

**LegCo Panel on Manpower
(For Meeting on 4 July 2001)**

**Proposed amendments to the
Small Claims Tribunal Ordinance, the Labour Tribunal Ordinance
and the Minor Employment Claims Adjudication Board Ordinance
to limit costs of appeal and transfer of cases
from the relevant Tribunal or Board**

Introduction

This paper seeks Members' views on the Department of Justice's proposals to amend the Small Claims Tribunal Ordinance, the Labour Tribunal Ordinance and the Minor Employment Claims Adjudication Board Ordinance in order to limit costs on appeal or transfer of cases from those bodies to the Court of First Instance or the Court of Appeal.

Background

2. The purpose of the Small Claims Tribunal established under the Small Claims Tribunal Ordinance (the Ordinance) is to provide a cheap, simple and informal forum for the determination of limited monetary claims founded on contract or in tort. Proceedings in the Tribunal are on an inquisitorial rather than an adversarial basis. No legal representation is permitted in the Tribunal's proceedings. Accordingly, litigants (especially those on lower incomes) will not be at risk of having to pay costs that are disproportionate to the amount at stake.

3. However, such protection may be lost when an appeal is made to the Court of First Instance or the Court of Appeal where the general principle that costs follow the event applies (that is, usually the loser must pay both his own and his opponent's legal costs). In So Sai Ming v. The Kowloon Motor Bus Co. (1933) Ltd., the respondent (who won \$15,000 on the merits in the Tribunal) had to pay legal costs amounting to \$122,610.00 after KMB appealed on a procedural point. The respondent, who had little money, has had to pay KMB's costs by small instalments.

The Proposal

4. Some private lawyers have suggested that the Government should consider whether the Small Claims Tribunal Ordinance should be amended so that, upon appeal or transfer, costs should be capped and a litigant should bear only his own legal costs (if any) and, hence not be put at risk of having to pay the costs of both sides should he lose in court. The Department of Justice considers that it is unfair, unjust and contrary to the purpose of establishing the Small Claims Tribunal to protect poor litigants in particular from having to pay disproportionate costs if such protection is lost in proceedings upon appeal or transfer. The appellate and transferee courts are also components of the small claims system. The Department of Justice therefore recommends measures to :-

- (i) limit a party's entitlement to costs on appeal to the same kinds of costs as are recoverable in the Tribunal itself, in particular excluding the costs of legal representation;
- (ii) amend section 7 of the Small Claims Tribunal Ordinance so that small claims litigants whose proceedings are transferred to the Lands Tribunal, the District Court or the Court of First Instance may not be subject to the same undue costs risks that presently apply on appeal;
- (iii) clarify a grey area as to the recoverability of a solicitor's or barrister's advisory or drafting fee under section 24 of the Ordinance (to disallow the recovery of such fees consistently with the exclusion of lawyers from the Tribunal); and
- (iv) amend the Labour Tribunal Ordinance (Cap 25) and the Minor Employment Claims Adjudication Board Ordinance (Cap 453) in a similar manner (note : Cap 453 only provides for the transfer of cases to the Labour Tribunal in which legal representation is also not allowed – therefore the parties are not at risk of incurring disproportionate costs).

Consultations

5. The Department of Justice has sounded out the Judiciary, the Bar Association, the Law Society, the two law schools, the Consumer Council and Members of the Legislative Council Panel on Administration of Justice and Legal Services (AJLS Panel) on its amendment proposals to obtain their views on the broad principles proposed.

6. The Law Society and the Consumer Council are in support of the Department of Justice's proposal and in addition, the Law Society suggests that costs on appeal from the Tribunal should be limited to what would be recoverable in the Tribunal except if the court were to determine that the appeal was frivolous, vexatious and without merit. The Bar Association and the Judiciary Administrator however do not support the proposal to cap costs on appeal and on transfer from the Tribunal. Main arguments against the proposal include : there is no reason why a successful party to an appeal should be deprived of his right to have his costs indemnified by the losing party, poor litigants may be discouraged to initiate appeal because of the lack of financial means to meet his own share of legal costs and lastly, concern that the amount of costs to be borne by an unsuccessful litigant on appeal would be disproportionate to the amounts claimed in the action is more apparent than real since the court can, as a matter of discretion, refuse to award costs to the successful party in appropriate cases.

7. When the proposal was discussed at the meeting of the AJLS Panel held on 26 April 2001, some Members expressed strong support for the proposal to cap costs on appeal and transfer. The Chairman of the Panel expressed that while she could see some merits in the current proposal, she expressed her concern about requiring poor litigants to bear their own legal costs on appeal. She also expressed her opinion that it might be appropriate to abolish the right of appeal altogether because in any event, the remedy of judicial review would be available as a last resort.

8. The Department of Justice consulted the Labour Advisory Board (LAB) on 14 and 29 May 2001 on its amendment proposals. Employee Members indicated support for DoJ's proposals to amend the Labour Tribunal Ordinance and the Minor Employment Claims Adjudication Board Ordinance to limit a party's entitlement to costs on appeal or transfer. Employer Members,

however, considered that there might not be a need to amend the Ordinances.

9. Some LAB members raised possibilities of other arrangements to overcome the present issue of disproportionate costs, including the setting up of a compensation scheme, the extending of the Duty Lawyer Scheme to cover civil cases on appeal and the removal of the means test when granting legal aid on appeal.

10. LAB members' proposals have been considered, but these do not appear to provide feasible solutions. It is inappropriate to set a precedent to establish a compensation scheme to deal with the cases under discussion. Moreover, legal aid is available to a party to proceedings upon appeal against a decision of the Small Claims Tribunal or the Labour Tribunal if he satisfies the conditions of eligibility including passing the means test and the merits tests under the Legal Aid Ordinance. It is therefore unnecessary to extend to civil matters the Duty Lawyer Scheme. Further, the granting of legal aid would avoid the denial of justice because of lack of means. One of the cardinal criteria for legal aid to be granted is to pass the means test. There is no justifiable ground to depart from this requirement in respect of the cases under discussion.

Merits of the proposed amendments

11. One of the principal objects of the Small Claims Tribunal Ordinance was to minimise the costs of litigating small claims cases. The applicable policies are that costs must be proportionate to the amount in issue and that the less well-off can litigate such cases without the risk of being crushed by costs. While this object is achieved in the Tribunal, it is undermined by treating legal costs on appeal as being recoverable. Since the Tribunal and the appellate court are two components of the one system, the Department of Justice holds the view that it is illogical to eliminate the risk of bearing legal costs in the Tribunal, but not the appellate court.

12. On the point about depriving a successful party to an appeal of his right to have his costs indemnified by the losing party, the Department of Justice's view is that legal representation is not inevitable. The unsuccessful party in the Tribunal (poor or not) has a choice whether to take a point of law or jurisdiction on appeal. There is nothing illogical or unjust in providing him

with a right of appeal without potential for recovery of costs. On the point about depriving litigants who cannot afford to obtain legal representation, in actual cases, as only cases where doubts exist on a point of law or jurisdiction could be brought for appeal, many of the points or arguments can be and are frequently taken by the court itself. On the point that the court has the discretion to refuse to award costs to the successful party, the Department of Justice is of the view that the discretion is an insufficient safeguard against the danger of a party bearing disproportionate costs on appeal and that the general principle that costs follow the event normally prevails.

13. There are precedents in other jurisdictions which show that, even where legal representation is allowed, there is a trend to cap legal costs in small claims cases by reference to the amount of the claim or not to allow legal costs at all. In England and Wales, for example, when assessing costs, the courts dealing with claims allocated to the small claims track must have regard, among other matters, to the amount or value of the property involved. Quebec does not permit judgments of the Small Claims Division to be appealed. No costs of legal representation may be awarded in New Brunswick, although a judge may award costs against a party who has brought or defended an action unreasonably. In Nova Scotia, barrister's costs on an appeal are capped at \$50 (Canadian).

14. To sum up, the proposed amendments would free employees or lower income litigants generally from the risk of having to pay disproportionate legal costs when they lose a case on appeal brought either by themselves or by their employers or other opponents. The benefits the proposal can bring to poor litigants should outweigh the disadvantages. The proposal is also considered to be in line with the spirit of setting up the Small Claims Tribunal, the Labour Tribunal and the Minor Employment Claims Adjudication Board, which is to provide a cheap, simple and informal forum for the determination of limited monetary claims founded on contract or in tort.

15. On the point about abolishing the right to appeal, the Department of Justice considers that this would leave the parties with less scope for challenging the merits of a decision of the Tribunal, even on points of law (as opposed to questions of jurisdiction). This is because, in judicial review, the court is concerned merely to check that a public body has not exceeded its powers. The court, unlike on appeal, does not ordinarily have the power to re-take the decision itself, or to exercise the discretion in the way which it, the

court, thinks would be best. In judicial review, the court is exercising its supervisory jurisdiction of the exercise of the public power. This is distinct from the appellate jurisdiction that the courts exercise in other areas. In the ordinary course, persons wishing to challenge a decision must avail themselves of any statutory appeal rather than seeking judicial review.

Advice Sought

16. Members are invited to provide their views on the Department of Justice's proposals as set out in paragraph 4 of the paper.

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