Accountant Accountant
Canadian Armed Forces	Commander P.J. Ringwald Directorate of Medical Treatment Services
Federal Public Service	Lise Martin Executive Secretariat, Public Service Commission
Imperial Oil Limited	Hugh O'Neill Employee Relations Manager
International Brotherhood of Electrical Workers	Wayne Earl Associate Business Manager
Metropolitan Toronto Police	Lorne Perron, Director, Labour Relations
	Len Hazel, Supervisor, Labour Relations
Metropolitan Toronto Police Association	Ed De Silva, Vice-President
Ottawa Police Force	Patrick Clarkin Staff Superintendent
Ottawa Police Association	John Peterson President
Royal Canadian Mounted Police	Roy G. Moffatt Deputy Commissioner Administration
	A.D.F. Burchill Superintendent Officer in Charge Compensation Branch
	Dr. Alain Trottier Acting Director Health Services
	J.A.D. Lagassé Assistant Commissioner Director of Personnel

Sûreté du Québec

André Gendron
Inspecteur-chef
Direction des ressources humaines

Yvon St. Gelais
Inspecteur

NOTES