

**Recommendations for the new Employment Claims Tribunal**

**Introduction**

HOME welcomes the public call for feedback issued by the Ministry of Manpower (MOM) on the pending Employment Claims Tribunal (ECT). The current Labour Court system is highly disadvantageous to migrant workers, who face near-insurmountable evidentiary and financial barriers to obtaining redress for their salary claims.

HOME submits the following recommendations for a more robust ECT that will assist workers to overcome some of those barriers and grant them greater access to justice.

**Recommendation 1: Rules of procedure, in particular regarding evidence and recording of tribunal proceedings, should be improved, formalised and publicized**

Rules of procedure governing the current Labour Court are opaque or too general. To promote transparency and the rule of law, the rules of procedure should be reviewed and publicized, especially with regard to evidence and recording.

The Employment Act provides the Labour Court Commissioner with excessive discretion with regard to evidence. Part XV (119) (2) of the Employment Act states that the Labour Court Commissioner shall not be bound to act in a formal manner or in accordance with the [Evidence Act (Cap. 97)](http://statutes.agc.gov.sg/aol/search/display/view.w3p;page=0;query=DocId%3A%2291ece5fd-ffce-4839-8cd4-5480d4e6d892%22%20Status%3Apublished%20Depth%3A0%20%20TransactionTime%3A20160328000000;rec=0) but may inform himself on any matters in such manner as he thinks just; and shall act according to equity, good conscience and the merits of the case without regard to technicalities. This has resulted in arbitrary decisions which are often not justified when evidence is being considered. HOME has received numerous reports of presiding commissioners refusing to accept material evidence, such as video recordings made by workers of employers confessing to non-payment of salary, or of employers admitting to unauthorised salary deductions. On occasion when such evidence is accepted, it is only because of appeals from HOME. HOME has also had to provide its own video viewing equipment to the Labour Court so that vital evidence could be reviewed.

HOME recognizes that applying the full extent of the Evidence Act may defeat the purpose of the ECT as an expeditious tribunal; however, a transparent and more rigorous process which outlines the types of evidence it will accept would significantly promote transparency without compromising on efficiency. Migrant workers already face difficulties in obtaining evidence for their claims, due to the informal or oral nature of agreements in their industries. HOME therefore recommends that the current standards of evidence be reviewed and made public to ensure a more transparent and accountable tribunal process.

The process by which the Labour Court records court proceedings also remains unclear. HOME has witnessed Labour Court Commissioners - in their capacities as lone presiding officials, apart from translators - making hand-written notes during proceedings. We recommend that a court transcriber be assigned for all hearings and this be formalised in the rules to improve the accountability and transparency of the tribunal’s procedures.

**Recommendation 2: Extend the Temporary Job Scheme (TJS) or Change of Employer (COE) to migrant workers undergoing salary disputes**

Current immigration rules prevent migrant workers from seeking new employment while undergoing a salary dispute if employers cancel their work permits, which they often do in retaliation. This acts as a strong disincentive to migrant workers to pursue their claims, as they must wait out the dispute resolution process in Singapore without a job. This is very expensive and many workers go into debt.

Employers understand that migrant workers are unlikely to have the resources to pursue any salary claims to completion, and routinely abuse this imbalance in bargaining power. Even though they are required by law to provide for their meals and accommodation during the period of the claim, they often fail to do so. Law enforcement in this area is also weak.

HOME regularly encounters employers who make unauthorised deductions of their workers’ salary, cancel work permits in retaliation for a salary claim, and offer tiny settlements instead of paying in full what is due to the complainants at Labour Court mediation sessions, even in cases where the claimants have strong evidence in support of their claims.

Instead of limiting employment under the Temporary Job Scheme (TJS) to prosecution witnesses only, HOME recommends that TJS should be made available to all claimants as long as a *prima facie* case can be established. Alternatively, claimants under the same conditions should be allowed to access the Change of Employer (COE) scheme.

**Recommendation 3: Make the ECT Notes of Evidence and Grounds of Decision affordable**

At present, claimants have to pay $5 per page for the notes of evidence and grounds of decision of the Commissioner. HOME has documented a case where the claimant was required to pay almost $1000 to obtain them. Such costs are prohibitive, especially for low wage migrant workers.

The grounds of ECT decisions, in brief or otherwise, should be available on application at an affordable rate. This will permit claimants to be better appraised of the factors that were considered by the tribunal, enhancing their ability to act in accordance with the law in the future, and assist them to decide on any further actions they may wish to take.

**Recommendation 5: Extend one-year time limit to file claims with ECT**

As migrant workers face unique challenges in obtaining official information, they often remain unaware of their rights and responsibilities. HOME has encountered many cases of workers who only realise that their salary had been subjected to unauthorised deductions long after the one-year time bar has expired.

While HOME understands that the ECT is designed to resolve cases quickly, a one-year time bar permits errant employers to get away with excessive salary arrears, especially if the deductions were made early into their employees’ service. We recommend the time bar to be extended to 2 years as this is the usual contracted period of employment for migrant workers.

**Recommendation 6: Open tribunal**

In the interest of transparency and accountability, the ECT should be open to the public unless it is determined that a private hearing would be in the interests of justice. We further recommend that claimants should be allowed to bring in non-legal representatives to assist them.

Migrant workers face significant informational asymmetry in cases of salary disputes. Compared to respondent employers, they are not in possession of time cards and salary records, do not have the same access to legal advice, have to receive important information from the tribunal through a translator, and are ill-informed regarding their rights and responsibilities. This can create an environment that may be hostile or confusing to the worker. Permitting migrant workers to make applications to be accompanied by non-legal representatives during mediation and tribunal proceedings would allow them be better informed regarding the court process and the options available to them.

**Recommendation 7: Stipulate the qualification and competence of the Commissioner to preside over hearing**

There is currently no transparency regarding the competence of the commissioner who presides over the Labour Court. We recommend that the ECT publishes the minimum requirements of its presiding officers with regard to educational, legal and work experience in order to improve transparency and inspire public confidence.

**Recommendation 8: Make enforcement of court orders accessible and affordable**

Our experience shows that many migrant workers face difficulties enforcing orders awarded in their favour, as they are required to pay hundreds of dollars up front in administrative fees.

HOME has also observed that some employers declare bankruptcy to avoid payment, only to set up a new company under another name to escape liability. The MOM and Ministry of Finance should monitor such employers closely.

These kinds of financial evasion are possible because the Labour Court issues orders to pay workers, who often cannot afford to enforce them. To address these difficulties, the ECT could start issuing orders to pay the ECT directly, which will hold the funds in escrow to be disbursed to claimants.

Employers are less likely to default on payments to be made directly to the court, as they would be unable to take advantage of the worker’s inadequate resources to enforce an order.  Failure to comply would result in a penalty. The ECT or an alternative administrative body should enforce the order on the worker’s behalf, as the costs of doing so are prohibitive.

We recognise that some bankrupt companies experience genuine financial difficulty. In such situations, HOME recommends that the MOM creates a fund for workers who are owed wages due to insolvency.

This can be financed by corporate taxes or foreign worker levies. Hong Kong’s Protection of Wages on Insolvency Ordinance is one such measure. Singapore should consider implementing something similar.