

Foreign domestic workers waiting for their case to be assessed after seeking refuge at an NGO safe-house.



## **Building Cross-Border Access to Justice for Hong Kong's Migrant Workers**

Updated on Lessons Learned (May 2020)

## Introduction

This document provides a brief overview of JWB's experience to date in developing cross-border access to civil justice for migrant workers returning home from Hong Kong. This document may be helpful to frontline community service organizations and lawyers helping workers who cannot stay in Hong Kong to pursue their claims. Increased claims are possible in the wake of Covid-19, with migrant workers especially vulnerable to downsizing, abuse, and exploitation.

Through JWB's ongoing casework, we have seen varying levels of receptiveness towards cross-border migrant worker cases across Hong Kong's judicial and administrative systems. With the support of our pro bono partners, JWB has continuously innovated procedures that would enable migrant workers to pursue legal claims in Hong Kong, even after they have returned home.

This update covers:

- I) conditions at key venues where migrant workers bring claims,
- II) actions against unscrupulous employment agencies, and
- III) pursuing discrimination claims from overseas.

The descriptions reflect a snapshot in time, and include both progress made and problems to address.

More detailed information about cross-border litigation in Hong Kong is available in JWB's [A Practitioner's Manual For Migrant Workers](#). (Free download)

Questions or feedback from readers is welcomed. Visit [www.forjusticewithoutborders.org](http://www.forjusticewithoutborders.org) to connect.

## General labour claims

This section discusses JWB experiences helping workers file claims with the Labour Department and the Labour Tribunal from abroad.

### **Labour Relations Division, Labour Department**

The Labour Relations Division has so far been willing to accept labour claims filed by overseas claimants, or to continue to facilitate conciliation even where a worker leaves Hong Kong subsequent to filing a claim.

With written authorisation, NGO staff and union representatives are allowed to assist with the filing process. While conciliation meetings arranged by the Labour Relations Division usually require the worker's attendance, participation by phone was once allowed for a worker who was no longer in Hong Kong. Subject to the other party's agreement, a representative may also participate in the conciliation meeting.

### **Labour Tribunal**

- **Filing a claim when claimant is overseas**

Recent cases that JWB was involved in have confirmed this is possible. NGO representatives must present a letter signed by the claimant providing reasons for the claimant's absence from Hong Kong and the scope of the authorisation. The representative must also be prepared to respond to some degree of resistance from the Labour Tribunal. Reference to the Court of First Instance's decision in *Mallorca Joenelyn Domingo v Ng Mei Shuen* [2018] 3 HKLRD 694 is likely to be helpful in explaining the claimant's right to access the Hong Kong court system from abroad. (Learn more about the Mallorca Joenelyn Domingo case and JWB's role [here](#))

- **Union representation**

Subject to the Labour Tribunal's approval, the Labour Tribunal Ordinance affords both workers and employers the right to non-legal representation<sup>1</sup>. Appointed representatives for migrant workers must be an office bearer of a registered trade union and not be legally trained.

The Labour Tribunal has allowed JWB's overseas clients to be represented by union office bearers on multiple occasions, provided they have properly authorised the union officer to represent and have submitted documentation regarding their inability to return to Hong Kong.

Note that representation applications must be prepared with care, setting out the legal basis for representation, the representative's capacity as a union office bearer and the worker's circumstances in his/her home country.

- **Giving evidence via video link in trial proceedings**

With the success of JWB's test litigation in *Mallorca Joenalyne Domingo v Ng Mei Shuen* [2018] 3 HKLRD 694, giving evidence via video link is now a viable option at the Labour Tribunal. In addition to giving valid reasons for the worker's inability to return to Hong Kong, an application for video link must set out, in detail, the set-up and all logistical arrangements at the overseas site to ensure the fairness of the proceedings.

That said, video link testimony currently remains a rare procedure at the Labour Tribunal. While the Court of First Instance's decision in *Mallorca Joenalyne Domingo v Ng Mei Shuen* [2018] 3 HKLRD 694 serves as the authority for the applicable principles, how the Labour Tribunal will consider future video link applications remains to be seen.

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<sup>1</sup> See Section 23(1)(e) Labour Tribunal Ordinance; *Mallorca Joenalyne Domingo v Ng Mei Shuen* [2018] 3 HKLRD 694, paragraph 67

## Complaints or claims against employment agencies

A large number of workers that JWB encountered have faced some level of illegal overcharging by unscrupulous employment agencies. This section details JWB's experience helping workers pursue complaints against agencies from abroad.

### **Employment Agencies Administration (“EAA”)**

The EAA is generally willing to handle complaints and proceed with investigations, at least in cases where the complainant leaves Hong Kong after reporting the case and giving a statement in person. The complainant would usually be required to confirm his/her willingness to return to Hong Kong and stand as a prosecution witness in Court.

However, the EAA has been reluctant to accept statements from overseas complainants (e.g. via video or telephone conferencing) for the purpose of criminal prosecution. It remains to be seen whether involving pro bono lawyers (e.g. by way of a power of attorney) would make a difference.

### **Small Claims Tribunal**

- **Filing a claim when claimant is overseas**

Filing has so far been a smooth and easy process, provided that those helping an overseas claimant can submit the claimant's original claim form by the time of filing. Anyone can submit the documents to the Small Claims Tribunal on behalf of the overseas claimant.

- **Representation**

Theoretically, with the claimant's written authorisation, anyone who has not received legal training is eligible to be appointed as a representative<sup>2</sup>. Prior approval of the Small Claims Tribunal is required, but (so far) has not been difficult to secure. This has been true even when the claimant is overseas and unable to return to Hong Kong to personally attend any of the pre-trial hearings.

Acting on behalf of the claimant, the representative would be expected to deal with all procedural matters and respond to the Tribunal's queries during the hearing. They would then report the Tribunal's directions back to the claimant during breaks or after the hearing.

The representative's role at trial remains an open question, as cases engaged to date are still in process. JWB's experience in the Labour Tribunal is likely helpful here. The representation application may include a request for the representative to deal with the conduct of the trial proceedings, including cross-examination of the defence witness(es), while the overseas claimant will be required to testify either in person or, if allowed, via video conferencing.

- **Giving evidence via video link in trial proceedings**

To JWB's knowledge, this remains untested at the Small Claims Tribunal. In principle, it is possible to apply for the use of video link pursuant to Practice Direction 29 and the legal principles laid down in *Mallorca Joenelyn Domingo v Ng Mei Shuen* [2018] 3 HKLRD 694.

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<sup>2</sup> Section 19(1)(d) Small Claims Tribunal Ordinance

- **Default judgement**

Sometimes defendants refuse to show up. The Small Claims Tribunal Ordinance allows for claimants to apply for judgment where the defendant fails to appear at the hearing. Upon application, the Small Claims Tribunal has the discretion to order that judgment be entered “if it is satisfied that the claimant is entitled to judgment”. There is close to no guidance in the legislation or case law as to how the Small Claims Tribunal may determine whether a claimant is entitled to judgment in the defendant’s absence, such as whether the merits of the claim are relevant, and if so, the applicable standard of proof for default judgment to be ordered.

In one of JWB’s cases, the Small Claims Tribunal adjudicator delved extensively into the merits of the claim, even though the defendants never appeared. Those bringing claims to the Tribunal may consider arguing that the Tribunal’s inquisitorial approach creates an unnecessary burden on the claimant, especially given defendants who never give any indication of contesting the claim.

## Discrimination claims

JWB has handled a number of overseas discrimination claims. Learnings here have confirmed JWB's previously researched understandings of bringing such claims from abroad.

### **Equal Opportunities Commission ("EOC")**

The EOC accepts complaints of discriminatory treatment, even if the aggrieved person is no longer working or residing in Hong Kong. A migrant worker who has returned to his/her home country can file a complaint to the EOC by mail, fax or email, with the assistance of an NGO representative.

Where the EOC invites the parties to attend a conciliation meeting, the appointed representative can attend the meeting and discuss the matter with the respondent on behalf of the complainant. Pro bono lawyers may also attend the meeting, provided that the respondent agrees.



## Going Forward

This update reflects JWB's successful efforts in helping migrant workers bring claims from abroad. Establishing precedent has helped show that workers may be able to avoid the time and expense of returning to Hong Kong to pursue their claims. At the same time, this frees workers still in Hong Kong of the dilemma of whether to risk the expense of staying in Hong Kong to pursue a claim or returning home and effectively dropping their case.

The next step is turning these new precedents into normal reality. Working with NGOs, union colleagues, and pro bono legal partners, we seek to reach a critical mass of cases that will make cross-border access to justice efficient, effective and affordable for migrant workers.

JWB's ongoing casework will also continue to uncover and address the gaps and ambiguities in the law, while addressing the procedural and logistical challenges that overseas claims tend to bring. Working together, we can help migrant workers seek justice, even after returning home.