

EXECUTIVE COUNCIL

CONFIDENTIAL

Title of Report: Tax Appeals Tribunal

Paper No: 221/11

Date: 28 September 2011

Report of: Attorney General

1.0 Purpose

The purpose of this paper is to seek temporary appointments to the Tax Appeals Tribunal to deal with existing/forthcoming appeals, pending a permanent solution.

2.0 Recommendations

It is recommended that:

- (a) the Senior Magistrate, two volunteer JP's (Andrew Brownlee and Keith Biles) and three independent applicants (Paul Freer, Brian Tonner and Michele Tonner) are appointed as Members of the Tax Appeals Tribunal in accordance with section 180 of the Taxes Ordinance; and
- (b) the Courts Administrator be appointed as clerk to the Tax Appeals Tribunal in accordance with section 182 of the Taxes Ordinance;
- (c) the proposed appointments under (a) be made for two years;
- (d) the proposed appointments under (b) be made on a short term basis (six months is recommended; which will necessarily involve a transfer of appointment to the new Senior Magistrate); and
- (e) Members endorse further work being done, in particular with the new Senior Magistrate and JP's to provide a longer term solution to the problem of recruiting members to the Tax Appeals Tribunal.

3.0 Summary of Financial Implications

None.

4.0 Background

Legislative Requirement for Tax Appeal Tribunal and previous membership

4.1 The Taxes Ordinance provides for a Tax Appeal Tribunal, which must have between five and seven members, to be appointed by the Governor (on the advice of Executive Council). Elected Members and public officers in the Finance Department are not eligible for appointment.

4.2 ExCo paper 156/08 identified that the Tribunal had not sat for many years and that records did not show with any certainty who current members were. It was agreed at the August meeting at which the paper was considered that the appointment of any current members should be brought to an end, and a recruitment exercise should take place to appoint new Members.

4.3 Efforts have been made on several occasions since then to recruit members to the Tribunal, but although several persons have expressed interest, there has been no success in identifying the minimum of five candidates.

Options

4.4 As an alternative solution, an approach was made to the Senior Magistrate and JP's with a proposal to potentially amend the Taxes Ordinance to replace the current provisions for a Tax Appeal Tribunal with new provisions which would mean that the Tribunal was made up of the Senior Magistrate and two JP's (in the same way as the Mental Health Appeal Tribunal is made up).

4.5 Unfortunately agreement could not be reached with JP's to this proposal. A number of reasons were given for the lack of support by JP's, and can be summarised as; (a) concern that they may not have the necessary level of expertise/experience to deal with the complexities of tax law; (b) an increased workload (unpaid); and (c) a risk of possible confusion by the public between the role of a court and the role of a tribunal.

4.6 In relation to the first concern it is noted that the proposal involved sitting with the Senior Magistrate, who would have sufficient legal expertise, and that the Tribunal has always been made up of lay persons; therefore experience in law or tax law is not required (although certain analytical skills are necessary).

4.7 In relation to the increased workload, it is right to point out that JP's act in the role voluntarily in their own time. But given that there appear to have been long periods without any appeals, and that the average is almost certainly considerably less than one a year, the concern can hopefully be negated.

4.8 The third issue concerned the subject matter of the Tribunal itself and was summarised by the Senior Magistrate's view that "there is a clear distinction between JP's sitting on a Mental Health Review Tribunal, protecting the welfare of the mentally ill, and sitting on a Tax Appeal Tribunal, considering the narrow range of issues concerned with the collection of tax by the government; that distinction is clear to the JP's, and will also be clear to the public".

4.9 An alternative to that proposed would be to amend the legislation to simply substitute the Summary Court for the Tax Appeals Tribunal. Similarities may be

drawn here between the Summary Court having the role equivalent to an Employment Appeals Tribunal in UK, ie as a Falklands solution to a lack of resources.

Temporary solution pending identification of satisfactory option

4.10 However, rather than pressing ahead with either solution without the full support from all the key parties it has been suggested that, as a purely interim solution, a few JP's would be willing to be temporarily appointed pending resolution of a long term solution. Such interim appointments would be dependent on their either being appointed with the Senior Magistrate, or their having a legally qualified clerk to advise on the law. This temporary solution would allow the one appeal outstanding (and potentially one or two more in the pipeline) to be dealt with soon and provide time to create a constructive solution for the future.

4.11 The position of the clerk to the Tribunal is also currently vacant. The legislation currently requires the clerk to be a public officer. The Courts Administrator would be an obvious potential candidate for the clerk's role, albeit that the Courts Administrator is not legally qualified, and so could not currently advise the Tribunal on the law (that is not a requirement of the role, but may be relevant to the temporary appointment of the JP's currently proposed as set out above). Because the AG's Chambers frequently provides legal advice to the Commissioner and his staff, the potential/perceived conflict of interest would appear to rule out appointment of one of FIG's lawyers as a clerk.

4.12 The scenario we face is that there is no ideal temporary solution available at present. However, perhaps the best temporary solution available for membership of the Tribunal is the appointment of the three individuals who did express an interest in appointment to the tribunal (Paul Freer, Michele Tonner, and Brian Tonner) together with the Senior Magistrate and two JP's; to achieve the required minimum of five members. In fact four names of JP's were put forward as part of this temporary solution, but it is suggested that two of those who are current FIG employees (Phyl Rendell and Derek Clarke) could be put aside in favour of the three members of the public who willingly applied for the appointments (the appointment of six members would be useful).

4.13 In relation to appointment of a clerk, whilst appointing the Senior Magistrate as a clerk was explored with John Trevaskis, he indicated that it would not be appropriate for him to do so. (The new Senior Magistrate could potentially be directed to undertake such duties thereby excluding this from being an issue in future).

4.14 It should be noted that the Tribunal can sit and hear an appeal with a minimum panel of three, but there must be five appointed Members from which to draw a panel. This means, that for practical purposes, the temporary panel hearing any pending or forthcoming appeals will likely have to include the Senior Magistrate. This is because none of the JP's will sit without him either on the panel or as clerk, and because if it could be arranged that Michele and Brian Tonner do not sit on the same panel, that would be desirable.

4.15 The Senior Magistrate has suggested that the Courts Administrator could properly be appointed as clerk, provided it is clear that her role will be purely administrative, and she will not be involved in the hearing or decision making process. Given that the Senior Magistrate will be on the panel, that should provide an appropriate safeguard in terms of ensuring that the Courts Administrator's role is monitored.

4.16 It should be noted that what is being proposed is only a temporary solution; to address an existing appeal which has been pending whilst a solution to the appointments has been sought, and in potentially in relation to another appeal which officers are aware is likely to be submitted in November.

Task Group for long term solution

4.17 Fundamentally more work is required by officers to find a solution, and perhaps a task group set up by the Chief Executive might be best placed to do so (perhaps including an HR representative, and AG's Chambers representative, the new Senior Magistrate, and the Taxation Officer).

4 Financial Implications

None.

5 Legal Implications

There are no legal implications to the proposed temporary solution; although a change in the law may be required before a longer term solution can be reached.

6 Human Resources Implications

The likely infrequency of demands for Tax Appeal Tribunal work as an interim measure are such that the proposals should be able to be absorbed within existing workloads of the Courts Administrator and Senior Magistrate.