

IF YOU GO DOWN TO THE WOODS TODAY, ARE YOU IN FOR A BIG SURPRISE?

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INTRODUCTION

More people died harvesting British Columbia's forests in 2005 than in any previous year on record. The year also saw the highest number of compensation awards to forest workers for serious injuries since the provincial worker compensation scheme was established in 1917.

While stakeholders offer a variety of explanations for the record number of fatalities and injuries, all agree that a contributing factor has been the recent transformation of the legal working relationship in the forestry industry. Faced with immense economic pressure occasioned by significant market changes and public demands for greater environmental integrity, most major forest companies have responded by shedding almost all of their woodland employees over the past two decades and replacing them with independent contractors.

Of the 7,000 firms engaged in the timber harvest and related work, more than 95 per cent are small businesses with fewer than twenty employees and almost half are sole proprietorships or one-person corporations. These independent contractors now stand in the shoes of their former employers. They have the greatest responsibility for compliance with safety regulations, and they are now paying the compensation fund premiums to WorkSafeBC that their bosses used to pay.

This paper opens with a statistical picture of the forestry sector and forest worker safety over the past decade. It considers changes in the legal relations between the principal parties and their changing relationship with the law of workplace safety and the economics of accident compensation.

While there is likely no consensus on whether reorganization is the cause of B.C.'s deadliest year in the woods, the provincial safety and compensation regulator appears to acknowledge that a problem exists. A relatively recent WorkSafeBC guideline appears to be designed to allow regulators to interpret B.C. legislation—enacted as it is on the foundation of the employer–employee relationship—in a way that makes licensees¹ as responsible for safety as they were when they actually had woodlands employees working directly for them. Whether WorkSafeBC's Guideline 26.2.1 can bridge that gap, or whether B.C.'s current legislation regulates an industry that no longer exists, is the question at hand.

1 The terms licensee, major forest company and integrated company refer to the large companies holding timber tenures and other harvesting rights who traditionally harvested and processed the bulk of B.C.'s forestry resources.

NATURE AND EXTENT OF THE PROBLEM

The past sixty years have seen major changes in work relationships in B.C. forest harvest operations. Worker tenure has shifted from employment with large firms to either employment with very small firms or, for many, self-employment as a subcontractor. A brief demography of this increasingly atomized industry is a useful introduction to its safety record over the past decade.²

According to a 2004 report by the government-appointed Forest Safety Task Force, the roughly 90,000 people who work in B.C. forestry are almost equally divided by the size of the firm that employs them. Roughly 45,000 people work with one of 6,800 small firms employing less than twenty people, while the other 45,000 work for 200 medium and large firms employing twenty people or more.

Of the 45,000 people in small firms, almost all are in woodlands operations, as opposed to the manufacture of forest products, management or related services. About 2700 are one-person corporations or sole proprietorships operated by fallers that constitute almost half of the 6800 small firms. The other 3900 include one-person firms involved in log hauling and forest management, as well as multiple-employee firms of two to nineteen people in forest management, road construction, log hauling and silviculture. The 200 medium and large firms work almost exclusively in the forest product sector, in areas such as lumber, finished products, pulp, and to a lesser extent, paper.

As seen in Figure 1,³ the record forty-three deaths and 113 serious injuries in 2005 were preceded by two years in which deaths and serious injuries among forest workers declined. However, taking into account the entire past decade, it is the relatively safe results in 2003 and 2004 that are the anomaly—they are the only two years in which fewer than twenty people involved in timber harvesting died on the job.⁴

Figure 1 also presents the results of dividing the number of forestry deaths and serious injuries in each year by the amount of timber the B.C. government reported harvested in that year. The number of deaths does not appear to have an exceptionally strong correlation to the volume harvested—there is a range of over 100 per cent between the lowest and highest values for deaths per unit in the most recent five years. However, the year-to-year changes between the absolute number of deaths and the deaths per volume harvested correlate fairly closely. The number of serious injuries in any year appears to be more closely correlated to the volume harvested, with a smaller range of variance between years with low and high numbers of injuries per volume harvested.⁵

2 All industry composition figures are presented in or derived from British Columbia, Forest Safety Task Force, *A Report and Action Plan to Eliminate Deaths and Serious Injuries in British Columbia's Forests* (January 2004), online: Forest and Range – Province of British Columbia <http://www.for.gov.bc.ca/bcts/safety/Forest_Safety_Task_Force_Final_Report.pdf> [Task Force Report].

3 For the purposes of statistical analysis, the terms forestry, forestry workers, and logging or harvest operations all refer to the people and the process involved when trees are cut, “bucked” (where limbs, rot, other growth removed and cut to size and stacked in preparation for transport), “skidded” to a marshalling point and “hailed” by logging trucks to either a sorting area, a plant where they will be processed or to a point where they will be “boomed” for transport by river to their next destination. While these statistics also reflect fatalities and injuries among other forestry workers involved in “silviculture” (the replanting and tending of new timber stands) or “integrated forest management” (everything from planning logging operations to engineering and constructing logging roads), workers in these areas make up a far smaller percentage of killed or injured forest workers than those in tree falling and other harvest operations.

4 *Task Force Report*, *supra* note 2 at 26.

5 There are a number of possible explanations for why changes in deaths and injuries do not correlate more closely with changes in harvest volumes more closely, including different climatic conditions year to year, shifts in the proportion of harvest work done by people or machines based on market or topographical conditions, and shifts in the proportion of harvest coming from different regions of the province caused by market and international trade conditions.

FIGURE 1
B.C. FORESTRY WORKERS FATALITIES AND SERIOUS INJURIES (2001-2005)

	2000	2001	2002	2003	2004	2005
Fatalities						
Fatalities	21	28	25	15	12	43
Fatalities/Harvest*	.28	.36	.35	.21	.15	N/A
F. Δ% prior year		+33	-11	-40	-20	+158
F./H. Δ% prior year		+29	-2	-40	-29	N/A
Serious Injuries						
Serious Injuries	94	100	106	80	110	113
Serious Injuries/Harvest*	1.25	1.30	1.48	1.13	1.37	N/A
S.I. Δ% prior year		+7	+6	-25	+38	+3
S.I./H. Δ% prior year		+4	+14	-24	+21	N/A

* per million cubic metres - Crown and private land

Source: WorkSafeBC “Forest Industry Statistics”, BC Forest Safety Council “Serious Injury and Fatality Statistics, 2005”; B.C. Ministry of Forests “2006/07-2008/09 Service Plan: Annual Timber Harvest Crown and Private Land”.

Some forest industry workers are more likely to die on the job than others, including those on B.C.’s coast, those in logging and those working for themselves or for small companies. For example, coastal operations (north coast of the mainland and Vancouver Island) resulted in 62 per cent of work-related fatalities in B.C. woods since 1973, while historically cutting 30–35 per cent of the annual harvest.⁶ Loggers accounted for 53 per cent of all deaths in 2001 and 2002, with only 15 per cent of deaths attributed to log hauling and 25 per cent to other logging, silviculture, and forest management activities.⁷ The number of combined death and injury claims for woodlands workers is proportionately three times greater than their share of all forest industry jobs, and the dollar value of compensation claims paid to loggers four times greater.⁸ Finally, two-thirds of those who died in the forest industry worked for small enterprises,⁹ either as independent operators or as employees of firms with fewer than twenty employees.

WorkSafeBC, the successor to the B.C. Workers Compensation Board, reports that overall the forest may be a safer place to work than in the past, at least in terms of a forest worker’s likelihood of being injured on the job. According to the agency, overall injury claims per 100 person-years fell by 50 per cent between 1993 and 2002.¹⁰

However, this assessment obscures the fact that 2005 saw the highest number of serious injury claims in history, and the risk of being *seriously* injured in the woods appears to be on the increase. The most recent statistics indicate that the number of serious injuries per 1,000 person-years rose by 23 per cent between 1998 and 2000.¹¹ As well, the number of non-serious injury claims is likely being suppressed by legal changes which require loggers to pay their own WorkSafeBC premiums, making loggers less likely to make a claim and more likely to go

6 *Task Force Report, supra* note 2 at 26; British Columbia, Ministry of Forests, *Budget 2006: Ministry of Forests and Range and Minister Responsible for Housing - 2006/07-2008/09 Service Plan* online: British Columbia Budgets <<http://www.bcbudget.gov.bc.ca/2006/sp/for/for.pdf>>.

7 *Task Force Report, supra* note 2 at 27.

8 *Task Force Report, supra* note 2 at 27.

9 *Task Force Report, supra* note 2 at 24.

10 *Task Force Report, supra* note 2 at 24.

11 *Task Force Report, supra* note 2 at 25.

to work injured and unsafe.¹² As with fatalities, two-thirds of seriously injured workers work for themselves or small companies.

Forestry workers not only appear to face an increasing risk of death or serious injury on the job, but their jobs are significantly more dangerous than other jobs in B.C., including those already considered to be high risk. From 1998 to 2002 forest workers were not only ten times more likely to die on the job than all other B.C. workers, but their risk of dying was three times greater than that of workers in other high risk sectors, including construction, wood and paper manufacturing and heavy manufacturing.¹³ In the same period, woodlands workers were twice as likely to sustain a serious injury as workers in other high-risk sectors, and in 2002 they were 2.5 times more likely to sustain any injury than all other B.C. workers.

B.C. forest workers also appear to be at significantly greater risk than their counterparts in other jurisdictions. From 1998 to 2001, B.C. had ten times more logging and forestry fatalities than Alberta while harvesting just four times as much timber.¹⁴ The recent B.C. task force on forest safety did not compare B.C.'s current harvest volumes with those of our neighbours in Washington and Oregon, but it did find that, compared to these areas "similar in terrain and timber", B.C. had almost five times as many fatalities as Washington and more than three times as many as Oregon.¹⁵

LEGAL TRANSFORMATION

While innumerable explanations have been offered for what clearly appears to be a worsening safety record in B.C.'s forests, two trends have been identified as particularly significant. In January 2004, the provincial government received *A Report and Action Plan to Eliminate Deaths and Serious Injuries in British Columbia's Forests* ("Task Force Report") from the Forest Safety Task Force it had appointed in the previous year. The Task Force stated that important causes of deaths and injuries include the shift of forest workers from direct employment with licensees and large contractors to a "proliferation of smaller firms and independent owner-operators"¹⁶—with a concomitant shift of the safety burden from licensees to contractors—as well as economic pressure for "greater productivity and efficiency" which may "colour how employers and senior management answer questions with safety implications".¹⁷

The legal relations between the major players in forestry operations have evolved from the Company Model (1940s to mid-1980s) to the Major Contractor Model (1980s to mid-1990s) to the Independent Operator Model, under which the most dangerous work in B.C. has been organized since the mid 1990s.¹⁸ The summaries below indicate some of the most important legal rights of workers under each model, as well as the parties' duties to others and to the law.

12 Western Fallers Association, *A Report on Contributing Factors to Faller Accidents in British Columbia and What Must Be Done to Bring Them Down – A View From The Field* (August 2005), online: Ministry of Forests and Range <http://www.for.gov.bc.ca/bcts/safety/Western_Fallers_Association_Report.pdf> at 51.

13 *Task Force Report*, *supra* note 2 at 26.

14 Alberta, Department of Environment, *State of the Environment – Land* (June 2005), online: Alberta Government <http://www3.gov.ab.ca/env/soe/land_indicators/35_timber_harvest.html>.

15 *Task Force Report*, *supra* note 2 at 28.

16 *Task Force Report*, *supra* note 2 at 32.

17 *Task Force Report*, *supra* note 2 at 33. The Western Fallers' Association ("WFA"), an organization representing subcontractors, pointedly placed the bulk of the responsibility at the feet of licensees and contractors who, according to the WFA, push production past the bounds of safety with an economically insecure workforce stripped of legal protections.

18 Evolution and rough timeline from Western Fallers Association, *supra* note 12.

COMPANY MODEL

For the first forty years of the heavy industrialization of B.C.'s forest sector, large companies harvested pursuant to timber licences granted to them by the provincial government. The licensees were "integrated", in that they both harvested timber and owned and operated the mills that converted raw logs into wood products, pulp and to a lesser extent paper. Provincial legislation placed significant restrictions on the export of raw logs and required companies that wanted to harvest provincial timber to maintain processing facilities appurtenant to the source of public timber. The large capital investment needed to qualify for harvesting rights virtually assured that B.C.'s forest sector would be dominated by a few large companies.

As a consequence of directly employing the vast majority of workers who harvested timber, the integrated companies had common law duties to forest workers as well as statutory duties under the *Employment Standards Act* ("ESA"),¹⁹ *Workers' Compensation Act* ("WCA"), and the *Labour Relations Code* ("LRC").²⁰ This direct employment relationship afforded forest workers a measure of protection against some of the causes of workplace injuries and fatalities by regulating the maximum hours employees could be required to work and maintaining a minimum wage per hour or piece; by protecting workers from disciplinary action if they refused to do unsafe work or alerted provincial regulators to unsafe worksites; and by requiring employers to pay into a fund to compensate injured workers in such a way that premiums roughly reflected the company's safety history. Unionized workers also had a legal right to strike if the action was required to protect their health and safety.

MAJOR CONTRACTOR MODEL

It was likely in response to the economic recession and weak commodity prices British Columbia experienced in the mid 1980s that major forest companies began to devolve their harvest operations to logging contractors. Over the course of a decade, the vast majority of forest workers saw their employment shift from the licensees to large logging companies contracted to run the licensees' woodlands operations. Forestry workers continued to be in an employer-employee relationship, though many lost collective bargaining rights as the contractor operations—initially subject to successor provisions in the *Industrial Relations Act*—were decertified.

The essential difference between the first two models is that the licensees were no longer in an employment relationship with woodlands workers as virtually all companies had contracted out their harvesting, hauling, and silviculture operations. Licensees were no longer required to pay compensation fund premiums for these workers. While not entirely immune from the impact woodlands accidents had on premium assessments, as the safety record in the woods had an indirect effect on premiums for wood product operations, licensees no longer suffered a direct financial penalty when fatality and injury claims pushed up compensation premiums for that sector.

INDEPENDENT OPERATOR MODEL

Over the past decade, large forest companies have further removed themselves from woodlands workers and in doing so from legal responsibilities for ensuring a safe workplace and the financial consequences of workplace accidents. At the same time their large logging contractors have also moved to strip themselves of employer responsibilities by requiring forestry workers to accept a new form of tenure as independent subcontractors. In today's forestry op-

19 *Employment Standards Act*, R.S.B.C., c. 113, s. 1.

20 *Labour Relations Code* R.S.B.C. c. 244, s. 1.

erations, most integrated companies contract for harvest operations with a prime contractor, a firm comparable to the large logging contractors of the previous decade. Rather than supplying all of the workers necessary for forestry operations, the prime contractor today contracts with a number of smaller contractors for each of the tasks involved including falling, hauling, engineering, and silviculture. Falling contractors themselves enter into personal services contracts with individual falling subcontractors, who are now required to operate as small corporations or sole proprietorships.

Individual forest workers are now three steps removed from companies that hold the bulk of the harvesting rights in the province, and with whom the provincial government arguably has the greatest leverage and influence. Responsibility for safety is legally divided and diffused among four different “employers”, including the individual subcontractor and the top three levels of the chain. The licensees, prime contractors and falling contractors predominantly employ supervisors and contract managers. They have few woodlands workers for whom they must pay compensation premiums and for whose safety they are directly responsible.

One interesting consequence of the new model is that the statutory safety responsibilities of a greater proportion of people performing or directing work in the woods flow from their status as *employers*, not as employees. While the duties of employers are largely aimed at the planning and policy level, employee duties for their own safety and that of others are more detailed and directive.²¹ Ironically, even though more people in the workplace are higher up on the WCA chain of authority, there are fewer who are subject to explicit requirements for their conduct and job performance.

Finally, and likely the most important difference in the new model is that without an employer, front-line workers no longer enjoy statutory protections that would allow them to refuse to do unsafe work. They cannot strike in the face of an unsafe workplace as they could if they were covered by a collective agreement. They are not protected against discipline or discrimination for refusing to do unsafe work, or for exercising their legal rights as they would be even in a non-union employment situation.

To gain a level of protection comparable to that enjoyed by employees, subcontractors would have to explicitly contract for such provisions with falling contractors.²² This may be impossible for contractors to achieve on an individual basis. There is no evidence that such provisions exist in logging contracts today.

Even if subcontractors were able to achieve such contract language, they would likely have difficulty enforcing their contractual rights. If, for example, a falling contractor sent a subcontractor home for refusing to do unsafe work, the expense and time involved in pursuing a private law claim might dissuade the subcontractor from starting an action. Furthermore, the effect on their reputation and on the likelihood of securing more contracts would almost certainly be sufficient disincentive.

WORKSAFEBC RESPONDS

Guideline 26.2-1 is the Province's only legal initiative since the Task Force. It appears to be aimed at correcting the regulatory “underlap” that exists due to the disconnect between the current Independent Contractor Model and the regulatory regime built on the employer–employee relationship. The Guideline interprets the WCA and the *OH&S Regulation* to mean that licensees still have significant responsibilities for forest worker safety, but is that interpretation accurate?

21 Compare *Workers Compensation Act*, R.S.B.C. 1996, c. 492, ss. 116 & 117 [WCA].

22 Or, for example, a provision that a demand to do work contrary to legislation and standards constituted *force majeure*.

The Guideline first attempts to bring licensees within the ambit of section 115 of the *WCA* and purports to impose the same duties on licensees that the provision imposes on an “employer”. Those duties include ensuring the safety of an employer’s workers and the safety of “any other workers” at a workplace where the employer’s “work” is being carried out.²³ This is problematic as the licensee has no employees at this workplace. Thus, it is highly unlikely that any falling subcontractors in the woods would come under this umbrella.

The Guideline also states, without further elaboration, that “the entire range of activities relating to timber harvesting ... should be viewed as the licensee’s work”.²⁴ By this, WorkSafeBC attempts to create a duty by establishing that all harvesting is by law the licensee’s “work”, even if the licensee has no employees present. A closer reading of the Guideline suggests that WorkSafeBC is uncertain if it can enforce this proposition. After asserting that the entire range of harvesting activities is the licensee’s work, the Guideline goes on to say that harvesting should also be viewed as the main and falling contractors’ work as well as the subcontractor’s work. How can the Guideline possibly impose a duty on licensees while diffusing ownership of the work among three or four parties?

Next, the Guideline posits two additional ways of attaching safety duties to licensees. It states that a licensee is an “owner” of the workplace (though admittedly a co-owner along with the Crown) by operation of the *WCA* definition which broadens the normal meaning of the word “owner” to include a “licensee or occupier of lands” that are used as a workplace.²⁵ However, as might be expected, the safety duties required of a licensee as “owner” of the lands are not the same as those that of a licensee as an employer or site operator.

The “owner” duties only appear to arise when the licensee has knowledge that health and safety may be compromised by the “condition or use of the workplace”.²⁶ The only example provided in the Guideline, hazards created by inadequate construction or maintenance of logging roads, speaks of the owner’s duty as one related to the state of the land, and not the pace and safety of the work.

The Guideline finally states that licensees have a duty to coordinate all health and safety activities, and ultimate responsibility to “do everything that is reasonably practicable” to maintain a system that ensures compliance with the law. It does this by first deeming licensees to be the “prime contractor[s]” in forest workplaces, and then by applying the *WCA* provisions on workplaces with multiple employers.²⁷ Unfortunately, the Guideline has only its earlier contortions to build upon as it tries to construct *this* licensee duty.

Section 118 of the *WCA*, which applies to workplaces where the employees of two or more employers work, puts the responsibility for safety on the shoulders of a single firm designated as the prime contractor. Since practically every faller working in the forest is legally an employer, the first condition—that there be more than one employer at the workplace—appears easy to satisfy. However, making a licensee responsible through designation as the prime contractor is suspect. When interpreting section 115 earlier, the Guideline did not establish that the licensee was, by law, an *employer* at the workplace, but rather that the harvesting was the licensee’s “work”. This “work” concept does not appear in section 118.

Section 118 also provides that the prime contractor is the person who explicitly contracts

23 *WCA*, *supra* note 21, s. 115.

24 British Columbia, WorkSafeBC, *Guidelines Part 26 – Inspections and investigations with respect to forestry operations*, online: WorkSafe BC <<http://www2.worksafebc.com/publications/OHSRegulation/GuidelinePart26.asp#SectionNumber:G26.2>>, [G-26.2-1] at 2.

25 *WCA*, *supra* note 21, s. 106.

26 G-26.2-1, *supra* note 24.

27 *WCA*, *supra* note 21, s. 118.

with the owner of the workplace to be the prime contractor for the purposes of the WCA, or, in the absence of such contract, the owner is the prime contractor. One assumes that if it is the practice of licensees to contract with the Crown to be a WCA prime contractor at the time they are granted harvesting rights, Guideline 26.2-1 would cite that practice. This means that the licensee's prime contractor duties arise only insofar as the licensee is the "owner" of Crown land through its licence to occupy it. This raises the question of whether the duties, if they arise at all, would apply only on land-based tenures, such as a Tree Farms Licence, and would not apply where numerous companies possess a non-tenure right to harvest from the same lands under, for example, a Timber Sales Agreement.²⁸

It appears that the provincial regulator's sole legal response to the deaths and serious injuries in B.C. forests may have no teeth. Perhaps it was not intended to bring about significant change, created as it was in reaction to the *Task Force Report*. The Western Fallers report counted Guideline 26.2-1 as one of the legal measures WorkSafeBC fails to enforce. This assertion appears to be accurate. An exhaustive review of the WorkSafeBC website does not reveal a single example of the Guideline being cited or used to make licensees liable for workplace safety since the Guideline's publication in February 2005.

Perhaps it doesn't matter that the Guideline has no teeth and is not being enforced. Short of being subject to explicit statutory duties enforced with stiff financial penalties, and to legal requirements to pay premiums based on the claims experience for the forestry work done in its name, is any licensee likely to invest the dollars necessary to significantly reduce the number of deaths and serious injuries in the woods?

The legislature could actually do what WorkSafeBC's new Guideline purports to do by amending the WCA to make it clear that licensees bear the general duty for safety planning and for regulatory compliance in the woods. A December 2006 coroner's report on a forest fatality made twenty-two forest safety recommendations, including a recommendation to the provincial government "that the language and definitions of the *Worker's Compensation Act* as it relates to owners and timber tenure licensees, supervisors and prime contractors be clarified to address the specified issues of the forest industry".²⁹ In the minds of the coroner's jury, Guideline 26.2-1 apparently does not bridge the legal gap that has emerged between licensees and workers in the past two decades.

To give legal effect to the Guideline's alleged purpose would also require that the WCA be amended to create a financial incentive for licensees to carry out safety responsibilities diligently. This would include requiring them to contribute premiums to the compensation fund in proportion to the people working in areas licensed to them, and varying their assessments based on the claims experience there. This would also have the salutary effect of enabling WorkSafeBC to reduce or eliminate contractor and subcontractor premiums.

The more assessments reflect the claims experience across the sector, and not just the claims of one subcontractor, the easier it will be for subcontractors to make minor injury claims and to avoid unsafe work. Alternatively, or in addition, the WCA could be amended to keep contractor and subcontractor premiums at the current level, and create a STIIP-like benefit for all independent operators, administered by WorkSafe BC and funded by contributions to the fund.

²⁸ See *Forest Act*, R.S.B.C 1996 c. 157, Part 3.

²⁹ *Findings and Recommendations as a Result of the Inquest into the Death of Gramlich, Theodore (Ted) Joseph*, (BC Coroner's Service, December 2006), reprinted in *BC Forest Safety Council's response to the recommendations directed to the Council by the Coroner's Gramlich Inquest*, App. A. at 6–9, online: BC Forest Safety Council <http://www.bcforestsafecouncil.org/content-nav-alerts/alerts-07-01-01-gram_response.pdf>.

CONCLUSION

It may take a number of years to determine if the forty-three work-related deaths and 113 serious injuries that occurred in B.C.'s forests last year were a statistical blip or a new plateau, but it is clear already that such a record is unacceptable. The dangerous nature of timber harvesting is not the issue. It is unconscionable that a job essential to the process of converting public resources into huge wealth remains five to ten times more dangerous than jobs in poorer industries. While better training is an irreplaceable part of protecting lives and limbs, our collective commitment to workers must include accepting a little less wealth as the price of a lot less carnage. Forest workers, like all workers, have a right to as safe a workplace as can reasonably be provided.

The publishing of guidelines claiming that the law does something it does not will not improve the safety record. The law should be amended so that those with the greatest reward from timber harvesting bear the greatest responsibility and have the greatest economic incentive to ensure the safety of those who generate the wealth. The law should ensure that everyone who faces danger working in the forestry industry is able to work at a safe pace, and to refuse to do unsafe work without fear of discipline or economic loss, irrespective of the particular tenure of their employment.