

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 Migrant Domestic Workers

Lessons Learnt to Date (June 2020)

Justice Without Borders Singapore

INTRODUCTION

This document provides a brief overview of JWB's experience in developing cross-border access to civil justice for migrant workers returning home from Singapore. This document may be helpful to both lawyers and frontline community service organizations assisting workers who cannot stay in Singapore to pursue their claims.

This update seeks to help lawyers and caseworkers by providing key learnings to date in litigation, including: (a) obtaining evidence, which is crucial for the advancement of civil claims, (b) preparing overseas clients for negotiation and litigation (c) facilitating a smooth litigation experience for overseas clients and (d) facilitating post-litigation processes. The descriptions reflect a snapshot in time, and include both progress made and problems to address.

Background

The Singapore legal system is known for its high rule of law. Judicial accountability and a robust legal framework operate in tandem with efficient regulatory systems to maintain an environment that is hostile to corruption and violations of fundamental rights. However, ensuring access to the system can be challenging for certain high-needs populations, such as migrant workers. In fact, this highly mobile group often requires significant intervention to reconnect them to the local legal system.

In our casework, JWB has thus continuously maximised existing tools in the legal system to obtain justice for migrant workers, even after they have returned home. Effective case preparation makes the difference here, and JWB's learnings to date have helped improve workers' ability to bring a proper claim. With service providers potentially seeing an increase in workers facing employment and abuse claims, JWB's learnings can help ensure greater success for workers pursuing their claims.

More detailed information about cross-border litigation in Singapore is available in JWB's [Pursuing Civil Claims for Foreign Domestic Workers in Singapore and From Abroad: A Practitioner's Manual](#) (Free download).

Questions or feedback from readers is welcomed. Visit www.forjusticewithoutborders.org to connect.

Obtaining Evidence After a Worker has Left Singapore

Migrant workers are often short of information and evidence when trying to pursue their claims from abroad. This poses a major roadblock in negotiation and litigation. As a refresher, different evidence involving contracts or injuries can make the difference in negotiation, or even litigation. JWB's key learnings in this area include recovering evidence from various sources along a migrant worker's route of travel.

Many workers are not given copies of their employment contracts, agency contracts and other documents that they sign in the process of recruitment. These documents are important for pursuing claims, as they set out the terms of employment that the worker seeks to enforce. These include salary, compensation for working on rest days, as well as placement fees charged by employment agencies (which often exceeds legal limits). Without a contract, the worker is left with little or nothing to sue on. In such cases, it is likely that she would have to give up her claim.

Furthermore, contracts signed in Singapore are typically written in English, often not a migrant worker's first language. As such, many workers remain unclear about the terms of their employment, despite having signed legally binding documents. This creates uncertainty in litigation and pre-litigation negotiations. In worse cases, the worker may be caught by surprise if and when these contracts come to light. Often, the contract turns out to be vastly different from what she recalled the agreement to be. In litigation, this could greatly weaken the worker's credibility, as she would have made statements based on inaccurate information.

In addition to contractual breaches, workers may also suffer physical or sexual injury, emotional distress and other losses or harms in the course of their employment. Workers can claim compensation for such harms under the law of tort.

For tort claims, evidence such as medical reports, hospitalisation records and doctors' memos are key to supporting the claim, as they are objective proof of the harm the worker suffered. In settlement negotiations, these documents provide a great deal of leverage. If the case goes to litigation, courts may rely upon them to award damages to the worker. In cases involving long term or permanent disabilities, courts may refer to these records in calculating the amount of damages that should be awarded to make up for her future loss of earnings.

Finally, while many caseworkers and lawyers look to the official documents listed above, other valuable types of evidence are just as relevant in claims brought from overseas. Photographs, voice recordings, messages and eyewitness accounts relating to the claims remain important, but can often disappear due to being misplaced during travel. Witnesses may move out of Singapore and lose contact as well.

By leveraging on existing laws, JWB has found ways to obtain evidence in home and host countries that were deemed "lost", or were never provided to our clients. This has enabled us to turn seemingly hopeless cases into claims. We share key examples of evidence collection strategies in this section.

Singapore - invoking the Personal Data Protection Act 2012 ("PDPA")

Employment and agency contracts can be obtained from the worker's employment agency by invoking her right to her personal data under section 21(1) of the PDPA. This request should be accompanied by a signed letter from the worker authorising the requesting party to receive her personal information on her behalf.

In one of our test cases, the agency did not respond to initial requests for the documents, but was compelled to do so after a complaint was filed before the Personal Data Protection Commission (“**PDPC**”). In order for the PDPC to intervene, the worker may be required to sign a letter of authorisation allowing the PDPC to disclose her contact information to the agency. Workers can sign these letters even from abroad.

A key learning at this early stage is that some agencies may respond to official pressure. The process above is free, and can at least put an agency on notice that even though a worker has left Singapore, she is intent on pursuing her claim.

Indonesia - invoking the law on Public Information Openness (Act No. 14 of 2008) and the law on Medical Practice (Act No. 29 of 2004)

i. Obtaining Employment and Agency Agreements

In Indonesia, the worker’s employment contract and Indonesian agency agreement can be obtained by invoking her rights under the Public Information and Openness Act. JWB obtained the documents of twenty workers using this procedure¹.

Requests should be sent to the BP2MI², the national board for the placement and protection of Indonesian overseas workers. Note that records will only be available for workers who were recruited through agencies legally licensed in Indonesia.

Applications should include a Power of Attorney that the worker has executed in favour of the organisation making the request. The application should also include a

¹Includes workers returning to Indonesia from host countries other than Singapore. Thus, this procedure may be useful for Indonesian practitioners helping workers returning from various countries.

² Badan Pelindungan Pekerja Migran Indonesia

letter of introduction expressing the reasons for seeking the documents. It is recommended that the letter of introduction refer to the Commissioner of Public Information (KIP), which a complaint may be made to in the event that the documents are not provided. However, we highlight that the KIP complaint is more of a pressure point than an actual remedy - in practice, complaints to the KIP do not always result in action.

ii. Obtaining Medical Records

As mentioned above, medical records are important sources of evidence for tort claims. This includes medical records from home countries as well. Although the worker may have been injured in Singapore, home country medical evidence may be relevant to determine the lasting effects of the injuries, if any. The cost of the medical fees incurred in the worker's home country may also be added to the claim in Singapore.

In Indonesia, medical records may be obtained by invoking the worker's rights under Article 52 of Law No. 29 of 2004 concerning Medical Practice. This provides that patients have a right of access to their medical records. Workers covered by government health insurance may be required to take an additional step of first obtaining a reference letter from a government hospital, after which the treating hospital may produce the medical records.

Cross-Border Litigation for Migrant Workers

With evidence collected, caseworkers and lawyers can turn to negotiations with the former employer or employment agency in Singapore. When negotiation fails, litigation remains the only option for workers to pursue their claims.

Preparing workers for litigation while they are abroad

Civil litigation is a procedure-heavy process that of course requires both lawyers and the litigants (i.e the worker). While litigants are not required to attend most hearings³, they must remain active in the background, as they frequently must sign documents and provide instructions in writing. Dealing with the logistics of court documents takes on a new dimension for those litigating from abroad.

i. Electronic Execution of Documents

Throughout the litigation process, litigants are regularly required to approve court documents before they are filed into court. This is to ensure that the information that reaches the court is in line with the litigant's instructions.

For litigants without access to printing facilities, the simple act of signing off on a document requires considerable coordination. Tech-savvy litigants may download "DocuSign", an application that enables them to affix their e-signature onto documents. For litigants who prefer this mode of approving documents, JWB recommends developing step-by-step instructions to guide them through the process. Alternatively, the litigant may give her written consent for her signature to be attached on any relevant document on her behalf.

³ Save for trial, in the rare event that the matter has not been resolved via a settlement by that stage

As long as the litigant is comfortable with the above arrangements, they present efficient and cost-free alternatives to the traditional method of mailing the physical documents to litigants to sign and mail back. This enables the litigant to keep up with the dynamic pace of civil litigation, even from abroad.

ii. Notarisation of Court Documents in Home Countries

If a case proceeds far enough in litigation, litigants are required to execute Affidavits-of-Evidence-in-Chief (“**AEICs**”), which are statements signed in the presence of a notary. By doing so, the litigant declares that statements are true to the best of her knowledge or belief. AEICs set out the litigant’s personal knowledge or belief pertaining to the events relating to the claim. AEICs are crucial, as they can be used as proof in court as to what the litigant has witnessed. In the absence of an AEIC, the litigant would need to obtain the permission of the court to give evidence orally instead - an undesirable option for someone residing overseas.

Our experience has taught us that notarisation may mean different things in different countries. In Indonesia, to notarise is to attest to the truth and veracity of a document. This is different from Singapore, where the notary merely attests to the fact that the signee has affirmed its contents. We learnt of this through an incident where an Indonesian notary declined to notarise a client’s affidavit on the basis that he could not attest to the truth of its contents.

The issue was addressed by replacing the standard notarisation clause with the following clause: “*Seen for legalisation of the signature of [name of worker] residing at [address] by me, a notary public in [location], on this [date].*”

Caseworkers and lawyers will thus want to confirm with an overseas notary what they expect the notary to do. Generally, that would be attesting that the person signing the document has affirmed that the contents are accurate.

Finally, if the document is in English, a translator should be present to interpret it fully to the worker and notary.

Facilitating a Smooth Litigation Experience for Overseas Clients

iii. Alternative Dispute Resolution

In practice, the majority of cases do not result in trials. Rather, they are resolved through settlements at pre-trial stages.

Based on our experience, there is no bar to overseas litigants' abilities to engage in Alternative Dispute Resolution (such as mediation) before the court, or out-of-court settlements. The litigant can authorise a representative in writing to negotiate and enter into a settlement on her behalf.

For most of our clients, the incentive to settle is high. Settlement bypasses the time, stress and inconvenience that would be incurred in a trial. Although testifying over videolink is an option available in the law, it is not guaranteed as of right; leave to do so is granted on a case by case basis. It can also incur facility use charges in either or both of Singapore and the client's country of residence. If the court refuses video link, the litigant may be required to travel to Singapore to attend the trial. Most of our clients prefer to avoid this, as it would disrupt their lives back home, and can be prohibitively expensive, given local wages. Pre-trial settlement is thus often a more attractive option.

iv. Security for Costs

A recurring roadblock for cross-border litigants is Security for Costs. This is a legal application which defendants can make to compel a claimant (i.e. the worker) to furnish security for the defendant's legal costs.

Defendants can make this application on the basis that the plaintiff (i.e. the worker) ordinarily resides outside of Singapore. This would apply to just about all workers who leave and then bring claims from abroad. The rationale behind this is that an order for costs would be difficult and costly to enforce against a foreign party. Therefore, in the event that the defendant wins the suit, the defendant should not be prevented from recovering legal costs from the plaintiff.

In deciding whether to order security, the court will consider whether such an order will stifle a genuine claim. Thus, as a matter of strategy, it could therefore be beneficial for the worker to focus only on her stronger claims, rather than advancing all her claims (regardless of strength) in court.

Recently, JWB was successful in resisting an application brought against a client in **Nina Duwi Koriah v Noor Hayah binte Gulam and another [2019] SGDC 285** ("**Nina**"). In **Nina**, the Singapore Court declined to order Security for Costs on the basis that it might stifle a genuine claim.

Given that a number of our cases are headed for litigation, JWB expects to encounter more applications for Security for Costs in the near future. We look forward to sharing future learnings on this issue.

Facilitating Post-Litigation Needs

v. Transferring judgment winnings to a third party in the event that the client does not have a bank account in her name.

JWB has encountered Indonesian clients who do not have their own bank accounts. In such cases, clients may request that their judgment winnings be transferred to a third party - usually a family member or partner.

To ensure that the judgment winnings do make their way to the client, JWB has taken preventive measures by requesting for documents proving the nominee's relationship to the client. In Indonesia, this would be the Family Card, which would set out the relationship between husband and wife if the worker is married. If the worker is not married, it would set out details of her family members.

It is also prudent to request that the client sign an authorisation letter agreeing to transfer the judgement winnings to her nominee. The letter should set out the client's details, the suit number (if applicable), the nominee's identification and bank account details, as well as the client's declaration that she has signed the instruction letter out of her free will.

Going Forward

This brief update reflects the successful experiences JWB has had in assisting migrant workers prepare to bring claims from abroad. Establishing precedents has helped show workers that they may be able to avoid the time and expense of returning to Singapore to pursue their claims, and that a lack of documentation - which has traditionally been a crippling factor - may not spell the end of the road.

At the same time, this frees workers still in Singapore of the dilemma of whether to risk the expense of staying in Singapore to pursue a claim, or returning home and effectively dropping their case.

The next step is turning these test cases into normal reality. Working with NGOs, union colleagues, and pro bono legal partners, we seek to reach a critical mass of cases that will render access to justice - far from being an elusive paper concept - efficient, effective and affordable.

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.

* Cover page photo credit: Tom White