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RESEARCH ARTICLE

DIMENSIONS OF CONTRACT OF EMPLOYMENT- AN ANALYSIS

[1]Daragad B.R. and Sharanabasava[2]

[1]Assistant Professor, J.S.S Sakri Law College, Hubballi; [2]Assistant Professor, S.C. Nandimath Law College, Bagalkot

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Corresponding Author: Daragad B.R.

ABSTRACT

Contract of employment has not been defined either in legislations or in case laws. Over the years, the courts have adopted various tests in order to determine whether or not a certain relationship amounts to a relationship of employment. We should be aware that a "contract of employment" is also known as a "contract of service". However, a contract for services is a contract whereby a person is merely under an obligation to perform some work or service for another person, without an employment relationship being created between the two. Conceivably no business activity can be carried on creating legal obligations without a contract. The contract of employment means a contract of personal service which creates a relationship of employer and employee under the contract of service as opposed to the relationship of employer and an independent contractor under the contract for services. We know in some of the cases it becomes very difficult to distinguish even between contract of service and contract for services because of the vagueness of the tests of control by the employer over the employee. The contract is present in both the cases. But the test is, in case there is a breach of contract, is the employer entitled to claim merely damages in law? or is he entitled' to take disciplinary action against an employee? If the employer is entitled to take disciplinary action under the contract then the contract is of service and in case he can claim only damages for breach then contract is for services. The contract is present in both the cases. But the test is, in case there is a breach of contract, is the employer entitled to claim merely damages in law? or is he entitled' to take disciplinary action against an employee? If the employer is entitled to take disciplinary action under the contract then the contract is of service and in case he can claim only damages for breach then contract is for services. The contract of employment may be formed by express written agreement, express oral agreement, or by conduct. We can trace the sorce of contract of employment from different Statutes, Awards of Industrial Tribunals and Labour Courts, Settlement agreements and Industrial Employment Standing Orders. The authors made an attempt to analyse the meaning of Contract of employment and its sources and about the enforciability of the same in different heads.

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INTRODUCTION

The term "contract of employment" has not been comprehensively defined either in legislation or case law. Over the years, the courts have adopted various tests in order to determine whether or not a certain relationship amounts to a relationship of employment. The modern approach adopted by the courts is to consider all the factors relevant to the issue of employment and to weigh up those factors that point towards the existence of a contract of employment and those that point away from such a contract.[1] The presence or absence of any one factor is not conclusive, as the decision depends on the combined effect of all the relevant information. The factors given should not be treated as a checklist to identify those factors that appear to point one way and those which point the other, from which a result can be calculated It is the overall effect of the relationship between the parties involved that will lead a court to decide whether or not a person is employed. You should be aware that a "contract of employment" is also known as a "contract of service".

However, a contract for services is a contract whereby a person is merely under an obligation to perform some work or service for another person, without an employment relationship being created between the two. People working under a "contract for services" are usually contractors or self-employed.When examining the factors relevant to whether there is a contract of employment, you should be concerned not only with the written terms (if a written contract exists) but also with the practical circumstances of the relationship between the parties. This is because the terms of the contract can be express (e.g. written or orally agreed) or implied (e.g. from actual practice).

Meaning of Contract of Employment: Conceivably no business activity can be carried on creating legal obligations without a contract. The contract of employment means a contract of personal service which creates a relationship of employer and employee under the contract of service as opposed to the relationship of employer and an independent contractor under the contract for services. We know in some of the cases it becomes very difficult to distinguish even between contract of service and contract for services because of the vagueness of the tests of control by the employer over the employee.

The contract is present in both the cases. But the test is, in case there is a breach of contract, is the employer entitled to claim merely damages in law? or is he entitled' to take disciplinary action against an employee? If the employer is entitled to take disciplinary action under the contract then the contract is of service and in case he can claim only damages for breach then contract is for services.

The General Principals for formation of contract of employment

- Express written agreement, or
- Express oral agreement, or
- Conduct.

As far as formation by express agreement is concerned, an aspect deserving special attention is the situation where the agreement is for employment to commence at a date later than that of the agreement itself. As far as formation by conduct is concerned, contract of employment may be concluded by the mere conduct of starting work at the employer's direction.

The General Principals for formation of contract of employment
Offer and Acceptance, and Consideration: The first area of general contractual principle is that of offer and acceptance and consideration. The problem of *unilateral contracts,* which is discussed as a matter of general contractual principle under those heads of offer and acceptance and consideration, is a more generalized version of the problem of the structure of the contract of employment.

***Certainty and Intention to Create Legal Relations*:** The second area of general contractual principle is that of intention to create legal relations and certainty of contractual terms.

***Express and Implied Terms and Co-operation*:** The next main aspect of general contractual principles was that concerning express and implied terms and the closely connected question of contractual co-operation.

Sources of Contract Of Employment Under Indian Law

Statutes: One of the main sources of terms and conditions of employment in India is legislation. In the case of government employees the terms and conditions are governed by the civil services rules, and their protection is provided under Article 311 of the Indian Constitution. In the case of employees governed by the Industrial Disputes Act 1947, there are numerous statutes which provide for the terms and conditions of service. The most crucial statute enacted during the British rule, after the First World War, was the Trade Unions Act 1926. This Act brought a radical change to enforce at least a theoretical equality between the employer and the employee by recognizing the legality of trade unions and granting them the right to have collective bargaining. The Trade Unions Act provided, for the first time, immunities to the trade unions and their members for industrial actions for which the trade unions or members could not be held liable in criminal conspiracy or damages in torts or breach of contract at common law. Most of the legislation relating to the terms and conditions of employment in India was passed either immediately before or after India attained independence from the British rule. Legislation regarding hours of work, rest days, overtime, annual leave with wages, and for the purposes of providing restrictions on employment of workmen, children and young persons, have been enacted under the Factories Act 1948, Mines Act 1952 and the Plantations Labour Act 1951. The Statutory sources of the terms and conditions of employment have overriding effect over all other sources. Therefore if any contract between the employer and the employee relating to the terms of employment, standing order or any settlement or even an award given by the labour court or industrial tribunal is inconsistent with the provisions of the legislation, the statutory provisions will prevail and govern the relations between the employers and the employees. However, it may be mentioned that some of the statutes relating to the terms and conditions do leave the scope for collective bargaining between the employers and the employees.

In relation to those terms of employment if a settlement has been arrived at between the parties which is binding under section 18 of the Industrial Disputes Act, unless it has been modified by the award of the labour court or the industrial tribunal, the settlement will have overriding effect over those statutes which only provide for minimum standards of the terms and conditions of employment.

Awards of Industrial Tribunals and Labour Courts: In relation to contracts of employments covered under the Industrial Disputes Act, these days in India, the awards of labour courts and industrial tribunals are a very important source of the terms and conditions of employment. Second Schedule of the Industrial Disputes Act. 1947 provides the matter within the jurisdiction of Labour Court in which the second part clearly says that, application and interpretation of Standing Orders is purely subjected to Labour Court. Under the Industrial Disputes Act the awards of the industrial Court or tribunal are binding on all the parties and shall not be called in question by any court. Even if there is any settlement between the employers and the employees, or if there are standing orders to the effect, in as much as they are inconsistent with the award of the tribunals, the award shall supersede such settlement or standing orders. The awards of the tribunals generally override all other sources of the contract of employment except the mandatory provisions of statutes.

Settlements: In industrial jurisprudence collective agreements arrived at between the employer and the employee playa vital role in respect of terms and conditions of employment. The officially recognized collective agreements which have the binding effect on parties are called "settlements" under the Industrial Disputes Act. The employer and employee also sometimes enter into private collective agreements. Such private collective agreements, though not legally binding, have a normative effect to play in day to day industrial relations in India. Once there are settlements between the parties they have overriding effect even on the express provisions of a contract between the employer and the employee. So long as such settlements are in operation, they override even the standing orders of the organization and the implied terms of contract.

Industrial Employment (Standing Orders) Act, as source of Contract of Employment: Before the year 1946, apart from the scanty legislation providing safeguards to protect the health, safety and payment of wages in time and providing for compensation to workmen in case of accidents, there was no legislation to regulate terms and conditions of employment in India. This meant that the terms and conditions of employment were left to the free will of the parties. Therefore, there was nothing in law to restrict employers from having different contracts of employment with his workmen. Because of the lack of collective bargaining and weaker position of the workmen, quite often discriminatory treatment was given by the employers to the same category of workmen. In order to give protection to the workmen against the superior economic position and bargaining strength of the employers in contractual relations, 'The First attempt by the legislation at central level to interfere with the contract of employment, or, at least to have the terms of employment defined with precision, was the enactment of the Industrial Employment (Standing Orders) Act, 1946. The Indian Parliament enacted the Industrial Employment (Standing Orders) Act in the year 1946. Under this Act the government has framed model standing orders defining the terms and 'conditions of service. The Act is applicable to all industrial establishments employing more than hundred workmen, and it is required under the Act to frame rules as far as possible in accordance and conformity with the model standing orders wherever they are prescribed. It is required of the industrial establishments to frame rules for the following matters:

- Classification of workmen (whether permanent, temporary, apprentices, probationers or *badlis);*
- manner of intimating to workmen periods and hours of work, holidays, pay-days and wage rates;
- shift working;
- attendance and late coming;

- conditions and procedure in applying for, and the authority which may grant, leave and holidays;
- requirement to enter premises by certain gates and liability to search;
- closing and reopening of sections of the industrial establishment, temporary stoppage of work and the rights and liabilities of the employer and workmen arising there from;
- termination of employment and the notice thereof to be given by employer and workmen;
- suspension or dismissal for misconduct and acts or omissions which constitute misconduct; The act of misconduct which forms a basis for punishment must however, be one enumerated in the standing orders of the establishment. Punishment for an act which is not enumerated in the standing orders of the establishment is wholly illegal.
- means of redress for workmen against unfair treatment or wrongful exactions by the employer or his agents or servants;
- any other matter which may be prescribed.

Along with these additional matters have been inserted through Industrial Employment (Standing Orders) Central Rules1946 1O-A. Additional mattersto be provided in Standing Orders relating to all industrial establishments in coal mines:

- Medical aid in case of accident;
- Railway travel facilities;
- Method of filling vacancies;
- Transfers;
- Liability of manager of the establishment or mine;
- Service certificate;
- Exhibition and supply of Standing Orders.
- 1O-B. Additional matters to be provided in the Standing Orders relating to all industrial establishments,-
- Service Record-matters relating to service card, token tickets, certification of service, change of residential address of workers and record of age;
- Confirmation;
- Age of retirement;
- Transfer;
- Medical aid in case of accidents;
- Medical examination;
- Secrecy;
- Exclusive Service.

The standing orders framed under the Act, of 1946 are in fact not law in the strict sense: They are understood more as an agreement between the employer and the employee. After the employers frame the standing orders under the Act, they are required to submit to a certifying officer who certifies them after giving notice to the union and proper hearing to employers and employees.[69]Initially, standing orders were meant to check malpractice by the employers who left conditions of services undefined and, therefore, the certifying officer under the Act was not supposed to see the reasonability aspect of the standing orders once they were agreed upon by the employers and the union. But the amendment of section 4 of the Acthas drastically changed the powers of the certifying officer who is now empowered to adjudicate upon the fairness or reasonableness of the provisions of standing orders and suggest changes. The matter is not under arbitrary discretion of the certifying officer, his orders are subject to appeal under the Act. Even though there might be standing orders in an industrial establishment, it can be a subject matter of industrial dispute under the Industrial Disputes Act, 1947 and can be referred for adjudication by the appropriate government to the labour court or the industrial tribunal. Though standing orders are not law in the strict sense, it has been held in a number of cases that they have the force of law and constitute statutory terms of employment. The Supreme Court has expressed the view that the standing orders have a statutory force.

However, standing orders are not exhaustive, and it cannot be contended that what is not provided in the standing orders cannot be a term of employment. If, for example, a misconduct is not included within standing orders but an employee commits some serious misconduct which is normally considered as a justifiable ground for disciplinary action, it would be 'unreasonable to contend that despite such serious misconduct he should be deemed not to have committed any misconduct. Standing orders acquire the force of law in the sense that there cannot be any individual contract of employment contrary to their provisions. The industrial tribunal cannot disregard them in so far as the matters are covered by them. But, if an industrial dispute is raised regarding propriety, fairness or reasonableness of standing orders, the industrial tribunal will have the powers to modify them. So it is appropriate to state that till the time the dispute is raised directly about the matters covered in the standing orders they hold the field and the industrial tribunals are not empowered to ignore them and are bound to decide disputes in conformity with their provisions. Standing orders become part of statutory terms and conditions of service between the employers and employees. But they cannot override the provisions of any statute. However, terms of standing orders would prevail over the terms of a contract of employment between the employer and employee which is in conflict with such orders. *A fortiori* standing orders will override also the implied terms of contract of employment between the employer and the employee. But the Act is applicable only to those industrial establishments employing one hundred or more workmen. Therefore, where the Act is not applicable the contract of employment is still a matter of free will of the parties with regard to terms and conditions of employment, except in those matters which are covered by statutory sources discussed above.

TERMS OF CONTRACT OF EMPLOYMENT

Express Terms of Contract of Employment: In every contract of employment express terms between the employer and the employee are the most important source of the conditions of employment. In those employments which are governed by the common law of master and servant, express terms override all other sources except in so far as they might be inconsistent with the statutory sources (which are very rare to be found). Even in the case of industrial establishments where the common law of master and servant is not applicable but which are not covered by the Act of 1946 relating to standing orders, express terms between the employers and the employees are the most important source of conditions of employment. Moreover, as we have seen; standing orders are not law in the strict sense and have only the force of a statute. Therefore, if there is any express contract between the employer and the employee which is contrary to standing orders, it is not illegal; standing orders merely lay down the general conditions of employment and it is open to employers and the employee to enter into a contract specifying terms different from the standing orders, if the situation so demands. Such contracts are particularly entered into and recognized in case of highly specialized, skilled and technical jobs. If there is any conflict between standing orders and a special contract between the employer and the employee, the latter will prevail, since standing orders are not a statute but are only framed under a statute. Express terms between the employer and the employee also override custom or usage of trade and even implied terms under the contract.

Implied Terms Contract of Employment: In India the role of implied terms in industrial jurisprudence is very negligible. The labour courts and industrial tribunals have unlimited powers to impose obligations both on the employers and the employees without following the common-law principle to imply terms into a contract in the interest of social justice, industrial peace and growth and progress of industry. In this aspect Gajendragadkar C.J. in the case of *Workmen* v. *Dharampal Premchand (Saughandhi),* held that while attempting to solve industrial disputes, industrial adjudicator is generally reluctant to lay down any hard and fast rules or adopt any test of general or universal application. In another case he emphasized that social and economic justice is the ultimate ideal of industrial adjudication. Therefore, we find that terms are implied, imposed, modified and added, even

against the express terms of the contract of employment, by industrial courts but they are implied for considerations of social justice and industrial peace and not on the basis of the principles on which the common-law terms are implied in the cases of master and servant. However, industrial courts may imply terms into the contracts of employment, if the consideration of industrial peace and social justice are not relevant to a case, on the basis of the common-law principles. To that extent implied terms in common law have a role to play even in the industrial jurisprudence of India.

Judiciary on Contract of Employment

It was held in *Associated Cement Companies Ltd.* v. *T.C. Srivastava and others,* that neither under the ordinary law of the land nor under the industrial law a second opportunity to show cause against the proposed punishment is necessary. This does not mean that, a Standing Order may not provide for it, but unless the standing order provides for it, either expressly or by necessary implication, no inquiry which is otherwise fair and valid will be vitiated by non-affording of such second opportunity. The conditions of service for industries are generally laid down by Standing Orders certified under the Industrial Employment (Standing Orders) Act, 1946. The conditions of employment can also be laid down in any other manner. The employer and employee may enter into special conditions of employment. In case of conflict between the statutory conditions of employment contained in Standing Orders and the special terms contained in the written contract, the terms of former shall prevail over the latter. Such Standing Orders though binding between the employer and employees of industry, have no force of law to be binding on Industrial Dispute.

In *Suresh A. Kerkar* v. S. *V. Novagi Presiding Officer Industrial Tribunal and others:* the petitioner had extended his leave on medical grounds. During the time of such leave he was arrested by the police but was later discharged. His services were terminated on the ground that he suppressed the fact of his arrest and instead misrepresented the company by producing a false certificate that he was suffering from jaundice. He was examined by company's physician and the report did not, confirm his illness from jaundice. It was held that merely securing a wrong or false medical certificate, by itself, does not amount to misconduct. The certificate of the doctor may be false due to ignorance or incompetence and therefore a wrong or false certificate does not necessarily create delinquency either on the .doctor or on the person who produces it. As such the charge framed on this ground is bad. Secondly when a workman does not disclose his arrest to the company, it has nothing to do with the discipline in the premises of the establishment. Indeed the rules of discipline are meant to avoid unruly and disorderly behaviour of the employee within the working premises which is likely to affect the peaceful atmosphere and the smooth working of the establishment. Therefore the petition was allowed. Where the standing order contemplates a notice to be given to the workman for the purpose of enabling him to show cause, within a specified period, against his dismissal, the notice must give a reasonable opportunity to the workman. That is a condition precedent which must be satisfied before an order of dismissal can be validly passed by the employer.

In *Free Wheels India Ltd.* v. *State of Haryana and others:* The Standing Orders provided for automatic termination of employment on absence for eight consecutive days. A workman who abstained from duty for more than 8 days and later produced fitness certificate to join duty was terminated. It was held that in terms of the Standing Orders, the workman must be deemed to have left the service of the Company and his employment thereby automatically terminated. No doubt, it was open to the workman to seek conversion of his period of absence into leave without pay in terms of the Standing Orders but this could be done only if he offered an explanation for the absence to the satisfaction of the departmental head. No such explanation was ever offered or submitted by the workman. A certificate of fitness, without any thing more, cannot be said to amount to an explanation.
In *Pallavan Transport Corporation* v. *Appellate Authority under the Industrial Employment (Standing Orders) Act, Madras &others,*it was held that the authority under the Act is entitled to fix the age of retirement at 58 years taking into account the comparative nature of the work discharged by the two classes of employees if it has come to the conclusion that the work is not so hazardous or arduous as to impair the workmen's serviceability or utility beyond 55 years. Dealing with compulsory retirement it held that the purpose for which compulsory retirement is retained in respect of Government servants is not the punishment but for the purpose of infusing efficiency in services. As far as Corporation is concerned, if it finds that any of its employees is unfit for discharging the duties, it has the necessary power of removal from service or discharge. Therefore there is no need for incorporating an additional arrangement by way of compulsory retiremet.

In *Steel Authority of India Ltd. &another* v. *Dilip Kumar Debnath & others:* the respondent an employee of the Steel Authority of India challenged his dismissal order. Standing Order 29 of the Steel Authority of India Ltd. authorised the disciplinary authority to terminate the services of an employee without holding any inquiry in appropriate case after recording reasons therefore. It was held that such a provision is reminiscent of the days of hire and fire and it is unfortunate that a public sector undertaking should keep such a provision in its standing orders. Appeal was, therefore, dismissed with permission to initiate disciplinary proceedings, if they so chose.

In *The Management of Ashok Leyland, Ltd., Madras* v. *Presiding Officer, III Additional Labour Court, Madras and Another:* A semi-skilled worker was in the employment of Ashok Leyland Ltd. He absented himself without leave for more than 8 days continuously and he lost his lien of work on account of this absence. There was no such provision in the standing orders but there was a clause in a settlement which was supplemental to the Standing Orders providing for loss of lien. Further, the Labour Court found that he was absent with leave and therefore it held that standing orders will not get attracted. It was held that before terminating workmen reasonable opportunity should be given and any action in violation of principles of natural justice will offend Arts. 14 and 21 of the Constitution. It was further held that it is necessary for the employer to prescribe what should be the misconduct so that the workman knew the pitfall he could guard against. A clause 'any other act of misconduct' retained in the standing orders may give an authority to deal with a really recalcitrant employee whose misconduct does not fall in any other act or omission enumerated in standing orders but there is always a chance of it being abused by the employer. The employer is concerned with only such conduct of the employee which affects him or affects any condition of service of employees. Any anti-social act affecting public interest would be misconduct even though it is not directly connected with the work of the employer. There may be acts affecting the society at large and while affecting the society at large may be affecting the employer more. The employer is not barred from taking action in such cases.

In *Behar Journals* v. *Ali Hasan:* The probation period provided by the Standing Orders was for 3 months only. But in the appointment letter of the respondent the period of probation was six months. It was held that the certified Standing Orders have statutory force. It is not possible in law for the parties to enter into contract overriding the Statutory Contract as embodied in the Standing Orders. Therefore, probationary period in this case could not be for a period longer than 3 months.

In *S.S. Light Railway Co.* v. *S.S. Railway Workers Union:* It was held by the Supreme Court that "The right to contract in industrial matters is no longer an absolute right and statutes dealing with industrial matters abound with restrictions on the absolute right to contract. The doctrine of hire and fire is completely abrogated both by statutes and by industrial adjudication, and even where the services of an employee are terminated by an order of discharge simpliciter the legality and propriety of such an order can be challenged in Industrial Tribunals. These restrictions on the absolute right to contract are imposed because security of employment is more and more regarded as one of the necessities for industrial peace and harmony and the contentment it brings about is a prerequisite of social justice.

If reasons for discharging an employee are furnished to the employee concerned, he not only has the satisfaction of knowing why his services are dispensed with but it becomes easy for him in appropriate cases to challenge the order on the ground that it is either not legal or proper which in the absence of knowledge of these reasons, it may be difficult if not impossible for him to do."

Workmen of Firestone Tyre-and Rubber Co. Ltd.'* v. *The Management: *Supreme court held* that it is not always essential for the management to hold a domestic enquiry before dismissal because the management can prove merits of dismissal before the tribunal itself even though a domestic enquiry is required under the *standing orders* of the company.

In *Tara Oil' Mills Co. Ltd.* v. *Its Workmen:* Justice Gajendragadkar held that in order to constitute misconduct of drunkenness, fighting, riotous or disorderly or indecent behaviour within or without the factory as provided in the Standing Orders 22 (viii) of the company the appellant should be able to show that the disorderly or riotous behaviour had some rational connection with the employment of assailant and the victim. And in this case the delinquent workman had assaulted a Chargeman outside the factory because the Chargeman was in favour of introducing the incentive bonus scheme in the ·company. Thus the act of the delinquent workman was held to be misconduct and attracted Standing Order 22 (viii) of the company entitling dismissal.

Schedule I, Clause 14(3) of the Model Standing Orders provides that the following acts and omissions shall be treated as misconduct:

- Wilful insubordination or disobedience, whether alone or in combination with others, to any lawful and reasonable order of the superior;
- Theft, fraud or dishonesty in connection with the employer's business or property;
- Wilful damage or loss of employer's goods or property; (d) taking or giving bribes or any illegal gratification;
- Habitual absence without leave, or absence without leave for more than ten days;
- Habitual late attendance;
- Habitual breach of any law applicable to the establishment;
- Riotous or disorderly behaviour during working hours at the establishment or any act subversive of discipline;
- Habitual negligence or neglect of work;
- Frequent repetition of any act or omission for which a fine may be imposed to maximum of 2 per cent of the wages in a month or
- Striking work or inciting others to strike in contravention of the provisions of any law, or rule having force of law.

It may be pointed out that the acts of misconduct listed above are merely illustrative and not exhaustive. There could be many other types of acts which may amount, to misconduct even though they have not been provided in the Standing 'Orders.

It has been held by the Supreme Court in *Mahendra Singh Dantwal* v. *Hindustan Motors Ltd.and Others*that "Standing orders of the company only describe certain cases of misconduct and same cannot be exhaustive of all species of misconduct which a workman may commit. Even thou if the given conduct may not come within the specific terms of misconducts described in the standing orders, it may still be a misconduct, in the special facts of a case, which it may not be possible to condone and for which the employer may take appropriate action. Ordinarily the standing orders may limit the concept but not invariably.

CONCLUSION

To conclude, definiting or having accurate tool for defining contract of employment is a difficult task, but in general it is a written agreement between a specific employee, an employer, or a labour union is known as an employment contract. It lays out the obligations and rights of the two parties—the employer and the employee. Review details on what to anticipate when asked to sign a contract, the different forms of agreements that apply to employees at work, and the benefits and drawbacks of employment contracts. whenever and wherever we need clarity on contract of employment it is better to rely on the various sources available to identify the existance and effectiveness of contract of employment. Anything which is good for effective and better management of industrial relations can be a part of contract of employment. We have seen that courts are having power to change or overrule the terms of contract of employment there in the statutes.

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