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Panels on Administration of Justice and Legal Services and Manpower

Minutes of joint meeting
held on Monday, 24 May 2004 at 4:30 pm
in Conference Room A of the Legislative Council Building

Members present	:	Members of Panel on Administration of Justice and Legal Services
		Hon Margaret NG (Chairman) Hon Albert HO Chun-yan Hon Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon CHAN Kam-lam, JP Hon Miriam LAU Kin-yee, JP * Hon Ambrose LAU Hon-chuen, GBS, JP
		Members of Panel on Manpower
		Hon CHAN Kwok-keung, JP (Deputy Chairman) Hon LEE Cheuk-yan Hon Andrew CHENG Kar-foo Hon LEUNG Fu-wah, MH, JP
		* also a member of Panel on Manpower
Members absent	:	Members of Panel on Administration of Justice and Legal Services
		Hon Jasper TSANG Yok-sing, GBS, JP (Deputy Chairman) Hon Emily LAU Wai-hing, JP Hon TAM Yiu-chung, GBS, JP Hon Audrey EU Yuet-mee, SC, JP

Members of Panel on Manpower

Hon LAU Chin-shek, JP (Chairman)
Hon Kenneth TING Woo-shou, JP
Hon Cyd HO Sau-lan
Dr Hon LUI Ming-wah, JP
Hon CHAN Yuen-han, JP
Hon LEUNG Yiu-chung
Hon SZETO Wah
Hon LI Fung-ying, JP
Hon Tommy CHEUNG Yu-yan, JP
Hon Michael MAK Kwok-fung
Hon Frederick FUNG Kin-kee

Public Officers attending : **Items II and III**

The Administration

Mr Matthew CHEUNG Kin-chung
Permanent Secretary for Economic Development and Labour (Labour)

Mr Alan WONG
Assistant Commissioner for Labour (Labour Relations)
Labour Department

Miss Mabel LI
Senior Labour Officer
Labour Department

Judiciary Administration

Mr Wilfred TSUI
Judiciary Administrator

Mr Augustine L S CHENG
Deputy Judiciary Administrator (Operations)

Clerk in attendance : Mrs Percy MA
Chief Council Secretary (2)3

Staff in attendance : Mr Paul WOO
Senior Council Secretary (2)3

Mr Watson CHAN
Head, Research and Library Services Division

Miss Kitty LAM
Research Officer 8

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I. Election of Chairman

Miss Margaret NG was elected Chairman of the joint meeting.

II. Research Report on "The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places"
(RP06/03-04)

2. Head, Research and Library Services (H/RL) gave a power-point presentation on the Research Report prepared by the Research and Library Services Division (RLSD), which examined the mechanism for resolving labour disputes in Hong Kong, the United Kingdom (UK), New Zealand and Taiwan. He explained the following major attributes of the systems in the jurisdictions studied -

(a) conciliation and measures to improve efficiency and effectiveness of the conciliation process;

(b) hearing of labour disputes, including pre-trial hearings;

(c) legal aid for labour dispute cases;

(d) alternative methods for resolving disputes; and

(e) enforcement of judgments.

3. Permanent Secretary for Economic Development and Labour (Labour) (PS(EDL)(L)) provided the following supplementary information in relation to conciliation undertaken by the Labour Relations Division (LRD) of the Labour Department -

success rate of conciliation

(a) as explained in the Research Report prepared by RLSD, the settlement rate (68.5%) in New Zealand in 2002-03 included cases

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which were fully settled (45.4%) through the official mediator, as well as cases which were partially settled, settled by the parties themselves, or decided by the mediator (23.2%). Hong Kong's settlement rate in 2002 (63.2%) only covered cases which were fully settled by LRD. Therefore, if the same definition of settlement rate had been used for comparison, Hong Kong's settlement rate should have been higher than that of New Zealand; and

time needed to complete conciliation

(b) LRD's performance pledge was to arrange a conciliation meeting within five weeks from the date a claim was lodged at LRD. At present, the average waiting time for a conciliation meeting at LRD offices was 3.7 weeks. Most of the cases, including settled cases concluded at LRD and unsettled cases referred to the Labour Tribunal (LT), required only one conciliation meeting.

III. Review on the operation of the Labour Tribunal

(LC Paper Nos. CB(2)2424/03-04(01) - (02); 1932/02-03(02); 2527/02-03(01) and 3025/02-03(01))

4. PS(EDL)(L) briefed members on the Administration's paper (LC Paper No. CB(2)2424/03-04(01)). The paper explained the measures to improve the mechanism adopted by the Labour Department in referring unsettled cases of labour disputes and claims to LT. It also contained some preliminary comments on the Research Report of RLSD. PS(EDL)(L) drew members' attention to the following major issues highlighted in the paper -

(a) in 2003, LRD handled a total of 34 116 cases which represented a decrease of 3% over the historic high figure of 35 254 cases in 2002. In the first quarter of 2004, the number was 7 725, a decrease of 8% over the same period in 2003;

(b) the settlement rate of conciliation at LRD went up from 63.2% in 2002 to 65.1% in 2003, an all-time high after the Asian financial crisis in 1997. The figure rose further to 67.1% in the first quarter of 2004. This had led to reduced number of unsettled cases to LT. In 2003, LRD referred 10 103 unsettled cases to LT, a decrease of 9% over 11 132 in 2002. For the first quarter of 2004, the figure stood at 2 119, representing a decrease of 19% over 2 601 for the same period in 2003 and a decrease of 11% over the figure in the last quarter of 2003; and

(c) an agreement had been reached between LRD and LT on standardizing the claim form used by claimants. This would

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obviate the need for the claimants to provide to LT the same information which they had already given to LRD. The standardized form would be put into use shortly.

5. Judiciary Administrator (JA) briefed members on the updated position on review of the operation of LT as set out in his letter dated 17 May 2004 to the Panel (LC Paper No. CB(2)2424/03-04(02)) -

(a) the Working Party appointed by the Chief Justice (CJ) to review the operation of LT (the Working Party) intended to submit its report to CJ by the end of June 2004;

(b) the three-month experiment implemented in mid-2003 in listing callover cases separately in the morning and in the afternoon so as to minimize the time of the parties waiting for their cases to be heard proved to be satisfactory. The practice had been extended to other courts of LT. The other short-term improvement measures were continuing and would be reviewed by the Working Party; and

(c) the current 12 courts were adequate to deal with the caseload. As at 3 May 2004, the waiting time from appointment to filing of claim was five days, as compared with 14 days in 2003. The waiting time from filing to callover hearing was 24 days, same as the figure in 2003.

(*Post-meeting note* - On (a) above, the Working Party's report was published in June 2004 and issued to the Panels (English version was issued on 2 July 2004 vide LC Paper No. CB(2)3004/03-04 and Chinese version on 23 July 2004 vide LC Paper No. CB(2)3149/03-04)).

Issues raised by members

Improvement measures for resolving disputes

6. Mr Andrew CHENG noted that in New Zealand, a proposed "fast track mediation" scheme was being considered (in the context of the Employment Relations Law Reform Bill), under which the disputing parties were encouraged to reach an agreed settlement within a specified period. If an agreement could not be reached, the mediator would make a decision on the case. In UK, a fixed period of conciliation (which varied according to the nature of the case) would be introduced so as to encourage the parties to settle their disputes as early as possible. On expiry of the specified period, the conciliator would decide whether to continue with conciliation, or refer the case to the Employment Tribunal for a hearing. Mr CHENG opined that the idea of setting a specified period of conciliation to encourage early settlement

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deserved careful consideration, adding that it was also necessary to provide safeguards against shortcomings such as the possibility of the parties being pressurized to reach a hasty settlement against their wish.

7. PS(EDL)(L) noted Mr Andrew CHENG's views. He said that the Administration was not aware of a serious problem as far as the time for conciliation was concerned. He said that as explained above, the average waiting time for conciliation meeting at LRD offices was 3.7 weeks. Most cases required only one conciliation meeting for a mediated settlement. In the absence of a settlement, the case would be referred to LT for adjudication.

8. Mr LEUNG Fu-wah said that under the existing dispute resolving system, settlement was sometimes delayed as a result of the duplication of work undertaken by LRD and LT, such as duplicated efforts in conducting conciliation. He pointed out that the existing legislation stipulated in unambiguous terms the rights and obligations of employers and employees. Therefore, he did not see the need for both LRD and LT to engage in conciliation of the same case. He further opined that under certain circumstances, such as in simple and straight-forward cases where the parties had no dispute on their statutory rights and obligations which had been clearly explained by the conciliator, a settlement could be achieved more speedily if the conciliator had authority to require mandatory compliance with his decision.

9. On the issue of conciliation, JA explained that the Labour Tribunal Ordinance required that the Tribunal Officers should conduct conciliation with a view to achieving settlement of a claim. He added that the concern about duplication of work of LRD and LT would be considered by the Working Party.

10. Mr LEE Cheuk-yan said that if a major reform of the existing system was considered necessary, he would be inclined to support a model similar to that in UK, where there were two specialized adjudicating bodies, i.e. an Employment Tribunal to adjudicate cases and an Employment Appeal Tribunal to handle appeals. This would expedite a final settlement without the need for an appeal to be taken to the High Court as was the present situation in Hong Kong. A more moderate approach, on the other hand, would be to streamline and simplify the existing practices and procedures. In this connection, Mr LEE reiterated his opinion expressed previously that there was no need for both callover hearings and pre-trial mention hearings in LT as they unnecessarily prolonged the length of the proceedings. The practice had given rise to a lot of complaints by the parties. In his view, mention hearings could be dispensed with because it was the duty of the Tribunal Officers to complete the investigative work and prepare all the necessary documents to ensure that the case could proceed to trial.

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11. JA explained that not all cases required the holding of both callover and pre-trial mention hearings. The Presiding Officer, after making enquiries at the callover hearing, might set down the matter for trial if the case was simple. However, if the matter required more evidence from the parties, the Presiding Officer would set it down for pre-trial mention. The purpose of pre-trial mention was to examine availability and completeness of evidence to decide whether the case was ready to proceed to trial. As evidential matters were sorted out during a pre-trial mention between the parties, who were not legally represented, the trial proceedings could actually be expedited.

12. Mr LEE Cheuk-yan asked whether it was the intention of LT to reduce the number of mention hearings to one for each case (Appendix I to the Research Report). JA replied that whether mention hearing was necessary in a particular case and the number of such hearings required were matters for the decision of the Presiding Officer, taking into consideration the special circumstances of the case.

13. In response to the Chairman and Mr LEUNG Fu-wah, PS(EDL)(L) said that where an unsettled case was referred to LT, LRD would pass to LT all the information and documents provided by the claimant. The claimant was not required to submit the information afresh.

Enforcement of judgment and appeals

14. Mr Andrew CHENG said that one of the major concerns of the employees was that they could not obtain the compensation awarded by LT in the event of default payment by their employers. Despite that the employees, as judgment creditors, could apply to the District Court to enforce the judgment, the time and expense involved might deter them from pursuing their claims. He suggested that a review on the mechanism for enforcement of judgement should be conducted in the light of the approach adopted in other jurisdictions. He pointed out that under the system in New Zealand, the party whose claim was successful might apply to the Employment Relations Authority for the issuing of a compliance order. If the compliance order was not complied with, the applicant could apply to the Employment Court, which had the power to sentence the person in default to imprisonment, order payment of a fine, or to have the person's property sequestered. There were other means available in New Zealand and UK, such as application for a court order to obtain information on the financial situation of the judgment debtor. Mr CHENG opined that these measures, particularly those adopted in New Zealand, provided substantive powers of the court to enforce judgments to protect the interests of the successful claimants. He suggested that the Administration should consider the practicality of introducing measures along similar lines.

15. Mr LEE Cheuk-yan agreed that the system of enforcing judgments in New Zealand was an effective mechanism for safeguarding the interests of the claimants.

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16. PS(EDL)(L) said that he appreciated the concern about difficulties experienced by employees in obtaining their entitled compensation because of defaults by the employers. The Administration would consider any suggestions on means to improve the situation. He added that, however, whether or not Hong Kong should adopt practices similar to that in New Zealand or other jurisdictions involved policy considerations, and should be examined in the light of the possible impact on other non-employment related civil claims. He said that the matter would be examined by the Administration, taking into account the relevant recommendations which might be made by the Working Party.

17. Referring to the power of the Employment Court of New Zealand to imprison defaulters who failed to comply with a compliance order, Ms Miriam LAU requested RLSD to provide supplementary background information on the grounds for providing the Court with such power.

(*Post-meeting note* - The supplementary Information Note (IN15/03-04) was issued to the Panels vide LC Paper No. CB(2)3075/03-04 on 14 July 2004.)

18. Ms Miriam LAU further suggested that the procedures for successful claimants to apply for court Bailiffs to execute a distress warrant to seize the judgment debtor's goods and properties should be simplified.

19. JA said that he would convey members' views for the consideration of the Working Party.

Legal aid in appeal cases

20. Mr Albert HO pointed out that in cases where the employers appealed to the Court of First Instance against the decision of LT, the employees often found themselves in a difficult situation because of the high costs of litigation which they had to bear. In many cases, the costs were out of proportion with the amount of compensation originally awarded to them by LT. As a result, a lot of employees, particularly those who failed to obtain legal aid, simply gave up their claims. Mr HO suggested that for labour dispute cases, the possibility of conducting the appeal without legal representation by both parties to the proceedings could be explored.

21. Mr HO further pointed out that in Taiwan, the losing party was not required to bear the solicitor's cost incurred by the winning party under certain circumstances (paragraph 5.2.27 of the Research Report). He suggested that a similar system could also be examined.

22. Ms Miriam LAU opined that it would be extremely difficult for the parties to argue their case in the court in the absence legal representation,

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particularly when the appeal was brought on grounds of a point of law. She said that to ensure justice and a fair trial, legal aid should by all means be provided to the employees.

23. Mr LEE Cheuk-yan said that he had previously recommended to the Administration that in cases where an appeal was lodged by the employer, then the employee as the respondent should be provided with legal aid, with the Director of Legal Aid exercising a discretion to waive the means test for legal aid. In cases where the employees were the appellants, the normal means testing would apply. Mr LEUNG Fu-wah supported the suggestion.

24. Mr CHAN Kwok-keung informed members that in 1999, he had proposed to amend the Legal Aid Ordinance to provide the Director of Legal Aid with the power to waive the financial eligibility limit for legal aid in respect of employees who were the respondents to appeals brought by their employers. However, the proposed amendments were not supported by the Administration.

25. In response to the Chairman, H/RL said that Hong Kong was the only place among the jurisdictions covered in the Research Report where legal representation was not allowed in the hearings of the adjudicating body. In New Zealand, legal aid covered proceedings of the adjudicating body. Legal aid was not available to cases in the Employment Tribunals in England and Wales, but was available to cases in the Employment Appeal Tribunal and the Employment Tribunals in Scotland subject to certain conditions. The conditions were as follows -

(a) the applicant was unable to fund or find alternative representation elsewhere; or

(b) the case was an arguable one; and

(c) the case was too complex to allow the applicant to present it to a minimum standard of effectiveness.

The way forward

Admin/ JA

26. The Chairman requested the Administration and the Judiciary Administration to take into consideration the views expressed by members, as well as the findings of the Research Report, in reviewing the operation of LT.

JA

27. JA said that he would revert to members on the findings and recommendations of the Working Party after its report had been completed and considered by CJ.

28. The Chairman suggested and members agreed that the Panel on Administration of Justice and Legal Services and Panel on Manpower should

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hold a joint meeting to receive a briefing on the Working Party's report in due course.

29. The meeting ended at 5:30 pm.

Council Business Division 2
Legislative Council Secretariat
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