Migrant Workers' Access to Justice in Singapore's Employment Claims Tribunal:
Preliminary Findings of a Qualitative Study

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Abstract

Singapore's new Employment Claims regime raises new challenges for low-wage migrant workers' access to labour justice. The introduction of procedural norms and systemic assumptions more closely modelled on civil litigation's has exacerbated and erected new barriers to obtaining redress. The legislation ostensibly addresses this manifest imbalance between employers and vulnerable workers by prescribing a judge-led approach; however, its adequacy and application appear yet unclear. This study sketches the contours of the difficulties low-wage migrant workers face in this new regime, from their perspective, at each stage of the adjudication process. Their greatest difficulty appears to be being handicapped in effectively presenting their claims by their lack of awareness, and resultant anxiety, about civil process. Other issues—evidentiary difficulties, language and cost barriers—are also apparent. The study also explores what migrant workers' conception of a fairer model of employment dispute resolution looks like: essentially, more inquisitorial. It concludes with proposing improvements within the current adversarial paradigm.

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[*] HOME works with, empowers, and advocates for, low-wage migrant workers in Singapore who have suffered violations of their human and employment rights. HOME facilitates these workers' access to justice by guiding them in quantifying and substantiating their claims, understanding how to take charge of the legal mechanisms and procedures for obtaining redress; and by supporting them with the expense of their case and other resources where necessary. HOME also engages relevant authorities and bodies in dialogue, and collaborates with other civil society actors and partners to strengthen migrant workers' access to justice.

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1 Introduction

Migrant Labour in Singapore

Transient migrant workers predominate in 'semi-skilled' and 'low-skilled' manual labour in Singapore. To manage this relatively large population, the Singapore government utilises an employer-sponsored work visa system, tiered by the employees' level of skills and qualifications, as well as their salaries. Generally, migrant workers' entry, immigration status and the legality of their employment are closely tied to one particular employer. Holders of the "higher" categories of Work Passes (the Employment Pass and S Pass) have some limited freedom to seek new employment; but for Work Permit holders, the lowest-paid group, liberty to change employment remains the exception rather than the rule. The high recruitment costs and concomitant debts incurred by migrant workers in this work pass category, combined with these restrictions, render workers highly vulnerable to exploitation, wage theft and similar violations of their employment rights.[1]

As of December 2017, Singapore had approximately 1.2 million semi- and low-skilled migrant workers (Work Permit and S Pass holders), of which 246,800 were domestic workers.[2] However, as domestic workers are excluded from the Employment Act and Employment Claims Act, the main statutes conferring substantive and adjectival employment rights respectively, this report considers only non-domestic migrant workers, with particular emphasis on Work Permit holders in the construction, marine and services sectors, who constitute the majority of cases at HOME's non-domestic workers' help desk.

[1] HOME, *Wage theft and exploitation among Singapore's migrant workers* (Position paper, published online January 2017) pp 5–7 https://static1.squarespace.com/static/5a12725612abd96b9c737354/t/5a1fce6f652dead776d3c970/1512033911372/Position_Paper_Wage-Theft-Exploitation-among-Singapores-Migrant-Workers.pdf (accessed 23 June 2018).

[2] Ministry of Manpower, *Foreign workforce numbers*, http://www.mom.gov.sg/documents-and-publications/foreign-workforce-numbers (accessed 23 June 2018).

Purpose & Outline

Singapore's new Employment Claims regime which entered into force in April 2017 symptomises a paradigm shift in the conceptual framework and assumptions undergirding the legal and administrative mechanisms for the resolution of employment disputes. Broadly, this shift may be characterised as being from a system which still bore at least vestigial traces of the interventionist, inquisitorial roots of the office of Commissioner for Labour, to a party-driven one which explicitly emphasises conciliation and yet has been, in practice, very much premised on adversarial conceptions at adjudication. While this has brought certain benefits, it has also thrown up significant new challenges for low-wage migrant workers' access to labour justice. The new regime, under which adjudication is modelled after civil procedure, seems constitutionally not well-equipped to rectify the systemic disadvantage which had rendered them vulnerable to violations of their primary labour rights in the first place, and in certain ways may even tend to exacerbate that systemic disadvantage when they seek recourse to enforce those rights.

The present study is a qualitative scoping of migrant workers' experiences and difficulties in pursuing salary claims in the Employment Claims Tribunal ("the Tribunal"), established by the *Employment Claims Act 2016* ("the Act"). The primary product of the study is intended to be material to raise awareness of, and guide migrant worker claimants through, the process of salary claims in the Tribunal. However, its findings are also formally documented here; upon which subsequent investigation may build.

The historical predecessor of the Tribunal will first be described, followed by an overview and discussion of the present regime's salient features, both as set out in the legislation and as observed in HOME's experience: focusing on extant and potential difficulties for migrant workers. The methodology of the investigation is then outlined. A substantial description of the empirical findings follows, organised around the same structure as was adopted for the investigative method, which in turn tracks the various categories of issues an unrepresented person may

face in the Tribunal. Finally, the significance of these findings is considered, with a view to sketching out suggestions for the continued progress of the Tribunal's fairness and accessibility; and possible directions for further study indicated.

2 Context

Salary Claims in Singapore, Historically

Since colonial times,[3] besides litigation in Singapore's ordinary courts, statutory intervention has furnished low-cost, simplified mechanisms for resolving employment disputes, including salary claims. The special status accorded to employment disputes, which took the name and often the form of *inquiry*,[4] appeared to recognise that wage-related claims, though small in quantum compared to commercial disputes, were of too great a significance to claimants to leave to the *laissez-faire* vagaries of civil litigation; and that workers were ill-equipped to contest such claims along the lines of the adversarial model of dispute resolution.

Prior to the establishment of the current regime, this mechanism was established under and governed primarily by the *Employment Act 2009*, Part XV. As a matter of longstanding administrative practice, this mechanism comprised two stages: mediation followed, if necessary, by adjudication. Both stages were within MOM, which is the Ministry having charge of the statutory office of the Commissioner for Labour. Mediation was conducted by officers of the Labour Relations and Workplaces Division. Disputes unresolved by mediation would be referred to one of a panel of senior MOM officers deputised as an Assistant Commissioner for Labour, and colloquially termed the "Labour Court". Despite its name, the Labour Court was an essentially administrative mechanism, not a judicial organ. This had a few consequences.

[3] Cf the *Labour Ordinance 1955*.

[4] See eg, *Employment Act 2009* ss 115, 116, 119.

Procedure

Principles of procedure in the Labour Court are set out in s 119 of the *Employment Act*. Reading sections 115, 116 and 119 together as a whole, it becomes apparent that the Commissioner for Labour, and officers deputised thereunder, are envisioned by the statutory scheme substantially as protagonists in inquiry proceedings. As the name "inquiry" suggests, the presiding officers were free, and arguably indeed obliged by their office, to take the lead in examining the parties and calling for evidence; often enough they exercised these powers. In practice, this proactive role also sometimes had the effect of prompting workers to consider the main issues in their own case, and to address them in evidence or cross-examination.

Although very loosely modelled on the ordinary courts', procedure was not bound by the formal adversarial structure. Most evidence was given orally; documents were adduced at the sessions themselves. This primarily oral mode, with the interpretation provided at MOM, meant that extensive formalities, including costly professional written translation in respect of documentary evidence, printing and postage, were less usually a heavy burden on migrant workers.

Costs

As of early 2017, when it was replaced as a dispute resolution mechanism for salary claims, claimants paid a fee of $3 to register their case. The requisite mediation which preceded adjudication in the Labour Court was free of charge. Besides the initial registration fee, there were no other filing or hearing fees required within the processes of the Labour Court itself. The main significant cost would be incurred if the claimant sought to appeal, and applied for that purpose for records of the Labour Court's proceedings.

Appeals

Appeals from the Labour Court went directly to and were heard by the High Court.[5] The legal availability and extent of judicial oversight of the Labour Court's inquiries, although of course subject to practical constraints of its expense and the

[5] *Employment Act 2009* s 117.

merits of the particular case, were fairly relaxed. Since the Labour Court was actually an executive (administrative) office, not a judicial curia, the High Court was not excessively parsimonious in exercising oversight. It was, for example, axiomatic that such appeals were "by way of rehearing";[6] that is, not limited to ventilating errors of law or jurisdiction.[7]

Parameters of and procedure in such appeals were governed by the general *Rules of Court*, which left much to the discretion of the presiding Judge or Registrar. In practice, the High Court demonstrated itself to be not overly constrained or deferential in the exercise of its powers; perhaps implicitly recognising the institutional limits of the Labour Court, presiding officers of which were usually not legally trained. One specific aspect worth mentioning is the adduction of new evidence. The relatively short timeframe of Labour Court proceedings, and the expense and difficulty of obtaining certain evidence, meant that migrant worker claimants were often not in a position to put forward their strongest case at the Labour Court stage. If the applicant–claimant was able to satisfy the High Court that there were cogent reasons why probative evidence had not been available earlier, the Court had discretion to admit fresh evidence.[8]

Institutional Parameters

Since the Labour Court was, in substance, an office within MOM, it was an administrative forum, and the procedures and protocols of communication with it were not inherently restricted by the formalities required in respect of the judiciary. NGOs such as HOME, which are recognised by MOM as being legitimate actors and advocates in migrant workers' employment issues, do have channels, however limited and imperfect, for liaising with MOM in respect of individual cases. To some degree, although administrative bodies do not have the formal transparency of judicial organs, this informality allowed some leeway for communicating on specific cases, and on issues faced by particular workers. If any

[6] *Rules of Court 2014* O 55 r 2(1).

[7] Cf *Valentino Globe BV v Pacific Rim Industries Inc* [2009] 4 SLR(R) 577, [10]–[11].

[8] See eg, Tribunal Appeal 3 of 2017 in the High Court; Tribunal Appeal 4 of 2017 in the High Court.

clarification or feedback was necessary, workers could avail themselves of HOME's usual channels of communication with MOM.

The Employment Claims Tribunal and its Statutory Regime

Singapore's *Employment Act* confers tiered rights and protections to different classes of employees. The most substantive rights, under Part IV, are conferred on workmen (manual labourers) and other low-wage employees, so long as not in a managerial or executive position. In 2008, the *Employment Act* was amended to extend to lower-paid managerial and executive employees adjectival protections in respect of how their salary was paid, and in recourse to the Labour Court.[9] These changes were widened in 2014, such that these managerial and executive employees were now given all the protections under the rest of the *Employment Act* as well, except for the substantively interventionist Part IV rights.[10] Notwithstanding the elevation of the salary cap[11] which delimits this class of managerial and executive employees, a "lacuna" was thought to remain,[12] since employees whose salary exceeded the $4,500 cap (as revised) still had no recourse except to the ordinary courts, with all the attendant expense, delay and hazards of litigation. This was just the most concrete aspect of the fundamental underlying concern. The concern is that legislative regulation of employment left "PME" (professionals, managers, executives) employees insufficiently protected; and that this legislative scheme was premised upon assumptions, which were outdated or not necessarily justified, that such employees had sufficient bargaining power to contractually protect themselves and adequate resources to assert their rights in the event of disputes.[13]

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[9] *Employment (Amendment) Act 2008* s 2(f) inserted section 2(2) into the *Employment Act*, which applied sections 20, 20A, 21, 22, 23 (read with section 10 or 11, as the case may be), 24, 25 and 34 ("payment of salary" provisions) and Parts XII to XVI (provisions relating the Commissioner for Labour) of the *Employment Act* to managerial and executive employees.

[10] *Employment, Parental Leave and Other Measures Act 2013* s 2(1).

[11] From $2,500 to $4,500, by the *Industrial Relations (Amendment) Act 2010* s 6.
A helpful overview of these changes can be found in *Hasan Shofiqul v China Civil (Singapore) Pte Ltd* [2018] SGHC 128, [45]–[48] (*per* George Wei J).

[12] *Singapore Parliamentary Debates*, Vol 94, 16 August 2016 (Patrick Tay Teck Guan, Second Reading of the *Employment Claims Bill*).

[13] See eg, *Singapore Parliamentary Debates*, Vol 94, 11 July 2016 (K Thanaletchimi, 'Difference between Workmen and Non-workmen in Employment Act'); *Singapore Parliamentary Debates*, Vol

The consistent growth in the proportion of PMEs in relation to Singapore's resident workforce gave added impetus to these concerns.[14]

In response, MOM first mooted a new tribunal for small employment claims in April 2014,[15] held a public consultation between 25 February and 23 March 2016, and formally introduced into Parliament a Bill in July 2016,[16] which was passed the next month. The *Employment Claims Act 2016* came into effect on 1 April 2017.

The stated aims of the new regime were to provide all employees with an affordable and expeditious mechanism for resolving employment disputes; and to enhance the adjudication of these disputes by allocating to them a bench of legally-qualified, judicially experienced Magistrates.[17] It was also envisaged that, despite the adaptation of adjudicative forms, this new regime would continue to accord special privileges to the role of "tripartism",[18] Singapore's model of labour relations based on patriotically harmonious partnership;[19] and hence emphasise conciliation and consensus.

As such, the overall mediation—adjudication scheme of the new salary claims regime has remained broadly comparable to the Labour Court system, although

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93, 19 January 2015 (Patrick Tay Teck Guan, Ang Hin Kee, Second Reading of *Industrial Relations (Amendment) Bill*).

[14] *Singapore Parliamentary Debates*, Vol 93, 19 January 2015 (Tan Chuan-Jin, Minister for Manpower, Second Reading of *Industrial Relations (Amendment) Bill*); cf *Singapore Parliamentary Debates*, Vol 94, 5 March 2018 (Patrick Tay Teck Guan, Committee of Supply — Head S).

[15] Tan Chuan-Jin, Acting Minister for Manpower, Address at the Ministry for Manpower's Workplan Seminar (24 April 2014); see also Rajah & Tann LLP, 'MOM Proposes Small Claims Tribunal to Hear Salary Disputes', *Client Update*, April 2014; Amir Hussain, 'MOM proposes small claims tribunal to resolve employment disputes', *Today* (Singapore), 24 April 2014.

[16] *Singapore Parliamentary Debates*, Vol 94, 11 July 2016 (Teo Ser Luck, Minister of State for Manpower, introducing the *Employment Claims Bill*).

[17] *Singapore Parliamentary Debates*, Vol 94, 16 August 2016 (Lim Swee Say, Minister for Manpower, Second Reading of the *Employment Claims Bill*).

[18] *Singapore Parliamentary Debates*, Vol 94, 8 April 2016 (Lim Swee Say, Minister for Manpower, Committee of Supply — Head S); *Singapore Parliamentary Debates*, Vol 94, 6 March 2017 (Patrick Tay Teck Guan, Committee of Supply — Head S).

[19] Underlying principles of which were sketched in S Rajaratnam, 'The Crucial Role of Trade Unions in the Modernisation of Singapore' in National Trades Union Congress, *Why Labour Must Go Modern* (NTUC, 1970) 25.

the bifurcation of mediation followed by adjudication has now been statutorily formalised. The substantive changes have primarily been in the adjudication stage; and, consequently, in the relation between mediation and adjudication. What follows is a brief outline of the new regime: both its legislated features, and HOME's experience of their implementation in practice, illustrated in an inevitably anecdotal fashion which is intended to highlight, qualitatively, the empirical points upon which the framework for the present study was conceived.

Compulsory Mediation

Mediation itself has not much changed from what it was under the previous regime. It has been delegated to the "Tripartite Alliance for Dispute Management" (TADM), within a corporation named Tripartite Alliance Limited.[20] From migrant workers' perspective, however, mediation has remained within MOM *de facto*, physically and administratively, since many of the Approved Mediators now employed by TADM were previously performing the same function as officers within MOM's Labour Relations and Workplaces Division, which was essentially the operational seat of the statutory office of the Commissioner for Labour. One concrete difference in the new system is the $10 or $20 fee (depending on the amount alleged to be owed) applicable to the lodging of a mediation request.[21] In principle, waiver of these fees should be available to low-wage workers such as WP holders; nonetheless, HOME has seen several workers, whose agreed basic salary was below $1,600, who had already suffered substantial short- or non-payment of salary for several months but were nonetheless charged the fee.

What has changed is the formalisation of the relationship between mediation and adjudication. The mandatory status of mediation in the new regime has been given effect in very hard-edged concrete ways, which in some respects may be thought to be at odds with the very nature of mediation. Mediation as a prerequisite for adjudication is not, in the statutory scheme, applied to the breakdown of the employment relationship as a substantive whole, but atomistically to each distinct head of claim, or "specified employment disputes" as they are referred to in the

[20] *Employment Claims Regulations 2017* reg 2 (definition of "mediation service provider").
[21] *Employment Claims Regulations 2017* reg 7.

legislation. The prescribed form certifying that mediation has failed, and that the claimant is thereby eligible to commence proceedings in the Tribunal (the "Claim Referral Certificate"), identifies and quantifies each such "specified employment dispute".[22] This means that workers must be mindful to ventilate every possible claim against their employers at the earliest stage. If any item, however small in relation to the total claim, has been omitted from that Claim Referral Certificate, the worker cannot simply apply to the court to add it to the claim: a fresh mediation request must be lodged. In practice, over the year or so of the Tribunal's operation, a similarly atomistic restrictiveness has developed in respect of the quanta likewise specified. HOME saw 12 workers who, at the time they attempted to file their claims at the Tribunal Registry, wished to change only the proportioning, amongst the various "specified employment disputes", of the total amount claimed.[23] They were not requesting to change the total quantum of their claim, or to change their heads of claim. Yet they had to return to TADM for their Claim Referral Certificates to be re-issued before the Tribunal Registry accepted the filing of their claims.

On the other hand, respondent employers are not bound at adjudication by positions taken at mediation. In numerous cases HOME saw, some of whom participated in the present study, respondent employers who, at mediation, had told the workers such things as—they did not agree with their basis of calculating overtime pay; or they did not have the means to pay them the full amount—subsequently completely denied liability in court.

The criterion that mediation be compulsory also necessitates, putatively, that the entirety of the claim goes through mediation, such that all heads of claims must be identified and cannot be added to after mediation. Yet since mediation is inherently voluntary in a way that dispute resolution at law is not, the very nature

[22] *Employment Claims Regulations 2017*, Second Schedule.

[23] TADM File References 201701[xxx]2E-001, 201701[xxx]2E-002, 201701[xxx]2E-003, 201701[xxx]2E-005, 201701[xxx]2E-006, 201701[xxx]2E-007, 201701[xxx]2E-009, 201701[xxx]2E-010, 201701[xxx]2E-011, 201701[xxx]2E-014, 201701[xxx]2E-015, 201701[xxx]2E-016.

of mediation must be such as to be unossified by parties' legal rights: and positions taken during mediation ought therefore not to prejudice those in adjudication. There arises a patent tension between the innate voluntariness of mediation and its compulsory role in the scheme of dispute resolution under the Act. Since the identification of heads of claim at the outset, and their quantification, are in principle distinct from the conciliatory process of mutual compromise which mediation ideally is, this is not (as yet) a direct contradiction. However, the tension between these opposed characteristics manifests itself in the discrepancy between how, on the one hand, claimant workers are bound by the heads of claim and even, in practice, the quanta as stated at mediation; yet respondent employers' positions at mediation are entirely without prejudice to those taken before the Tribunal.

Costs

Aside from mediation fees under the *Regulations*, the *Employment Claims Rules 2017* (the subsidiary legislation under the Act governing the adjudication process in court and on appeal) prescribe fees for each step of the curial procedures, ranging from $10 (for a summons, for example) to $600 for appeal-related filing fees in the High Court. Most of the fees are in the range of $30 to $60: a ten- to twenty-fold increase from the Labour Court's registration fee. However, it is not merely the quantum which affects low-wage workers; the step-by-step structure is also a significant change from the old one-time payment.

Procedural and Language Issues

As compared with the Labour Court, the norms and practice of procedure in the ECT are much more formalised. The emphasis on the documentary exchange of Claim, Response, and documentary evidence and typewritten, electronically-provided forms, in advance of the court sessions and in accordance with prescribed timelines, means that the adjudication is far less in the verbal mode, as compared with the Labour Court. It would be fair to say that the pre-Hearing steps of the process, which were relatively less onerous in the Labour Court, have taken on an importance equal to that of the Hearing itself. This is exacerbated by the heavy emphasis on resolving the matter at the pre-Hearing stage through settlement—even after the matter has been referred out of TADM. Literacy, not only in written

English *per se*, but also in the idiom, forms and corpus of assumptions which form the backbone and backdrop of court process, as well as a strong grasp of the flow and potential steps or options in civil procedure, takes on a far more prominent and essential significance.

Language barriers take on sharpened significance in a system where the pre-Hearing stages of a matter, which are primarily by way of documents, are so important. Since the expected norm is for documents to be exchanged and digested prior to each Hearing, and a reply already formulated, this imposes far more of a burden on migrant workers to read and prepare their own documents, and understand and rebut the adverse parties', in English.

While the concrete formalisation of the myriad necessary steps or procedural liberties, in the progress of matter before the Tribunal, may potentially engender greater transparency and clarity from an objective, observer's perspective—for example, in the record of proceedings of a matter—it may also hinder migrant workers in particular. What had previously been a question of simply oral application (indeed a verbal request) in the Labour Court, which could be made *ad hoc* directly to the presiding Assistant Commissioner for Labour through an interpreter, now requires typewritten forms in English and the payment of filing fees.

Furthermore, the concretisation of procedural liberties as these written forms, with their attendant filing and service procedures and prescribed fees, may mean that migrant workers' less formal attempts to exercise these liberties, for example, by way of oral application through an interpreter, may not be properly considered, or even recognised as such. HOME is aware of one worker who verbally informed the presiding Magistrate that he wished to call his former colleagues as witnesses but his erstwhile employer refused to release those workers from their offshore workplace (on a vessel). The Magistrate simply passed over this, apparently without considering whether he should issue summonses, or at least inform the

worker of the formal procedure for applying for such summons.[24] Another group of workers, when confronted with allegedly forged signatures on salary payment vouchers, of which they were furnished photocopies, verbally asked the Magistrate to cause the originals of those documents to be produced so that they could have them examined more closely.[25] The Magistrate ignored this request. In those cases, the workers had at least a vague notion of what they could ask for, and attempted, however imperfectly, to express it. From HOME's experience, it would be at least as usually the case that migrant workers would not know what to ask for.

Institutional Parameters

The Employment Claims Tribunal is a closed tribunal, with no legal or other representation, agency or access to the public or other observers allowed. Representation is allowed only in the limited cases prescribed by the *Regulations*:[26] union members by union officers; juveniles by their parents or guardians; joint claimants by each other; and persons under some mental or physical infirmity which prevents the presentation of their case.[27] Almost all Work Permit holders are not unionised: the transience and precarity of their employment in Singapore mean that incurring the costs yields very little benefit. And while they are certainly on the wrong side of a significant imbalance in their ability to litigate their claims, their difficulties seldom amount to an incapacity recognised at law. As regards joint claimants, HOME has seen a number of groups of migrant workers who together filed claims against the same employer arising out of the same factual matrix, and whose cases progressed through the pre-Hearing stages together; yet were heard separately. Undoubtedly there are good reasons for this, in terms of procedural justice; but the effect is that migrant workers are usually completely on their own when they appear before the presiding Magistrate in court: an environment where they face steep language barriers and other less tangible handicaps, such as an acutely heightened awareness of their own foreignness and

[24] ECT/[xx]/2017. This exchange between the worker and the Magistrate was noted in the Magistrate's record of proceedings. The worker subsequently reached a settlement with his employer.
[25] ECT/1[xx]/2018, ECT/1[xx]/2018, ECT/1[xx]/2018 ECT/1[xx]/2018, ECT/1[xx]/2018. The workers subsequently reached a settlement with their employer.
[26] *Employment Claims Act 2016* s 19(3).
[27] *Employment Claims Regulations 2017*, Third Schedule.

vulnerability.

Furthermore, since adjudication of salary claims is now in a judicial body, its constraints and parameters, and channels of communication with it, are far more formally defined: not only by statute, but also by the weight of tradition and of the customary conception of the judicial role. HOME and other organisations have very little scope to advocate for or represent workers in their communication with the Court. This can be a significant difficulty in cases where a migrant worker claimant has some special application which they find hard to express or explain.

A related corollary of the judicial character of the Tribunal is that even insofar as HOME (or other organisations) may be able to assist individual workers with particular difficulties by communicating with the court, any success in this regard is confined to those particular cases. There is simply no systematic way to bring to the attention and consideration of the Tribunal Bench, or of the Registry as a body, the recurrent issues faced by low-wage migrant workers in the Tribunal, which those cases are instances of. The ostensible way forward would be to ventilate these matters via appeal: common law adjudication's means of standardising the principles of both substantive and procedural justice. But as outlined below, the availability of appeals under the Tribunal's statutory regime is not intended to remedy every conceivable injustice. Indeed, even if appeals were as generally available as from the ordinary courts, they are unsuited to this purpose. The very nature of the migrant workers' difficulties in court is that these difficulties are, in a sense, interstitial: not easily within the neat boxes conventionally recognised as "questions of law". To put it another way, attempting to apply the law's conceptual framework of procedural fairness to the disadvantage or handicaps which migrant workers experience in court would often be a category mistake.

The ostensible solution to address the prohibition on legal representation and the potential imbalance between unrepresented employers and workers is the "judge-led approach" envisioned in section 20 of the Act. Section 20 states, *inter alia*, that the Tribunal "is to ensure that the relevant evidence is adduced". In the cases cited

at notes 24 and 25 above, this principle of the "judge-led approach" could and arguably should have been applied to compel the appearance of the witnesses and production of the documents requested by the workers. The very fact that this did not happen illustrates that it is far from clear what section 20 may mean in practice, or the extent and weight of the duty, if any, it imposes on the presiding judicial officer. Possibly, the concept of a "judge-led approach" is one which remains unfamiliar to judicial officers whose legal training, background in public legal service or private practice if any, and prior judicial experience, would have been almost invariably premised upon an adversarial paradigm of adjudication, and ill at ease with an inquisitorial praxis.

There also appear to be a range of views amongst judicial officers (albeit expressed in a non-curial capacity) as to the implications of section 20 for the duties of a Tribunal Magistrate. Speaking extrajudicially,[28] the learned Deputy Registrar Yan Jiakang opined that section 20 merely conferred discretionary powers. On the other hand, the learned Deputy Registrar Wong Thai Chuan indicated that the exercise of those powers was a weighty question the presiding Tribunal Magistrate was bound to seriously *consider*, especially in light of the special role of the Employment Claims Tribunal, but stopped short of concluding that any obligation to exercise them in some particular way could conceivably arise in individual cases. District Judge Jasbendar Kaur went the furthest, acknowledging the possibility that in certain cases, the circumstances may be such that the Tribunal Magistrate comes under a duty to positively exercise those powers. District Judge Kaur also explained that this duty, if it arises, is simply an aspect of the more general duty of a judge to manage the conduct of proceedings in the interest of justice and fairness, as manifested in the context of the Tribunal and its legislative purpose, particularly as may become apparent in the circumstances of a particular case. It will be argued below that District Judge Kaur is, with respect, correct.

[28] State Courts Public Talk 2017, *What You Need to Know about Resolving Employment Disputes* (Address and Public Forum at the State Courts, 18 November 2017).

Appeals

Appeals from the Tribunal are governed by sections 23 to 27 of the Act, as well as by the *Employment Claims Rules 2017*. While these do not expressly exclude Order 55 of the *Rules of Court*, they largely supercede it. Order 55 envisions a "rehearing" initiated via Originating Summons. The procedure is thereby arguably an invocation of the High Court's original jurisdiction, leaving considerable latitude on crucial questions, such as the availability and scope of appeal, and admissibility of fresh evidence, to the discretion of the presiding Judge or Registrar, albeit subject to certain restrictions in due recognition of the 'first instance' forum. By contrast, what the Act clearly contemplates is that adjudication of matters commenced within its regime, at least in respect of their substantive merits, will terminate in the Tribunal. Section 23(2) creates a leave mechanism which requires the District Court's satisfaction that the appeal contemplated raises some question of law (or jurisdictional error). From HOME's experience, it has already been seen that the District Court will apply this criterion strictly. There is no general right to invoke the High Court's jurisdiction, upon which limitations are superimposed. Rather, the liberty conferred by the statute is congenitally narrow.

Section 25(2)(b)'s absolute bar on new evidence on appeal has already proven very difficult to understand for workers whom HOME has assisted. Given the short limitation periods for claims under the Act,[29] and the expedited timeframe contemplated for such matters, from the lodging of the mediation request to the Hearing in the Tribunal, some workers would not be able to gather enough evidence in sufficient time. This is not for a lack of diligence: the systemic difficulties which migrant workers face in obtaining evidence to substantiate their employment claims, or to rebut false evidence produced by their employers, has been well-documented.[30] This is compounded by the expense of, for example,

[29] Within 6 months from the cessation of the employment; 1 year otherwise, except for claims under other legislation where that legislation provides another limitation period: *Employment Claims Act 2016* s 3(2).

[30] Tamera Fillinger et al, *Labour Protection for the Vulnerable: An Evaluation of the Salary and Injury Claims System for Migrant Workers in Singapore* (Transient Workers Count Too and Chen Su Lan Trust, 2017) 39–45.

marshalling forensic expertise to counter forged signatures. Workers who strive to gather more evidence even as their case is ongoing, against all the obstacles they encounter, would understandably find it difficult to comprehend the justice of the bar on new evidence.

While section 25(2)(a)'s bar on the High Court's powers in respect of factual findings has not yet been tested, the problems this potentially creates are essentially similar. It may be thought to be a remarkable waste of time and resources, both the parties' as well as the judiciary's, that the High Court, if it finds such errors in the Tribunal's application of the law (which presumably may include such matters as admissibility and principles of evidence) which may affect the facts found, nonetheless has no power to substitute the correct findings on its own motion, but must remit the matter to the Tribunal.

Critical Perspectives

Given how new the regime is, and the relative lack, until a very late stage, of substantial detail on its implementation,[31] which would have provided grist for the mill of substantive analytical consideration and debate, there has been a marked dearth of critical discussion. Most, by far, of the limited literature referring to the Employment Claims Tribunal has been legal firms' summaries of the new regime and its developments for their clients. During the Second Reading of the Bill, a few Members of Parliament raised concerns about the increased costs of proceedings in the State Courts as compared with the Labour Court.[32] Some also adverted to the other difficulties, besides expense, which such workers might encounter. Messrs Zainal Sapari, Louis Ng and Daniel Goh pointed out that for vulnerable workers, presenting their case might be very onerous; with the latter specifically mentioning foreign workers as such a group. Mr Murali Pillai approached this problem of the

[31] The *Employment Claims Regulations 2017*, dated 30 March 2017, were published in the Electronic Edition of the Government *Gazette* only at 5 pm on 31 March 2017, the night before the Act came into force.

[32] *Singapore Parliamentary Debates*, Vol 94, 16 August 2016 (Patrick Tay Teck Guan, Muhamad Faisal Bin Abdul Manap, Zainal Sapari, Debate on the *Employment Claims Bill*). As to the low cost and simplified procedure of the Labour Court, see eg, the anecdotal descriptions in Leong Wee Keat, 'Number of disputes goes down: Labour Court', *Today* (Singapore), 14 July 2009.

"inequality of arms" between employer and employee from the slightly different perspective of the situation where the employer had some advantage; for example, being represented by legally-trained personnel, or in-house counsel: a possibility also mooted by at least one observer.[33] Mr Dennis Tan raised concerns about the effect which the new restrictions on appeals would have.

Aside from these concerns, consideration of the impact of an adversarial system of adjudication *per se*, with all its attendant burdens on the parties, on low-wage migrant workers who have the least resources and ability to litigate a matter in court, has been remarkably sparse. Most of the critical perspectives on the Employment Claims Tribunal, such and as limited as they are, have focused on peripheral details such as the monetary jurisdictional limit and the very short time bars applied. There has also been considerable debate on the exclusion of non-salary employment disputes such as unfair dismissal and workplace discrimination or harassment.[34] However, issues arising out of the costs and any fee waivers granted, monetary jurisdictional limits and language accessibility are questions of implementation. As regards the scope of the Tribunal's jurisdiction in respect of non-salary matters, this concerns the latitudinal breadth of its application, not its substance. Arguably, even the restrictions on availability and scope of appeal are matters relating more to the superstructure of the Tribunal rather than its essential nature.

The fundamental issue of whether the adversarial nature of court proceedings is structurally suited for its purpose, especially in respect of disadvantaged or vulnerable parties, has yet to be thoroughly ventilated. During the debate on the Second Reading of the Bill in Parliament, the Minister for Manpower explained that the envisioned solution to the "power differential between employees and employers" was a "judge-led approach".[35] However, what this means in practice,

[33] JWS Asia Law Corporation, 'Singapore Employment Claims Tribunal to come into operation from April 2017 – whither employment arbitration?', *Legal Highlights*, August 2016.
[34] *Singapore Parliamentary Debates*, Vol 94, 5 March 2018 (Patrick Tay Teck Guan, Kuik Shiao-Yin, Committee of Supply — Head S).
[35] *Employment Claims Act 2016* s 20.

and its adequacy to address the depth of the difficulty, is far from axiomatically self-evident; nor has this become clearer in the past year and a quarter since the Tribunal's statutory regime commenced operations.

3 Methodology

The findings of this qualitative study were gleaned from semi-structured interviews with 25 migrant worker participants who had sought assistance from HOME in respect of their salary claims that fell within the current regime because they commenced after 1 April 2017. Initially, the study targeted 30 participants: as at end June 2018, HOME had seen more than 70 workers whose cases had proceeded to the Tribunal in one way or another. Due to logistical and other constraints, completing 30 in-depth interviews proved too difficult within the lifespan of the present study; however, for reasons outlined at the conclusion below, a pool of 25 participants sufficed for the purposes of this study. Not all of the participants' cases proceeded to full Hearing before a Tribunal Magistrate. Many were settled at the pre-hearing stage. Nonetheless, it is clear that for every worker whose claim became protracted further than the most preliminary mediation stage, the difficulty and expense of having to present their case in court, rebut their employer's, and navigate alien curial processes on their own, weighed heavily in their minds. Whether a migrant worker claimant settles the case pre-Hearing or elects to formally contest the matter right until its end, both categories of their experiences are therefore valuably edifying as to the degree and quality of the workers' access to justice in the Tribunal.

These interviews proceeded based on a questionnaire (annexed as the Appendix) grouped around seven categories of questions:

- threshold issues, in particular, the effect of compulsory mediation on a case;
- costs;
- language issues;

- participants' understanding of Court proceedings: as to what happened at each stage of the progress of a case through the Tribunal, and the overall relation of different stages in the case;
- participants' understanding of civil procedure: of how to use evidence, present their case, impugn the adverse case, and of the Court's role;
- enforcement of Court orders; and
- a residual category by means of which participants' overall views and any recommendations were sought.

Of the respondents, 6 were Chinese-speaking (China and Taiwan nationals), 2 Burmese-speaking (Myanmar nationals), 1 Tamil-speaking (Indian national), and the rest Bengali-speaking (Bangladeshi nationals). Almost all were Work Permit holders. The only exception was a Long Term Visit Pass holder whose spouse was a Singaporean resident and was therefore employed under a Letter Of Consent Work Pass; but the type of work and quantum of salary were comparable to a Work Permit holder's.

The questions were verbally interpreted to participants in their own language, by interpreters with extensive direct experience of assisting migrant workers with salary claims and other employment issues. Written translations of the questionnaire were provided to the Bengali- and Chinese-speaking respondents. However, the primary mode of the interviews was verbal, as many participants were not highly literate even in their own language. Due to resource constraints, there was no written Burmese translation. The one Tamil-speaking participant was illiterate, so written translation was unnecessary.

The interviews themselves were conducted in a relatively informal manner, each ranging from one and half to over two hours. Questions were explained and clarified as necessary, and follow-up questions were asked with considerable flexibility from the written questionnaire: the aim being to elicit from the participants in-depth responses to and holistic consideration of the issues which this study sought to illuminate. However, a balance was also consciously struck between, on the one hand, ensuring that participants understood each question,

and its background assumptions if any, as well the overall framework, enough to respond meaningfully; and, on the other, avoiding the tendency to lead participants into certain already-charted courses. Where necessary, interviewers endeavoured to give participants sufficient information about the legal context and systemic assumptions of adjudication, while refraining from suggesting or implying value judgments or interpretations of those broader facts' ramifications in individual circumstances. Where the implication of such evaluation was inevitable or inadvertent, countervailing perspectives were drawn to participants' attention. Generally however, in ascertaining this balance, the approach was to err on the side of conservatism and parsimony.

Open-ended prompts ostensibly comprise forty per cent of the questionnaire. In fact, participants were encouraged to freely and fully elaborate on their experiences and views, even for questions which, in the questionnaire's written form, are couched in terms susceptible of binary responses. The responses were then qualitatively categorised. Although it sacrifices something of rigour and repeatability, and much of the quantitative significance of the distribution of the results, this approach was preferred to anticipating the possible range of responses and putting such an anteriorly-defined range to participants, in the interest of illuminating the qualitative reality of migrant worker claimants' access to justice with minimal preconceptions. Given this open-ended approach, it seems all the more significant that there was a surprising degree of consistency in the emergence, from participants' responses, of some repeated themes.

The purpose of the interviews was fully explained to the participants in their own language, and all consented to have their responses documented. Most of the interviews were audio-recorded; however, some participants declined to be recorded, and accordingly, their responses were documented in writing only.

4 Migrant Workers' Experiences in the Employment Claims Tribunal

The structure of the interviews as outlined above, divided into sections and specific questions, was for clarity and convenience. However, the participants' responses were more loosely organic, and often their experiences and opinions were expressed in a manner that was much more fluid than is reflected in the questionnaire. Their responses were therefore collated in a way that reflects their considered views, taken as a whole, and elicited through the process of, each interview.

Effect of Compulsory Mediation

This part of the interview, being fairly open-ended, elicited a diverse and nuanced range of responses. It became apparent over the course of conducting the interviews that there is a mismatch between the workers' expectations of the role of MOM and the reality of MOM's much-curtailed role, *de jure*, within the current regime. This point emerged both at this initial "threshold issues" section of the interviews as well as at the end, when general comments on the Tribunal and its place in the salary claims resolution system were solicited. For convenience and clarity, all such responses have been collated within the latter section.

It should be clarified that while mediation has been entrusted to a private corporation (as is permitted under the Act), the Tripartite Alliance for Dispute Management Limited (TADM), many of the very same personnel (currently employed by that corporation) thus appointed to handle the initial stages of a salary case as Approved Mediators were previously performing the same function as MOM officers. Since the mediation is also held at MOM premises, the effect is that, from the workers' perspective, mediation by TADM tends to be conflated with administrative intervention by MOM.

Should mediation be compulsory before adjudication? The role of MOM
One-fifth of participants said that claimants should have the option of going directly to court: some elaborating that the employers' behaviour had already made clear that they had no intention of settling the wages owed, so mediation was a waste of time. About a third said that the court was better than MOM.

On the other hand, slightly less than half of the participants expressed that they had no objection to compulsory mediation. Of these, half of them also said that going to MOM (ie, for mediation) prior to going to court was better than going directly to court. Others explained that while going to court was preferable because it was more effective in yielding progress in their case, nonetheless going for mediation first benefited them by allowing them to better understand the issues in their claims and prepare for their case.

Whether positions taken at mediation should be binding
Nearly half the participants said that employers should be held to admissions made or positions taken during mediation. Most of these participants further clarified they meant that both parties should be thus bound. About a third of the participants said that they should be able to amend or add to their claims more easily. Only one participant said that both parties should be able to change their position from that taken at mediation. A few participants said that what happens during mediation should be recorded or documented, or at least more transparent. Some of them expressed the more nuanced position that this record could be purely for the claimants' own reference, not necessarily to be relied upon in court as evidence.

Costs

Almost all the participants said that the court fees had been extremely onerous for them at that point in time. These included some who had been granted a fee waiver, but also some who had been denied it. The participants who said that personally they could manage the fees added that, as foreign workers, they knew that the fees would be too much a burden for many other workers in the same

position. At various points during their interviews, almost all the participants alluded to the constant stress and anxiety caused by their precarious financial position during their case. One-third said that at that time, they did not even have enough money for food and other basic living expenses such as shelter and transport, or that they were living on borrowing from friends. Others, while not explicitly asserting that they did not have enough money for food and transport at that time, alluded to their difficulties in saying that they were very conscious of exactly how many days' food and transport expenses the court fees would cost them.

Opinion was divided on the present fee structure, with different filing fees applicable to each of the many different steps in the proceedings. A few participants had no issue with, or even preferred, "step by step" fees. However, twice more of them preferred a single one-time fee, with some explicitly saying that would be better even if it means the initial filing fee would be more, because it allows greater certainty and peace of mind. Many said that it did not matter whether the court fees were charged piecemeal or all at once: the fundamental issue was that they did not have means for such incidental expenses at all.

As regards translation of documentary evidence, participants said that if they had to pay for professional translation at the prevailing market rates, their claims would be defeated because they could not possibly afford them. A few said that requiring them to pay for such translation is unfair because such costs are for too onerous for them when they have no income and are already in financial difficulty. Half felt that such translation should be provided, free of charge, as part of the court's services—comparably to interpretation in court. One said that if completely free translation services are not possible, claimants should only be charged later on when they are better able to afford them: the fees could be deducted from the amount won. Another suggested that employers should bear this cost. Perhaps the most interesting comment was that the reason or justification why the courts should provide these services free was that Singapore was a cosmopolitan city with many workers of many different nationalities, so the need for such services was a matter of course.

On the whole, participants generally acknowledged that court fees were a necessary element of running a public dispute resolution system. More than a third said that the fees should be borne by the respondent employers, reasoning that workers would never want to go to the difficulty of pursuing a salary claim if they had not been wronged by their employers. Most of these participants said that the State should bear this cost, either means of waiving the fees, or MOM bearing the fees. One went so far as to emphasise that rather than waiving the fees, the employer should be compelled to pay those fees. It was also pointed out that the government could well afford this because MOM collects a lot of money in form of foreign workers' levies. A quarter of participants proposed that the fees should be charged at the end of the case, saying that workers would be willing and able to pay such fees when they had won and gotten their rightful wages.

When asked for whom fees should be waived, most said such waiver should be granted to all Work Permit holders; one elaborating that for S Pass and Employment Pass holders, they could afford to part-pay the requisite fees. One participant said that all Special Pass holders should be granted waiver: almost *ex hypothesi* all such foreigners have no income, since Special Passes are issued on condition that the bearer may not work. Some said that waiver should be granted on a case-by-case basis, which is the status quo, based on either a merits or a means test. Notably, the participant who suggested a means test was a Chinese worker. His view could be contrasted with the Bangladeshi workers' experience. They pointed out that workers like themselves usually have no savings because almost all their wages are remitted home to Bangladesh for their families.

Language Issues

Court Documents & Forms

Almost all the participants were unsatisfied with the interpretation to them, and their understanding of, court forms. This was primarily in reference to the originating document, Form 65, since most participants did not know enough about possibilities and procedures in court to even consider using other Forms, unless explicitly instructed or advised to. It should be noted that as a matter of

practice, a few months after the Tribunal regime came into effect, MOM (or rather, the Approved Mediator entity, TADM) began filling out Form 65 for claimants they referred to the Tribunal. Almost all of them said that, at best, only the key identifying details, such as their own and the respondent employer's particulars, and the total claim amount, were interpreted to and verified with them before they were instructed to sign on the document.

All the participants said that they would prefer to have the printed court forms, or samples thereof, in their own language. Fully a third suggested that the forms should be available with side-by-side or line-by-line translations in their own language alongside the English. Most of them said that ideally there should be verbal interpretation as well as such written translations, since some workers are illiterate in their own language. The one illiterate participant explained that even for workers like himself, a printed translation would be useful because they could refer to and review it with the assistance of friends.

Interpretation between Court Sessions

A very small proportion of participants opined that interpretation services between court sessions, and not just in court, would be merely beneficial. A similar number said such services were not necessary. Another explained that he felt that workers needed advice, not just interpretation.

The overwhelming majority, however, said that interpretation between court sessions was necessary, or even critical. A third of these said that not only interpretation was needed, but also some degree of explanation as to what to expect at the next court session. Most explained that without such interpretation, they would not have known what or how to respond to their employer, or what to prepare to say in court. Some went so far as to say that (had they not been assisted by HOME) they would have been forced to give up their claim, or their case would have failed. Many responses described how the lack of interpretation outside the court sessions and concomitant inability to prepare themselves for the next court date, was fundamentally emasculating. They felt powerless and passive. There was a striking consistency in the terms used, by some participants, that they could not

decide or plan their own steps but could only comply with directions or react to the immediate contingencies that arose at their hearing or other court session.

Interpretation & Understanding in Court

Almost a fifth said that they did not understand the proceedings in court, and the decision and reasoning of the court. Some said that they felt they had an adequate understanding. Twice that proportion said that they understood somewhat, to varying degrees, but not entirely. One of them explained that while he understood individual words and statements on their own, with interpretation, he still felt lost because he did not know how they fit in to the larger scheme of things.

Understanding of Court Proceedings

This section of the interviews explored participants' experience and understanding of the various stages and types of sessions in court. At issue is not any question of language barriers or adequacy of interpretation *per se*, but rather, migrant workers' conceptual grasp of the nature, purpose, progress, direction and overall ebb and flow of court proceedings.

For most claimants in the Tribunal, their experience of being in court and of engaging with a judicial officer is primarily at the Case Management Conferences (CMCs) which precede Hearing.[36] Less than half the participants felt satisfied with their understanding of the CMCs. A small proportion understood somewhat, but not entirely. However, it is noteworthy that while about half subjectively felt that they understood, their descriptions of the CMCs, their purpose and what could be achieved in that forum, were somewhat limited. All of these, except a few whom HOME had worked closely with from an early stage since before their claims were registered for even mediation, described the CMCs as mediation sessions. It was clear that the workers' understanding was very patchy: there was a poor grasp of the proper relationship between the CMCs and the Hearing. The CMCs tended to be perceived primarily as an end in themselves: that end being a mediated

[36] Louisa Tang, 'Over 1,000 claims filed at Employment Claims Tribunal in first years of operations', *Today* (Singapore), 24 April 2018.

settlement of the dispute, as opposed to preparation for ascertaining rights and duties.

More than a quarter felt that they had not understood the direction, purpose and significance of the proceedings at the CMC stage. They described their experience of going through the court processes as following instructions, or responding to directions or questions; prevented from taking a more purposeful and proactive role by their lack of awareness of the overall framework of court proceedings.

Not all of the participants' claims proceeded to full Hearing before the Tribunal Magistrate. Of the participants who did, about a fifth were satisfied with their understanding of what transpired at the Hearing. The same number said that they partly understood, but not entirely. One explained that while he was able to understand most of the individual words and statements through the interpreter, he did not grasp the overall direction and progress of the Hearing at that time, as it happened. A small number felt that they had not understood what was going on at all.

The vast majority of participants felt they did not have an adequate understanding of the different steps of the court process and their purpose and relation. They elaborated on this in much the same terms as were used to describe poor grasp of the CMCs: that they felt like they could only follow instructions, and, thus complying with directions given, go "from one step to the next" because they could not perceive the significance of the steps beforehand, or their overall structure. This lack of understanding was a source of great anxiety and stress for them.

The great majority of participants said it would have been helpful if they had been informed beforehand of, and thereby better understood, the purpose of each court session. Most of them elaborated that this would have helped them prepare the necessary materials as well as what to say or ask for, such that they would have been less anxious, stressed and disempowered. Some participants pointed out that better awareness of the court processes and of the purpose of the different stages and sessions would also save the court's time and resources, as matters were often

adjourned because a party was ill-prepared for a session and had not brought necessary documents. Practical considerations aside, another group of participants said that better understanding would mean claimant workers would be better able to accept the outcome if they lost their case; essentially, that justice would be seen to be done.

Understanding of Civil Procedure

Claimant's Case

Most participants felt that they were able to understand what elements they needed to plead for their case to succeed, but added that their evidence was insufficient to prove those points. About a quarter said they did not understand. Most participants felt able to objectively assess the strength of their case, especially in terms of evidence. But the rest, about a quarter, said they felt unable to take that critical 'outside' perspective on their case, or found it very difficult. While some participants felt that they understood how to use evidence, or they would be able to had they got evidence, more of them said that they found it very difficult or confusing to use their evidence and organise or structure it in a way that best supported their case, or would find it so, even if they had sufficient evidence. The rest said that they had not really considered the issue because the main difficulty was that their evidence was simply inadequate.

Respondent's Case

Half the participants felt able to understand how their employer's allegations in response would affect their case. But almost an equal proportion of the participants felt that they did not fully understand, and only grasped it vaguely. It should be noted, of course, that most participants in this study had largely had the benefit of HOME's assistance in reviewing any response documents from the adverse party.

A third said that they did not know what to aim for or establish when questioning the adverse party in court. Notably, a few of them explicitly said that they had thought (or think) that if their employer's response contained false allegations,

they would just have to assert that those were untrue, and it would then fall to the employer to positively disprove the claimants' case or prove the false allegations as against the bare denial asserted by the claimants. Half of the participants said that even if they knew what the purpose of questioning their employer was, and the points they should aim to establish, they would not know how to do so. Of those who said they felt they knew how the question the adverse party: in those cases the presiding Magistrate had generally taken the lead, adopting a fairly proactive inquisitorial approach in examining the respondent's case, which gave the claimant workers more confidence in doing the same.

Representation in the Tribunal

The majority of the participants said that it was extremely difficult for them to pursue their case, and respond to their employer's, on their own without any assistance or representation in court, pointing out the imbalance, in knowledge and resources, between workers and employers. They elaborated on this in various ways. Most of them said that they were not highly-educated; they were manual labourers who had come to Singapore simply to work, never thinking that they would have to seek out the protection of the law, or of the necessity to protect themselves by keeping documents and other evidence. A few said that specifically that they did not know how to think about their case like a lawyer, or at least a better-educated person, would; let alone present and substantiate it. Others, showing consciousness of other migrant worker claimants' situations, pointed out that, as much difficulty as they had encountered, at least they had had assistance and guidance from HOME, and that it would be far harder for migrant workers who had not had similar help. One participant went so far as to say that for any migrant worker whose case goes to court, it was impossible to win; they would certainly fail because of their poor grasp of legal procedures and inability to protect themselves with evidence.

Most participants acknowledged that not allowing legal representation was fair, in the sense that they understood that if lawyers were allowed, practically, workers would not be able to afford them, but employers would. However, a quarter said it was not fair, regardless whether legal representation was allowed or not. They

explained that when both parties were in-person, this was still unfair because employers had far superior knowledge, resources, and experience of legal cases, and far greater ability to marshal and even fabricate evidence. Notably, some explicitly explained their feeling that this was both fair and unfair, distinguishing between objective, neutral fairness on the one hand, and, on the other, a justice which took account of the real position of individual parties.

The Role of the Court

A third of the participants felt they did not understand what the Magistrate was thinking or expecting during the Hearing, or what the Magistrate's view of the case was. This inability to get a reading on the courtroom, combined with their poor understanding of court procedures and of conducting a legal case, contributed to their anxieties that they did not know where their case stood and where its weaknesses were. The vast majority also said they either did not know what the court could do for them, in respect of specific powers that the court could exercise, such as summoning witnesses or evidence; or did not know they could take any initiative to ask the court for anything or take anything other than a passive stance vis à vis the court's conduct and carriage of the matter, or felt too intimidated to try asking for anything or speaking up to the presiding judicial officer. Of the few who said that they knew they could ask the court to exercise certain procedural powers in their favour, most had been assisted by HOME since the early mediation stages.

While it is doubtful whether all of the participants in this study have a consciously explicit conception, at least in the received idiom, of the traditional distinction between adversarial and inquisitorial models of adjudication, what is clear is that, overwhelmingly, they favoured a more proactive role for the court. Remarkably, this was the case even for the 2 participants who said that they had been positively unfairly treated by the Tribunal Magistrate.

The great majority of participants said that the court should have given them more guidance. They acknowledged and accepted that this meant the same guidance would be extended to the respondent employer, saying that this would only be fair

since the basic guidance which they were wishing that the court would provide would be knowledge which most employers already had. On the whole, they appeared to be aware that the courts faced certain institutional constraints: almost half of those participants indicated awareness of a distinction as between guidance in respect of information and in respect of advice. They emphasised that they did not mean that the court should help them along in their case, or advise them on decisions in the individual's case; what they wished for was some guidance as to what the law, including procedural norms, expected and permitted; what they might expect over the course of their case; and the options or steps open to claimants in the Tribunal. A few said that being given greater awareness of the law and procedure beforehand would help them to accept whatever the outcome turned out to be as fair. One of them explicitly said that the converse was now true: it would difficult for him to accept that an adverse outcome was fair because his inadequate preparation for his case would have been no fault of his own but because he was completely in the dark as to how to prepare.

Even so, the view was expressed that such guidance was beyond the constraints of the court, or at least "not the job" of the judge. It was clear that they had in mind more than merely practical constraints: one said that, as much as migrant worker claimants need help, it would not be fair for the court to take cognisance of one party's weakness; another, that for the court to intervene in light of this imbalance would constitute an implicit acknowledgement of the weakness of the worker's case.

More than half felt that the court ought to take more of an inquisitorial role to ascertain the truth of the matters contested, using (in their own language, as interpreted) terms such as "investigate", "find out" and "dig out the truth". Several participants (on either side of this difference of opinion as to whether the court should "enter the arena") pointed out, at various stages of their interviews, that the imbalance as between workers and employers in their knowledge, resources and abilities to generate, retain and produce documentary evidence, and to present their case, tended against correct findings or just outcomes. A few of these, who were amongst those who felt that the court could not take a more interventionist

approach said they did not know how to resolve this problem; the others felt that this justified a more proactive role for the court.

Enforcement

Almost all of the participants said they would not know what to do if they won their case but the respondent refused to satisfy the Order. Of the rest, one said she knew only because she had sought HOME's advice.

When it was explained that the burden of enforcing the Order was left to the initiative and resources of the judgment creditor, the greater majority of participants said that the court should help successful claimants enforce those Orders. They said that the court should at least (proactively) make inquiries: as to whether the Order had been satisfied, and as to the judgment debtor's means of satisfying it. Generally, their rationale was that since the Order had been issued by the authority of the court, it should be for the court to ensure that its authority was respected and not contemned. A small number felt that this responsibility should fall to MOM.

As for how those authorities might effect enforcement, most favoured a punitive or deterrent approach. Some of the proposals described were, in effect, seizure and/or sale of the judgment debtor's assets, albeit where the burden and expense of identifying and liquefying those assets was borne by the court or MOM. Others pointed out that since their employers were Singaporeans or at least residents, they were likelier to be extended credit and should be compelled to take out loans to satisfy the debt. There was also a suggestion that their former employers should, if their business had failed, be compelled to take up salaried work, from which they should pay the wages owed to their erstwhile employees. One participant said that the government should compensate workers in situations where there is nothing to recover from the employers, saying that foreign workers deserved special protection from such losses because of their vulnerability and economic precarity.

General Comments

Participants were asked to comment on what they thought the main difficulties migrant workers in general would have in pursuing their salary claims in the Tribunal; how Tribunal processes could be fairer; and any other opinions they had on salary claims within the Tribunal's regime. Many of the views expressed and improvements suggested pertained to wider systemic issues which migrant workers in Singapore struggle with. For present purposes, only the responses relevant to either the Tribunal itself or to its role and scope in the overall ecosystem of dispute resolution mechanisms for salary claims are discussed below.

Main Difficulties Faced by Migrant Workers in the Tribunal

Despite the considerable financial difficulty that many migrant worker claimants in the Tribunal face, only one participant cited the court fees as one of the greater problems they encountered. A sixth of the participants felt that language barriers were a major difficulty. One-fifth felt that being in court was very intimidating and in itself was a source of anxiety and stress. The same participant who had mentioned court fees as a major difficulty also referred to this as another significant issue. A third of the participants cited the length of time required for the totality of court proceedings, especially the length of time between sessions relative to the extent of progress in the case at each session.

A quarter of the participants said that the biggest problem for claimant workers was their lack of evidence especially relative to their respondent employers. While this is not in itself a structural issue of the Tribunal, its locus being external to the Tribunal's regime, it arguably furnishes part of the justification for a more inquisitorial approach.

However, the most commonly-identified difficulty was migrant worker claimants' lack of awareness of the law and curial procedures, and concomitant inability to present and substantiate their case effectively. More than a third of the participants referred to this as the biggest problem for migrant workers in the Tribunal.

Recommendations

Aside from suggestions that the court should take a more inquisitorial or at least proactive role, the majority of suggested improvements essentially concerned diminishing the role of the court and increasing MOM's role, in the overall scheme and ecosystem of dispute resolution mechanisms for salary claims. A quarter of participants went as far as to say that such salary claims (ie, low-wage migrant workers') should not have to go to court at all. Almost half of the participants expressed recommendations to the effect that MOM should proactively monitor companies' wage payment practices, investigate the veracity of records, and/or conduct inspections to ensure that workers were actually being paid properly. A third of the participants suggested that MOM could take a substantial deposit, pegged to the number of foreign workers employed, as a condition of granting employers the necessary permits, licences or quotas for hiring foreign workers. They explained that the deposit should be substantial enough for salary claims to be settled from it, justifying with reference to the relatively small quantum of salary claims, and the lack of any complex legal issues which required judicial resolution. One participant also suggested that, to mitigate workers' poor ability to protect themselves with documentary evidence, or awareness of the importance of doing so, MOM should hold educational programmes about keeping documentary records of terms and hours of work. He went into a fair amount of detail as to how this should be implemented so as to ensure that workers actually had realistic opportunity to attend.

A third of the participants said that they wished MOM would resolve their salary claims, without having to be referred to the courts to adjudicate the matter. Notably, 2 of these had been amongst those who had preferred going to court for their own case, which indicates that they distinguished between their *empirical* experience of mediation in respect of their particular case (ie, a negative impression of mediation), on the one hand, and what they thought the structure or system for resolving salary disputes should be, *normatively* (ie, administrative resolution of such issues would be better than adjudication, at least in its present form). One-fifth of participants specifically pointed out that MOM has administrative and punitive powers, and information regarding the employers, which the courts do

not; which powers can and should be proactively leveraged upon to settle disputes. An even higher proportion, more than a third, while not necessarily particularising or justifying this with reference to MOM's powers, felt that MOM had the responsibility to resolve foreign workers' salary issues.

5 Analysis & Recommendations

Challenges for migrant worker claimants' access to justice in the Employment Claims Tribunal regime may be broadly, and somewhat crudely, divided into: issues of the administration or implementation of the regime; and structural or systemic issues. As outlined above, the focus of this study is primarily on the latter. Administrative incidentals will be discussed insofar as they illuminate structural challenges.

Language Issues

While several participants alluded to a negative experience of the interpretation service provided, commenting that some interpreters had been unprofessional, rude or even obstructionist, these comments were not taken into account overall: firstly, because that is not a structural problem. Secondly and more significantly, it was clear overall that the main issue as far as language barriers were concerned was the disempowerment engendered by such dependence on interpreters in the first place. To a considerable extent, such disempowerment is inevitable given the disconnect between the linguistic medium of our courts and the diverse backgrounds of the migrant workers those courts now serve; it is also a difficulty faced by many Singaporeans.

Nonetheless, one practicable way forward is to bring down the barriers in respect of at least TADM's and the Tribunal's own forms. The standard documents for originating process, fee waiver applications, declaring service, calling evidence, setting aside Orders, registering settlements, and so on, should be available in the

most commonly-spoken languages amongst foreign Work Permit holders who seek recourse in the Tribunal; or at least samples of those forms. Undoubtedly some—perhaps many—workers would still need assistance in filling in the specific contents or particulars required. But the availability of written translations would go a long way towards mitigating the disempowerment and alienation which debilitates migrant workers in court. At the very least, they would be able to understand the nature and effect of the documents they are instructed to sign on as their own. As is clear from many participants' responses, a significant proportion of them had thought, for example, that Form 65 (originating process) was a referral document allowing them to proceed to court; not realising that Form 65 constituted their own statement of their case to the court.

In the longer term, making interpretation services available between court sessions would allow claimants to more genuinely take ownership of the progress, pleading and substantiation of their case, especially through understanding of the respondents' case they must answer. As several participants pointed out, facilitating the weaker parties' substantive engagement with and understanding of the proceedings will ensure that justice is not only done, but seen to be done. Arguably, this kind of legitimisation is particularly important in a community justice organ, such as the Employment Claims Tribunal, where most ordinary people would have their only encounters with the legal system.

Costs

The participants' responses indicate that migrant workers generally are aware of and acknowledge the necessity of court fees. Even amongst those who advocated a broad waiver of fees for Work Permit holder claimants, the reason was generally not their low income level per se, but the more specific circumstance that, having had no income for a few months by then in most cases and no savings because of their families' dependence on their remittances, they did not have enough even for life's most basic necessities.

MOM has taken the position that the higher fees applicable under the current *Employment Claims Act* regime should be waived for the bottom twentieth percentile of wage earners in Singapore,[37] which should cover most Work Permit holders.[38] In substance, therefore, this is the same as the most favourable position that participants in this study have wished for. HOME fully agrees with MOM that such a threshold for waiver of the fees should apply at both stages of the salary claims process. Alternatively, as suggested by a participant in this study, the waiver should be granted as a matter of course to at least Special Pass holders, who are not allowed to work.

Pending the implementation of adequate and appropriate arrangements for such waiver, it is edifying to consider migrant workers' provisional views on the issue. Almost two-fifths of participants felt that employer respondents should bear these fees; almost a quarter proposed that the fees should be charged at the end to whoever wins. These responses are enlightening in what they reveal of migrant workers' distinct circumstances in making salary claims. In contrast to the voluntarist assumptions of civil litigation, wherein legal proceedings are *tabula rasa ab initio* and therefore whoever initiates must bear the burden of freely electing to so do: most participants in this study expressed, in one way or another, the wish that their claims would be seen in context as a last resort which they were driven to by their employer's recalcitrance. Furthermore, in contrast to the general principle of civil procedure that the winning party should at least notionally be indemnified, ultimately, of the costs of establishing or enforcing their rights: migrant workers struggle in a very concrete sense with balancing their day-to-day basic needs against the immediate burden of bearing those costs, so much so that

[37] Currently, those earning below $2,200: Ministry of Manpower, *Singapore Yearbook Of Manpower Statistics 2018: Income, Wages And Earnings Table(s)*, Table B.1 (accessed 3 July 2018) http://stats.mom.gov.sg/Pages/Singapore-Yearbook-Of-Manpower-Statistics-2018-Income-Earnings-and-Wages.aspx

[38] Ministry of Manpower — Oral Answer to Questions, "Briefing for the Law Society Pro Bono Services Office on the Employment Claims Tribunal and Tripartite Alliance for Dispute Management", 23 March 2017; Ministry of Manpower — Oral Answer to Questions, "Briefing for Non-Governmental Organisations on the Employment Claims Tribunal and Tripartite Alliance for Dispute Management", 27 April 2017.

the aforesaid general principle simply has no relevance. They would gladly forego that right in order to afford even the first steps in their claims.

It can be concluded that the premises assumed in the principles of general civil procedure do not reflect, and therefore poorly serve, the reality of most migrant worker claimants' circumstances. These include the premise that parties have sufficient resources to—and will—initiate proceedings when their rights have been non-trivially infringed, and to take such steps as are reasonably necessary to prosecute their claims with efficacious diligence. In the all-too-frequent case of a migrant worker stretching his meagre resources just for public transport to MOM and the courthouse, this assumption is far removed from reality. The lesson this bears has implications not only for the costs of salary claim proceedings; it also illuminates more general issues with the conceptual structure of the Tribunal and the fundamental assumptions it rests upon.

Complexity & Formality of Curial Procedures

Much detail of the lengthier narratives of their experiences which participants gave in the course of their interviews has been omitted from the collation of their responses. As anecdotes, however, they revealed migrant worker claimants' lack of awareness of the fundamental corpus of adjectival principles assumed by the Magistrates, Registrars, other court staff, TADM mediators and anyone else familiar with the legal system. Even when the workers felt that they adequately grasped the nature and purpose of the proceedings at hand, some of their responses revealed that they had only a partial or inaccurate understanding. This was exemplified by how the Case Management Conference was characterised as a mediation.

Besides these narrative details, an even more telling indication of workers' poor grasp of legal procedure was the time and effort required, on the part of interviewer, interpreter and participant, to express the questions used in this study, and the issues it sought to investigate, adequately for the participant to meaningfully engage with those issues and give a considered opinion in light of

their own experiences. In other words, even after having gone through those experiences, migrant workers did not find it intuitive to frame, represent and evaluate their experiences. There could be no doubt that the participants had definite and often nuanced opinions and feelings about their experience of the salary claim process in the Tribunal; however, expressing them was not always self-evident, at least in a way that was mutually intelligible in relation to the conceptual lexica with which the adjudication system and its other actors represent it.

It will be apparent how incapacitating the workers' lack of awareness could be. Many migrant workers, while keenly aware of their own ignorance, do not know what they do not know, and consequently are unable to ask for specific assistance. On the other hand, understanding migrant workers' disconnect from the legal process is often beyond the presiding judicial officers and attending court staff, for whom that legal process is an instinctually familiar daily environment. Given that the participants in the study, who had already gone through substantially the whole employment claims process (excluding enforcement)under the new regime, still struggled to conceptualise their case, its process and their experiences in court, at least in the framework of terms with which the adjudication system conceives itself, migrant workers who are still in the midst of their case would certainly have similar or even greater difficulties.

What exacerbates migrant workers' disempowerment arising from lack of awareness of legal procedures is the stress and anxiety engendered by the formality of court procedures. Several participants mentioned that they found just being in court intimidating, and expressed the fear that if they made any missteps in court, inadvertently said anything "wrong", or failed to rebut their employers' allegations of criminal behaviour on their part, there would be negative implications for the court's perception of their case, or even punitive consequences such as imprisonment.

Firstly, reducing the language barriers in the ways suggested above would mitigate this lack of awareness to some extent. However, what was also clear was that language issues are far from the severest difficulty migrant workers have in the

Tribunal. As one participant explained, while individual words and statements were adequately interpreted to him, he did not understand how they fit in to the larger scheme of things, or the overall direction and progress of the proceedings. Secondly, the relevant bodies, including MOM, TADM and the Tribunal or Community Justice and Tribunals Division of the State Courts, might consider developing material to educate migrant workers—and indeed all Tribunal litigants in person—on legal processes and what to expect in court; the adversarial assumptions of our system of adjudication; conceptualising, pleading and substantiating their claims; and responding to the adverse case. This may be in consultation with NGOs who assist migrant workers on a daily basis with such questions; and ideally involving former Tribunal litigants themselves, to ensure that any such material produced is genuinely useful and comprehensible from their perspective. In this regard, one participant had pointed out—and outside this study HOME is anecdotally aware—that many Bangladeshi workers have difficulty understanding the Bengali translations of materials produced by MOM, even if they are literate. This is at least partly because the Bengali used tends to be of the 'Kolkata' (West Bengal) dialect: so much so that the English version of those materials is more useful for the workers, which is certainly not saying much.

It is also hoped that more liberal exceptions to the privacy of the Tribunal may be considered and developed. Section 18 of the Act mandates that the Tribunal proceeds *in camera*.[39] Section 19 prohibits representation. Aside from union members, children, and joint claimants, the only individuals who may be represented are those "unable to present [their] case by reason of illiteracy or infirmity of mind or body".[40] While no language is specified as that by which "illiteracy" would be determined, it seems clear enough from practice that it is taken to refer to *any* language: so illiteracy in English is insufficient grounds for applying to be represented. This restrictiveness means that, despite the practical meaninglessness of literacy in a language which in Singapore is not used in court or in most business or employment transactions—Bengali or Burmese, for example—

[39] The *gravamen* of s 18 provides that "all proceedings before a tribunal are to be conducted in private."

[40] *Employment Claims Regulations 2017*, Third Schedule, cl 2.

migrant workers are on their own in court. As several participants in this study acknowledged, there are cogent reasons for barring lawyers before the Tribunal; not least of which is the imbalance between workers and employers in their access to professional advice and representation. However, support for a disadvantaged litigant need not amount to representation. Often, as some participants expressed, merely having a friend or caseworker present "to observe the hearing of a claim" is a significant source of reassurance for an unrepresented person.[41] Section 18(3)(c) of the Act leaves a significant residual discretion to allow just that; presiding Registrars and Magistrates should at least consider exercising that discretion.

A fourth possibility which might be considered is the development of verbal formulae (and perhaps also written translations) to be incorporated into both the pre-Hearing stages and the Hearing(s) themselves, by means of which the presiding Registrar or Magistrate might clearly spell out to the Tribunal litigants the status of the matter and what the options were for their substantive next steps, as well as what liberty they had, for example, to ask the court for more time, for ordering further or better particulars or discovery from the adverse party. This would be comparable to the standard allocutions in criminal procedure: both the traditional words with which an accused is formally called upon to enter the defence upon the close of the Prosecution's case,[42] and the statutory extensions and adaptations of this rule of trial procedure into the pre-trial Criminal Case Disclosure Conferences for accused in person.[43] Besides the specific information conveyed, a direct and clear addressing of procedural expectations and liberties would also have the broader benefit of communicating the more fundamental principle, especially to more vulnerable parties such as migrant workers, that they do have procedural rights and liberties, and that that the court and its judicial officers and staff have a positive interest in the fairness and natural justice of the proceedings

At this juncture, it might be pointed out that such special provision for an unrepresented accused is an exception to judicial neutrality which must be strictly

[41] *Employment Claims Act 2016* s 18(3).

[42] Now legislatively enshrined in the *Criminal Procedure Code 2012* s 230(1)(m).

[43] *Criminal Procedure Code (Prescribed Forms) Regulations 2010*, Forms 43, 49 and 52 in the Schedule.

confined: a concession to the punctilious adjectival demands specific to the criminal process, which is ostensibly unique in its potential for severe consequences for the accused. But the traditional distinction between criminal and civil proceedings, and therefore between the strength of the procedural protections that should be accorded to parties thereto, does not always align with the impact of a case for a litigant. To a migrant worker counting on his hard-earned wages to clear his family's crushing debts, or to provide even basic necessities for his children, procedural safeguards may be at least as important in a salary claim as in a criminal matter; if not even more so. Criminal proceedings, for the most part, punish only the accused: their dependants only temporarily deprived of their income in the case of most custodial sentences. On the other hand, steep barriers to accessing labour justice in respect of unpaid wages may have far more lasting repercussions for claimants' families.

Mismatch of Expectations: The Role of MOM and Mediation

At various points during the interviews, many of the participants repeatedly emphasised their wish that salary claims could be resolved by or within MOM without having to proceed to court. It cannot be doubted that migrant workers, like anyone else, would prefer resolving their disputes informally if at all possible. As a few participants pointed out, the perception in some quarters that migrant workers may commence ill-founded claims out of avarice is misconceived: because for most workers, who are keenly conscious of their own disadvantaged position and lack of awareness in respect of formal dispute resolution mechanisms, initiating such proceedings is an absolute last resort.

Closer scrutiny of the responses reveals, however, a more nuanced position than simply a preference for the pre-adjudication, ie mediation, stage. Many of those who expressed a preference against going to court cited the further delay and opportunity costs involved in pursuing their claims to the next stage, adjudication. For at least some of these, therefore, their stated preference was not so much positively opting for mediation as it was the natural corollary of a system tilted towards settlements at mediation, in terms of both timeframe and consequent

opportunity costs. Furthermore, some of those who indicated a positive preference for mediation *first* explained that in terms of mediation's instrumental value—affording them the opportunity to understand their case and its process better, and to gauge their employer's position—but with their perspective still oriented towards adjudication as the primary mechanism of formal dispute resolution.

Some of those who preferred going to court, or thought that an option to proceed directly to adjudication would be better, felt that the court was fairer, or that the mediator had been unhelpful. On the other hand, some preferred the court simply because it was more efficacious, in that court orders have a legal force which mediation does not. Many participants expressed the view that MOM can in fact exert real force to compel employers both to admit and to satisfy liability in salary claims; and that they should. Amongst them were some of those who had expressed preference for resolving their claims in court: it was said that if MOM were to exercise these powers, then remaining in MOM to resolve salary claims would certainly be preferable to curial adjudication.

It will be apparent that many participants tended to conflate the two distinct functions of mediation and administrative enforcement. This may be for the historical reason that MOM previously performed both functions; and because TADM mediation continues to be physically within MOM, and conducted by former MOM officers. But it could also be related to a misalignment between migrant workers' expectations, assumptions or backdrop of reference points in thinking about dispute resolution mechanisms for salary claims, on the one hand, and those which underlie the Act's regime, on the other.

Tellingly, a significant number of participants who expressed assent to the status quo of compulsory mediation preceding adjudication were also amongst those who said that parties should be held to their positions taken during mediation. On one level, this obviously indicates misunderstanding of the nature of mediation. At a deeper level, however, this apparent contradiction illuminates a more fundamental issue.

The Act's frame of reference is premised upon two poles of dispute resolution: mediation and adjudication. In soliciting participants' views and experiences of this regime, the framing of the interview also assumed that binary schema. This may partly account for the seeming contradiction in participants' opinions about (compulsory) mediation and what its relation to the adjudication stage ought to be. What emerged from participants' responses in this area as a whole was that the mediation–adjudication scheme was incomplete for expressing what they thought deficient about dispute resolution for salary claims, and they hoped it could or should be. Disinclination towards adjudication was not necessarily, therefore, indicative of a preference for mediation. A fundamental characteristic common to mediation and adjudication is that both are, at least traditionally, party-led.

It is clear from that what most participants have in mind as a better system of dispute resolution for migrant workers' salary claims involves a far more proactive third party or body hearing the dispute and actively exercising substantive powers to right it. This became amply apparent from their references to the sorts of powers they felt should be brought to bear in resolving salary disputes; for example, information as to the real business activity and financial health of employer companies, forensic retrieval of company and employment records and other documents, control over the issuance of Work Passes and ascertainment of "quota",[44] as well as *de facto* punitive powers. All of these are quintessentially administrative powers, not judicial. Participants had at least some awareness of judicial limitations in that regard, which was why they expressed preference for resolution by MOM as opposed to the Tribunal. In indicating preference that "MOM settle", therefore, they were largely expressing their wish for an administrative model of dispute resolution.

MOM does, of course, investigate contraventions arising out of non-payment of salary, impose administrative penalties, and occasionally, prosecute offenders in court. However, such enforcement is currently completely untethered from the salary claims process. It is also fairly sporadic in relation to the frequency of

[44] The colloquial term for what is bureaucratically known as "Dependency Ratio Ceiling": the maximum permissible proportion of non-resident employees, which varies by sector.

deliberate or egregious underpayment of wages, which in many cases seen by HOME would arguably amount to wage theft.[45] Given low-wage migrant workers' vulnerability, MOM's enforcement should be more systematic and publicly transparent, with a view to deterrence. Steps should also be taken to ensure that such enforcement action concretely and fairly helps the workers; for example, by linking the commencement and findings of investigations to the salary claim process, particularly where the worker has difficulty in substantiating their claims with documentary evidence precisely because of the employer's unlawful non-compliance with statutory requirements to keep and furnish employment records.[46]

Institutional Constraints

The foregoing discussion of participants' perceptions and expectations of MOM's proper role in the overall ecosystem of dispute resolution mechanisms for salary claims should raise the question of whether, in the long view, a judicial forum is really the most appropriate model for resolving low-wage migrant workers' employment disputes. A metaphorical epithet which recurred, strikingly, in the responses of a number of participants, was, "MOM is like our guardian in Singapore," and slight variations thereof. The context usually made clear that what was meant was the normative standard of what those participants thought MOM *should be*, by virtue of its relation to low-wage foreign workers; not what it currently *is* by virtue of its actions. One might well question if the judiciary is better or at all suited to such a paternal (or maternal) role.

During the interviews with participants, it became clear that even for those who had had the fortune to encounter Magistrates who endeavoured to at least

[45] See eg, HOME, *Wage theft and exploitation among Singapore's migrant workers* (Position paper, published online January 2017) https://static1.squarespace.com/static/5a12725612abd96b9c737354/t/5a1fce6f652dead776d3c970/1512033911372/Position_Paper_Wage-Theft-Exploitation-among-Singapores-Migrant-Workers.pdf (accessed 23 June 2018).

[46] *Employment (Employment Records, Key Employment Terms and Pay Slips) Regulations 2016*, under Part XII of the *Employment Act 2009*.

understand, if not take account of, the context of salary claims for migrant workers, and the difficulties they had surmounted in pursuing their claims in court, it was extremely difficult for the Magistrates in that curial capacity to take account of (much less address) the imbalance between the claimant worker and respondent employer, even where the particular handicap(s) that the worker laboured under was directly relevant to the proceedings and the findings thereof. Evidently, the fundamental issue is systemic, not of one Magistrate or another. The examples described earlier, cited in notes 24 and 25 above, illustrate such situations. The nature of the difficulties they had encountered was inextricably entwined with their particular evidential situations, which was why the issue was not accounted as a parameter of the present study's findings. Even if only anecdotally, those cases exemplify the difficulties inherent in the application and implications of section 20, or more broadly, with how a court is to navigate such an expanded vista of substantial inquisitorial powers and duties: uncharted waters for most of the judicial officers charged with this responsibility.

The issue of the role of and duties incumbent upon the Tribunal, particularly in light of section 20 of the Act, is one which merits close attention and critical consideration, and is beyond the scope of the present study. For present purposes, it must suffice to say that while much remains to be learned from both the experience of practice or policy and the academic debates regarding specialised statutory tribunals in other jurisdictions,[47] the special considerations applicable to adjudication in such bodies, and the compelling arguments against defaulting to the traditional adversarial approach, have already been explicitly acknowledged by Singapore's highest judicial authority.[48]

The Court of Appeal applied those arguments to the distinctly Singaporean context of the Strata Titles Board, which hears disputes between, for example, management corporations and subsidiary proprietors of residential condominiums or commercial or retail buildings. Against the backdrop of the Board's duty and

[47] See eg, Matthew Groves, 'The Duty to Inquire in Tribunal Proceedings' [2011] 33 *Sydney Law Review* 177.

[48] *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109, [170]–[175].

power to ascertain the good faith of a proposed collective sale, the Court of Appeal explicitly corrected the tendency for such proceedings to be conducted on an adversarial footing, quoting approvingly from commentary that the adversarial system loses one of its fundamental justificatory premises when there exists a systemic (as opposed to "natural") imbalance between the parties, and that it may not be justified where there is also a wider public interest at stake.[49] Although those comments were made in the context of public law, the Court of Appeal applied that reasoning *mutatis mutandis* to strata titles disputes. Both those grounds for an inquisitorial approach by the Strata Titles Board *a fortiori* justify, indeed necessitate—amongst other arguments which deserve fuller treatment elsewhere—a robustly purposive interpretation of section 20 of the Act. Most employees, especially low-wage migrant workers, are in a far weaker position in relation to their employers than minority subsidiary proprietors are vis à vis a collective sale committee. The enactment of the employment claims regime and the Parliamentary debates around it, the special provisions for the nature and proceedings of the Tribunal, and the very subject matter itself, manifest the public interest in the just hearing and disposal of employment claims.

The judiciary is not an administrative bureaucracy; nor should it be run like one. The ideal of judicial independence requires that each exercises the powers and discharges the responsibility of the curial office free of all sway or influence, even each other's. Nonetheless, with the greatest of respect for that ideal, it is suggested that a more systematic consideration by the Tribunal's Bench and Registry of section 20's nature, purpose and effect, in the context and history of the Act's statutory scheme and its predecessors, may be apposite as the Tribunal passes the first year of its operation. It is to be earnestly hoped that the present study may contribute to shedding some small light onto that.

[49] [2009] 3 SLR(R) 109, [174], quoting P P Craig, *Administrative Law* (Thomson Sweet & Maxwell, 5th ed, 2003), 264.

6 Further study

The most fundamental structural deficiency of this study was that nearly all of the participants had had the benefit of substantial assistance and, less tangibly, support and advice from HOME, from a significantly early stage in the employment claims proceedings; in most cases, from the mediation stage. This presumably puts them in a better position to understand and navigate those proceedings. To that extent, the representativeness of this study may have been affected. Notably however, even without prompting, many participants elaborated their views on how much more difficult their claims would have been on their own.

In terms of its contribution to critical evaluation of the Tribunal and its statutory regime, the present study is only a modest scoping investigation, intended to help ascertain the qualitative contours of low-wage migrant workers' experiences. That is one reason why qualitative faithfulness to inductively parameterising the participants' experiences through analysing their responses to open-ended questions was prioritised over rigourous repeatability via questions structured to be quantitatively analysable; for example, with the structure and substance of responses predetermined as a graduated scale for each question. This aim also means that the quantitatively small scale of the study does not present too much of a handicap on its reliability. However, studying the extent of each issue identified would certainly require further investigation on a far larger scale, structured quantitatively. Such a study should ideally involve participants selected on a more random basis than the present.

Appendix

Interview Questions

Threshold issues *— Impact of compulsory mediation on experience of ECT process*
Context: When you have a claim, you have to go through mediation first. You can only go to court if mediation fails. The effect is that:

1) what both parties say is confidential: not recorded and will have no effect in court, but
2) claim items will be sent to the court, and new items cannot be added;
3) it is difficult to change the claim amount.

What do you think about compulsory mediation before going to Court?

Guiding sub-questions

- Do you think that any position claimed or admission made by either party during mediation should have effect in the Court proceedings?
- Do you think parties should be able to recalculate or add items to the claim (or counterclaim) when the case goes to Court?

Fees & Disbursements

- What effect did the claim filing fee have on your daily life?
- What do you think should be the criteria for waiver of court fees?
- Do you think it's good to have many separate filing fees for different documents?
- Are there alternative ways to the court fee system?
- What if you had to pay for certified translations of your evidence?

Language issues

- Was the Claim Form (and other forms, eg Declaration of Service) fully interpreted to you? Or were you just told roughly what it was about and instructed to sign?
- Do you think it would be better to have (samples of) the forms printed in your own language? Or for the forms to be verbally interpreted to you?
- Did you feel that you needed interpretation services in between court sessions, not just at hearings or conferences? For example, when you received your employer's response documents.
- What was the effect of not having such interpretation?

- Did you feel that you understood what the judge was saying during hearings, and all the reasons for the decision?

Hearings

- What happened at your Case Management Conference? Did you understand it?
- What happened at your Hearing? Did you understand it?
- Do you think it would have been helpful for your understanding of the Case Management Conferences/Hearings if you had known the purpose of, and had been informed what you can achieve, or what rights you can exercise at, these court dates?
- Did you understand the different steps in the hearing process, and their purpose/rationale? How the different steps are connected?

Understanding of Civil Procedure

- Do you feel you understood what you needed to prove?
- Did you feel able to step outside your case, look at your evidence objectively, and assess its adequacy?
- Did you understand how to use your evidence?

- Did you understand the effect, on your case, of what your employer or witnesses were saying?
- When questioning your employer or witnesses, did you understand what you needed to aim for or establish?
- Did you know how to question your employer?

- Did you understand what the judge wanted or expected when speaking to you, your employer or other witnesses?
- Did you feel you understood what the Court can do for you? Were you aware that you have the right to ask the Court to exercise certain powers in respect of obtaining evidence?
- Did you feel that the Court should have guided you in the steps you should take?

- How did you feel about going through this process (analysing and attacking your employer's case) on your own?
- Do you feel it is fair that both parties manage their case on their own without lawyers?

Enforcement

- Do you know what to do if your employer refuses to pay? Do you know the expense and consequence of each course of action?
- Do you think the Court should provide more help with making sure that judgments are obeyed?
- What help should the Court provide?

Residual

- Do you have any other thoughts or comments about the ECT process?
- What is the main difficulty you think foreign workers have in the ECT?
- How do you think ECT processes could be fairer? For everyone? For foreign workers?