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CHAPTER ONE – INTRODUCTION

I. Establishment of the Working Party

1.1 In June 2003, the Chief Justice established the Working Party on the Review of the Labour Tribunal ("the Working Party") with the following terms of reference:

> "To review the operation of the Labour Tribunal and to recommend improvements thereto."

1.2 Its membership is as set out in Appendix I.

II. Background

1.3 The Labour Tribunal ("the Tribunal") was established in 1973 by the Labour Tribunal Ordinance, Cap. 25 ("the Ordinance") to provide a quick, simple, cheap and informal forum for resolving employment disputes. Industrial or trade disputes about general employment conditions of service are outside the Tribunal's scope.[1]

1.4 Since 1973, the caseload of the Tribunal has multiplied many times. The economic downturn in recent years has further brought about a sharp increase in the caseload. Over the years, employment law and the nature of employment disputes have become much more complex. All these pose demanding challenges for the Tribunal in seeking to resolve employment disputes in a quick, simple, cheap and informal manner.

1.5 At the same time, with fundamental changes in the conditions of Hong Kong society, the Tribunal users, both employers and employees, as well as the community, have much higher expectations of the Tribunal in providing access to justice efficiently and expeditiously. They and those interested in labour affairs, including Members at the relevant panels of the

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[1] Speech of the Attorney General, Mr. Roberts, when moving the second reading of the Labour Tribunal Bill 1972, *LegCo Proceedings 1971-2, 382-3* (Feb 9, 1972).

Legislative Council, have raised various concerns over different aspects of the operation of the Tribunal.[2]

1.6 In meeting the challenges and the rising expectation of its users, the Judiciary has been conducting reviews from time to time to improve the operation of the Tribunal. The Judiciary has also made certain improvement measures, including deploying additional resources and devising improved procedures, to tackle specific problems identified. The Tribunal has, for instance, introduced some short term measures to improve the operation of the Tribunal in mid-2003.[3] Despite all these past efforts, some of the concerns in relation to the operation of the Tribunal remain unresolved. The relevant panels of the Legislative Council also requested the Judiciary to conduct an overall review on the practice and procedure of the Tribunal.

1.7 It was against the above background that the Working Party was established.

III. The Work of the Working Party

1.8 In conducting the review, the Working Party has considered publications and reports on the objectives, practice and procedure of the Tribunal, including papers and minutes of meetings of the relevant panels of the Legislative Council.[4] The Working Party has also considered the report on "The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places" prepared by the Research and Library Services Division of the Legislative Council Secretariat and released on 22 April 2004.

1.9 In addition, the Working Party has taken into consideration the views of judges and judicial officers with experience in their work, including past and present Presiding Officers of the Tribunal, and the Tribunal Officers and other support staff as appropriate.

1.10 In the course of its deliberations, the Working Party has made reference to the experience in other jurisdictions, namely, Australia, New

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2 The relevant panels of the Legislative Council are the Panel on Administration of Justice and Legal Services ("AJLS Panel") and the Panel on Manpower.

3 A list of the Short term improvement measures is at Appendix II.

4 A list of major reference materials is at Appendix III.

Zealand, England and Canada, on the modes of employment dispute resolution and the adjudication process. [5]

1.11 The Working Party had held 11 meetings from June 2003 to June 2004, and had conducted a visit to the Tribunal in August 2003.

IV. Scope of the Review

1.12 As a working party comprising only members of the Judiciary and guided by its terms of reference (see para. 1.1), the Working Party has focused primarily on the review of the practice and procedure of the Tribunal.[6] The Working Party is conscious that the Tribunal process is only one part of the overall employment resolution mechanism in Hong Kong. The Working Party does not, however, consider it appropriate, and has not endeavoured to embark upon such wider issues as the practice and procedure in handling employment disputes before a claim is filed in the Tribunal including the role of conciliation, and the role of the Minor Employment Claims Adjudication Board in the overall mechanism of employment dispute resolution in Hong Kong.

V. The Report

1.13 This Report will first set out the set-up, practice and procedure of the Tribunal (Chapter Two) and the caseload, case nature and waiting time of the Tribunal (Chapter Three). It will then examine the developments in other jurisdictions in employment dispute resolution (Chapter Four). The Report will proceed to examine and review various aspects of the operation of the Tribunal with a view to recommending improvements thereto (Chapter Five).

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5 A list of key reference materials in relation to employment dispute resolution in other jurisdictions is at Appendix IV.

6 This is also consistent with the request put forward by the relevant panels of the Legislative Council.

CHAPTER TWO – THE SET-UP, PRACTICE AND PROCEDURE OF THE LABOUR TRIBUNAL

I. The Set-Up of the Tribunal

2.1 The Tribunal has three main components: the Registry, the Tribunal Officers ("TOs") and the Presiding Officers ("POs").

A. Registry

2.2 The Registry is responsible for the administration of the Tribunal. It deals with the filing and service of claims and documents and the fixing of hearing dates, and handles payments-in and payments-out for the parties. The Registry also answers enquiries and provides assistance to parties on Tribunal procedure.

B. Tribunal Officers

2.3 The duties and powers of the TOs are set out in section 14 of the Ordinance. In essence, they are under a statutory duty to conduct an inquiry into the claim and to prepare a summary of facts (Form 6 report) relating to the claim for the POs. In practice, TOs will assist the parties to fill out the claims and to identify the issues in dispute.

2.4 For the purpose of preparing the Form 6 report, TOs are given the power to interview and obtain statements from the parties and other relevant persons, to attend and inspect places of work, and to request for production and to take copies of relevant records, books of account or other documents. A person interviewed by a TO may decline to answer questions or provide a statement, in which case the TO is required to record it in his report. It is a criminal offence for any person to refuse, without reasonable excuse, to comply with the TO's request to produce documents or to wilfully obstruct a TO in the discharge of his duties.[7]

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[7] Under section 44 of the Ordinance, the person shall be liable on summary conviction to a fine at level 4.

2.5 Under section 15(1) of the Ordinance, the Tribunal shall not hear a claim until a conciliation certificate signed by a TO or an authorized officer[8] has been filed or produced to the effect that :

(a) One or more of the parties has refused to take part in conciliation;

(b) Conciliation has been attempted but no settlement has been reached;

(c) Conciliation is unlikely to result in a settlement; or

(d) Conciliation may prejudice the interests of a party.

C. Presiding Officers

2.6 POs are judicial officers appointed from the rank of magistrates. From time to time, solicitors and barristers are appointed to serve as deputy POs. POs and deputy POs sit alone to hear and determine claims brought in the Tribunal.

2.7 Under section 20(3) of the Ordinance, the PO is under a general duty to investigate any matter he considers relevant to the claim, irrespective of whether it has been raised by the parties. Section 20(2) further provides that a PO may subpoena witnesses, order the production of documents and exhibits, and put questions generally to a party or a witness. The Ordinance provides that any person who, without reasonable excuse, fails to comply with a witness subpoena or an order for production of documents or exhibits commits a criminal offence.[9]

2.8 Additionally under section 15(3) of the Ordinance, if it appears during the hearing of a claim that there is a reasonable likelihood of a settlement of the claim, the Tribunal may, with the parties' consent, adjourn the claim for conciliation by the Commissioner for Labour.

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8 A public officer authorized by the Commissioner of Labour to assist in conciliation under the Ordinance may also sign the conciliation certificate.

9 Under section 43 of the Ordinance, the person shall be liable on summary conviction to a fine at level 2.

II. The Staffing and Location of the Tribunal

2.9 Currently, the Tribunal has 12 courts. Of the 12 courts, 6 courts deal with call-over hearings and 6 courts deal with trials.[10]

2.10 There are 39 TOs. 3 of them are designated as Settlement TOs, whose duty is to assist the parties to reach a settlement.[11] Settlement TOs are not involved in the investigation of claims. The remaining 36 TOs are responsible for conducting inquiries into claims and rendering assistance to the parties in the preparation for trial.

2.11 There are 48 support staff in the Registry. They are responsible for handling the filing of claims, making appointments with the TOs, listing of hearings before the POs, booking of interpreters, arranging for service of claims, processing of payment into the Tribunal and arranging for payment to judgment creditors.

2.12 The main Registry and 10 courts of the Tribunal are located at two floors in the Pioneer Centre, a commercial building in Mongkok, Kowloon. The other 2 courts of the Tribunal are located at the Eastern Law Courts Building.[12]

III. Jurisdiction of the Tribunal

2.13 The jurisdiction of the Tribunal is prescribed by section 7 and the Schedule to the Ordinance. Briefly, other than claims that fall within the jurisdiction of the Minor Employment Claims Adjudication Board (MECAB),[13] the Tribunal has exclusive jurisdiction over:

(a) Claims in contract that arise out of the breach of a term of a contract of employment or of apprenticeship;

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10 See paras. 2.24 to 2.33 below.

11 See para. 2.29 below.

12 This is because the premises at Pioneer Centre can only accommodate 10 courts.

13 A claim brought by not more than 10 claimants for a sum of money not exceeding $8,000 per claimant falls to be dealt with by the Minor Employment Claims Adjudication Board: see the Schedule to the Minor Employment Claims Adjudication Board Ordinance, Cap. 453.

(b) Claims for breach of the Employment Ordinance, Cap. 57, or the Apprenticeship Ordinance, Cap. 47;

(c) Disputes as to an employee's right to severance payment or payment of wages by a person other than his employer under Parts VA and IXA respectively of the Employment Ordinance or the amount of such payment;

(d) Claims for remedies under Part VIA of the Employment Ordinance;[14] and

(e) Claims transferred to the Tribunal by the MECAB.[15]

2.14 Other than claims for remedies under Part VIA of the Employment Ordinance, the power of the Tribunal is limited to making an award for a sum of money. The Tribunal may, however, at any stage of proceedings, decline jurisdiction under section 10 of the Ordinance if it is of the opinion that for any reason the claim should not be heard and determined by it. Such reasons may include, for example, doubt as to whether or not the Tribunal has jurisdiction[16] or the dispute requires detailed analyses of voluminous and complicated documentation or involves complex issues of facts or law.[17] The Tribunal may, when it declines jurisdiction, transfer the claim to the Court of First Instance, the District Court or the Small Claims Tribunal depending on the monetary value of the claims involved.[18]

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14 Part VIA of the Employment Ordinance relates to employment protection by providing remedies for unreasonable dismissals, variation of the terms of employment without the employee's consent and unlawful dismissals.

15 The MECAB deals with about 2,600 claims per year.

16 *Dataprep (HK) Ltd v. Kuo Chi Yung Peter* [1974] HKLR 383.

17 *Archer v. The Hong Kong Channel Ltd* HCLA No. 12 of 1996.

18 At present, claims not exceeding $50,000 are heard in the Small Claims Tribunal. Claims exceeding $50,000 but not exceeding HK$1 million are heard in the District Court. Claims exceeding HK$1 million are heard in the Court of First Instance of the High Court.

IV. Processing of Claims in the Tribunal

A. Filing Claims

2.15 In practice, very few claimants will proceed directly to file a claim with the Tribunal when a dispute arises. Instead, most claimants will first lodge a complaint with the Labour Department and seek the assistance of the labour officers of the Labour Relations Division (LRD) of the Labour Department in conciliating the disputes. If the dispute cannot be resolved through the intervention of the LRD, the claimant can choose to file a claim with the Tribunal, in which case the LRD will send a memorandum to the Tribunal, together with the documents supplied by the parties to the LRD. The memorandum gives a brief description of the dispute. It will be read by the TO before he interviews the claimant.

2.16 The Tribunal has a 24-hour computerized telephone appointment booking system. Claimants usually make use of the system to make an appointment before attending the Tribunal to file their claims.

2.17 A claimant may file a claim without first making an appointment, but if he does so, a TO may not be available to interview him on that day, and he may have to make another visit to the Tribunal on another date for the purpose of such interview. The appointment system is particularly valuable for claims that involve multiple claimants and for claimants who require assistance in filling in the claim forms.

2.18 When a claim is filed, the Registry will fix a date for the first hearing (i.e. call-over hearing) of the claim. The Registry will also serve the claim on the defendant and notify him in writing to attend an interview with the TO.

B. Inquiries by Tribunal Officers

2.19 During the interview with the claimant, the TO will check or assist him in filling in his claim forms,[19] obtain a statement from him and conduct inquiries for the purpose of preparing the Form 6 report which contains a summary of facts relating to the claim. The TO will also give

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19 More details are set out at para. 5.52 in Chapter Five.

directions on the documents and witness statements to be produced and obtained to substantiate the claim.

2.20 The claim will then be served on the defendant by the Tribunal. The defendant will be invited to attend an interview with the TO. At the interview, the TO will obtain a defence statement from him, make inquiries into the case and give directions on the documents and witness statements for substantiating the defence.

2.21 During the separate interviews with the parties, the TO will also explore with the parties the possibility of settlement. If the parties are prepared to consider a settlement, the TO will assist them to reach a settlement. This has broadly been referred to as conciliation. The TO usually deals with this by telephone. Where the parties wish, the TO will convene a meeting between them to discuss settlement.

2.22 Where settlement is reached, the agreement will be reduced into writing and the parties will sign on it. The settlement will then be submitted to a PO for approval. Once approved, the parties will be notified and informed that they do not need to attend the call-over hearing. Unless the parties agree otherwise, the settlement will be made the subject matter of an award and may be enforced accordingly.

2.23 If the parties do not wish to settle or if there is no settlement, the TO will compile the Form 6 report, setting out the background of the case and a summary of the claim and the defence, and enclosing the relevant documents. The report will also set out the matters that are agreed by the parties and those that are in dispute and required to be resolved. Where a party has failed or refused to attend the interview, the TO will make a report of the failure or refusal in the Form 6 report. The TO will also draw the PO's attention to any failure or refusal to produce documents or to otherwise comply with the directions of the TO.

C. Hearings in the Tribunal

(1) Call-over Hearing

2.24 Unless the parties agree otherwise, section 13(1) of the Ordinance requires the first hearing to take place not earlier than 10 days but not later than 30 days from the filing of the claim.[20]

2.25 The first hearing is intended to be a call-over hearing when witnesses are not required to attend. If a claimant fails to attend, his claim may be struck out[21] or adjourned to another date at the discretion of the PO. If a defendant is absent at the hearing, the PO may, if satisfied that he has been duly served and the claim is sufficiently established, proceed to determine the claim and make such award or order as the PO thinks fit.[22] The PO may also, at his discretion, adjourn the hearing for re-service on the defendant and/or to enable the claimant to prove his claim, in which case the defendant will be notified by the Tribunal of the adjourned hearing.

2.26 If all parties are present at the hearing, and if the PO considers that the case is ready for trial in all aspects, he may proceed to hear and determine the claim. This is only done in simple and straightforward cases.

2.27 In most cases, the PO will clarify with the parties the matters that require clarification in the claim or the defence at the call-over hearing. He will also give directions on the preparation for trial, including the calling of witnesses and production of further documents and evidence. He will also set a hearing date for the trial.

2.28 An important function of the PO presiding over the call-over hearing is to identify and explain to the parties the issues in dispute and the relevant law and procedure, including the burden of proof. This is done because the parties have no legal representation. In so doing, the disputes between the parties may be identified and narrowed, and the time and costs for the trial correspondingly reduced. The parties will also be in a better

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20 The intention of Section 13(1) of the Ordinance is to afford time for the Tribunal to effect service on the defendant and for the TO to contact and interview the defendant, make the necessary inquiries and to prepare the Form 6 report and for the parties to make necessary preparation for their cases, while ensuring that the claim will be heard within a reasonable time. This time limit has remained unchanged since the establishment of the Tribunal some 30 years ago. More details are set out at paras. 5.76 to 5.84 in Chapter Five.

21 Section 20A(1) of the Ordinance.

22 Section 21 of the Ordinance.

position to appreciate and assess the merits of his and the opponent's case. They may then consider how best to further conduct their case, such as to call further witnesses or to produce further evidence, or to consider and attempt settlement.

2.29 At the call-over hearing, bearing in mind that the parties cannot have any legal representation, the PO will explain to the parties the alternative of settling their claims without adjudication. If the parties express willingness to settle, he may assist the parties to attempt settlement or refer the parties to a Settlement TO, who will assist the parties to attempt settlement. This has broadly been referred to as conciliation. In this connection, it should be noted that under section 15(3) of the Ordinance, if it appears during the hearing of a claim that there is a reasonable likelihood of a settlement of the claim, the Tribunal may with the parties' consent adjourn the claim for conciliation by the Commissioner for Labour. As this will lead to delay, the PO usually would not take this course, but where the parties wish, he will assist the parties or refer them to a Settlement TO.

2.30 A PO who has presided over the call-over hearing usually will not subsequently sit at the trial of the claim.

(2) Pre-trial Hearings

2.31 Where the parties have failed or refused to co-operate with the TO or to comply with the pre-trial directions, or where further investigations by the TO are required, the PO may list the claim for a pre-trial hearing (also referred to as "for mention hearing") instead of immediately fixing a trial date. Likewise, the PO may list the claim for a pre-trial hearing if a case involves multiple parties, a large number of witnesses or documents or complicated issues. The purpose of the pre-trial hearing is to ensure that the necessary preparations have been completed and the pre-trial directions fully complied with before the trial commences. The objective is to avoid adjournments and disruptions in the course of the trial, thereby saving time and costs of the parties, witnesses and the Tribunal. Depending on need, more than one pre-trial hearing may have to be held.

(3) Trial

2.32 At the trial, the PO will receive oral and documentary evidence adduced by the parties and also hear submissions from the parties. He may also subpoena witnesses, order the production of documents and exhibits and also put questions to the parties and witnesses. He has an investigative role in that he is under a statutory duty to investigate any matter he considers relevant to the claim, irrespective of whether it has been raised by the parties.

2.33 At the conclusion of the hearing, the PO will make an award or order and deliver his determination as soon as possible. In announcing the determination, the PO will usually give brief oral reasons for it. A PO may subsequently reduce his reasons into writing or, where one party has appealed, render full written reasons. The PO has power to make an award to a party his costs and expenses in attending a hearing of the Tribunal or in being interviewed by the TO.[23] The award or order made by a PO will be reduced into writing and the Registry will arrange for it to be served on all the parties.[24]

D. Restoration of Claim

2.34 A claimant whose claim has been struck out on account of his absence at the hearing may within 7 days after the hearing or such further period as the Tribunal may allow, apply to restore the claim. The PO may impose such terms as he thinks fit when allowing a claim to be restored.[25]

E. Setting Aside and Review of Award

2.35 A defendant who is absent at a hearing may within 7 days after the hearing or such further period as the Tribunal may allow, apply to

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23 Section 28 of the Ordinance.

24 Section 22 of the Ordinance.

25 Section 20A of the Ordinance.

set aside any award or order made at the hearing. The PO may impose such terms as he thinks fit when granting the application to set aside.[26]

2.36 Within 14 days from the date of an award or order, a PO may on his own motion review the award or order and re-open and re-hear the claim.[27] This power of review may also be exercised by the PO upon the application of a party made within 7 days from the date of the award or order.[28]

2.37 On the application of a party for review, the PO, having regard to the possibility of assets which may be available to satisfy an award being disposed of to the prejudice of any party, may make such order regarding payment into the Tribunal, giving of security or other orders he considers fit.[29]

V. Procedure in the Tribunal

2.38 Hearings in the Labour Tribunal are conducted in public, unless the PO considers that in the interest of justice it should be held in private.[30] Legal representation is not allowed. With the leave of the Tribunal, an officer of a registered trade union or an employers' association may appear as a party's authorized representative.[31] Leave for such representation is invariably granted by the POs and in practice, it is not uncommon for employees to be represented by officers of trade unions.

2.39 Hearings in the Tribunal are characterized by informality in the procedure and flexibility in the handling of evidence.[32] The strict rules of evidence do not apply. The parties will be given an opportunity to examine and cross-examine witnesses, and also to make a closing address at the conclusion of the evidence.

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26 Section 21A of the Ordinance.

27 Section 31(1) of the Ordinance.

28 Section 31(2)(b) of the Ordinance.

29 Section 31(4) of the Ordinance.

30 Section 18 of the Ordinance.

31 Section 23(1)(e) of the Ordinance.

32 Sections 20 and 27 of the Ordinance.

2.40 Section 45 of the Ordinance confers upon the Chief Justice the power to make rules providing for, among other things, matters of procedure that are not provided for in the Ordinance and generally for the better carrying out of the provisions of the Ordinance. Rules have been made pursuant to this provision.[33] In relation to matters of procedure for which no provision is made by the Ordinance or by the Rules made under section 45, the PO may determine the applicable procedure.[34]

2.41 Where necessary, the PO may adjourn the proceedings before him on terms that include making payment into the Tribunal or the giving of security where he is of the opinion that an adjournment may result in prejudice to a party because of the disposal or loss of control of assets by a defendant.[35]

VI. Appeals from the Tribunal

2.42 A party may appeal with leave of the Court of First Instance of the High Court to that Court against a determination or order made by a PO, including a decision made on a review. Leave is only granted where the appeal involves a point of law or jurisdiction.[36] A refusal by the Court of First Instance to grant leave to appeal is final.[37]

2.43 Any party dissatisfied with the decision of the Court of First Instance on an appeal heard by leave may appeal to the Court of Appeal of the High Court with leave of that Court. Leave is only granted if the Court of Appeal considers that a question of law of general public importance is involved.[38] Refusal of leave by the Court of Appeal is final.[39]

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33 The Labour Tribunal (General) Rules.

34 Section 46 of the Ordinance.

35 Section 30 of the Ordinance.

36 Section 32(1) of the Ordinance.

37 Section 32(3) of the Ordinance.

38 Section 35A(1) of the Ordinance.

39 Section 35A(3) of the Ordinance.

2.44 Under section 22(1) of the Hong Kong Court of Final Appeal Ordinance, Cap. 484, an appeal shall lie to the Court of Final Appeal as of right where the matter in dispute on the appeal amounts to $1 million or more, or with leave of the Court of Appeal or the Court of Final Appeal, if the question involved is one, of which by reason of its great general or public importance, or otherwise, ought to be submitted for decision.

VII. Enforcement of Tribunal Award

2.45 An award of the Tribunal, including an award made by consent, may be registered in the District Court and, upon registration, becomes a judgment of the District Court and may be enforced accordingly. The registration must be made within 12 months of the making of the award.[40] Awards that have not been registered within the 12-month period may only be enforced by way of a separate claim based on the award commenced in either the Small Claims Tribunal or the District Court or the Court of First Instance of the High Court, depending on the amount of the award in question.[41]

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40 Section 38 of the Ordinance and Rule 12 of the Labour Tribunal (General) Rules.

41 See footnote 18 above.

CHAPTER THREE – CASES BEFORE THE TRIBUNAL AND TIME TAKEN FOR DISPOSAL OF CASES

I. Caseload, Claim Items and Value of Claims

[Appendices V(a) - (d)]

3.1 When the Tribunal commenced operation in 1973, there were 908 claims. In 2003, 11,263 claims were filed – a more than 12-fold increase in about three decades. The highest number of claims was recorded for the year 2002 at 12,326. [Appendices V(a) and (b)].

3.2 One claim may consist of more than one claim item. In terms of the number of claim items, it had also increased from 12,897 in 1994 to 36,890 in 2003 – a nearly 3-fold increase in 10 years' time. The highest number of claim items was also recorded for the year 2002 at 40,385 [Appendix V(c)].

3.3 The value of claimed amount increased from HK$229 million in 1994 to HK$1,212 million in 2003. The highest value of claimed amount was also recorded for the year 2002 at HK$1,436 million [Appendix V(d)].

3.4 In 1973, the Tribunal had 2 courts. Currently, the Tribunal operates 12 courts – a 6-fold increase in about 3 decades. During the same period, the number of TOs had similarly increased by more than 6-fold from 6 to 39.

II. The Case Nature

[Appendix V(e)]

A. Increased Complexity

3.5 When the Tribunal was first established, the majority of the disputes were for arrears of wages, wages in lieu of notice and other simple

employment benefits conferred by the Employment Ordinance, Cap.57 or under the agreement between the employers and the employees.

3.6 As time went by, the Employment Ordinance has undergone substantial development and has conferred greater employment benefits and protection.[42] Employment law has been made more complex and there are more contested employment disputes.

B. Repeal of Section 9 of the Ordinance

3.7 In 1999, the repeal of section 9 of the Ordinance lifted the 12-month limitation period over claims that could be filed in the Tribunal.[43] From then on, employment disputes that fall within the limitation period of 6 years under the Limitation Ordinance, insofar as they do not involve remedies under Part VIA of the Employment Ordinance,[44] can be brought in the Tribunal.

C. Wide Range of Claims

3.8 In contrast to the early days, claims presently filed in the Tribunal cover a much wider range of disputes.

3.9 It is not possible to conduct a detailed analysis of the changes in nature of the claims in the past 30 years due to lack of relevant statistical

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42 The following additions were made to the Employment Ordinance over the years:

1974: Part IVA Protection against Anti-union Discrimination;
Part VA Severance Payments;

1977: Part VIIIA Annual Leave with Pay;
Part IXA Liability to Pay Wages of Sub-contractor's and Nominated Sub-contractor's Employees;

1984: Part IIA End of Year Payment;
Part VB Long Service Payments;

1997: Part VIA Employment Protection.

43 When the Tribunal was set up in 1973, the limitation period was 6 months. In 1979, it was increased to 12 months. Claims with cause of action arising more than 12 months before the date of filing had to be litigated in either the Small Claims Tribunal or the District Court or the High Court. The repeal of section 9 means that the only relevant limitation period is that of 6 years prescribed for contract claims under section 4(1) of the Limitation Ordinance, Cap. 347.

44 Claims for remedies under Part VIA of the Employment Ordinance must be brought within 9 months : see Section 32I and 32J of the Employment Ordinance.

data. However, a brief analysis of the breakdown of the types of claims filed in 2003 at Appendix V(e) illustrates the wide range of claims brought before the Tribunal.

D. Number of Parties

3.10 A claim may involve more than one claimant. A claim may also consist of more than one defendant. In 1994, there were 5,976 claims filed in the Tribunal involving 15,242 parties. On average, there were 2.55 parties involved in a claim. In 2003, there were 11,263 claims filed in the Tribunal, involving 43,717 parties. On average, there were 3.88 parties involved in a claim.

3.11 In 2003, of the 11,263 claims filed, about 74% (8,304 claims) involved 1 claimant, 22% (2,503 claims) involved 2 to 10 claimants, 2.6% (293 claims) involved 11 to 20 claimants, 1.1% (127 claims) involved 21-50 claimants and 0.3% (36 claims) involved over 50 claimants.

E. Caseload and the Economic Situation

[Appendix V(f)]

3.12 There appears to be a close relationship between, on the one hand, the economic conditions and the unemployment rates in Hong Kong and, on the other hand, the caseload of the Tribunal. Appendix V(f) gives the trend of increase in the number of claims filed in the Tribunal for the period from 1994 to 2003 and the movement of unemployment rates for the same period.

III. Waiting Time of the Tribunal

[Appendix V(g) – (i)]

A. From Appointment to Filing

3.13 As set out in para. 2.16, the claimants usually make an appointment before attending the Tribunal to file their claims.

3.14 The average waiting time from appointment to filing of claims has dropped significantly from 200 days in 1994 to 14 days in 2003 [Appendix V(g)]. As at 31 March 2004, the waiting time was 7 days.

B. From Filing to Call-over Hearings

3.15 As set out in para. 2.24, section 13(1) of the Ordinance requires the first hearing, i.e. the call-over hearing, to take place not earlier than 10 days but not later than 30 days from the filing of the claim.

3.16 The average waiting time from the filing of claims to call-over hearings remained in the range of 21 to 25 days during the period from 1994 to 2003 [Appendix V(h)]. As at 31 March 2004, the waiting time was 26 days.

C. From Call-over Hearings to Trial

3.17 The procedures for call-over hearings, pre-trial hearings (i.e. mention hearings) and trials are set out in paras. 2.24 to 2.33.

3.18 In respect of cases that had to undergo a trial, the average waiting time from the first call-over hearing to trial in the past 3 years from 2001 to 2003 was 131, 124 and 124 days respectively.

D. Overall Time Taken for Concluding a Claim from Date of Filing

3.19 In 2003, the Tribunal concluded 11,385 claims. About 70% were concluded within one month from the date of filing, another 8% within 2 months and a further 9% within 3 months. The cumulative percentage of claims concluded within 3 months is thus 87% and that for 6 months is 96% [Appendix V(i)].

IV. Modes of Disposal of Claims

[Appendix V(j)]

3.20 In general, claims filed in the Tribunal are disposed of either by way of settlement or after adjudication, which may be by default or contested.

3.21 In 2003, 11,385 claims were disposed of. Of these, 79 claims (1%) were transferred to other courts. 6,307 claims (55%) were settled. 3,659 claims (32%) went through an adjudication process. The remaining 1,340 claims (12%) were withdrawn. This pattern of disposal has been quite consistent over the past 3 years [See Appendix V(j)].

3.22 For claims that were settled, some of them were settled with the assistance of the TO before the first (call-over) hearing. Others were settled at or after the call-over hearing with the assistance of the PO. Where the parties wish to do so, the attempts by the TO and PO to explore the possibility of resolving the disputes by settlement have broadly been referred to as conciliation.

3.23 In respect of the claims settled in 2003, 1,246 claims (20% of all settled claims or 11% of all claims disposed of) were settled with the assistance of the TO before the call-over hearing. The remaining 5,061 claims (80% of all settled claims or 44% of all claims disposed of) were settled at or after the call-over hearing with the assistance of the PO.

3.24 In 2003, in respect of the 3,659 adjudicated claims, 955 claims (26% of all adjudicated claims or 8% of all claims disposed of) went through an adjudication process with mention hearings. The remaining 2,704 claims (74% of all adjudicated claims or 24% of all claims disposed of) were adjudicated without going through a mention hearing.

V. Overall Time Taken for Adjudicated Claims

[Appendix V(k)]

3.25 For claims that require to be adjudicated, the adjudication process in the Tribunal usually involves several hearings:

(a) Call-over hearing;

(b) Pre-trial (for mention) hearing; and

(c) Trial.

Where the parties apply to restore the claim, or to review or to set aside the award,[45] further hearings may be entailed.

3.26 The average waiting time for all claims that underwent adjudication from the date of filing to the date of rendering judgment was 96, 84 and 76 days for 2001, 2002 and 2003 respectively. It is relevant to note that the corresponding waiting time for adjudicated claims without a mention, i.e. pre-trial, hearing was much shorter, i.e. 54, 50 and 45 days for 2001, 2002 and 2003 respectively; and those for claims with pre-trial hearings was much longer, i.e. 188, 182 and 164 days for 2001, 2002 and 2003 respectively [Appendix V(k)].

45 In 2003, there were 664 applications to restore the claim, review or to set aside the award. This represents 18% of all adjudicated cases. The vast majority of these applications were unsuccessful.

CHAPTER FOUR – EXPERIENCE IN OTHER JURISDICTIONS IN RESOLVING EMPLOYMENT DISPUTES

I. Scope of the Research

4.1 In the course of its deliberations, the Working Party has made reference to the modes of employment dispute resolution systems in some overseas jurisdictions. In particular, the Working Party has looked at the experience of Australia, New Zealand, England and Canada. Conscious of the different political, economic, social and legal contexts in which the different jurisdictions are operating and bearing in mind the scope of the present review, the Working Party has focused its attention on three main areas:-

(a) The methods of resolving employment disputes;

(b) The approach and procedure adopted in the adjudication of employment disputes; and

(c) The avenues for appeals in employment dispute cases.

II. Australia

4.2 Australia has a long tradition of resolving industrial disputes by conciliation and arbitration.[46] Each State has its own procedure to deal with industrial disputes.

A. Federal Level: The Australian Industrial Relations Commission

4.3 Under the Workplace Relations Act 1996, all federal unfair dismissal claims have to be referred to the Australian Industrial Relations Commission ("AIRC") for conciliation first. Conciliation conferences are private, confidential, informal and no transcript or record will be kept.

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[46] The tradition goes back to 1904 when the Conciliation and Arbitration Act 1904 was passed.

4.4 When conciliation fails, the AIRC will issue a certificate of attempted conciliation. In addition, it will give an indication to the parties of the merits of the application and make recommendations as to whether the applicant should further pursue the matter. On receipt of the certificate, the applicant must elect whether to proceed to arbitration or to discontinue the proceedings.

4.5 Sometimes the AIRC will indicate that the claim has no reasonable prospect of success. In such situation, the AIRC must invite the applicant to provide further information in support of his application. Upon consideration of the further material or where the applicant does not provide further information, if the AIRC concludes that the claim has no reasonable prospect of success, it must issue a certificate to that effect. The claim will thereupon be dismissed.

4.6 Where the claim is not dismissed and the applicant elects for arbitration, he must lodge a notice to that effect within 7 days of the issue of the certificate and serve it on the employer. If he does not do so within the 7 days period, the application lapses and the file will be closed. Alternatively the applicant may lodge a notice of discontinuance and serve it on the employer.

4.7 Where the applicant has elected for arbitration, notice of listing will be sent by the AIRC to the parties with written directions for the filing and service, within a specified time, of outlines of submissions, names of witnesses, outlines of evidence and copies of documents upon which the parties intend to rely. Compliance with directions is compulsory. The hearing is conducted by a Member of the AIRC in public. Representation by lawyers or other persons is allowed. At the end of the arbitration, a written decision will be given, which is binding on the parties.

4.8 Appeal against the AIRC's decision is to the Full Bench of the AIRC (comprising 3 Members) with leave of the Full Bench.

4.9 In federal industrial relations matters, the parties can appeal to the Federal Court and in some cases, further appeal to the High Court.

B. State Level : The Example of New South Wales

4.10 The mechanism of resolving employment disputes by the AIRC applies to all the States of Australia although each State may develop its own model. In New South Wales, for example, the parties are

required to follow, as far as is reasonably practicable in the circumstances, the relevant dispute resolution procedures contained in an industrial instrument before the New South Wales Industrial Relations Commission ("IRC") will deal with the dispute.

4.11 The New South Wales Industrial Relations Act 1996 prescribes a model of conciliation, followed by arbitration. In discharging its functions, the IRC may, subject to this Act, determine its own procedure. It is not required to act in a formal way and is not bound by the rules of evidence. It may inform itself on any matter in any way that it considers just. The objectives are to act as quickly as practicable and in accordance with equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms.

4.12 For the purpose of resolving a dispute, the IRC may convene a conciliation conference. It is presided over by a member of the IRC and attendance by the parties is compulsory. The IRC may additionally require the attendance of other persons whose presence it considers will help in the resolution of the dispute. The Industrial Registrar may issue the necessary summons to compel such attendance.

4.13 In attempting conciliation, the IRC is empowered to do everything appearing to it to be proper to help the parties to agree on terms for the resolution of the dispute. It may issue recommendations or directions to the parties, including requiring them to negotiate in good faith. It may also initiate discussion sessions or conferences other than compulsory conciliation conferences mentioned above. Failure or refusal to comply with the recommendations or directions does not attract any sanction, but may be taken into account by the IRC in discharging its functions under the Industrial Relations Act 1996.

4.14 A decision of the IRC is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal, subject to a right of appeal to a Full Bench of the IRC.

III. New Zealand

4.15 New Zealand also has a long tradition of encouraging parties to employment disputes to resort to mediation instead of litigation. Under the Employment Relations Act 2000, a set of procedures and institutions have been established for the purpose of promoting informal resolution of

disputes as soon as possible upon the occurrence of the disputes, with low level judicial intervention.

A. Independent Mediation Services under the Department of Trade

4.16 Under the Employment Relations Act 2000, parties to an employment dispute are required to undergo mediation before starting any proceedings. Within the Department of Trade, there is an independent Mediation Service to provide general information on mediation and mediation service. Mediation can be done by telephone, fax or email. Mediators will visit employers and employees in the workplace to assess the appropriate service to be rendered.

4.17 The mediation process is free, flexible and confidential. It cannot be referred to in any later legal proceedings and mediators cannot be called to testify on the mediation process in any proceedings. The parties may by agreement confer power on the mediator to decide the matters in issue. The agreed terms of settlement and the decisions of the mediator are final and binding and can be enforced by filing the agreement or decision in the District Court.

4.18 Alternatively, parties may opt for arbitration and may also decide on the procedure to apply. The Arbitration Act 1996 and the formalities and procedures under the legislation do not apply.

B. The Employment Relations Authority

4.19 If mediation fails, the dispute will be referred to the Employment Relations Authority (ERA) for further investigation. The ERA is established to investigate and resolve employment disputes in a speedy, informal and non-adversarial way. The ERA has a duty to ascertain whether an attempt has been made to use mediation and must direct that mediation or further mediation be used before the ERA will investigate the dispute, unless it is of the view that such measures will not contribute constructively to the resolution of the dispute, or that it is not in the public interest, or that because of the urgent or interim nature of the dispute such measures are inappropriate. Where the ERA has directed mediation, the parties are obliged to comply and to attempt in good faith to reach settlement. Proceedings before the ERA will be suspended until the direction has been complied with or until the ERA directs otherwise.

4.20 In investigating a dispute, the ERA will convene an investigation meeting, which is normally open to the public. The meeting is presided over by a member of the ERA sitting alone. He is required by legislation to act reasonably and in accordance with the rules of natural justice. The ERA has wide investigative powers, and can summons, interview and examine the parties or any relevant witness for the purpose of gathering information. It is required to state in its determination the relevant findings on fact and issues of law, the reasons for its conclusions and the orders made. The awards and orders of the ERA are enforceable as a District Court judgment or order.

C. The Employment Court

4.21 Appeals from the ERA lie to the Employment Court. It is, however, not the function of the Employment Court to advise or direct the ERA in relation to the exercise of its investigative role, powers and jurisdictions.

4.22 A party to an employment dispute can apply to have the matter determined by the Employment Court if the Mediation Service or the ERA cannot resolve the dispute. The ERA may also refer a dispute to the Employment Court if it involves an important question of law, or where it is in the public interest to do so, or where there are pending related court proceedings. The parties may elect to have the entire matter heard afresh by the Employment Court. Alternatively, the dispute may be referred to the Employment Court for determination on one or more of the grounds specified in the legislation.

4.23 The Employment Court adopts an informal procedure. A judge may convene a conference to consider the extent to which attempts have been made to resolve the dispute by mediation. If the dispute proceeds to adjudication, that judge will not preside over the trial. Additionally, a judge may also during a trial convene a conference for a similar purpose. In such a case, he is required to arrange for another judge to preside over the conference, unless all parties agree otherwise. The Court will also convene a case management conference or issue case management directions with a view to determining the number of exhibits and witnesses, the order of examinations and the length of submissions.

4.24 Under the Employment Court Regulations 2000, the parties may be ordered to disclose documents requested by the opposing parties. Failure to comply with an order for disclosure may be visited with

adjournment, costs sanction or a dismissal or striking out of the claim or defence. Parties may also be prevented from introducing as evidence materials that could have been but were not disclosed. It is a condition of disclosure that the receiving party maintains the integrity and confidentiality of the documents and information disclosed, and will not use them for purposes beyond the case. Within 28 days after the conclusion of the proceedings or any appeal, all copies of documents disclosed must be returned to the disclosing party.

4.25 With the agreement of the parties, the Employment Court can hear the matter on the basis of agreed facts, or it may deal with only part of the subject matter of the ERA's determination, or it can deal with a defined question of law or fact. Where the election is for a full hearing of the whole dispute, the Employment Court may request from the ERA a written report on the extent to which the parties have complied with their statutory duty to deal with each other in good faith.

D. The Court of Appeal

4.26 Appeals from the Employment Court lie to the Court of Appeal and by way of case stated and with leave. It is limited to questions of law that carry general or public importance.

IV. <u>England</u>

4.27 In England, the Employment Tribunals (ET) (formerly the Industrial Tribunals) handle a wide range of employment disputes that are assigned to them by legislation.[47] The Employment Appeal Tribunal (EAT) hears appeals from the decisions of the ET. The County Court and the High Court, depending on the amount and nature of the claims, deal with common law and other disputes arising out of employment contracts.

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47 The jurisdiction of the ET extends to over 80 statutory claims. For a detailed description of the jurisdiction, see *Halsbury's Laws of England*, 4th edition (2000 Reissue) vol. 16, paras.657-660.

A. The Employment Tribunals

4.28 The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 and Schedule 1 made under Regulation 11(1) provide a code of practice and procedure for the ET. The overriding objectives of the Regulations are to enable cases to be dealt with inexpensively, expeditiously, fairly and in ways proportionate to the complexity of the issues involved. A tribunal panel normally consists of a chairman (who is appointed from the legal profession) and two lay members. With the parties' consent, a chairman may sit with only one lay member. A chairman usually sits alone on pre-hearing reviews and interlocutory hearings.

4.29 The chairman of an ET may issue case management directions such as exchange of witness statements, disclosure and inspection of documents, and the provision of particulars. He may also make orders for costs or strike out the application or defence where there has been non-compliance with such directions. The chairman may also conduct a pre-hearing review to consider the application, the defence and the merits of the case. He may impose conditions for defending the claim, including paying a deposit, where he considers that the defence has no reasonable prospect of success. He is required to give brief written reasons for the decision, which are copied to the parties. A chairman who has conducted a pre-hearing review will not preside over the hearing of the application.

4.30 Three aspects of the ET procedure are worth noting. Firstly, a tribunal panel is required to give written reasons for its decision in a summary form. Extended reasons may be given on the request of a party or on the panel's own initiative where it considers that further expansion of the summary reasons is necessary. The EAT, on hearing an appeal, may also direct that extended reasons be given. Secondly, applications for review will only be entertained where they are based on new evidence available since the conclusion of the trial, or where the existence of the evidence could not have been reasonably known of or foreseen at the time of the trial. Thirdly, the tribunal may make a costs order against a party where the party, or his representative has, in bringing, defending or conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or where the claim or defence is misconceived.

B. The Employment Appeal Tribunal

4.31 The EAT deals with appeals against decisions of the ET. It has the same status as the High Court. An appeal may be heard by a legal member sitting with two lay members or, with the parties' consent, one lay member. The legal members are appointed from the judges of the High Court or of the Court of Appeal. Appeals from the decisions of a chairman of an ET sitting alone are heard by a legal member sitting alone. Appeals from the EAT lie to the Court of Appeal on a point of law and subject to leave being granted.

C. The Advisory Conciliation and Arbitration Service

4.32 Conciliation is an integral part of employment dispute resolution in England. The Advisory Conciliation and Arbitration Service (ACAS) has a key role to play in employment dispute resolution.[48] It is a non-departmental public body of the Department of Trade and Industry, and is independent of the ET, EAT and the Judiciary. Parties to an employment dispute may approach ACAS for assistance before any claim is brought.[49] Additionally, ACAS has a statutory duty to attempt conciliation in most of the cases filed in the ET.[50] When a claim is made to the ET, the ET will copy the papers relating to the claim to ACAS, who will then contact the parties to offer conciliation. It will only provide conciliation service when all parties to a dispute desire conciliation. The service is completely free and kept confidential. ACAS conciliators may contact the parties either by phone or by meeting the parties separately, or bring the parties together in a joint meeting if this is considered to be productive.

4.33 The conciliation process is completely separate from the tribunal process. ET will continue to process the claim while conciliation by ACAS is going on, and will proceed to list the claim for direction

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48 According to ACAS 2000/01 Annual Report, ACAS received over 105,000 applications for conciliation in 2000/01 and close to 204,000 cases in the preceding year.

49 According to ACAS 2002/03 Annual Report, ACAS had dealt with 1,353 industrial disputes in 2002/03.

50 According to the ET Service Annual Report 2000/01, ACAS conciliated settlements accounted for 37% of all ET claims disposed of (i.e. 47,536 cases). ACAS 2002/03 Annual Report recorded having dealt with over 95,000 applications to ET, and only 1 in 4 went on to a tribunal hearing.

hearing or trial. When parties have reached settlement, the agreement will be recorded on a form and signed by the parties, and becomes legally binding on the parties. ACAS will then notify ET of the settlement and the claim will be formally closed. Where conciliation fails, ET will proceed to adjudicate the claim in the normal way. In order to promote timely settlement, the Employment Act 2002 introduces measures that will require conciliation to be completed within the period fixed.[51] If the dispute is not settled within the period fixed, the conciliation officer can decide whether to continue to conciliate or pass the case back to ET for a date to be fixed for trial.

4.34 Apart from conciliation service, ACAS also administers an Arbitration Scheme as a voluntary alternative to ET in relation to unfair dismissal claims. Disputes are determined by arbitrators appointed by ACAS. The award is confidential and the outcome of arbitration is final with a limited right to appeal.

4.35 One aspect of the work of ACAS that is worth noting relates to promoting good practice and developing in-house alternative dispute resolution, which are seen as important to the prevention of industrial relations dispute.[52] Employers are encouraged and assisted to establish in-house alternative dispute resolution procedures that aim at resolving employment disputes or rectifying employment decisions internally. The intention is to encourage workplace parties to include such a procedure as a term of employment and to exhaust it before proceeding to the ET.

V. Canada

4.36 This Report focuses on the position of the province of Ontario.

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51 The proposed Employment Tribunals (Constitution and Rules of Procedure) Regulations 2003, which is currently under consultation, propose a standard conciliation period of 13 weeks with a possible extension of 2 weeks and a shorter conciliation period of 7 weeks for claims for breach of contract, redundancy payment and non-payment of remuneration, unless a chairman of the ET directs for the standard conciliation period to apply.

52 The Employment Act 2002 also introduces steps to help employers and employees resolve their disputes internally by, for example, establishing minimum standards of disciplinary and grievance procedures in the workplace as an implied contractual right on both parties, and requiring employees, in certain circumstances, to raise their complaints and grievances with the employer before applying to the ET.

A. The Ontario Labour Relations Board

4.37 In Ontario, the Ontario Labour Relations Board ("the Board") is responsible for labour dispute resolutions. Their Labour Relations Officers ("LROs") will contact the parties by letter or by phone, and conduct the mediation in person, usually with both parties present (though often communicating with each party individually), or through a series of telephone calls. Everything said during the mediation is confidential. LROs do not give their file or notes, or any documents they receive, to the Board in the event of a hearing. If settlement can be reached, the terms will be reduced into writing and is often incorporated into a Board decision, and the matter is terminated. If settlement cannot be reached, the matter will proceed to adjudication.

4.38 Adjudication is a legal proceeding before the Board that can take the form of pre-hearing conference, consultation or hearing, depending on the type of application and the legislation involved. It is governed by formal Rules of Procedure.[53] An application or response may not be processed if it does not comply with the Rules. In particular, a party is not allowed to present evidence or make representation at any hearing or consultation about any material fact relied upon, which the Board considers had not been set out in the application or response. A LRO may be authorized to meet with the parties to help them resolve any issue, to make inquiries or for any other purposes.

4.39 A pre-hearing conference will be conducted before a Vice-Chair of the Board by telephone conference or in person at the Board's offices. It is more like a meeting of the parties or their representatives. These conferences are usually short in duration, at which preliminary or procedural matters are dealt with and attempts are made to narrow down issues. The Vice-Chair may give directions to facilitate subsequent proceedings. These directions or other agreements reached by the parties may be reflected in a decision or a pre-hearing conference memo issued by the Vice-Chair. A pre-hearing conference does not normally end with a final decision on an application.

4.40 The matter will then proceed to a consultation or a hearing. A consultation is less formal and is meant to be less costly to the parties. The Vice-Chair or panel plays an active role during the consultation in guiding the parties to identify and focus on the issues in dispute. It will also determine whether any statutory rights have been violated. While the

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53 Rules of Procedure of the Ontario Labour Relations Board.

precise format of a consultation varies with the nature of the case and the approach of the individual adjudicators, the consultations share some common features. For instance, in deciding whether there has been a violation of a statute, the Vice-Chair or panel may question the parties and their representatives, express views, define or re-define the issues and make determinations as to what matters are agreed to or in dispute. Moreover, the Vice-Chair or panel relies heavily on the information provided in the application and response. The opportunity to adduce oral evidence is limited. If oral evidence is received, it is confined to those matters defined by the Board. Consequently, the parties are obliged to provide in their application and response all the material facts that they intend to rely on. Any party who fails to do so may not be allowed to present evidence or make representation on the facts at the consultation. The Board will normally issue procedural rulings at the conclusion of a consultation, or may decide a matter in its entirety based on the submissions made at the consultation.

4.41 In contrast to a consultation, a hearing before the Board is similar to a trial before a judge. The parties may be represented by a lawyer or agent at the hearing. The Board will give written final decisions and they are binding on the parties.

4.42 There is no appeal against a Board's decision, but a party can apply to the Board to reconsider its decision on good grounds. The Board will normally do so only if there is new evidence capable of influencing the outcome of the proceeding, which was for some reason not available to the parties at the time of the original hearing. Reconsideration is not an opportunity to present the same evidence again, or to make the same arguments albeit with a new approach.

B. Judicial Review before an Ontario Court

4.43 A party dissatisfied with a decision of the Board may apply for judicial review before an Ontario Court. These are not appeals in the traditional sense. The Court does not review the facts of a particular case. It does not hear evidence and no witnesses will be called. The court merely looks at the Board's decision and determines if it is reasonable in all the circumstances.

VI. Observations

A. Conciliation and Mediation

4.44 In all the jurisdictions that the Working Party has considered, conciliation or mediation is an integral part of the employment dispute resolution mechanism. Invariably, these jurisdictions recognize that it has a valuable role to play in resolving employment disputes.

4.45 It is generally accepted and the Working Party agrees that the approach of encouraging the parties to resolve their disputes by conciliation or mediation has many advantages:

(a) It has the potential of reducing the number of contested cases coming before the tribunal or the labour court. Even if cases have to go as far as a full hearing, the hearing time is likely to be reduced because the issues would have been clarified and properly identified. This can save everyone's time and costs;

(b) Like family disputes, employment disputes may involve a large element of personal feelings and issues other than questions of law. The remedies available in the judicial system may therefore be inadequate to achieve a totally satisfactory resolution of the dispute. Conciliation offers an opportunity for the parties to set out the problems that they see with each other and for an independent and objective explanation of the issues at stake. A resolution based on the parties' own agreement is more constructive and more likely to be complied with than a decision imposed on them; and

(c) Conciliation or mediation also does not have the stark result of litigation, namely, a "win" or "lose" situation. This is important for employment disputes which, if not properly resolved, may create tension and conflicts in the society.

B. Adjudication

4.46 As for the adjudication process in the jurisdictions considered, legal representation is allowed. The first instance hearings are characterized by the adoption of simple, informal and flexible procedures.

While legal representations are allowed, the adoption of simpler procedure and more informal hearings promotes accessibility and facilities direct participation by the parties.

4.47 The courts and tribunals in the jurisdictions considered have also been pro-active in managing the claims. In New Zealand, the Employment Court adopts an informal procedure, convenes case management conferences and issues case management directions. In England, the chairmen of the ET exercise pro-active case management through pre-hearing directions. In Ontario, where the hearing of an employment dispute is conducted before the Ontario Labour Relations Board, there is available a less formal and costly procedure of "consultation", with the Vice-Chair of the panel assuming an active role in managing the case.

4.48 The common objective is to enable employment claims to be dealt with inexpensively, expeditiously, fairly and in ways proportionate to the complexity of the issues involved.

C. Appeals

4.49 In the jurisdictions which the Working Party has considered, appeals from court or tribunal of first instance are generally limited to a question of law or jurisdiction, or a question of law that carries general or public importance.

CHAPTER FIVE – REVIEW AND RECOMMENDATIONS

5.1 In conducting the present review, the Working Party has given careful consideration to the various concerns that have been expressed about the Tribunal. In the light of these concerns, it has concentrated on addressing operational issues and changes which might be made in order to better meet the objectives of the Tribunal and the expectations of its users.

5.2 The Working Party has reviewed the following aspects of the operation of the Tribunal with a view to making recommendations for improvement:-

(I) The Jurisdiction of the Tribunal;

(II) The Tribunal Process;

(III) Costs on Appeal;

(IV) Enforcement of Awards;

(V) Training for Presiding Officers and Tribunal Staff; and

(VI) The Premises and Location of the Tribunal.

Each of these areas is dealt with in the following sections of this Chapter.

Section I. The Jurisdiction of the Tribunal

5.3 There are principally two aspects of the jurisdiction of the Tribunal that have given rise to some concerns. The first relates to the scope of the Tribunal's jurisdiction to hear a claim for a sum of money. The second concerns claims in connection with Mandatory Provident Fund (MPF) contributions under the Mandatory Provident Fund Schemes Ordinance ("MPFSO"), Cap. 485.

A. Claim for a Sum of Money

5.4 Section 7 of the Ordinance provides that the Tribunal shall have jurisdiction to inquire into, hear and determine the claims specified in the Schedule. Paragraph 1 of the Schedule refers to a claim for "a sum of money".

5.5 There are different interpretations as to the meaning of the term "a sum of money". Some interpret it to be confined to liquidated damages which refer to damages for which the amount has been contractually agreed between the parties or fixed by statute. Others construe it as extending to unliquidated damages, which are damages that are at large and fall to be assessed by the court under the general principles of law.[54]

5.6 Paragraph 1 of the Explanatory Note of the Labour Tribunal Bill 1972 refers to the jurisdiction of the Tribunal as restricted to "claims in respect of liquidated sums arising out of a breach of contract of employment". On this basis, it had been decided that a sum of money means an ascertained sum and the jurisdiction of the Tribunal does not extend to a claim for unliquidated damages.[55]

5.7 In practice, however, it is wholly exceptional to find in employment contracts terms fixing the amount to be paid by way of damages in the event of breach. Practically therefore most employment claims will be for unliquidated damages. The jurisdiction of the Tribunal

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54 See *Chitty on Contracts* (2004) 29th edition, para. 27-010.

55 *National Ebauch Ltd v. Rishi Kaumar Bhatnagar* [1981] HKLR 114 per Roberts CJ. See also the decision of the Full Court in *Hung Sang Engineering Works Ltd v. Yu Wing Fat* [1975] HKLR 394 at 400.

will be very narrow if it only covers claims for liquidated damages. Considering this, it had been decided that a sum of money can extend to damages unliquidated in law but quantified in practice and the Tribunal has jurisdiction to deal with such claims.[56]

5.8 The two lines of judicial authorities on the scope of the Tribunal's jurisdiction were all decisions of the Court of First Instance (formerly the High Court) on appeals from the Tribunal. They carry equal weight and are binding on the Tribunal. It is open to the PO to follow one or other of the two lines of authorities. In practice, POs usually follow the latter line of authority (see para. 5.7).

5.9 Given that the Tribunal is intended to be a simple informal forum for resolving employment disputes, the objectives of the Tribunal will be better served if it has power to deal with all types of monetary claims relating to employment disputes, irrespective of whether they are for liquidated or unliquidated damages.[57] Consideration should be given to amending the Schedule to the Ordinance to put it beyond doubt that the Tribunal has jurisdiction to deal with both liquidated and unliquidated claims.

5.10 There may be claims of unliquidated damages that require expert evidence and involve complex issues of facts or law. The parties in these claims may benefit from having the claims transferred to either the District Court or the Court of First Instance[58] where the procedural rules and the availability of legal representation may aid the adjudication process. POs will in appropriate cases exercise the power of transfer, which is already provided for in the Ordinance.

Recommendation 1 *: The Schedule to the Labour Tribunal Ordinance should be amended to put it beyond doubt that the Labour Tribunal has jurisdiction to deal with both liquidated and unliquidated claims.*

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56 *Panalpina (Hong Kong) Ltd v. Ulrich Haldemann* [1983] HKLR 275, per Hunter J at 277-8. This decision was followed in *Ying Cheong Shoe Mfy v. Yam Yuk Bing and Another* [1987] 2 HKC 310, *David Ireland v. Canton Fitzgerald (HK) Ltd* HCA 2115/1988 and *De Nicolas, Nenita Cientos v. Lee Fung Lan* HCLA 15/1997.

57 Similar comments had been made in *Samulde Ma Violeta Cabaya v. Kwan So Han Sandy* HCLA 93/2003 at paras. 24-28.

58 See para. 2.14 in Chapter Two.

B. MPF Contributions and Claims under the MPFSO

5.11 The Mandatory Provident Fund has been put in place since 1 December 2000 under the MPFSO. Under the MPFSO, with the exception of certain exempted persons,[59] all relevant employees[60] and their employers are required to make mandatory contributions to the registered schemes they have joined.[61]

5.12 Broadly speaking, MPFSO stipulates that the employer has to contribute from his own funds an amount representing the employer's contribution to the registered scheme ("employer's contribution").[62] He also has to deduct from the employee's relevant income[63] an amount representing the employee's contribution ("employee's contribution") and to pay it to the registered scheme.[64] The amount of these contributions are based on a prescribed percentage of the employee's relevant income, or by reference to a specified scale in the case of a casual employee, for the relevant contribution period in which the income is earned.[65]

5.13 Under the MPFSO, any contribution in arrears is regarded as due to the Mandatory Provident Fund Authority (MPFA).[66] The person liable is required by the legislation to pay to the MPFA the arrears and a prescribed surcharge.[67] The MPFA is empowered to bring proceedings in a court of competent jurisdiction to recover the contribution in arrears and

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59 Section 4 & Sch. 1, Cap. 485.

60 Defined in section 2, Cap. 485 as "an employee of 18 years of age or over and below retirement age".

61 Section 7A, Cap. 485.

62 Section 7A(1)(a) & (2)(a), Cap. 485.

63 Section 2, Cap. 485 defines 'relevant income' as, in the case of a relevant employee, "any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (other than a housing allowance or other housing benefit), expressed in monetary terms, paid or payable by an employee (directly or indirectly) to that relevant employee in consideration of his employment under that contract, but does not include severance payments or long service payments under the Employment Ordinance (Cap. 57)".

64 Section 7A(1)(b) & (2)(b), Cap. 485.

65 Section 7A(3)(a) & (4)(a), Cap. 485.

66 Section 18(1), Cap. 485.

67 Section 18(2), Cap. 485.

the surcharge as a debt due to the MPFA.[68] The MPFA will pay any recovered dues to the approved trustees of the registered schemes.[69]

5.14 Accordingly, where an employer fails to make the employer's contribution in accordance with the requirements of MPFSO, the MPFA may institute proceedings against him to recover the dues.[70]

5.15 The Working Party is given to understand that the normal course is for an employee to lodge a complaint with the MPFA, whereupon the MPFA will conduct investigation and interview the employee and take a statement from him. In the event that the MPFA decides to bring proceedings against the employer, it will do so in its name, but the employee is required to attend court to give evidence.

5.16 Under section 7 of the Ordinance, the jurisdiction of the Tribunal is confined to the matters set out in the Schedule. The Schedule does not extend to claims brought under the MPFSO. Consequently, the MPFA has to institute proceedings in the Small Claims Tribunal, District Court or Court of First Instance of the High Court to recover contributions in arrears and surcharges.[71]

5.17 In the majority of cases where the employers fail to pay wages to the employees, the employers would have likewise defaulted in making MPF contributions to the registered schemes. Currently, the employees will bring a claim for arrears of wages in the Tribunal, but the MPFA has to pursue its claims against the employers under the MPFSO in another forum. This will result in two sets of related proceedings and may necessitate the employees having to attend hearings in two different forums.

5.18 The present situation is not satisfactory. Not only does it cause inconvenience and confusions to the parties, but it also means duplicity of proceedings. Unresolved disputes over MPF contributions

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68 Section 18(3), Cap. 485.

69 Section 18(5), Cap. 485.

70 MPFA instituted 8 claims involving 57 employees in 2001, 41 claims involving 1,295 employees in 2002 and 1,171 claims involving 2,737 employees in 2003.

71 Most of these claims are brought in the Small Claims Tribunal (SCT) as the amount at stake is mostly less than $50,000. However, in 2004, MPFA had brought 2 cases involving 30 employees in the District Court because the contributions in arrears exceed the jurisdiction of the SCT. The MPFA is also prepared to institute claims in the Court of First Instance relating to multiple claims against the same employers, where the arrears claimed exceed the jurisdiction of the District Court.

may also give rise to difficulties in quantifying claims for employment benefits.

5.19 Claims related to the MPF contributions are disputes arising from employment. Consistent with the objectives of the Tribunal as a forum for resolving disputes arising from employment, the Tribunal should be given the power to deal with claims related to outstanding MPF contributions.

5.20 The Working Party is of the view that the possibility of amending the Schedule of the Ordinance to extend the jurisdiction of Tribunal to cover claims brought by the MPFA under section 18(3) of the MPFSO should be explored. It must however be emphasized that even if the Tribunal's jurisdiction is so extended, the MPFA has to be the claimant for such a claim.

5.21 The possibility of such an amendment will need to be explored with all interested parties including the MPFA and the Labour Department, which will need to address the operational and logistical issues involved.

Recommendation 2 *: The possibility of amending the Labour Tribunal Ordinance to extend the jurisdiction of the Labour Tribunal to cover claims brought by the Mandatory Provident Fund Authority under section 18(3) of the Mandatory Provident Fund Schemes Ordinance, Cap. 485 should be explored with all interested parties including the MPFA and the Labour Department.*

5.22 Notwithstanding the coming into effect of the MPFSO, employees continue to claim in the Tribunal the full amount of the relevant income owed to them by their employers. Given that the MPFSO obliges an employer to deduct from the relevant income the amount of the employee's contribution, the Tribunal should only award to the employee the amount of the employee's claim after deducting the employee's contribution. The amount of the employee's contribution should be collected by the MPFA from the employer. Strictly as a matter of law, without making the MPFA a party to the claim, the Tribunal cannot, when

making an award to the employee, direct the employer to pay the amount of the employee's contribution to the MPFA either directly or indirectly through the Tribunal.

5.23 The inconvenience of having to join the MPFA to the proceedings before the Tribunal will be obviated if the Tribunal is empowered to order the employer to pay the employee's contribution into the Tribunal to be paid out to the MPFA as if the MPFA is a party to the claim before it.

5.24 The Working Party therefore recommends the possibility of amending the Ordinance and other relevant legislation to enable the Tribunal to order the employer to pay into the Tribunal the employee's contribution due under the MPFSO and for the same to be paid out to the MPFA should be explored with all interested parties including the MPFA and Labour Department.

Recommendation 3 **:** *The possibility of amending the Labour Tribunal Ordinance and other relevant legislation to enable the Labour Tribunal to include as part of an award, the employee's contribution under the MPFSO, and to order the amount to be paid out of the Tribunal to the Mandatory Provident Fund Authority as if the Authority is a party to the claim before the Tribunal should be explored with all interested parties including the MPFA and the Labour Department.*

Section II. The Tribunal Process

A. Overview

5.25 In general, claims filed in the Tribunal are disposed of either by way of compromise or after adjudication, which may be by default or after contest.

5.26 For claims that were settled, some of them were settled through the assistance of the TO before the first (call-over) hearing. Others were settled at or after the call-over hearing through the assistance of the PO.

5.27 For claims that require to be adjudicated, they may undergo several hearings. The parties may also apply to set aside or to review the award or order after the adjudication is concluded.

5.28 There are three main areas of concern in respect of the Tribunal process : (i) Settlement of claims; (ii) The appointment system; and (iii) Effectiveness and efficiency of the Tribunal process.

B. Settlement of Claims

(1) Concerns

5.29 Concerns have been raised as to the attempts made by TOs and POs at settlement. Views have been expressed that the Tribunal should confine its role and task to adjudication and that no form of conciliation should take place in the Tribunal. There are also others who are in favour of the Tribunal assisting the parties to reach settlement, but feel that there

have been too many repeated attempts at settlement,[72] resulting in delay in the Tribunal process.

(2) The Present Position

5.30 For the majority of the Tribunal claims (92%), the LRD of the Labour Department would have attempted conciliation before the claims were filed. Generally speaking, the attempt at conciliation failed either because the parties refused to attend the conciliation meeting or they could not reach agreement.

5.31 In cases where the parties had refused to take part in conciliation at the LRD, it is not the practice of the TO to explore settlement with the parties. The TO will only assist the parties to a claim to reach a settlement when all parties wish to consider settlement.

5.32 Similarly at the call-over hearing, the PO will only assist the parties to attempt settlement when all parties wish to explore the possibility of settlement.

(3) An Integral Part of the Tribunal Process

5.33 It has been suggested that the role of the Tribunal should be confined to adjudication and no attempts at settlement should be made at the Tribunal since conciliation would have been attempted by the LRD before a claim is filed.

5.34 The Working Party does not agree with this view. In the first place, the Working Party notes that not all claims would have gone through conciliation in the LRD.

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72 It has been suggested that in practice, the parties usually have gone through conciliation thrice before the case is decided by the Tribunal. Conciliation is normally first provided by the Labour Department before the filing of a claim. After a claim has been filed, an attempt of conciliation is made by the Tribunal Officer before hearing, which is followed by another round of conciliation by the Presiding Officer at the call-over hearing if the parties concerned have not yet settled the case. More efforts of conciliation may be attempted if the Presiding Officer refers the parties to conciliation when they agree to do so : see para. 6.2.3 of the Report on "The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places" prepared by Research and Library Services Division, Legislative Council Secretariat, April 2004.

5.35 Secondly, more than half of the claims in the Tribunal are disposed of by amicable settlement. There are good reasons for this, such as:

(a) The statutory power of the TO to make inquiry is more extensive than that of the Labour Relations Officer. The investigation by the TO may enable the parties to have a better understanding of the issues and the evidence.[73] It is not uncommon for the parties to refuse settlement because they do not have all the information; and

(b) The PO is legally trained and qualified. He is able to assist the parties to appreciate the issues. The parties will then be in a better position to evaluate their position and to make an informed decision on whether and how to settle the dispute. Where the parties wish to attempt settlement, the PO, with his legal training and litigation experience, will be able to help them to narrow their dispute and to conduct orderly and rational discussions in order to attempt to reach a mutually acceptable solution if possible.[74]

5.36 Thirdly, there are a number of distinct benefits in resolving employment disputes by settlement:

(a) It is less confrontational and stressful;

(b) It reduces conflict and promotes social harmony;

(c) The consensual approach increases the likelihood of due compliance with the outcome; and

(d) The negotiated outcome may include terms that cannot be part of a Tribunal award.

5.37 Fourthly, the Working Party observes that in all the jurisdictions that have been considered,[75] conciliation or mediation before adjudication forms an integral part of the employment dispute resolution mechanism. The benefits of resolving employment disputes through settlement have been fully recognized in these jurisdictions.

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73 11% of the cases disposed of in 2003 were settled with the assistance of the TO before the claims reached the call-over hearing.

74 44% of the cases disposed of in 2003 were settled with the assistance of the PO.

75 See Chapter Four.

5.38 Fifthly, in our jurisdiction, considering that legal representation is not permitted in the Tribunal and the majority of the parties do not have the benefit of legal advice, the Working Party believes that it is important that the Tribunal explains to the parties the option of settlement so that the parties can consider whether they wish to explore the possibility of resolving their disputes by amicable settlement. Having regard to our own experience and in line with the development and trend in other jurisdictions, the Working Party is of the view that where the parties wish, the Tribunal should continue to render appropriate assistance to the parties to facilitate them to settle their disputes.

5.39 Apart from the distinct benefits in resolving employment disputes by settlement and that having conciliation as part of the mechanism is consistent with the position in many jurisdictions, it must be recognised that if the cases which have been settled at the Tribunal all go to trial, the number of trials would more than double and the parties will consequently experience immense delay in achieving a resolution of their disputes.

Recommendation 4 *: Attempts at settlement should continue to be undertaken in the Tribunal: Where the parties wish, the Tribunal should assist the parties to resolve their disputes by settlement.*

(4) The Number of Attempts at Settlement

5.40 It has been pointed out that there are too many attempts at settlement at the Tribunal. The Working Party agrees that the parties may not be assisted by too many attempts at settlement. On the contrary, repeated attempts may be counter-productive and may delay the process.

5.41 The Working Party considers that except in those cases where the parties had not previously sought the assistance of the LRD, there should only be one attempt at settlement after a claim is filed in the Tribunal, and this should be undertaken at the call-over hearing.

5.42 Under this proposed arrangement:-

(a) For the majority of claims which are referred to the Tribunal by the LRD, the TO dealing with the inquiry of the claim will not go into the possibility of settlement at the pre-call-over hearing stage. Explanation of the option of settlement would be given at the call-over hearing by the PO when the PO will also explore with the parties the possibility of settlement. Where all parties wish, the PO will assist them to reach settlement or, in appropriate cases, refer them to the Settlement TO for assistance; and

(b) For cases where the claimant has not approached the LRD for assistance before filing the claim in the Tribunal, and there is no previous attempt at settlement, the parties will be referred to the Settlement TO for assistance if they wish to attempt settlement before the call-over hearing. If the attempt fails, but the parties still wish to explore settlement, the PO at the call-over hearing will also assist them to attempt settlement.

5.43 In proposing this arrangement, the Working Party has taken into account the following considerations :-

(a) POs with their legal training and experience in litigation, are in general more effective than TOs in assisting the parties to settle their disputes; and

(b) Relatively speaking, the parties would have a better understanding of the issues and the evidence when the claim reaches the call-over hearing stage.

5.44 To preserve the impartial role and the perception of impartiality of the Tribunal in the adjudication process, a PO who has attempted settlement at the call-over hearing should not preside over the trial of the claim. Likewise, TOs who conduct inquiries of claims would be kept separate from the Settlement TOs who assist the POs in settling disputes.

Recommendation 5 *: After a claim is filed in the Tribunal, except in those cases where the parties had not previously sought the assistance of the LRD, there should only be one attempt by the Tribunal at settlement at the call-over hearing.*

Recommendation 6 *: Where the LRD has attempted conciliation before the claim is brought in the Tribunal, the TO dealing with inquiry of claims will not attempt settlement with the parties.*

Recommendation 7 *: Where the LRD has not attempted conciliation before the claim is brought in the Tribunal, the Settlement TO will assist the parties to attempt settlement if the parties wish to do so before the call-over hearing.*

Recommendation 8 *: At the call-over hearing, the PO would explain the option of settlement and where the parties wish, assist them to reach settlement or in appropriate cases, refer them to the Settlement TO for assistance.*

Recommendation 9 *: A TO who is involved in the inquiry of the claim should not be involved in assisting the PO in settling a claim.*

Recommendation 10 *: A PO who has attempted settlement at the call-over hearing of a claim should not preside over the trial of it.*

5.45 The Working Party understands that occasionally complaints have been made that the parties were forced into accepting settlement. The Working Party is of the view that any settlement reached must reflect the genuine consensus of the parties. In explaining the option of settlement and in assisting the parties to reach an agreement, the PO as well as the Settlement TO should be sensitive to the risk of any perception that the parties are being forced into a settlement. They should be careful and vigilant in not creating any impression that they are imposing a solution upon the parties.

5.46 The Working Party is confident that the POs and the TOs are conscious of the importance of avoiding any perception by the parties that they are being pressurized into settlement.[76]

C. The Appointment System

5.47 As mentioned in para. 2.16, the Tribunal operates a 24-hour computerized telephone appointment booking system. An appointment register for filing claims is maintained. Claimants usually make use of the system to make an appointment before attending the Tribunal to file their claims.

5.48 The appointment system in the Tribunal was introduced in 1987. Since 2000, it has become computerized. Out of the 11,263 new claims filed in 2003, 96% had made use of the appointment system. On average, the Tribunal receives about 60 calls daily.

5.49 When a claimant calls to make an appointment, he has to provide the following information:

(a) The name of the claimant(s);

(b) The total number of claimant(s) involved;

(c) The name of the defendant(s);

(d) A contact telephone number; and

(e) The Labour Department reference number (if any).

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76 See item (b) of the Short term measures to improve the operation of Labour Tribunal stated by the Judiciary Administration to the AJLS Panel in August 2003 at Appendix II.

5.50 Over the phone, the claimant will be given a date and time for attending the Tribunal to be interviewed by the TO.

5.51 Before the appointed date, the Tribunal Registry will locate the relevant referral memorandum and documents sent by the LRD of the Labour Department and prepare the computer entries for the claim.[77] Such information will then be passed on to the assigned TO for perusal.

5.52 On the appointed date and time, the claimant reports to the Tribunal Registry. The assigned TO will interview him to obtain statements and relevant information. Based on the information provided, the TO would generate :

(a) A Title of Claim (Form 1) that bears the names and addresses of the parties; and

(b) A Form of Claim (Form 2) that contains the grounds for the claim and the items and amount of the claim.

After checking the accuracy of the contents, the claimant will sign on Form 2. After seeing the TO, the claimant will usually proceed immediately to complete the filing procedure at the Registry counter on the same day of the appointment. The Registry will give the claimant a notice of hearing (Form 3) showing the date and time of the call-over hearing. Thereafter, the Tribunal will serve on the defendant copies of Forms 1, 2 and 3, together with a letter inviting the defendant for an interview with the TO.

5.53 Over the years, some concerns have been expressed over the use of the appointment system. It has been suggested that the system was used to circumvent section 13(1) of the Ordinance[78] and should be abolished.[79] Similarly, it has been said that the Judiciary had adopted this system to ensure that all the incoming cases would meet the 30-day statutory limit.[80]

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77 See para. 2.15 in Chapter Two.

78 Under section 13(1), a claim has to be heard not earlier than 10 days and not later than 30 days from the date of filing.

79 Report No. 34 of the Director of Audit (March 2000), Chapter 7 Part 3, and the Report of the Public Accounts Committee on it (June 2000), paras. 16 - 27.

80 Para. 2.4.1 of the Report on "The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places" prepared by the Research and Library Services Division, Legislative Council Secretariat, 22 April 2004.

5.54 These views were perhaps put forward against the background that for some years, although the average waiting time from the filing of a claim to the date of the first hearing was kept within 30 days,[81] the average waiting time between the making of an appointment and the first hearing of a claim was consistently longer than 30 days. This is in spite of a number of measures taken by the Judiciary to cope with the sharp increase of caseload during those years and to clear the backlog of cases.[82]

5.55 Since 2000, the Judiciary has set a target of 30 days for the period between the making of an appointment and the date of the appointment.[83] As at 31 March 2004, the waiting time from the making of an appointment by telephone to the appointed date was 7 days, and the waiting time from the filing of the claim to the first hearing was 26 days.

5.56 The Working Party has considered the concerns expressed and reviewed the present operation of the appointment system. In deliberating on whether the appointment system should be maintained or abolished, the following points are relevant:

(a) The appointment system is not mandatory. A claimant may attend the Tribunal Registry to file a claim without first making an appointment; and

(b) In practice, it is advisable for claimants to make an appointment before proceeding to the Tribunal to file a claim because the appointment system serves a number of practical purposes:-

(i) Under the appointment system, the Registry can make available the referral papers for the TO to read before he interviews the claimant. A claimant can be seen promptly by an assigned TO when he attends the Tribunal Registry to file his claim;

(ii) Legal representation is not permitted in the Tribunal proceedings. The majority of the claimants do not have legal advice or assistance in the preparation of their

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81 It is also not the case that when time slots for hearing the claim within the 30 days' statutory limit are available that the Registrar of the Tribunal will ask the claimants to complete the filing procedure.

82 Efforts to cope with the caseload included expanding the number of courts and the number of POs as well as the use of night court sittings and Saturday court sittings.

83 This is taking up the recommendation of the Director of Audit in Report No. 34.

claims. They may wish to seek the assistance of the TO in filling out the claim forms, and in framing the claims and quantifying the amount claimed. It is therefore desirable for the claimants to see the TO before claims are filed;

(iii) The interview with the TO before filing enables the early discovery and correction of mistakes in the claim forms over such matters as the identity and description of the parties, the remedies sought and the calculations of the amount claimed. This will avoid the need to amend the claim at a later stage, thereby causing inconvenience to the parties;

(iv) Without the appointment system, claimants may need to spend considerable time at the Tribunal waiting to be interviewed by a TO. And, if no TO is available to see him on the date of filing, a claimant will have to make another visit to the Tribunal on another date for the purpose of being interviewed by the TO; and

(v) The appointment system enables the deployment of adequate staff resources by the Tribunal to deal with claims that involve multiple claimants.

5.57 In the Working Party's view, the appointment system is operating reasonably well. It is useful in ensuring that claimants are given prompt and adequate attention and assistance when they attend the Tribunal to make their claims. In fact, for the majority of the claimants who are not familiar with the law and the procedure, they will benefit from seeing the TO before filing their claims. The system is also particularly valuable for group claims. Though it is not mandatory, over 95% of the claimants make use of the system. This points to the fact that the system is serving useful practical purposes.

5.58 Whatever was the background which led to the appointment system originally, it has been proved to be a useful system for all concerned. The Working Party recommends that it should be maintained.

Recommendation 11 *: The appointment system should be maintained.*

5.59 The Working Party, however, considers that the waiting time between the making of an appointment and the first hearing of a claim should be reasonable and that there should not be undue delay. In this regard, a target waiting time for the period between the making of an appointment and the date of the appointment has been set and publicized. This practice should continue.

5.60 The existing target waiting time of 30 days for the appointment system is not an unreasonable one having regard to the waiting time in other jurisdictions and the caseload of the Tribunal. It is also noted that even before the introduction of the target waiting time in 2000, the waiting time for an appointment had greatly improved.[84] On the whole the Tribunal has been able to meet the target.

5.61 The existing waiting time of 30 days for the appointment system was introduced in 2000. The actual waiting time as at 31 March 2004 was 7 days. The Tribunal should keep under constant review the target waiting time for the appointment system to see if revisions should be made to the existing target having regard to all relevant factors.

Recommendation 12 *: The Tribunal should keep under constant review the target waiting time for the appointment system to see if any revision should be made having regard to all relevant factors.*

D. Efficiency and Effectiveness of the Process

(1) Concerns

5.62 A common concern relates to delays in and the efficiency of the Tribunal process. There are three aspects to this.

84 See Appendix V(g).

5.63 Firstly, some users feel that the process is cumbersome in that they have to make separate visits and state their case repeatedly to the Labour Department and the Tribunal. Some also find it inconvenient to have to spend time waiting for their turn at the call-over hearing.

5.64 Secondly, there are complaints that the time taken to conclude a claim is unduly long and there are too many court attendances. This in turn calls into consideration the reasonableness of the waiting time from the call-over hearing to the conclusion of the trial and whether the number of hearings in the adjudication process can be reduced.

5.65 Thirdly, comments have been made that ill preparation of the case by the parties and their failure or refusal to observe directions for disclosure and production of documents and witnesses often cause proceedings to be adjourned and delayed. It has been pointed out that, not infrequently, the parties would seek to introduce further evidence or documents at an advanced stage of the trial or even on appeal. On the other hand, some parties, notably the defendants, consider that they do not have adequate time to collate their documents and prepare their defence before the call-over hearing.

5.66 The upsurge in caseload over the past years together with the increase in the complexity of cases have placed the Tribunal under considerable strain. The Working Party finds that overall speaking, the Tribunal has managed to function reasonably well in facing the challenges. Changes have been introduced within the Tribunal to ensure the better disposal of cases within existing resources. Those working in the Tribunal should be commended for their continuous efforts in ensuring the efficiency and effectiveness of the Tribunal process.

5.67 However, in view of the demands placed on it and the concerns expressed on the efficiency of its process, the Working Party takes the view that some aspects of the Tribunal process can be further improved and streamlined so as to ensure that the Tribunal continues to be a forum for quick and informal resolution of employment disputes.

5.68 In addressing the concerns about the Tribunal process, the Working Party considers it important to bear in mind that the causes for concern are largely inter-related and require to be approached on that basis. The recommendations made by the Working Party, while suggesting specific improvements to some aspects of the Tribunal process, are intended to be taken as one whole package aiming at an overall enhancement of the process.

(2) Supply of Background Information

5.69 Some parties have indicated that they find it time-consuming and frustrating to have to state their case separately to the LRD and the TO at the Tribunal.

5.70 Given the difference in their role and purpose, the information the LRD seeks for the purpose of conciliation may differ from that sought by the TO for the preparation of the Form 6 report, both in terms of emphasis and details. The LRD also has to observe confidentiality in respect of information disclosed during conciliation. It has therefore become necessary for the parties to repeat their case to the TO and to give a statement when the claim is brought in the Tribunal.

5.71 The parties may however feel less burdensome if the detailed factual background is ascertained at the LRD stage and forwarded to the Tribunal when a claim is filed. The Working Party notes that the Judiciary Administration has commenced discussions with the Labour Department to explore whether the forms used in making claims in the Labour Department and the Tribunal respectively could be revised and streamlined.[85]

5.72 With the common aim to obviate the need for a claimant to repeat at the Tribunal the background information already supplied to the Labour Department, the Labour Department and the Judiciary Administration have agreed that :

(a) The Labour Department will adopt a new form in place of the existing claim forms (LD15 and LD485). The new form will contain common background information required by the Labour Department and the Tribunal including the particulars of the claimant(s) and the defendant(s), the terms of employment and the mode of termination; and

(b) In the event a claimant proceeds to file a claim in the Tribunal after going through the procedure at the Labour Department, the new form will be faxed to the Tribunal and may be adopted as Part I of the Tribunal's claim form.

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85 See item (f) of the Short term measures to improve the operation of the Labour Tribunal at Appendix II.

5.73 The Working Party believes that the adoption of the new form and the referral procedure set out at para. 5.72 above will operate to the convenience of the Tribunal users and looks forward to their early implementation.

Recommendation 13 *: Measures enabling detailed background information to be supplied by the parties to the LRD and to be forwarded to the Tribunal should be implemented. The New Form and the referral arrangement under discussion between the Labour Department and the Judiciary should be put in place as soon as practicable.*

(3) Prior Guidance and Information

5.74 There is already in existence a booklet entitled "Labour Tribunal"[86] that gives a general introduction to the Tribunal, its work and the main features of the Tribunal process.

5.75 The Working Party considers that the parties, who have no legal representation, will benefit from clear guidance about the procedure and what they are required to do. In this regard, additional pamphlets, leaflets or videos can be produced to give the parties information on the actual practice in the Tribunal and what they are expected to do to prepare their case for trial. Such information may include:

(a) What information or evidence is generally required to bring a claim or establish a defence;

(b) What should a witness statement generally contain;

(c) The purpose and importance of full disclosure of information and documents;

86 This is one of the booklets in a series of "Guide to Court Services". The booklet is also available on the Judiciary's website.

(d) How and what to prepare for the call-over hearing, pre-trial hearing and trial;

(e) Points to note for parties and witnesses in attending before the POs;[87]

(f) Points to note in applying for enforcement of an award; and

(g) Points to note in lodging an appeal.

Recommendation 14 *: Pamphlets, leaflets or videos should be produced to give the parties clear guidance on the practice and procedure in the Tribunal, what they are expected to do to prepare for their case and for hearings and what they should know in attending before the PO, in enforcing an award and in lodging an appeal.*

(4) Section 13(1) of the Ordinance

5.76 Section 13(1)(a) of the Ordinance concerns the time within which the first hearing of a claim has to take place. It requires a claim to be listed for a first hearing on a date not earlier than 10 days and not later than 30 days from the filing of the claim. The intention is twofold. Firstly, it is to afford time for the Registry to effect service on the defendant and for the TO to interview the defendant, to make the necessary enquiries and to compile the Form 6 report. Secondly, it is to ensure that a claim will be heard within a reasonable time.

5.77 The Working Party has examined the suitability of the time limit presently prescribed under section 13(1)(a) of the Ordinance. In the Working Party's view, there are good reasons for prescribing a time limit within which the first hearing of a Tribunal claim should take place. The underlying objective is to ensure that Tribunal claims are dealt with justly and expeditiously by, on the one hand, affording the parties a proper

87 Under the Short term improvement measures, POs have been reminding witnesses to wait outside the court for their turn to give evidence. Matters such as this should be set out in the pamphlets.

opportunity to put forward their case and, on the other hand, preventing undue delay to the process.

5.78 Several considerations are relevant when reviewing the suitability of the present time limit:

(a) The state of readiness of the parties and witnesses for trial significantly affects the effectiveness and efficiency of the adjudication process. Poorly prepared cases often lead to unnecessary adjournments, delays and wastage of resources;

(b) In the interest of fairness and with a view to avoiding unnecessary adjournments, the parties should be allowed reasonably adequate time before the first hearing to formulate their case, collate evidence, obtain witness statements and, in some instances, seek assistance and advice. They should also be allowed time to carry out the investigations and other directions and to make arrangements for attending court; and

(c) Due to the varying nature and complexity of the claims, the time required by the parties to complete all necessary preparatory work for the first hearing will vary from cases to cases.

5.79 In the Working Party's view, the time limit prescribed under section 13(1) of the Ordinance is unrealistic by reference to the actual operation in the Tribunal and what is generally required to enable a claim to be properly prepared for the first hearing.

5.80 In essence, the 10 days' and 30 days' periods under section 13(1)(a) represent respectively the minimum and maximum time for the Tribunal to process the claim and for the parties to make full preparation for their cases before the first hearing. Both these standards were set in 1973[88] when there were much fewer claims and labour law was much simpler. They have remained unchanged despite the expansion in the Tribunal's jurisdiction, the substantial rise in its caseload and the increased complexity of labour law.

5.81 A number of claimants find themselves coming under immense time pressure to gather the necessary evidence and to obtain statements and information from witnesses. The pressure felt by the defendants is even greater. Such pressure will further increase with the

88 It appears that the 30 days' limit was set without any objective basis.

recommendations that the parties should make full disclosure of information and exchange documents and statements by the stage of the call-over hearing (see para. 5.92-5.93).

5.82 The present time limit also creates severe time constraint for the TO to carry out the necessary inquiry and investigation of the claim and to prepare the Form 6 report. This is particularly so in cases where the defendants do not turn up for the interview, or where the parties do not fully co-operate with the TO.

5.83 As noted before, in cases where the parties were inadequately prepared, the first call-over hearing would have to be adjourned, leading to wastage of time and resources to both the parties and the Tribunal. Occasionally, further hearings would have to be listed to enable further inquiry and investigation to be carried out by the TO.

5.84 The Working Party considers that as a matter of principle, a reasonable and realistic time limit within which the first hearing of a claim should take place must allow adequate time for:

(a) The parties, in particular the defendant, to :

(i) Obtain statements and information from witnesses;

(ii) Prepare their cases fully;

(b) The Tribunal to :

(i) Effect service of the claim;

(ii) Contact the defendant;

(iii) Obtain statement and information from the defendant;

(iv) Conduct and follow-up on necessary inquiries; and

(v) Compile the Form 6 report.

5.85 Having regard to the above considerations, the Working Party recommends that :

(a) A claim should be fixed for the first hearing <u>not earlier than 20 days</u> after the claim is filed; and

(b) A claim should be fixed for the first hearing <u>not later than 45 days</u> after the claim is filed.

Presently the parties may by agreement vary the time limits under section 13(1)(a). The Working Party recommends that the PO should have the power to shorten or enlarge the time limits where the circumstances of the parties require it, such as when a party has to depart from Hong Kong urgently.

Recommendation 15 *: Section 13(1) of the Labour Tribunal Ordinance should be amended to provide that a claim shall be fixed for hearing not earlier than 20 days and not later than 45 days from the filing of the claim, unless the parties agree or the Presiding Officer directs otherwise.*

(5) Arrangements for call-over hearings

5.86 Before 14 July 2003, the practice of the Tribunal was to list all call-over hearings (which usually last for less than one hour) scheduled for the day at 9:15 a.m. on that day. Parties had to be at the Tribunal at 9:15 a.m. to wait for their turn. Sometimes, the parties might have to wait until the afternoon. There were concerns that parties were made to spend considerable time waiting in the Tribunal, which could cause the parties inconvenience and result in loss of income to those employees who had taken unpaid leave to attend the Tribunal.

5.87 To address the above concerns, the Tribunal introduced on 14 July 2003 a three-month experimental listing arrangement in 3 call-over courts, by listing call-over hearings in two separate sessions - one in the morning and one in the afternoon.[89] Under this new arrangement, parties who are required to attend before the Tribunal for call-over hearings would only need to set aside half a day, instead of a whole day, for this purpose. This would reduce the time and cost incurred by the parties in attending before the Tribunal. However, if due to reduction of the caseload, the morning session can accommodate the cases, there would be no need for any afternoon session.

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89 See item (a) of the Short term measures to improve the operation of the Labour Tribunal at Appendix II.

5.88 The new arrangement has operated satisfactorily and is welcome by the parties. Although union representatives may have to come to the Tribunal twice in a day if cases involving their members are listed separately in the morning and afternoon sessions, the parties consider the new arrangement a substantial improvement over the previous one. The new arrangement has since been extended to all other call-over courts.

5.89 Considering the savings to the parties and their favourable response, the Working Party recommends that the new listing arrangement should be continued, and be kept under regular review.

> ***Recommendation 16*** *: Call-over cases should usually be listed separately in the morning and afternoon sessions. This arrangement should be reviewed on a regular basis.*

(6) Compliance with Directions

5.90 The Working Party notes that delays in the Tribunal process are due to a number of problems, ranging from non-compliance by the parties with the directions of the TO and/or the PO on the preparation of the case and belated or failure to make disclosure of information to the other party, to non-cooperation of usually one of the parties concerned. In some instances, these problems arise because the parties, being unrepresented, are unable to cope. But there are instances where the parties deploy non-cooperation and non-compliance as tactical measures to delay the case.

5.91 To address the needs of the parties who have difficulties in coping, appropriate guidance and assistance should be provided to facilitate the parties to comply with the directions given by the TO and/or the PO. To this end, at the conclusion of the interviews with the TO and also at the call-over hearing,[90] the parties can be given a list setting out:

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90 See item (c) of the Short term measures to improve the operation of the Labour Tribunal at Appendix II.

(a) The documents and information that they are required to provide to the Tribunal and the other parties;

(b) The time within which they should provide the documents and information; and

(c) A warning about the consequences if a party does not comply with the direction for exchange of documents and information.

Recommendation 17 *: At the conclusion of the interviews with the Tribunal Officer and at the call-over hearing before the Presiding Officer, a list should be given to the parties setting out:*

(a) The documents and information that they are required to provide to the Tribunal and the other parties;

(b) The time within which they should provide the documents and information; and

(c) A warning about the consequences if a party does not comply with the direction for exchange of documents and information.

5.92 The Ordinance and/or the Labour Tribunal (General) Rules should be amended to provide appropriate sanctions with a view to discouraging the parties from seeking to delay the process. Consideration should be given to empowering the PO to strike out a claim or a defence and/or to enter judgment where a party fails, without reasonable cause, to comply with directions within the time prescribed.

Recommendation 18 *: The Labour Tribunal Ordinance and/or the Labour Tribunal (General) Rules should be amended to enable the Presiding Officer to impose sanctions in appropriate cases for failure to comply with directions.*

(7) Early Disclosure of Information

5.93 For the purpose of better case preparation and case management, the parties should be encouraged to adopt an open and co-operative approach and to make full disclosure of information at the start of the Tribunal process. Production of documents or witnesses at the last minute and attempts to surprise the opponent should be discouraged. With better information, the issues can be clearly identified at an early stage to enable the parties to properly assess their position. Providing all the necessary and relevant information at an early stage will also obviate the need for pre-trial hearings. It will also enable the PO to have a realistic estimate of the length of the trial when listing the claim.[91]

5.94 The Tribunal procedure should facilitate the early disclosure of information by the parties. At the separate interviews with the parties before the call-over hearing, the TO should direct the parties to provide to the Tribunal and serve on the other parties copies of the relevant documents, his own statement and witness statements either before or the latest at the call-over hearing. At the call-over hearing, if the parties have not complied with the TO's direction or if further documents or witnesses are called for, the PO should give direction for the documents and witness statements to be provided to the Tribunal and the other parties on a date reasonably before the scheduled trial date. The parties should also be made aware of the consequences of failure to make full disclosure as directed.

Recommendation 19 *: The TO should, at the separate interviews with the parties, direct the parties to provide the Tribunal and serve on the other parties copies of all the relevant documents, his own statement and witness statements either before or the latest at the call-over hearing.*

91 See item (d) of the Short term measures to improve the operation of the Labour Tribunal at Appendix II.

Recommendation 20 *: If the TO's direction on disclosure of documents and statements has not been complied with or if further disclosure is called for, the PO at the call-over hearing should give direction for such disclosure.*

Recommendation 21 *: The parties should be warned of the consequences of failure to make full disclosure as directed.*

5.95 A party may be reluctant or may even object to provide copies of documents to the other party in the claim for fear that the documents may be misused by the receiving party. To address this concern, the Working Party recommends that the receiving party should be put under a statutory duty not to use the documents and information disclosed for any purpose other than for the purpose of the Tribunal proceedings. Consideration should be given to amending the Ordinance or the Labour Tribunal (General) Rules to reflect this.[92]

Recommendation 22 *: The Labour Tribunal Ordinance or the Labour Tribunal (General) Rules should be amended to provide that a party is under a duty not to use the documents and information disclosed by another party in the claim, other than for the purpose of the Tribunal proceedings.*

92 Failure to observe the statutory duty may amount to civil contempt of court.

(8) Managing the Hearings and the Trial

5.96 Case management is an important aspect of the adjudication process having regard to the absence of legal representation in the Tribunal and the PO's statutory duty to investigate all relevant matters.[93] The Working Party finds that in general, POs are conscious of the importance of case management and have worked conscientiously to shorten the adjudication process.[94]

5.97 It is however to be noted that adjournments of hearings and overrunning of trials often contribute to delays. With the heavy diary of the Tribunal, if a hearing or trial is adjourned or overruns, it is likely to be resumed or part heard at some weeks or even months later.

(8)(a) Pro-active Case Management

5.98 The Working Party notes that the POs may have different approaches towards the parties' failure to comply with directions and time limits on the production of documents and witness statements. Some POs are more prepared to grant indulgence. Consistent with the objective of minimizing delays and avoiding abuses, the Tribunal should of course, while acting fairly, move towards greater emphasis on due observance of directions and time limits. In this connection, it should be noted that the PO's duty to investigate all relevant matters only obliges the PO to invite a party to consider adducing evidence or to comment on the relevant issues in the case. The PO cannot assume the role of an advocate for the party and it is therefore up to the parties to produce the relevant evidence. Accordingly, the PO cannot be expected to explore each and every matter that may possibly relate to the dispute, and to grant the parties repeated adjournments to produce witness and evidence.[95]

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93 The duty is prescribed by section 20(3) of the LTO.

94 See item (d) of the Short term measures to improve the operation of the Labour Tribunal at Appendix II.

95 There is a long line of authorities on the scope of the PO's duty to investigate. See for example : *Tse Lam* v. *Chan Tak Wai* HCLA 150 of 1995, *Ng Ming* v. *Cheung Wah Investment Co. Ltd.* HCLA 10 of 2003.

5.99 With the adoption of measures to facilitate early and full disclosure of information,[96] the need for adjournments to allow proper preparation for trial or production of documents and witnesses will be reduced. Early discovery will also enable the PO to make a more realistic estimate of the length of the trial.[97]

Recommendation 23 *: Presiding Officers should exercise more pro-active case management in managing the hearings and the trial, and should move towards greater emphasis on due observance of directions and time limits.*

(8)(b) Witness Statements

5.100 The use of witness statements is a valuable means of saving the time of a trial. In general, the parties and the witnesses should be encouraged to adopt their witness statements as evidence at trial so that they can be taken as read.[98] They may make additions or clarifications if they wish, but they need not repeat the contents of their statements since a copy would have been given to the other party to the claim in advance. They can then be questioned by the other party and the PO.

Recommendation 24 *: In general, the parties and the witnesses should be encouraged to adopt their witness statements as evidence at the trial so that they can be taken as read.*

96 See paras. 5.92 – 5.95.

97 See paras. 5.96 – 5.97.

98 The Court of First Instance held in *Ng Ming* v. *Cheung Wah Investment Co. Ltd.* HCLA 10 of 2003 that it was proper for a PO to ask a witness to adopt his witness statement as his evidence in chief.

(8)(c) Fewer Pre-trial Hearings

5.101 At present, pre-trial hearings are conducted for checking that the parties have made all the necessary disclosure and have complied with all the directions made at the call-over hearing. Often, further pre-trial hearings have to be conducted because the discovery is inadequate or because the parties have failed to comply with the directions of the PO on preparation for trial. This is not satisfactory.

5.102 The use of pre-trial hearings should be reviewed. With the adoption of early and full discovery and a firm and pro-active approach to case management with emphasis on adherence to directions and time tables, there should be a reduced need for pre-trial hearings.[99]

5.103 In addition, the following measures should be adopted. Firstly, pre-trial hearing should be dispensed with in simple claims. Secondly, for cases that are not simple and necessitate a pre-trial hearing, there should normally be only one such hearing. Thirdly, only in exceptional cases, such as those involving a large number of parties and documents or complex issues, that there should be more than one pre-trial hearings.

> ***Recommendation 25*** *: Pre-trial hearings should be reduced. It should be dispensed with in simple claims. For claims that are not simple, one pre-trial hearing should be the norm. Further pre-trial hearings should only be conducted in exceptional cases involving large number of parties and documents or complex issues.*

(8)(d) Listing of Part-Heard Cases

5.104 If a trial overruns and has to be part heard, it should be resumed on an early date. This may at times entail re-scheduling the Tribunal diary to enable the part-heard trial to be heard sooner.

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99 See para. 5.98 above on better case management before the trial.

Recommendation 26 *: If a trial overruns and has to be part heard, the Tribunal should endeavour to list the resumed hearing on an early date.*

(8)(e) Sanctions

5.105 Presently the Tribunal's power to order security upon adjournment of hearing is restricted to cases where the adjournment may occasion prejudice to a party because of a disposal or loss of control of assets by the defendant. Quite apart from the difficulties in establishing this, it does not relieve the prejudice and hardship caused to a claimant by delays in having the claim adjudicated and obtaining an award. The Working Party recommends that the power to order security upon adjournment should be extended to cases where the PO is satisfied that a party is guilty of delaying the process.

Recommendation 27 *: The power of the Presiding Officer to order security upon adjournment should be extended by legislation to cases where the Presiding Officer is satisfied that a party is guilty of delaying the process.*

(9) Review and Applications to Set Aside

5.106 Within 14 days from the date of an award or order, a PO may review the award or order and re-open or re-hear the case. This power of review may be exercised by the PO on his own motion, or upon the application of a party made within 7 days from the date of the award or order.

5.107 In 2003, there were 664 applications for review, setting aside awards and restoration of claims. The vast majority of these applications were unsuccessful. The Working Party notes that in some instances, the losing party may resort to the review procedure as a delaying tactic. It is also not uncommon for a party to make repeated applications for review. These applications will lead to further hearings and delay in the Tribunal process.

5.108 Under section 31(4) of the Ordinance, on a party's application for review, the PO may order the party to make payment into the Tribunal or to give security, if there exists a possibility that assets available for satisfying an award may be disposed of to the prejudice of the other party. The Working Party considers that the PO's power in this regard is too restrictive. By contrast, on an application to restore a claim or to set aside an award or order made in the absence of one party, sections 20A(1) and 21A(1) of the Ordinance confer on the PO a general power to impose terms that are just.

5.109 To prevent abuse of the review procedure, the Working Party recommends that the power to order payment into the Tribunal or to give security upon application for review should be extended by legislation to cases where the PO is satisfied that the application is devoid of merit and/or is made with a view to delaying the process.

Recommendation 28 *: The power of the PO to order payment into the Tribunal or to give security upon application for review should be extended by legislation to cases where the PO is satisfied that the application is devoid of merit and/or is made with a view to delaying the process.*

(10) Implementation of Recommendations

5.110 The Working Party wishes to emphasis that there are many aspects affecting the effectiveness and efficiency of the Tribunal process. The co-operation of the parties and their readiness to observe the procedural requirements and the directions for preparation of cases are as important as the pro-active management of the cases by the POs and the

TOs. Rules and procedures that facilitate co-operation and discourage abuse will also help to minimize delays.

5.111 The Working Party further wishes to point out that the implementation of the package of Recommendations 4 to 28 above will benefit from the application of information technology, and be supported by revised workflow and work practices in the Tribunal Registry. The Working Party proposes that the Judiciary Administration should be asked to consider how this may be taken forward.

Recommendation 29 *: The Judiciary Administration should consider how the implementation of the package of Recommendations 4 to 28 above will benefit from the application of information technology and be supported by revised workflow and work practices in the Tribunal Registry.*

Section III. Costs on Appeal

A. The Statutory Position

(1) Costs before the Tribunal

5.112 Under section 28(1) of the Ordinance, the Tribunal may award to a party costs and expenses before the Tribunal, which may include any reasonable expenses necessarily incurred and any loss of salary and wages suffered by that party in attending a hearing of the Tribunal.

(2) Costs on Appeal

5.113 Under section 32(1) of the Ordinance, any party who is aggrieved by a decision of the Tribunal may apply to the Court of First Instance of the High Court for leave to appeal on any ground involving a point of law or on the ground that the award was outside the jurisdiction of the Tribunal. Under section 35(2) of the Ordinance, the Court of First Instance may make such order as to costs and expenses as it thinks fit.

5.114 Under section 35A of the Ordinance, leave to appeal to the Court of Appeal of the High Court may be granted on a question of law of general public importance. Under section 35B of the Ordinance, the Court of Appeal may make such order as to costs as it thinks fit.

5.115 When the appeal is before the High Court, the general approach to costs between the parties is set out in Order 62, r.3(2) of the Rules of the High Court, Cap. 4A which provides:

> "If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

5.116 Under section 22(1) of the Hong Kong Court of Final Appeal Ordinance, Cap. 484, an appeal shall lie to the Court of Final Appeal as of right where the matter in dispute on the appeal amounts to $1 million or more, or with leave of the Court of Appeal or the Court of Final Appeal, if

the question involved in the appeal is one, of which by reason of its great general or public importance or otherwise, ought to be submitted to the Court for decision. Under section 43 of the Hong Kong Court of Final Appeal Ordinance, costs shall be paid by such party or person as the Court of Final Appeal shall order, and such costs shall be taxed by the Registrar, Court of Final Appeal or some other officers to whom the Registrar may delegate the function.

B. The Present Position

(1) Costs before the Tribunal

5.117 As legal representation is not allowed before the Tribunal, the question of costs for legal representation does not arise when the case is before the Tribunal. And the Tribunal does not award costs for any advisory or drafting fees which are charged by a barrister or solicitor in rendering service to a party in relation to his case before the Tribunal. Generally speaking, costs allowed for proceedings in the Tribunal are very modest.

(2) Costs on Appeal

5.118 Legal representation is allowed on appeal. It is not uncommon for Tribunal appeals to involve legal representation as appeals only turn on points of law. Depending on the amount of the claim, it is probable that the legal costs involved are disproportionate to the amount of the claim.

5.119 When the appeal is before the High Court, the normal course is for costs to follow the event as set out in Order 62, r.3(2) of Rules of the High Court. The “losing party” is usually required to pay the legal costs of the party who succeeds in the appeal. Both the appellant and the respondent are therefore exposed to the risk of legal costs.

5.120 Legal aid may be granted to a party on appeal if both the eligibility requirement and the merit test are met. If a legally aided party succeeds in an appeal, he will be able to recover from the losing party the legal costs incurred by the Director of Legal Aid. If the legally aided party loses in an appeal or cross-appeal, the winning party can only recover his

legal costs from the Director of Legal Aid if the appeal or cross-appeal is instituted by the legally aided party, or in other cases, to the extent that the contribution made by the legally aided person is in excess of the costs incurred by the Director of Legal Aid.[100]

5.121 Since July 1997, there has been one Tribunal appeal to the Court of Final Appeal.[101] The usual rule[102] as regards the award of costs was applied.

C. Proposals Relating to Costs on Appeal

5.122 It is noted that in the past few years, there were discussions as to whether the law governing the costs on appeals from the Tribunal (and those from the Small Claims Tribunal and the Minor Employment Claims Adjudication Board) should be changed.[103]

5.123 In summary, the proposal was that a party's entitlement to costs on appeal should be "capped" or "limited" to the same kinds of costs as are recoverable in the Tribunal itself, and the costs of legal representation should be excluded (the "capped costs" proposal).

5.124 In referring to the experience of overseas jurisdictions in this regard, the Working Party notes that as a variation of the "capped costs" proposal, the entitlement to costs (including both the costs which are recoverable in the Tribunal at present and those of legal representation) may be restricted to cases where the opposing party has acted vexatiously, abusively, disruptively or unreasonably, or where the bringing or conducting of the proceedings has been misconceived (i.e. the "no order as to costs" proposal).[104]

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100 Section 16C(1)(b) of the Legal Aid Ordinance, Cap.91.

101 *Archer v. The Hong Kong Channel Ltd.* (1977-98) 1 HKCFAR 298. See also the unreported judgment on costs delivered on 21 January 1999.

102 See para. 5.119 above.

103 This subject was last discussed at a meeting of the Panel on Manpower of the Legislative Council on 4 July 2001. At that meeting, members representing both the employers' and employees' sectors expressed reservations on the proposal.

104 See para. 4.30 above. See also para. 3.6.7 of the Report on "The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places" prepared by Research and Library Services Division, Legislative Council Secretariat, April 2004.

D. The "Capped Costs" Proposal

5.125 The Working Party understands that there had been in-depth discussion on the "capped costs" proposal by all concerned parties in 2001.[105]

5.126 The Working Party notes that the main arguments for introducing such a proposal are broadly as follows:

(a) A principal objective of the Tribunal is to minimise the costs of employment claims. Since the Tribunal and the appellate courts are two components of a single system, it is illogical to eliminate the risk of bearing legal costs in the Tribunal, but not in the appellate courts. In other words, parties to employment claims which usually involve small amounts should not be subject to the same costs risks as litigants in higher monetary value cases where legal costs are payable at both first instance and on appeal;

(b) The amount claimed in most employment claims is not huge. The eventual legal costs may be highly disproportionate to the amount claimed in question. The present statutory regime may create injustice to the respondent who has not chosen to invoke the appeal procedure by exposing him to the risk of bearing high legal costs. The position would become more acute if the respondent is the employee, who is usually in a less favourable financial position;

(c) The principle of "costs follow the event" may deter poor litigants from taking meritorious claims while wealthy litigants can afford the costs consequences of losing a given case. This is particularly relevant in employment claims where the financial position of the employee is usually less favourable than that of the employer; and

(d) The appellate courts are bound by well-established principles governing the award of costs, and may not feel able to take

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105 It is noted that the Administration had consulted all concerned stakeholders on a proposal to cap the costs on appeal from the Small Claims Tribunal, the Labour Tribunal and the Minor Employment Claims Adjudication Board. Representatives for the employers' and employees' sectors, the Bar Association, the Law Society and the Judiciary were consulted. Divided views were expressed and no conclusion was reached.

into account considerations such as proportionality of the costs to the amount of the claim in awarding costs.

5.127 The Working Party notes that the main arguments against the proposal are broadly as follows:

(a) In the proceedings before the Tribunal, matters of fact and law are involved. In Tribunal appeals, leave would only be granted on a point of law or on the jurisdiction of the Tribunal. Further appeal to the Court of Appeal is only limited to a point of law of general public importance. Final appeal to the Court of Final Appeal is limited to claims exceeding $1 million or where questions of great general or public importance are involved. This explains why the assistance of legal representatives is allowed and usually required in the appellate proceedings, as opposed to the first instance proceedings before the Tribunal itself. There are no compelling reasons why the parties to Tribunal appeals should not be subject to the same costs risks as litigants in other civil appeals;

(b) There is also no compelling reason why a successful party to an appeal, which can be the employee, should be deprived of his right to have his costs borne by the losing party. This may not necessarily work to the advantage of the less well-off litigants. The effect of requiring the parties to an appeal to pay their own legal costs would be that, in some cases, a poorer litigant who succeeds on appeal will not be able to recover his legal fees from a wealthier opponent. The right of appeal may then be worthless to him. There is even less justification for making a successful respondent bear his own costs of defending the appeal, the institution of which is not of his own choosing;

(c) The matter is not one of wealthy litigants using the threat of disproportionate costs on appeal to crush their opponents regardless of the merits of the case. Leave to appeal would only be granted in accordance with the strict criteria laid down in the statute. The appellate procedure could not be invoked lightly; and

(d) Under the existing regime, legally aided parties to Tribunal appeals are not personally vulnerable to bearing costs beyond

their means irrespective of whether they are appellants or respondents in the appeal proceedings.

5.128 Having considered both the arguments for and against the capped costs proposal, the Working Party is of the view that there is no compelling justification to support the introduction of such a proposal. The Working Party also notes that when the proposal was last discussed in July 2001, it was not supported by Legislative Council members representing both the employers' and employees' functional constituencies.

Recommendation 30 *: The proposal to cap or limit the costs on appeal to the same kinds of costs as are recoverable in the Tribunal itself should not be introduced.*

E. The "No Order as to Costs" Proposal

5.129 The considerations as set out in paras. 5.125 – 5.127 above apply equally to the "no order as to costs" proposal in the context of Tribunal appeals.

5.130 The Working Party notes that such a proposal is essentially based on the existing practice in England. It should however be pointed out that the context and the overall system in which employment claims and appeals are handled in England are very different from those in Hong Kong. The Working Party does not presently see any compelling justification to support the introduction of such a proposal either.

Recommendation 31 *: The proposal of not awarding costs against an unsuccessful party in a Tribunal appeal, except where that party has acted vexatiously, abusively, disruptively or unreasonably, or that the bringing or conducting of the appeal have been misconceived, should not be introduced.*

Section IV. Enforcement of Awards

A. The Present Position

5.131 To enforce an award of the Tribunal, a person has to obtain a certificate of award from the Tribunal and then have it registered in the District Court. Upon registration, the award becomes a judgment of the District Court and may be enforced like any District Court judgment.

5.132 The judgment creditor may levy execution through the bailiff on the chattels of the judgment debtor, apply for charging orders[106] against the landed properties of the judgment debtor, or apply for garnishee orders[107] so that monies held by a third party (such as a bank) for the judgment debtor can be applied to satisfy the award. In appropriate cases, the judgment creditor can also apply for oral examination of the judgment debtor to find out whether and if so what property or means he has to satisfy the award.[108]

5.133 Registration of the award must be made within 12 months of the making of the award.[109] Those not so registered may only be enforced by way of a separate claim commenced in either the Small Claims Tribunal or the District Court or the Court of First Instance, depending on the amount of the award in question.

B. The Proposed Changes

5.134 The time limit of 12 months for registration of the award does not exist for other civil claims. In the High Court and District Court,[110] a judgment or order for the payment of money may be enforced by writ of execution within 6 years, after which leave of the court will have to be obtained for the issue of the writ of execution. The Working Party sees no reason for distinguishing an award of the Tribunal from other civil claims.

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106 Order 50, Rules of the District Court.

107 Order 49, Rules of the District Court.

108 Orders 48 and 49B, Rules of the District Court.

109 Section 38 of the Ordinance and Rule 12 of the Labour Tribunal (General) Rules.

110 See Order 46, rule 2(1) of the Rules of the High Court and Rules of the District Court respectively.

This is particularly so because the judgment creditor in an award may have given indulgence to the judgment debtor by allowing the latter to pay by instalments, and inadvertently allow the 12 months to elapse. To require the judgment creditor to start a new action to enforce the award will not be reasonable and will cause him inconvenience. It is recommended that Rule 12 of the Labour Tribunal (General) Rules should be repealed.

Recommendation 32 *: Rule 12 of the Labour Tribunal (General) Rules should be repealed so that an award of the Labour Tribunal may be registered and enforced within 6 years.*

C. Other Matters

5.135 The Working Party has also considered whether the execution process can be simplified. Presently, a party has to go first to the Tribunal and then to the District Court to apply for execution by the bailiff. The need to pay a deposit for the use of the bailiff's services may sometimes cause hardship to parties with limited means. The amount of the deposit may at times be disproportionate to the sum awarded. On occasions, the parties' frustration with the execution process is compounded by the fact that the execution turns out to be futile.

5.136 The District Court is the venue for enforcement of awards, not only for awards of the Tribunal but also those of the Small Claims Tribunal. It has the advantage of centralizing all enforcement facilities of the bailiff office. The Working Party does not recommend any change in this aspect. However, it is noted that to assist the parties, pamphlets or booklets regarding the Tribunal can set out the steps for enforcement in clearer terms (see para. 5.75 above). When being sent the Tribunal award, the parties should also be informed that they can apply for the certificate of award immediately after the Tribunal has made the award so as to minimize any possible inconvenience.

5.137 As for the payment of a deposit, this is necessary to cover the expenses of the bailiff, such as their travelling expenses and the fees for arranging security guard services. The requirement applies to all executions, irrespective of whether the judgment or order sought to be enforced is made by a Tribunal or by a court. The Working Party recognizes the payment of a deposit may pose hardship to some parties. Given that it is a requirement for execution of judgment and order of all levels of court, the Working Party does not consider it appropriate to review the requirement and/or to make recommendation solely in the context of Tribunal awards. The issue of whether the requirement may be waived in part or in whole is more appropriately left to an overall review of enforcement of judgments generally.

Section V. Training for Presiding Officers and Tribunal Staff

A. Presiding Officers

5.138 Currently, there is a total number of 12 POs, consisting of 1 acting principal presiding officer and 11 presiding officers. They are appointed from the rank of magistrate and have legal qualification and experience.

5.139 It has always been recognized that the Tribunal is distinctive in nature and the POs should possess particular interpersonal skills as well as other professional skills and knowledge, especially in relation to employment conditions and employment law. Careful consideration has been given to the selection and deployment of judicial officers to serve as POs in the Tribunal. Attention has also been devoted to the development and maintenance of a pool of POs with good understanding of the employment law and conditions and who are well versed in dealing with employment disputes. As a normal course, judicial officers posted to act as POs will remain with the Tribunal for a period of not less than 2 years.

5.140 The Working Party recommends that the present practice on the selection and posting of judicial officers to act as POs should be continued, and that due regard should continue to be given to developing and maintaining a pool of POs who are competent and experienced to deal with employment disputes in the Tribunal.

Recommendation 33 *: The present practice on the selection and posting of judicial officers to act as POs in the Tribunal that aims at developing and maintaining a pool of POs competent and experienced in dealing with employment disputes in the Tribunal should be continued.*

5.141 As already observed, the Tribunal has had to deal with an increasing caseload. Over the years, judicial officers posted to the Tribunal have worked conscientiously to ensure that the Tribunal has been effective in responding to the challenges it has faced.

5.142 However, the enhancement of professional standard is a continuous process. In this regard, training, both introductory training in core competencies for newly appointed POs and continuous training for serving POs to support the distinct approach of tribunals, is important. This has not been overlooked. The Working Party notes that the Judicial Studies Board had from time to time held training courses on specific areas of relevance to the POs. For example, in the past 2 years, tailor-made courses on general mediation had been organized and attended by 36 judges and judicial officers.

5.143 The Working Party recommends that the training provided to newly appointed and serving POs should cover interpersonal skills, development in the employment law and practices locally and in overseas jurisdictions and pro-active case management. The training can be delivered in various ways, such as seminars and conferences on local employment conditions and common trade practices. Experience sharing sessions among the POs and case study conferences involving High Court judges hearing appeals from the Tribunal will also be beneficial. Given the unique nature of the Tribunal, tailor-made programmes on conducting settlement discussions may better suit the needs of the POs.

Recommendation 34 *: Through the Judicial Studies Board, training on local employment conditions and common trade practices, trends and development in employment disputes resolution and employment law, pro-active case management and interpersonal skills should be provided to newly appointed and serving POs.*

B. Tribunal Officers

5.144 Currently, there are 39 TOs. TOs are usually experienced officers who have worked in the Tribunal for a long period of time, or

judicial clerks who have experience working in other courts, tribunals or registries in the Judiciary. Over the years, the TOs have been providing valuable assistance to the POs in the resolution of employment disputes.

5.145 Continuous development of professional competencies for all support staff at the Tribunal, including the TOs, is of the utmost importance. To this end, various training courses had been organized for them. For instance, 2 courses on investigation of cases were held in the past 2 years for all the 39 TOs. Mediation courses were also provided to the TOs with a total of 41 attendances. An experience sharing session on mediation training was held, with 5 TOs attending. 38 TOs also took part in experience sharing sessions with the POs. In addition to tailor-made professional training, courses on Emotional Quotient (EQ) and Adversity Quotient (AQ) were conducted for all TOs.

5.146 The Working Party recommends that these training initiatives be continued and strengthened. Further, in view of the proposed changes to the Tribunal process and procedure as envisaged under recommendation 29, training should be provided to equip the TOs to implement the changes.

5.147 In particular, the Working Party considers that the training and development for TOs could be enhanced in the following manner:

(a) Developing standard manuals and guidelines for conducting investigations by TOs;

(b) Holding tailor-made courses to familiarize TOs with the local employment conditions and trade practices that may assist them in conducting investigations; and

(c) Strengthening the supervision of and facilitating experience sharing among TOs in conducting investigation of cases.

5.148 Further, for those TOs who would be assigned to assist the POs in assisting parties to settle their disputes, suitable training on the skills in conducting settlement discussions should be arranged for them.

5.149 The Judiciary Administrator is responsible for providing and coordinating training to all support staff in the Judiciary Administration. A Strategic Training Plan, underpinned by annual training and development programmes, have been developed to this end. The Working Party recommends that the above suggestions regarding training needs for TOs be taken into account when the Judiciary Administrator formulates the annual training and development programmes.

Recommendation 35 *: The Judiciary Administrator should be asked to consider introducing training and development programmes for TOs with a view to enhancing their skills in relation to investigation and in conducting settlement discussions.*

C. Registry Staff

5.150 Currently, there are 48 support staff working in the Registry of the Tribunal, dealing with various administrative tasks. Most of the Registry staff are officers in the clerical grade or contract staff of the Judiciary.

5.151 The Registry staff are frontline staff with whom the parties first come into contact. They also handle a wide range of enquiries. As in the case of the POs and TOs, they have been coping well with the challenges despite the heavy workload and unsatisfactory physical environment of the premises.

5.152 The Registry staff have access to training opportunities open to clerical staff in general, such as customers service skills and on the handling of telephone and in person enquiries.

5.153 The Working Party considers it beneficial for more training opportunities to be made available to Registry staff. It is however recognized that, given the heavy workload of the Tribunal, it may not always be possible to release the staff in the Registry to attend training courses.

5.154 The Working Party recommends that the Judiciary Administrator should give consideration on the enhancement of the training for Registry staff, including organising tailor-made training programmes that take into account their specific needs.

Recommendation 36 *: The Judiciary Administrator should give consideration to developing tailor-made courses for Registry staff in the Tribunal that meet their specific needs.*

Section VI. The Premises and Location of the Tribunal

A. The Present Position

5.155 At present, the Tribunal comprises 12 courts and two registries. The main registry and ten courts are located at the 19th and 20th floor of the Pioneer Centre, a commercial building in Mongkok at an annual rental of $11 million exclusive of management fees. A subsidiary registry and two other courts are operating at the 9th floor of the Eastern Law Courts Building, Sai Wan Ho on Hong Kong Island, as the Pioneer Centre accommodation has reached its full capacity. The latter was established in early 2000 to cope with the increasing workload in the Tribunal.

B. Concerns

5.156 The main premises of the Labour Tribunal are situated in a commercial building. The Tribunal shares the common areas with shops, restaurants and offices located at the same building. This blurs the image of the Tribunal as a court and lowers its esteem among litigants. In fact, some litigants even thought that the Tribunal is part of the Labour Department. Further, the location of the Tribunal in such a building gives rise to security problems that would not arise if it were located in a building managed by the Judiciary.

5.157 Over 200 users visit the Tribunal daily for various purposes. Given the setting at the Pioneer Centre, POs and staff have to use the public lifts and passages, together with the litigants. This may at times cause embarrassment.

5.158 Courtrooms at the Pioneer Centre are small and of odd shapes. The acoustics are poor. In some courts, there are insufficient seats for parties let alone the public. From time to time, parties have to wait in the corridor outside the courts. In addition, there is insufficient space for interviews and discussions. There is also insufficient space for witnesses to wait outside the courtroom for their turn to give evidence. The common area is noisy and over-crowded.

5.159 The present arrangement of operating the Tribunal at two locations is also undesirable. Parties complain about confusion in filing of documents.[111] There is overlapping of administrative facilities.

5.160 In summary, the existing premises for the Tribunal in Mongkok and the present arrangement of operating the Tribunal at two locations are highly undesirable and unsatisfactory. They hinder the efficient and effective operation of the Tribunal.

C. Proposal

5.161 The Working Party is of the view that consideration should be given to obtaining satisfactory premises and ancillary facilities for the Tribunal. The following considerations are relevant:

(a) The Tribunal should be located in a separate court building;

(b) The Tribunal should operate in one location;

(c) The Tribunal needs to maintain 12 to 13 courts in view of the workload. A suitable number of additional court(s) should be reserved for expansion and contingency;

(d) Courtrooms need to be of different sizes. Apart from the basic facilities of an ordinary court, their design should enhance the dignity and solemnity of a court;

(e) An average courtroom should be of reasonable size and shape to accommodate 30 to 40 seats;

(f) There should be larger courtrooms to accommodate group claims which may involve up to a hundred litigants;

(g) Sufficient facilities must be provided to TOs for their work;

(h) There should be sufficient conference rooms for use by litigants;

(i) There should be spacious waiting area for the parties, including space for witnesses to wait for their turn to give evidence;

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111 See item (g) of Short term measures to improve operation of the Labour Tribunal. This issue has been resolved as per the measure at (g).

(j) There should be an efficient lift system to cater for the large number of litigants and the public visiting the Tribunal each day;

(k) Security measures have to be sufficient to maintain safety and order in the Tribunal; and

(l) POs, TOs and staff should have separate access to their chambers and offices, avoiding mingling with litigants and the public.

5.162 The Judiciary is currently considering the possibility of relocation of the Tribunal to the old South Kowloon Magistrates Court Building at Gascoigne Road. According to a preliminary feasibility study, the requirements as set out in the preceding paragraph can be broadly met if the Tribunal is to be relocated to that Building. That Building is also conveniently located, so that users from Hong Kong, Kowloon and the New Territories will have easy access to it by means of public transport.

5.163 To relocate to the old South Kowloon Magistrates Court Building, a significant capital sum will be needed for its conversion and refurbishment. Although the initial capital sum will have to be incurred, the substantial annual rental of $11 million will be saved. Accordingly, there is no doubt that with relocation, substantial savings for the public purse will be achieved.

Recommendation 37 *: The Labour Tribunal should be relocated to a separate and purpose-built premises in a convenient location. The old South Kowloon Magistrates Court Building is a possible and suitable location that should be explored.*

RECOMMENDATIONS

Section I. The Jurisdiction of the Tribunal

Recommendation 1

The Schedule to the Labour Tribunal Ordinance should be amended to put it beyond doubt that the Labour Tribunal has jurisdiction to deal with both liquidated and unliquidated claims.

Recommendation 2

The possibility of amending the Labour Tribunal Ordinance to extend the jurisdiction of the Labour Tribunal to cover claims brought by the Mandatory Provident Fund Authority under section 18(3) of the Mandatory Provident Fund Schemes Ordinance, Cap. 485 should be explored with all interested parties including the MPFA and the Labour Department.

Recommendation 3

The possibility of amending the Labour Tribunal Ordinance and other relevant legislation to enable the Labour Tribunal to include as part of an award, the employee's contribution under the MPFSO, and to order the amount to be paid out of the Tribunal to the Mandatory Provident Fund Authority as if the Authority is a party to the claim before the Tribunal should be explored with all interested parties including the MPFA and the Labour Department.

Section II. The Tribunal Process

Recommendation 4

Attempts at settlement should continue to be undertaken in the Tribunal: Where the parties wish, the Tribunal should assist the parties to resolve their disputes by settlement.

Recommendation 5

After a claim is filed in the Tribunal, except in those cases where the parties had not previously sought the assistance of the LRD, there should only be one attempt by the Tribunal at settlement at the call-over hearing.

Recommendation 6

Where the LRD has attempted conciliation before the claim is brought in the Tribunal, the TO dealing with inquiry of claims will not attempt settlement with the parties.

Recommendation 7

Where the LRD has not attempted conciliation before the claim is brought in the Tribunal, the Settlement TO will assist the parties to attempt settlement if the parties wish to do so before the call-over hearing.

Recommendation 8

At the call-over hearing, the PO would explain the option of settlement and where the parties wish, assist them to reach settlement or in appropriate cases, refer them to the Settlement TO for assistance.

Recommendation 9

A TO who is involved in the inquiry of the claim should not be involved in assisting the PO in settling a claim.

Recommendation 10

A PO who has attempted settlement at the call-over hearing of a claim should not preside over the trial of it.

Recommendation 11

The appointment system should be maintained.

Recommendation 12

The Tribunal should keep under constant review the target waiting time for the appointment system to see if any revision should be made having regard to all relevant factors.

Recommendation 13

Measures enabling detailed background information to be supplied by the parties to the LRD and to be forwarded to the Tribunal should be implemented. The New Form and the referral arrangement under discussion between the Labour Department and the Judiciary should be put in place as soon as practicable.

Recommendation 14

Pamphlets, leaflets or videos should be produced to give the parties clear guidance on the practice and procedure in the Tribunal, what they are expected to do to prepare for their case and for hearings and what they should know in attending before the PO, in enforcing an award and in lodging an appeal.

Recommendation 15

Section 13(1) of the Labour Tribunal Ordinance should be amended to provide that a claim shall be fixed for hearing not earlier than 20 days and not later than 45 days from the filing of the claim, unless the parties agree or the Presiding Officer directs otherwise.

Recommendation 16

Call-over cases should usually be listed separately in the morning and afternoon sessions. This arrangement should be reviewed on a regular basis.

Recommendation 17

At the conclusion of the interviews with the Tribunal Officer and at the call-over hearing before the Presiding Officer, a list should be given to the parties setting out:

(a) The documents and information that they are required to provide to the Tribunal and the other parties;

(b) The time within which they should provide the documents and information; and

(c) A warning about the consequences if a party does not comply with the direction for exchange of documents and information.

Recommendation 18

The Labour Tribunal Ordinance and/or the Labour Tribunal (General) Rules should be amended to enable the Presiding Officer to impose sanctions in appropriate cases for failure to comply with directions.

Recommendation 19

The TO should, at the separate interviews with the parties, direct the parties to provide the Tribunal and serve on the other parties copies of all the relevant documents, his own statement and witness statements either before or the latest at the call-over hearing.

Recommendation 20

If the TO's direction on disclosure of documents and statements has not been complied with or if further disclosure is called for, the PO at the call-over hearing should give direction for such disclosure.

Recommendation 21

The parties should be warned of the consequences of failure to make full disclosure as directed.

Recommendation 22

The Labour Tribunal Ordinance or the Labour Tribunal (General Rules) should be amended to provide that a party is under a duty not to use the documents and information disclosed by another party in the claim, other than for the purpose of the Tribunal proceedings.

Recommendation 23

Presiding Officers should exercise more pro-active case management in managing the hearings and the trial, and should move towards greater emphasis on due observance of directions and time limits.

Recommendation 24

In general, the parties and the witnesses should be encouraged to adopt their witness statements as evidence at the trial so that they can be taken as read.

Recommendation 25

Pre-trial hearings should be reduced. It should be dispensed with in simple claims. For claims that are not simple, one pre-trial hearing should be the norm. Further pre-trial hearings should only be conducted in exceptional cases involving large number of parties and documents or complex issues.

Recommendation 26

If a trial overruns and has to be part heard, the Tribunal should endeavour to list the resumed hearing on an early date.

Recommendation 27

The power of the Presiding Officer to order security upon adjournment should be extended by legislation to cases where the Presiding Officer is satisfied that a party is guilty of delaying the process.

Recommendation 28

The power of the PO to order payment into the Tribunal or to give security upon application for review should be extended by legislation to cases where the PO is satisfied that the application is devoid of merit and/or is made with a view to delaying the process.

Recommendation 29

The Judiciary Administration should consider how the implementation of the package of Recommendations 4 to 28 above will benefit from the application of information technology and be supported by revised workflow and work practices in the Tribunal Registry.

Section III. Costs on Appeal

Recommendation 30

The proposal to cap or limit the costs on appeal to the same kinds of costs as are recoverable in the Tribunal itself should not be introduced.

Recommendation 31

The proposal of not awarding costs against an unsuccessful party in a Tribunal appeal, except where that party has acted vexatiously, abusively, disruptively or unreasonably, or that the bringing or conducting of the appeal have been misconceived, should not be introduced.

Section IV. Enforcement of Awards

Recommendation 32

Rule 12 of the Labour Tribunal (General) Rules should be repealed so that an award of the Labour Tribunal may be registered and enforced within 6 years.

Section V. Training for Presiding Officers and Tribunal Staff

Recommendation 33

The present practice on the selection and posting of judicial officers to act as POs in the Tribunal that aims at developing and maintaining a pool of POs competent and experienced in dealing with employment disputes in the Tribunal should be continued.

Recommendation 34

Through the Judicial Studies Board, training on local employment conditions and common trade practices, trends and development in employment disputes resolution and employment law, pro-active case management and interpersonal skills should be provided to newly appointed and serving POs.

Recommendation 35

The Judiciary Administrator should be asked to consider introducing training and development programmes for TOs with a view to enhancing their skills in relation to investigation and in conducting settlement discussions.

Recommendation 36

The Judiciary Administrator should give consideration to developing tailor-made courses for Registry staff in the Tribunal that meet their specific needs.

Section VI. The Premises and Location of the Tribunal

Recommendation 37

The Labour Tribunal should be relocated to a separate and purpose-built premises in a convenient location. The old South Kowloon Magistrates Court Building is a possible and suitable location that should be explored.

Appendix I

Membership of the Working Party on the Review of the Labour Tribunal

Chairman :	The Honourable Madam Justice Chu
Members :	The Honourable Mr Justice Lam
	Mr Lung Kim-wan, Deputy Registrar, High Court
	HH Judge Au Yeung
	Mr Patrick Li, Chief Magistrate
	Mr Josiah Lam, Magistrate
In Attendance :	Mr Wilfred Tsui, Judiciary Administrator
	Mr Augustine Cheng, Deputy Judiciary Administrator (Operations)
	Ms Frieda Leung, Chief Judiciary Executive (Judicial Support)
	Ms Heidi Ma, Assistant Registrar, Labour Tribunal

Appendix II

Short term measures to improve the operation of the Labour Tribunal

(a) Listing

Three call-over courts are conducting a three-month experiment in listing cases separately in the morning and in the afternoon to examine the impact on the time spent by parties while waiting for their cases to be heard. If the results are favourable, the question of extension of such arrangements to other courts will be examined.

(b) Settlement of cases

All Presiding Officers have been reminded to exercise care, particularly during call-over and mention hearings, to avoid any perception by the parties that they are being pressurized towards settlement. Where the parties wish, cases could be referred to the Tribunal Officers to deal with possible settlement.

(c) Mention hearings

A standard direction for filing of documents will be designed and used by Tribunal Officers and Presiding Officers to ensure parties submit all relevant documents on time prior to the hearings. A clear warning would be given to disputing parties that unless there are good reasons the hearings may proceed despite non-compliance. The number of mention hearings will thus be able to be minimized, aiming at only one mention hearing for each case.

(d) Trials

All Presiding Officers have been reminded to be more vigilant in controlling the length of trials and to minimize the number of part-heard cases.

(e) Witnesses

All Presiding Officers will remind witnesses to leave and wait outside the court for their turn to give evidence. This has been a standard practice for all trial courts.

(f) Standardisation of Forms

A dialogue has been established with the Labour Department to examine whether the forms used in filing claims in the Labour Department and the Labour Tribunal could be standardised.

(g) Separate Locations

While structurally it is not possible to merge the Labour Tribunal courts at the Pioneer Centre and the Eastern Law Courts Building, a reminder has been sent to registry staff on the established practice that parties attending courts in one of the locations can file their documents at the registry at either location.

Appendix III

List of General Reference Materials

Books

1. Brown & Marriott (1999), *ADR Principles and Practice*, (2nd edition) Sweet & Maxwell, Chapters 2 & 11.

2. England, J. & Rear, J. (1981), *Industrial Relations and Law in Hong Kong*, Oxford University Press, Chapters 12 & 13.

3. Ribeiro, R.A. (1978), *The Law and Practice of the Hong Kong Labour Tribunal: a socio-legal study on the problem of legal access*, Centre of Asian Studies, University of Hong Kong.

Reports and Papers

4. Report No. 34 of the Director of Audit, March 2000.

5. Report of the Public Accounts Committee on Report No. 34 of the Director of Audit, June 2000.

6. *Tribunals for Users - One System, One Service*, Report of the Review of Tribunals by Sir Andrew Leggatt, March 2001.
www.tribunals-review.org.uk

7. *Green Paper on alternative dispute resolution in civil and commercial law*, Commission of the European Communities, 19 April 2002.

8. *Moving forward: the Report of the Employment Tribunal System Taskforce*, July 2002.
www.dti.gov.uk

9. Papers to the Joint Meetings of the LegCo AJLS and Manpower Panels on 6 May and 19 June 2003 by:

(a) Cathay Pacific Airways Flight Attendants Union
(b) Federation of Hong Kong Industries
(c) Hong Kong Confederation of Trade Unions
(d) Hong Kong & Kowloon Trades Union Council
(e) The Federation of Hong Kong & Kowloon Labour Unions
(f) The Hong Kong Federation of Trade Unions
(g) Neighbourhood and Worker's Service Centre

10. *The Operation of Labour Tribunals and Other Mechanisms for Resolving Labour Disputes in Hong Kong and Selected Places*, Report of the Research and Library Services Division of Legislative Council Secretariat, 22 April 2004.

Appendix IV

List of Key Reference Materials on Employment Dispute Resolution in Other Jurisdictions

Australia

1. http://www.airc.gov.au

2. http://www.fedcourt.gov.au

3. http://www.austlii.org/au/legis/nsw/consol_act/

4. Pamphlets provided by the AIRC "Termination of Employment – General Information" and "Termination of Employment – Attending and Preparing for Hearings"

New Zealand

5. http://www.legislation.co.nz/browse_vw.asp?content-set=pal_statutes

Canada

6. http://www.gov.on.ca/lab/olrb/eng/homeeng.htm

England

7. www.acas.org.uk

8. www.employmenttribunals.gov.uk

9. www.employmentappeals.gov.uk

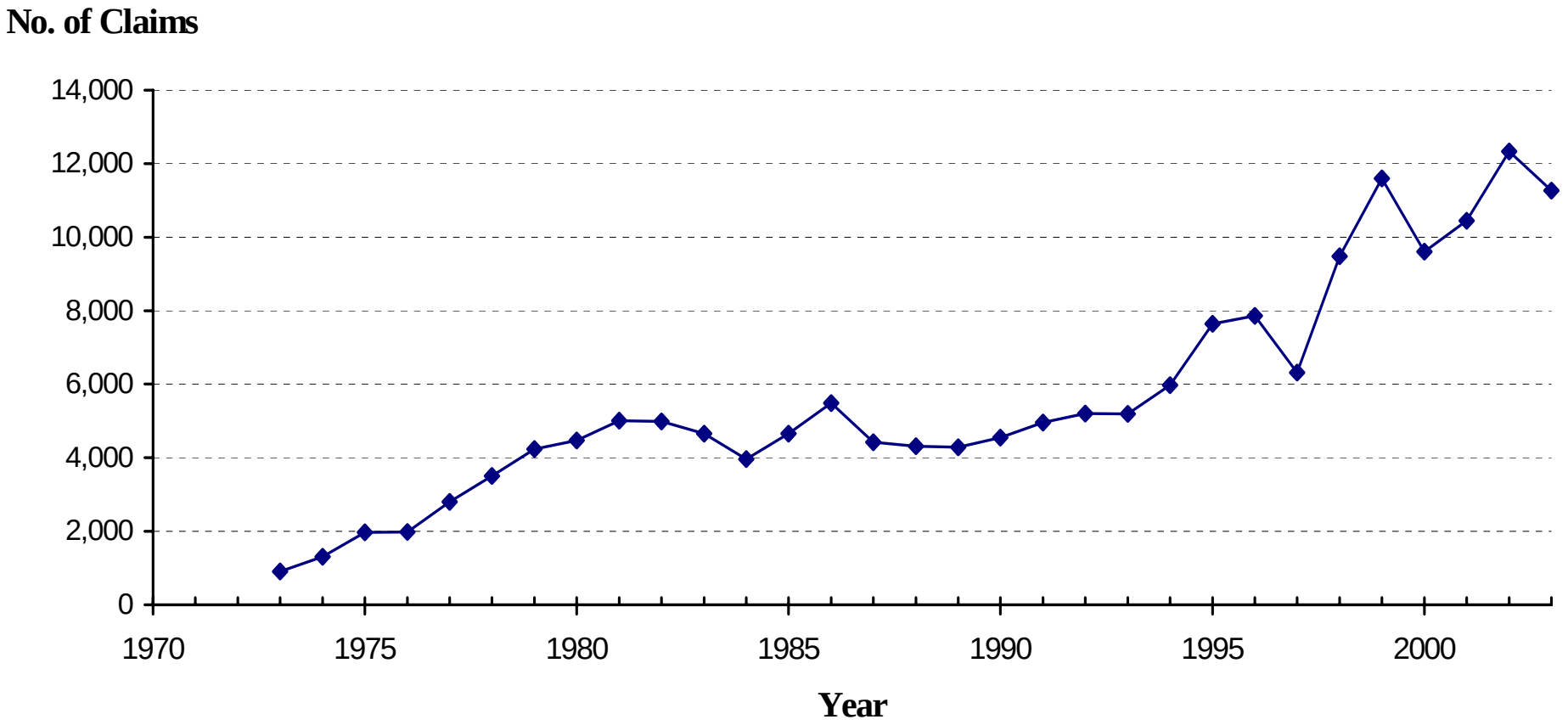
10. Halsbury's Laws of England (4th edition 2000 Reissue) Vol. 16

11. Booklets prepared by the Employment Tribunals and Employment Appeal Tribunal on their practice and procedure

12. Pamphlets prepared by the Advisory, Conciliation and Arbitration Service (ACAS)

Appendix V(a)

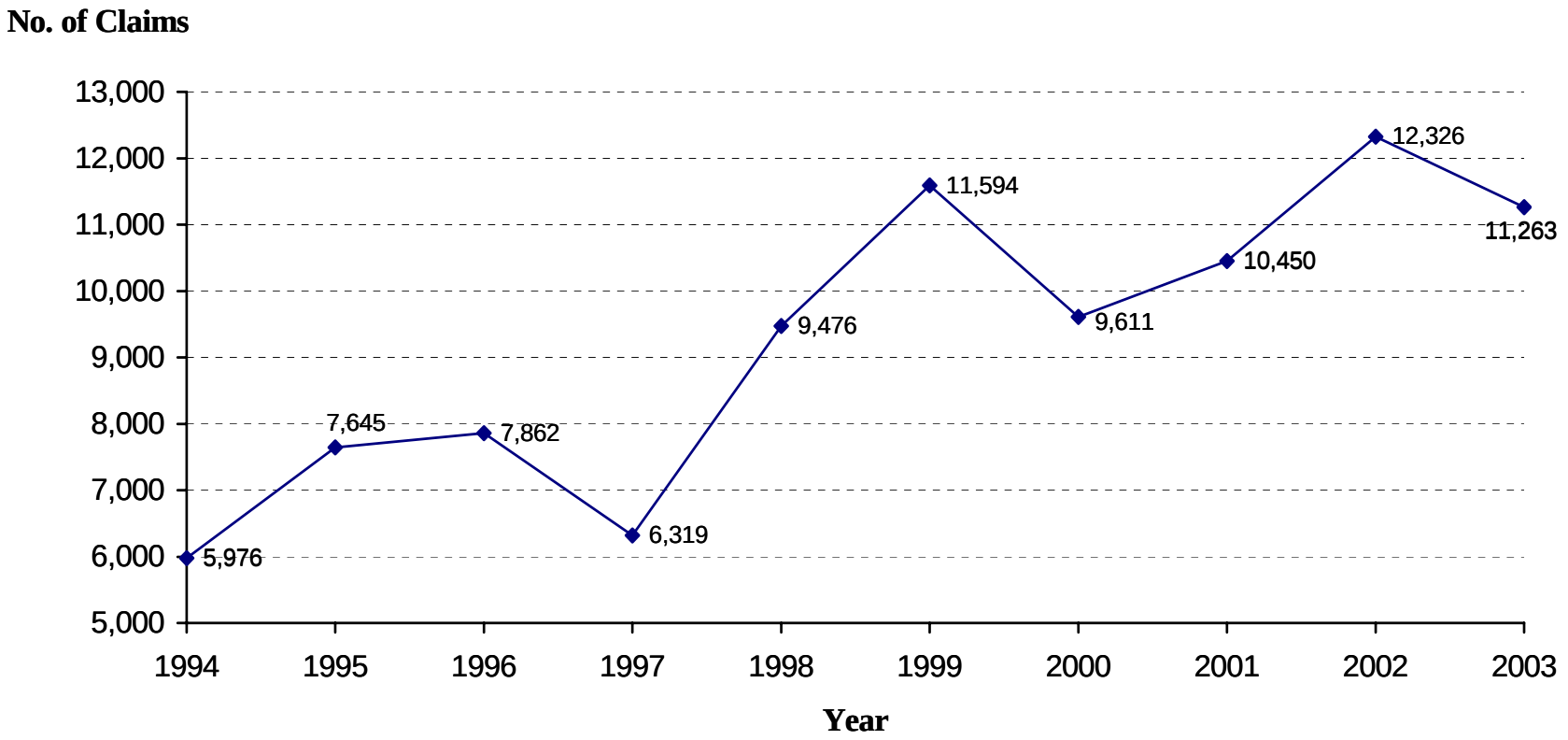
Caseload (1973-2003)



Labour Tribunal Statistics

Appendix V(b)

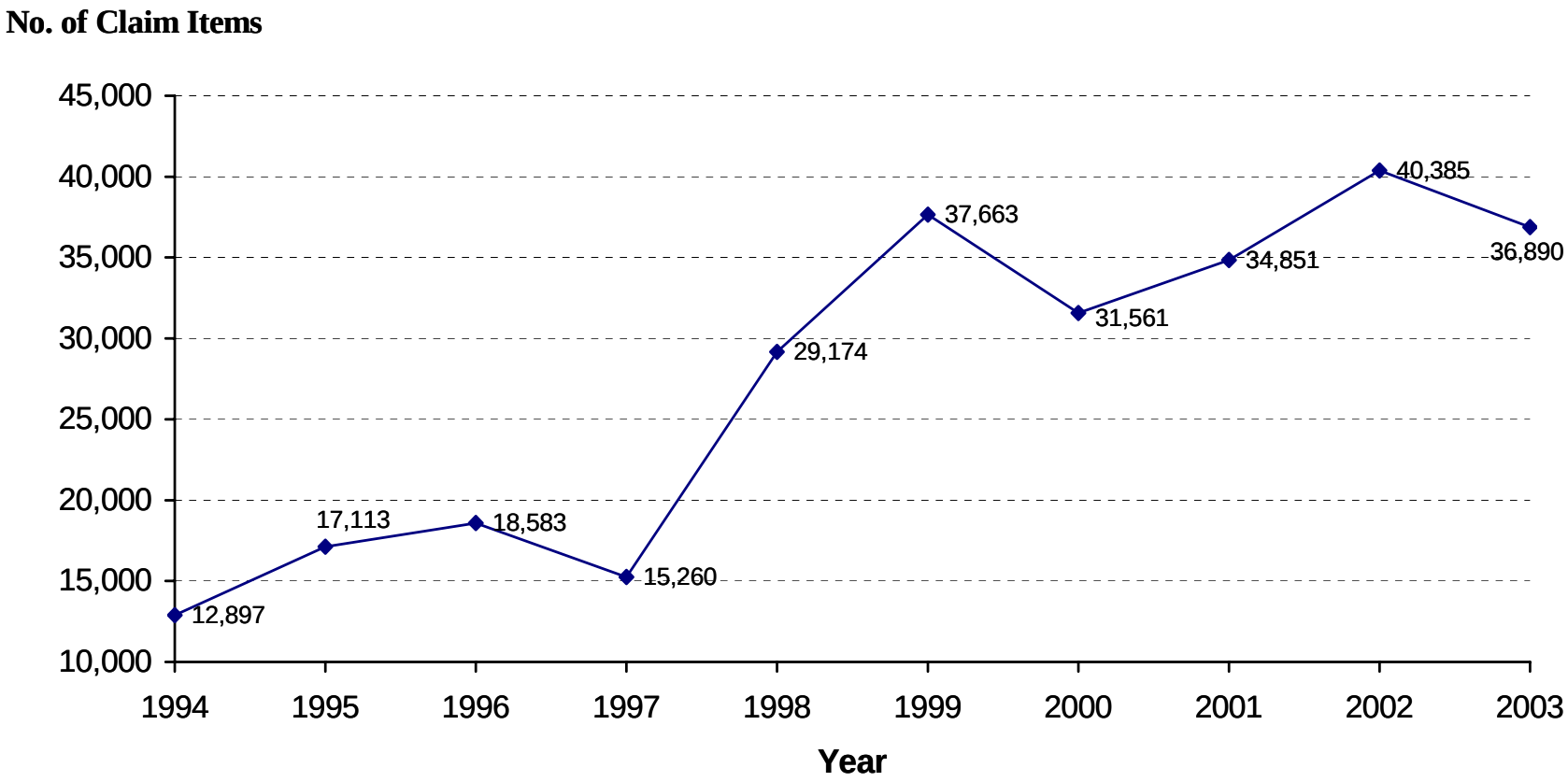
No. of Claims Filed (1994-2003)



Labour Tribunal Statistics

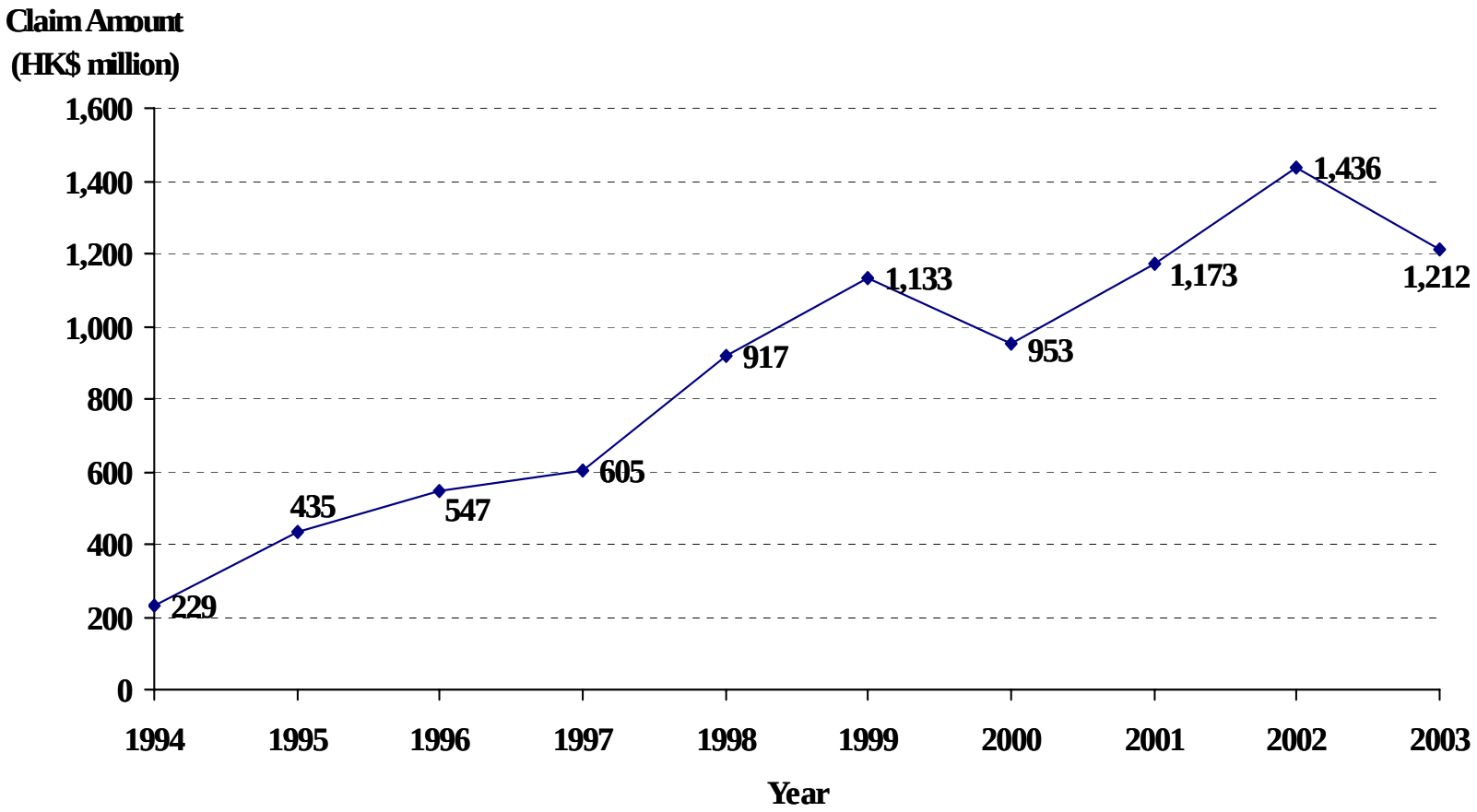
Appendix V(c)

No. of Claim Items (1994-2003)



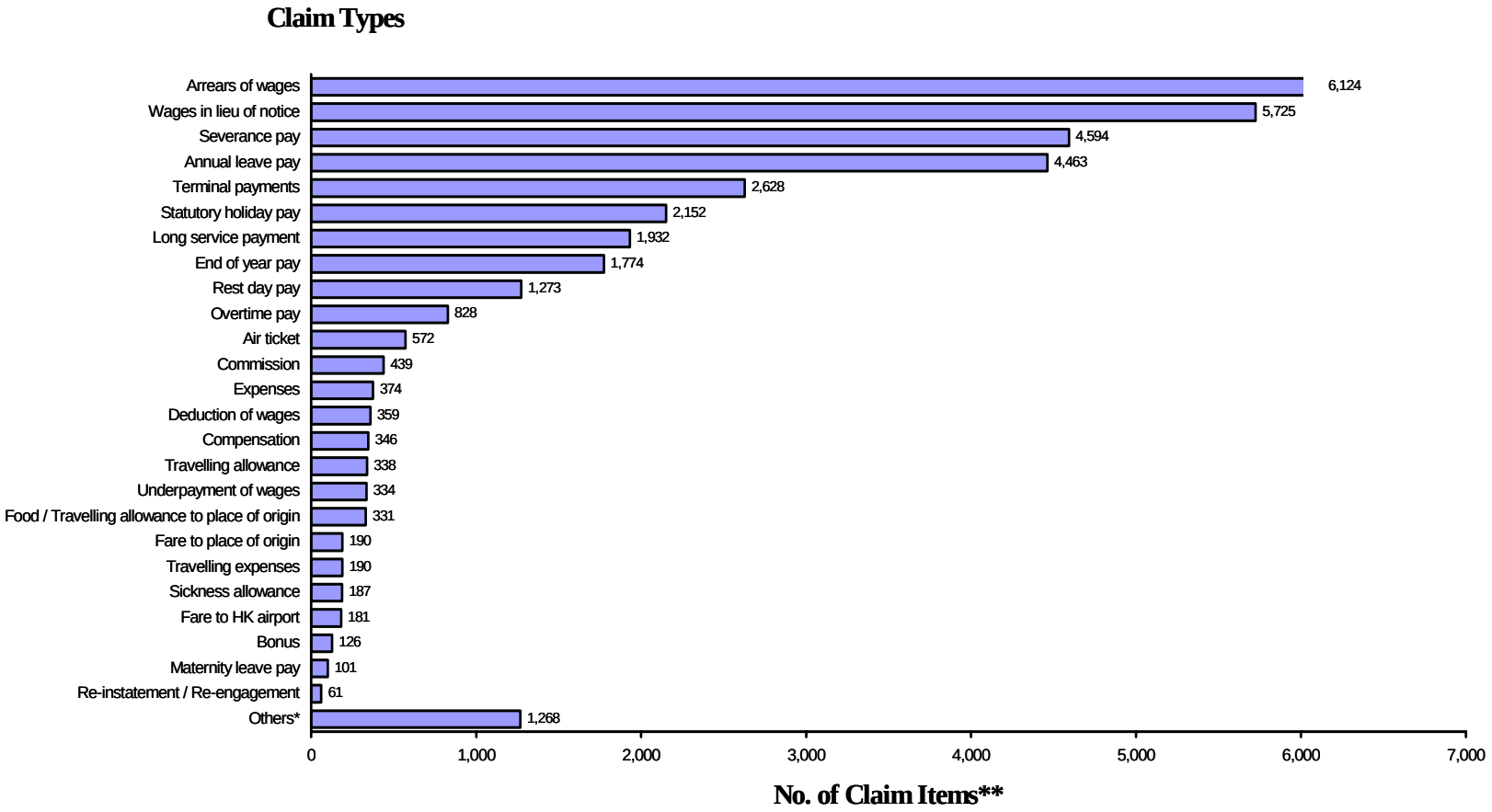
Labour Tribunal Statistics

Claim Amount (1994-2003)



Labour Tribunal Statistics

Breakdown of Claim Types (2003)



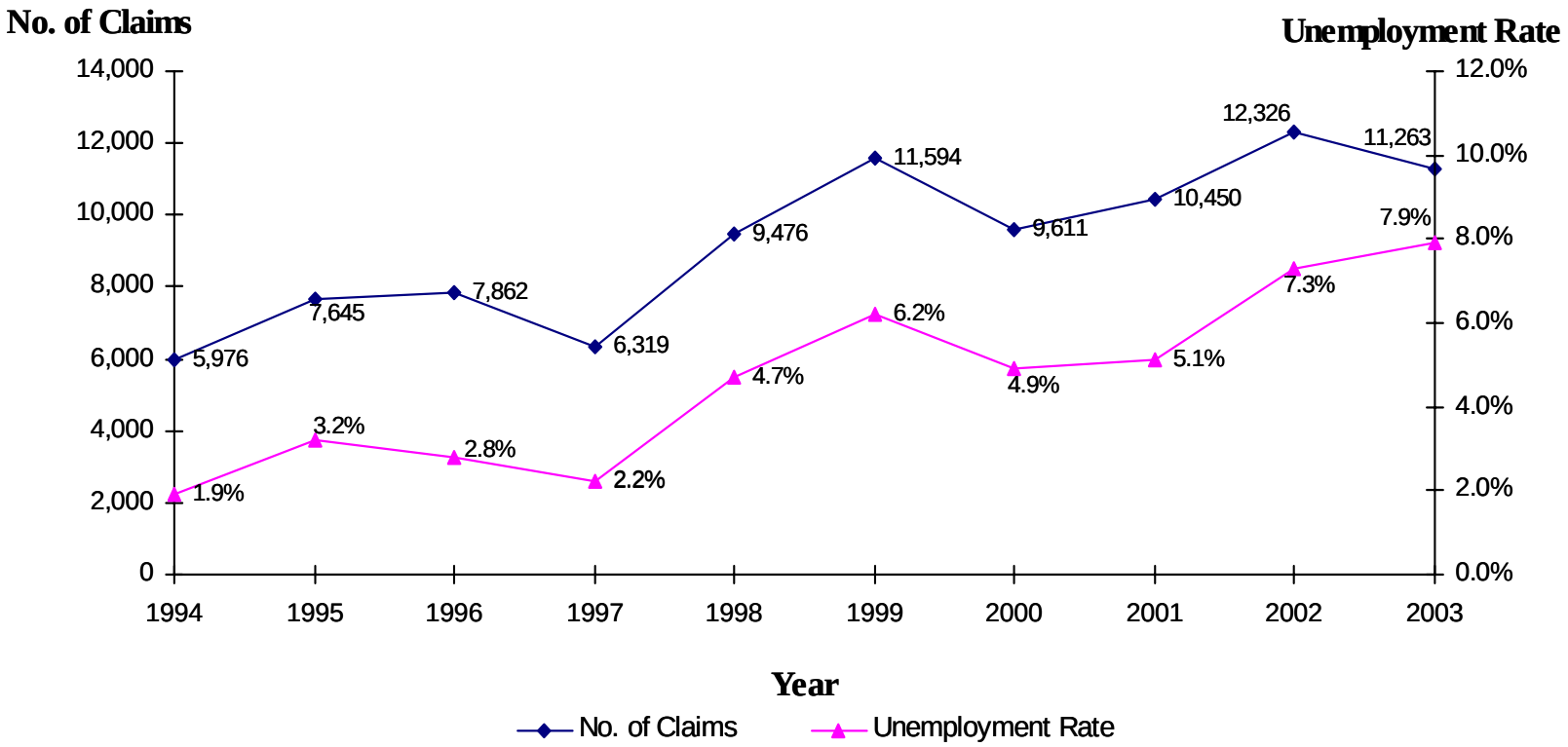
* Others include claims for medical expenses, airport tax, uniform deposit, telephone fee, etc.

** The total number of claim items was 36,890.

Labour Tribunal Statistics

Appendix V(f)

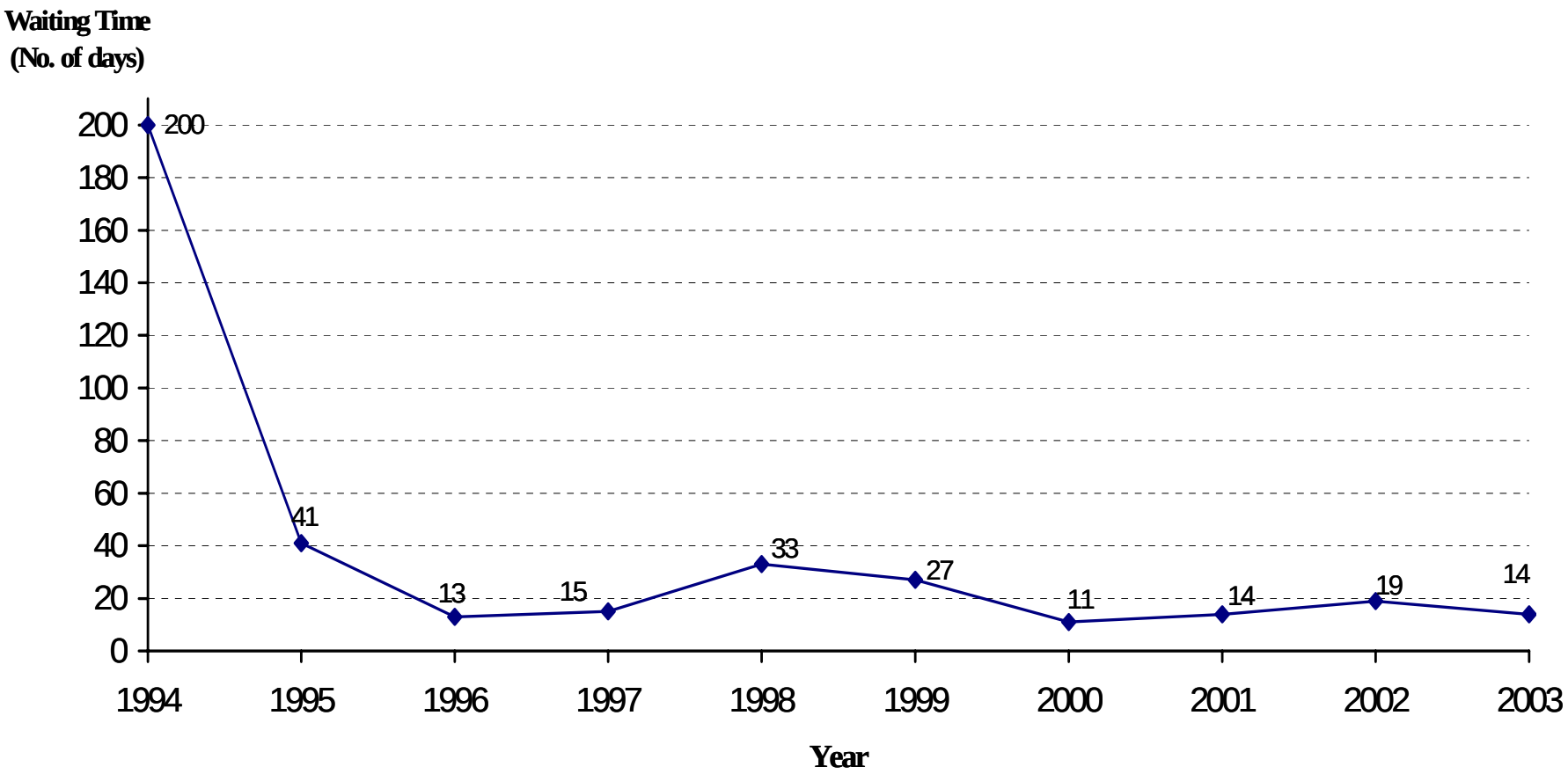
Caseload and Unemployment Rate (1994-2003)



Labour Tribunal Statistics and Labour Department Figures

Appendix V(g)

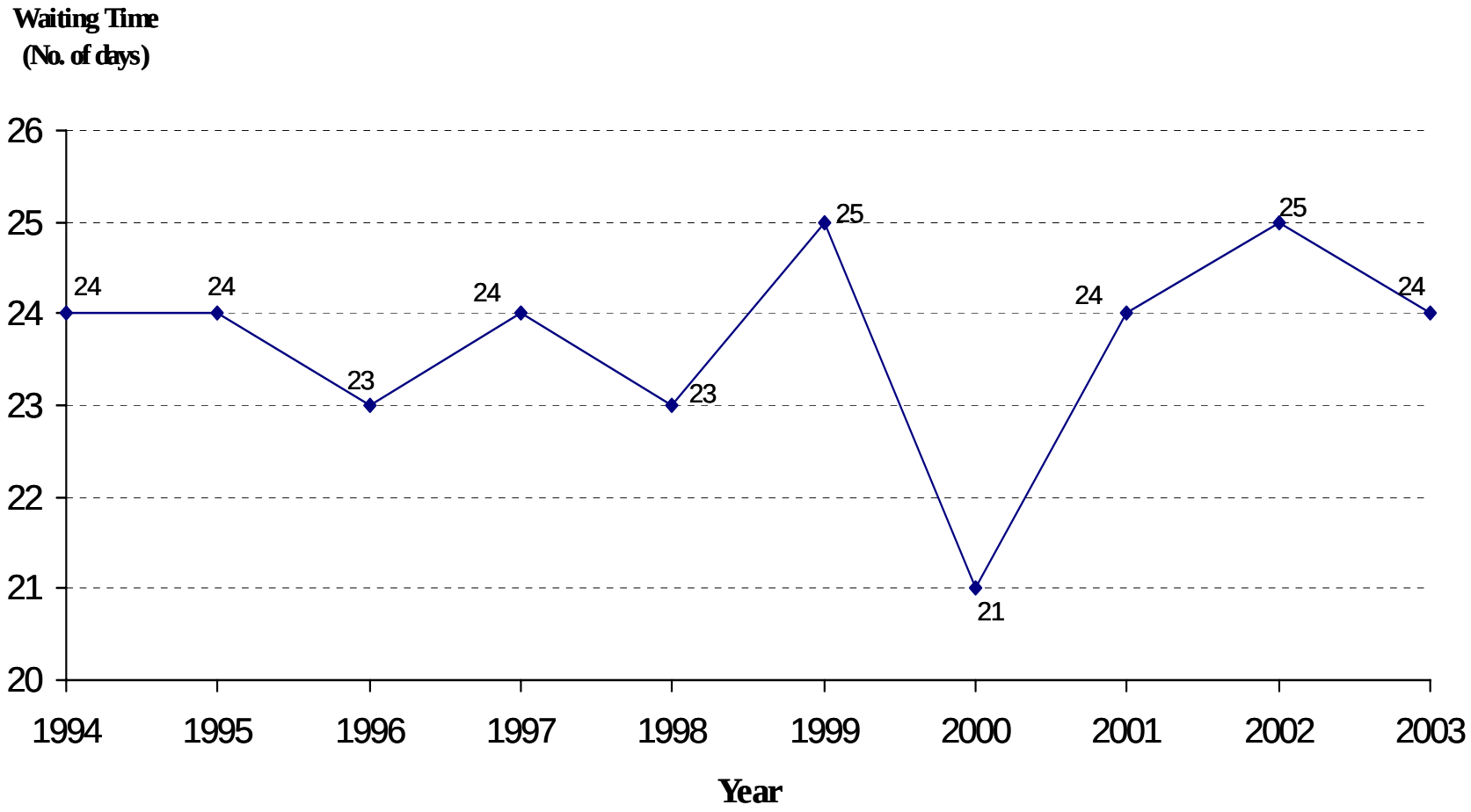
Waiting Time from Appointment to Filing (1994-2003)



Labour Tribunal Statistics

Appendix V(h)

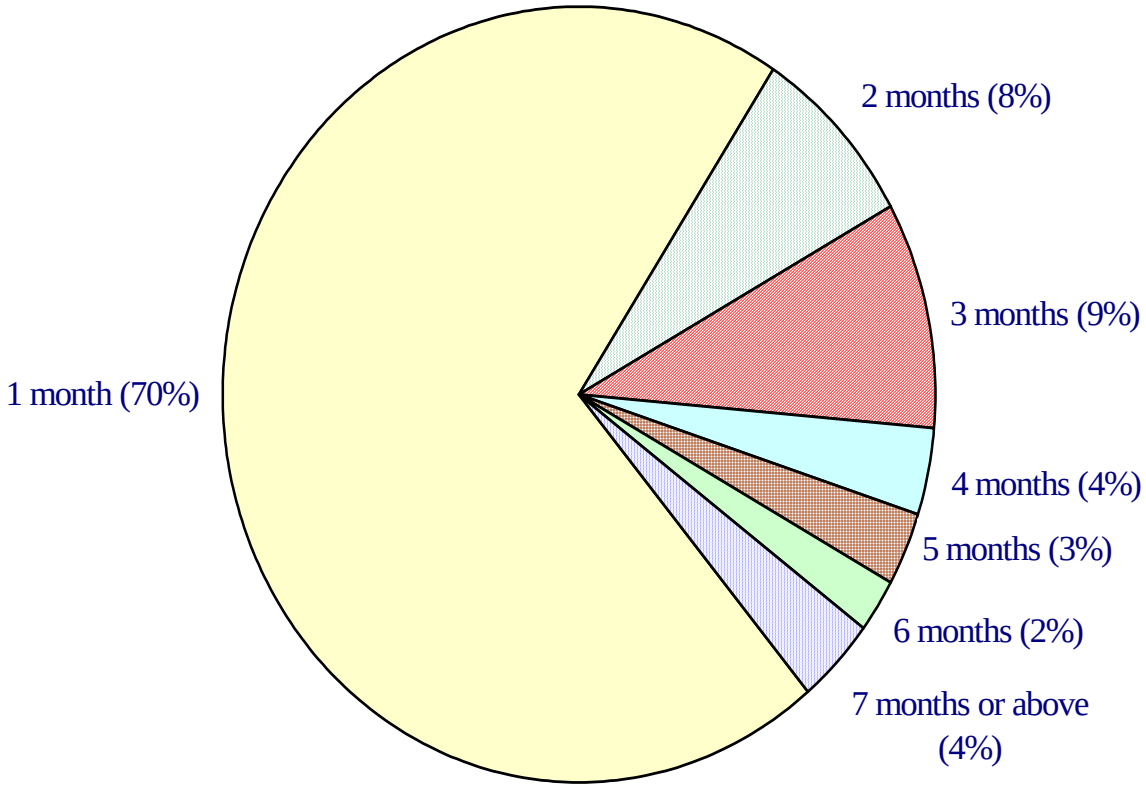
Waiting Time from Filing to Call-over Hearings (1994-2003)



Labour Tribunal Statistics

Appendix V(i)

Time Taken to Conclude a Claim from Date of Filing (2003)



Note: The percentage in brackets represents the number of claims concluded in 2003

Labour Tribunal Statistics

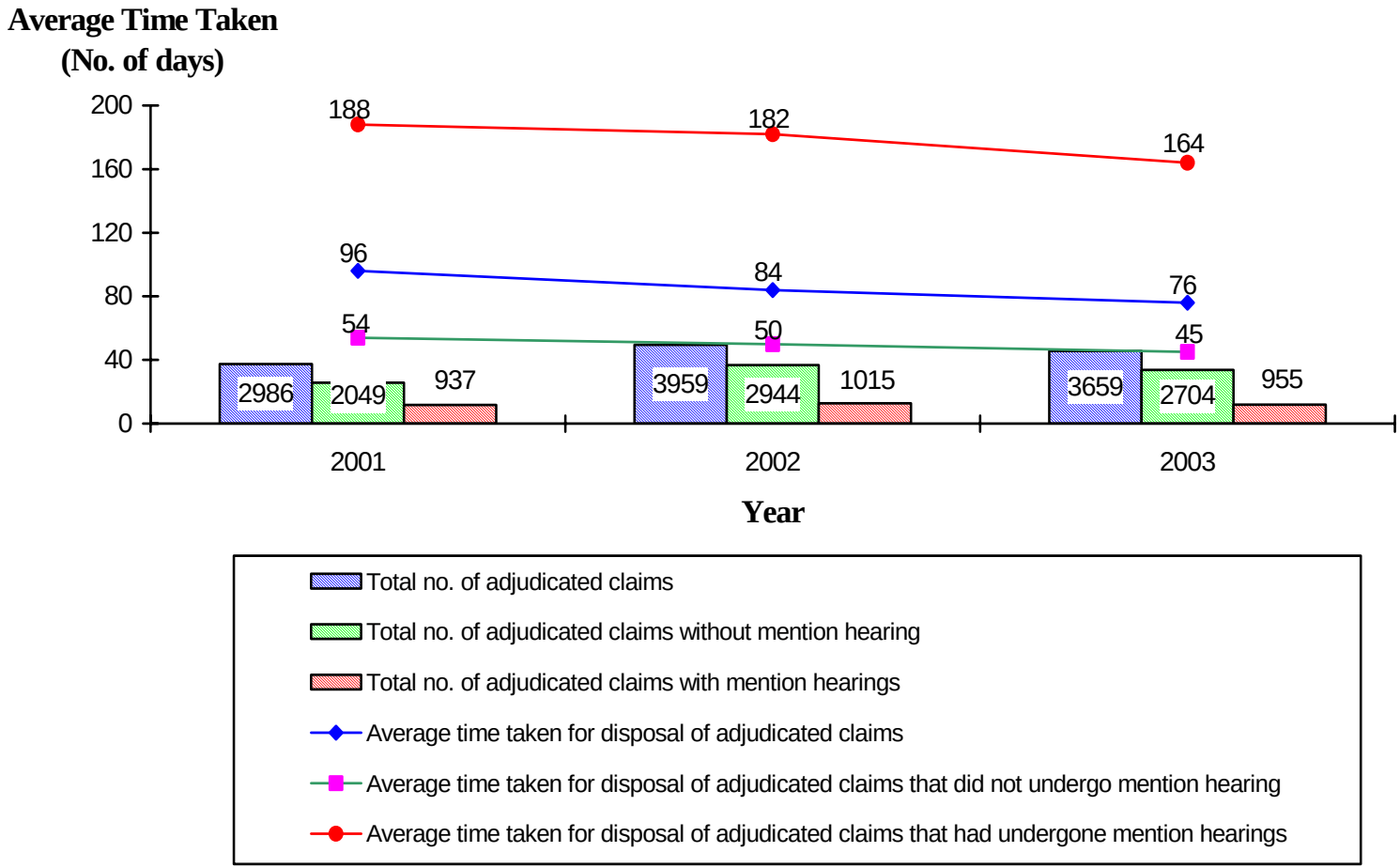
Appendix V(j)

No. of Claims Disposed of (2001-2003)

	2001		2002		2003	
Disposal Category	**No. of claims**		**No. of claims**		**No. of claims**	
(1) Settled	**4836**	**(52%)**	**6556**	**(53%)**	**6307**	**(55%)**
(2) Withdrawn	**1353**	**(14.5%)**	**1661**	**(14%)**	**1340**	**(12%)**
(3) Adjudicated claims	**2986**	**(32%)**	**3959**	**(32%)**	**3659**	**(32%)**
(i) Claims heard with all parties present	***1475***		***1710***		***1617***	
(ii) Claims heard & awarded (ex-parte)	***1294***		***1916***		***1746***	
(iii) Claims dismissed for want of prosecution [Claimant(s) absent for hearing]	***217***		***333***		***296***	
(4) Transferred to other courts	**141**	**(1.5%)**	**104**	**(1%)**	**79**	**(1%)**
Total no. of claims disposed of:	**9316**	**(100%)**	**12280**	**(100%)**	**11385**	**(100%)**

Labour Tribunal Statistics

Average Time Taken for Disposal of Adjudicated Claims* with and without Mention Hearings from Filing to Conclusion (2001-2003)



* Adjudicated claims exclude claims that were settled, withdrawn or transferred

Labour Tribunal Statistics