



**The Arbitration Council Digest
1 of 2006 (1 January to 30 June 2006)**

Introduction

In the period from 1 January to 30 June 2006, 51 cases were filed with the Secretariat of the Arbitration Council. 33 of the 51 cases resulted in an arbitral award being issued. For the other 18 cases, a settlement agreement was able to be reached by the parties prior to an arbitral award being issued.

Copies of arbitral awards in Khmer and English as well as detailed information regarding the law and procedures governing the Arbitration Council are available from the Secretariat of the Arbitration Council or on the internet at <http://www.arbitrationcouncil.org/>.

Number of cases filed	51
Number of cases settled without an award	18
Number of cases which an arbitral was issued	23
Number of cases where strikes were involved and a return to work order was issued	11

Figure 1 represents statistics from cases registered with the Secretariat of the Arbitration Council during the period from 1 January to 30 June 2006.

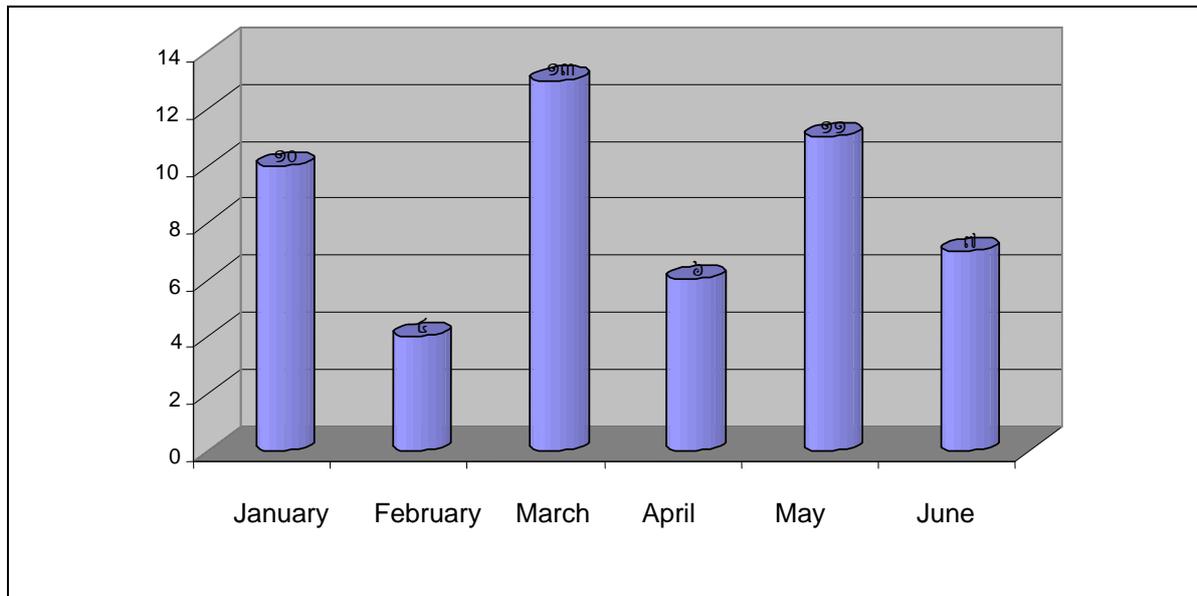


Figure 2 represents the number of cases registered with the Secretariat of the Arbitration Council each month during the period from 1 January to 30 June 2006

Case Summary:

The following summary concerns awards issued by the Arbitration Council in respect of cases registered with the Secretariat of the Arbitration Council from 1 January to 30 June 2006. This summary is provided for informational purposes only and should not be considered legal advice. This is a summary only and may not represent a complete summary of all legal points considered by the Arbitration Council.

Arbitration Council jurisdiction and procedure

The Arbitration Council may decline to decide a dispute if it is an interests dispute brought by a union without most representative status because the union does not have the requisite legal status.

07/06; 11/06; 20/06; 44/06, 48/06

A demand for a re-election of employees' delegates is a collective labour dispute, which arises from the exercise of a union's recognised rights in respect of their professional organisation status.

07/06

The Arbitration Council does not have the power to order a party to implement an Arbitral Award.

08/06; 45/06

The principle of *res judicata* prevents the Arbitration Council from reconsidering the same issue between the same parties.

08/06; 10/06; 24/06; 49/06

The Arbitration Council does not have jurisdiction to arbitrate an appeal or objection to an Arbitral Award.

10/06

The Arbitration Council may decide to discontinue its arbitral proceeding if during the arbitration process the parties do not abstain from strikes or lock-outs or any other action likely to aggravate the dispute.

28/06; 34/06; 50/06

The Arbitration Council will not consider rights disputes where there has not been an alleged violation of a legal right (that is where the alleged violation at the time of the hearing is hypothetical only).

14/06; 19/06; 32/06; 36/06; 38/06

The failure of a properly-invited respondent to attend a hearing without a valid reason does not hinder the arbitral proceeding of the Arbitration Council.

44/06

The Arbitration Council will decline a demand if the claimant does not adduce sufficient evidence in support of the demand.

44/06

The Arbitration Council will not entertain a claim if the claimant withdraws that claim.

45/06

The Arbitration Council does not have the power to order the implementation of judicial order(s).

49/06

Discipline and dismissal

Generally the Arbitration Council does not have the power to order that an employer dismiss an employee, unless for example that employee is endangering the health and safety of other employees.

01/06

Only the contracting parties have the right to terminate the employment contract.

01/06; 32/06

Employees' participation in strike action alone does not constitute serious misconduct. A dismissal of employees for reason of participation in strike action alone contravenes Articles 332 and 333 of the Labour Law.

01/06

An employer can terminate an undetermined duration contract only if the employer gives the employee prior notice in accordance with the Labour Law and has a valid reason for dismissal related to the employee's aptitude, behavior or operation of the enterprise or establishment.

07/06; 09/06; 24/06

Employers are strictly forbidden to terminate an employee on the basis of his/her membership in a union or participation in union activities, pursuant to Articles 12 and 279 of the Labour Law.

07/06

Without a valid reason for termination, the employee is entitled to compensation under Article 91 of the Labour Law.

07/06; 09/06

If an employer fails to impose disciplinary action against an employee within the time limits provided in Article 26 of the Labour Law then the Arbitration Council can find that the employer has renounced his/her right to dismiss an employee.

07/06

In order for an employee to enjoy the special protections against termination pursuant to Article 293 of the Labour Law and Prakas 305/01, the employee must meet the following criteria: (1) the employee is of a type specified, (2) the dismissal took place within the period of special protection, and (3) the employer has been notified of the name of the protected person by an acceptable means of communication.

07/06; 09/06; 43/06

With respect to the special protections awarded to employees by Prakas 305/01 against termination, notifying an employees' union status by delivering a sealed letter to the employer constitutes reliable means of communication. It is immaterial whether the employer reads the letter or not.

09/06

The Arbitration Council may review whether an employer's disciplinary action against an employee is in accordance with Internal Work Rules.

12/06

An employer may put in place policies concerning particular misconduct which provide that more warnings will be issued to employees before dismissal than that stated in the Internal Work Rules.

12/06

Where termination of a group of employees constitutes a mass layoff; the employer must give priority in re-hiring to those employees who were dismissed in the mass layoff.

12/06

Article 333 of the Labour Law prohibits an employer from imposing any sanction on striking employees and is fully effective when a strike follows legal procedures. However, if employees do not follow legal procedures they will not be fully protected under the law.

16/06; 49/06

A disciplinary sanction must be proportional to the seriousness of the misconduct (as per Article 27 of the Labour Law).

24/06; 33/06; 43/06, 44/06

The employer must follow its Internal Work Rules when taking disciplinary action against an employee.

24/06; 33/06; 43/06

Pursuant to Article 90 of the Labour Law, an employee remains entitled to an indemnity for dismissal even when the employee her/himself terminates the labour contract, if the termination results from actions of the employer which forced the employee to resign.

32/06

Suspending an employee for an indefinite period is not a proportional punishment to his/her misconduct.

33/06

Two elements must be fulfilled in order to satisfy Article 83(B)(5): (1) incitement and (2) commission of serious misconduct by other employees as a result of the incitement.

33/06

If a group of employees commit the same misconduct, it is inappropriate to sanction one or some of these employees while leaving the rest of them unpunished.

33/06

In the event, an employee participates in an illegal strike, the sanction imposed on the employee must still be proportional to the misconduct.

49/06

Employee status

A casual employee becomes a regular employee if s/he works for at least 21 days a month for more than two consecutive months.

12/06; 44/06, 47/06

Casual employees shall enjoy the same rights as regular employees, including minimum terms and conditions of employment.

44/06, 47/06

A labour contractor is not an employee. A labour contractor is a businessperson who contracts with another party to provide services, may recruit other employees to execute the tasks s/he has been contracted to undertake, does not receive a wage and is not under the direction and supervision of the contracting party.

47/06

In determining the classification of an employee, the Arbitration Council will consider the terms and conditions contained in the employment contract, the nature of the work performed by the employee. The Arbitration Council will not necessarily base its finding on the manner in which the employee is paid or the title listed in the employment contract.

47/06

Identity cards

Employees have an obligation to take care of the items and equipment (including company I.D. cards) that their employer provides to them in the course of their employment.

38/06

Employers have the right to require employees to take appropriate measures to ensure that they will keep their company I.D. cards well cared for and in their possession.

38/06, 44/06

The employer can require an employee to pay market price for a new I.D. card if the employee has lost the card provided by the employer.

44/06

Labour contracts

Amendments to a labour contract can only be made through true and free agreement. Each party to the contract must therefore be informed about the nature of the amendment. There must also be appropriate time for consideration of the amendment and for the parties to make a decision about whether or not to agree to amend the contract.

03/06; 14/06

A fixed duration contract which has been renewed, for a consecutive period exceeding two years, automatically becomes an undetermined duration contract.

36/06

The Arbitration Council does not have the authority to order contracting parties (the employer and employee) to enter into a certain type of contract (for example, a contract of fixed duration or of undetermined duration).

38/06

The right to agree on the terms and conditions in a contract belongs to the contracting parties alone.

38/06

An employment contract may be in oral form. An employment contract exists when there is an agreement from the employer to hire and from the employee to work in exchange for wages.

47/06

An employment relationship will exist between an employer and an employee, even where the employee has entered into the employment relationship with the employer via a third party agent of the employer.

47/06

An oral employment contract is an undetermined duration contract.

47/06

Labour rights of women

During maternity leave a woman who has worked in the enterprise for at least one year is entitled to 50 percent of her average wage for the three-month period of the maternity leave; the average monthly wage is calculated by adding the twelve months of wages preceding the maternity leave, and then dividing by twelve.

18/06; 24/06

The employer is obliged to provide a day-care center within its enterprise or nearby when 100 female employees are employed in the enterprise. The employer is obliged to provide this facility regardless of whether or not these employees have children who require care at the center.

19/06; 24/06

In the event an employer cannot provide a day-care center, Article 186 of the Labour Law provides the employer the option of reimbursing female employees the charges incurred by using external day-care facilities.

19/06; 24/06

There are no provisions in the Labour Law which provide for payment of three-month wages in advance to workers who take maternity leave.

20/06

The legal obligations to establish a day-care center and a nursing room are two separate obligations on the employer.

24/06

Payment in lieu of the provision of a nursing room on the premises of the enterprise is unlawful.

24/06

The employer must allow one hour per day for female employees to breast-feed their babies. Payment instead of breaks is not a lawful alternative.

24/06

Leave

Employers should arrange annual leave for employees during Khmer New Year and if annual leave is not provided at this time there must be an alternative agreement with the employees concerned.

06/06; 12/06

A policy which allows employees who have worked for less than one year to take annual leave is not prohibited by the Labour Law.

06/06

The employer cannot make an agreement or arrange for employees to give up, or put off, their right to use their annual leave, even if it is paid out instead. This action would be contradictory to the substance of Article 166 of the Labour Law and would therefore be null and void.

06/06; 12/06; 33/06

Pursuant to Article 166(4) of the Labour Law, an employee who has worked for three years is entitled to 19 days annual leave in the fourth, fifth and sixth years of service (as opposed to the usual 18-day entitlement). The same one-day increase shall be applied for every three years of service.

06/06

A company need not provide for paid sick leave in their internal work rules in the same manner as that provided in the model internal work rules annexed to Notice 14/02. Sick leave provisions in internal work rules which are above the law but less than what other comparable companies provide will be considered valid by the Arbitration Council.

20/06

The employer must calculate annual leave owed with reference to the date the employee commences her/his employment.

33/06

An employee does not have the unilateral right to decide to take annual leave at any time s/he wishes.

33/06

The employer has the right to seek to arrange employees' annual leave in order to ensure proper operation of the enterprise.

33/06

The employer must pay the attendance bonus to an employee who is absent with the employer's permission, in proportion to the number of days that the employee has worked per month.

48/06

Management prerogative

Hiring and dismissal is the sole right of the employer as one party to the contract.

01/06

The employer has the right to supervise and direct human resources and to operate the company according to their wishes as long as this supervision and direction is reasonable and in accordance with the law.

06/06; 18/06; 38/06; 44/06

The employer has the right to manage the enterprise in order to ensure a profitable production line; new workplace policies should not unilaterally affect the status of existing labour contracts.

14/06

The right of the employer to direct the enterprise includes the right to require employees to punch in according to the needs of the enterprise.

15/06

The employer's right to manage and direct the enterprise may include implementing a policy that prohibits employees from wearing shoes in the factory if this policy is reasonable for the particular workplace.

18/06

The employer has the right to seek to arrange employees' annual leave in order to ensure proper operation of the enterprise.

33/06

The managerial prerogative of the employer includes the right to transfer an employee from one section to another provided that the employer satisfies the following conditions: (1) the employee's wages are not reduced; (2) the transfer is not to a distant workplace; (3) the transfer is not between

day shift and night shift; and (4) the transfer does not demand a substantial change in the skills required to undertake the work.

38/06

The right of the employer to direct the enterprise includes a requirement that employees wear I.D. cards within the enterprise with a view to maintaining order and security in the workplace.

38/06; 44/06

The employer has the right to determine which sections should be paid on a piece rate basis and which sections should be paid on a fixed wage basis.

44/06

The employer has the right to determine whether to employ employees on a casual or regular basis.

44/06

Medical check fees

On the basis of Article 247 of the Labour Law and Prakas 09/94, the Arbitration Council finds that employers are obliged to pay the expenses of the medical check of her/his employees.

05/06; 38/06

In the event the medical check fee has been deducted by the employer from the wages of the employee, the three-year statute of limitations (set out in Article 120 of the Labour Law) starts from the date on which the medical expense was deducted from the employee's wages.

05/06

Where the medical check fee was paid by the employee prior to the commencement of employment, the three-year statute of limitations (set out in Article 120 of the Labour Law) starts from date the employment contract process concludes, that is when the employment relationship commences.

05/06

Article 247 of the Labour Law alone provides sufficient basis for concluding that the employer is obligated to cover the medical check fee for the employees

19/06; 23/06; 44/06

An employer who fails to comply with Article 247 of the Labour Law regarding medical check fees may be liable to a fine or imprisonment under the law.

19/06

Pursuant to Article 120 of the Labour Law, the right to claim for medical check fee reimbursement lasts for three years starting from the day the employee participated in the medical check.

44/06

The employer's reimbursement of the medical check fee to employees should be paid within a reasonable period after the fee was paid and not at the conclusion of the employment.

44/06

Occupational health and safety

The employer has a duty to arrange and to manage the workplace in order to guarantee the safety and security of employees.

12/06

Employees alleging that a company policy places the safety of the employees at risk must provide sufficient evidence to show that there were accidents or the threat of accidents which could be attributed to this policy.

18/06

Piece rate

When the piece rate changes, the employer must inform the employees about the new rate for each new model, but it is reasonable that this notification occur a short time after the sewing trial of each model.

05/06

The employer has the right to fix or change the piece rate. However, the rate must be fixed in a manner which permits an employee of average skill to earn at least the minimum wage.

11/06; 30/06; 44/06

To determine whether the piece rate set by the employer allows an employee of average skill to earn at least the minimum wage, the Arbitration Council may consider a number of factors including whether the employer had organised a trial to set the piece rate and if so, the participants in and the results of such test. In addition, the Arbitration Council can consider whether the employer has a policy of ensuring that wages are at least equal to the minimum wage and relevant data concerning the amount an employee earns on average, over a period of time.

11/06

Strike

Employees' participation in strike action alone does not constitute serious misconduct. A dismissal of employees for reason of participation in strike action alone contravenes Articles 332 and 333 of the Labour Law.

01/06

If a strike is conducted lawfully, employees are entitled to the attendance bonus of US\$5 pro rata for the time the employees worked, but not for the time spent striking. If the strike is unlawful, the employees are not entitled to any such bonus, because they did not attend work regularly.

02/06; 16/06; 36/06

Article 333 of the Labour Law prohibits an employer from imposing any sanction on striking employees and is fully effective when a strike follows legal procedures. However, if employees do not follow legal procedures they will not be fully protected under the law.

16/06; 49/06

Striking employees are not entitled to their wages during a strike period even if the strike follows the legal procedures set out in the Labour Law.

02/06; 16/06; 36/06

The Arbitration Council may decide to discontinue its arbitral proceeding if during the arbitration process the parties do not abstain from strikes or lock-outs or any other action likely to aggravate the dispute.

28/06; 34/06; 50/06

A concerted work stoppage by a group of employees that takes place within an enterprise or establishment not for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work, is not a strike under the meaning of Article 318 of the Labour Law.

33/06

Under Article 318 of the Labour Law, a strike must have three essential elements: (1) a concerted work stoppage, (2) conducted by a group of employees, and (3) with the purpose of obtaining satisfaction to a demand.

36/06

In the event, an employee participates in an illegal strike, the sanction imposed on the employee must still be proportional to the misconduct.

49/06

Suspension

When the labour contract is suspended, only the main obligations of the labour contract are affected, which means that the employees are not obliged to work for the employer and the employer is not obliged to pay the employees for the period of the suspension.

15/06

If during periods of suspension an employer requires employees to punch in, then the main obligations of the labour contract have not been suspended; that is despite an insufficiency work, there is no suspension and the employees have an obligation to work full time for the employer, while the employer is under an obligation to pay full wages to the employees.

15/06

Unions and worker delegates

A Collective Bargaining Agreement (CBA) will not be binding on a union as a whole, if only a member of that union has signed the CBA rather than the authorized union representatives.

03/06

Pursuant to the Labour Law and Prakas 305/01, the employer must deduct union dues from employees' wages if an employee who is a member of the union makes such a request.

05/06; 19/06

In order for an employee to enjoy the special protections against termination pursuant to Article 293 of the Labour Law and Prakas 305/01, s/he must meet the following criteria: (1) the employee is of a type specified, (2) the dismissal took place within the period of special protection, and (3) the employer had been notified of the name of the protected person through a reliable means of communication.

07/06; 09/06; 43/06

Pursuant to Article 288 of the Labour Law and Clause 2 of Prakas 286/01, in the event a union does not have representative status, all the employees and the union, have the right to nominate candidates for election. The employer is under an obligation to invite the employees' representatives to discuss the form, date, and number of positions to be allocated.

07/06

The Arbitration Council may decline to decide a dispute if it is an interests dispute brought by a union without most representative status because the union does not have the requisite legal status.

07/06; 11/06; 20/06; 44/06, 48/06

A demand for a re-election of employees' delegates is a collective labour dispute, which arises from the exercise of a union's recognised rights in respect of their professional organisation status.

07/06

With respect to the special protections awarded to employees by Prakas 305/01 against termination, notifying an employees' union status by delivering a sealed letter to the employer constitutes reliable means of communication. It is immaterial whether the employer reads the letter or not.

09/06

Pursuant to Article 293 of the Labour Law, the employer cannot dismiss a worker delegate without approval from the Labour Inspector. The dismissal of a worker delegate shall be null and void if the Labour Inspector does not approve it. In this event the employer the dismissal will be considered null and void and the employee reinstated.

43/06

An unregistered union cannot represent members without express authorization from each individual employee seeking to be represented.

44/06

Wages and bonuses

If a strike is conducted lawfully, employees are entitled to the attendance bonus of US\$5 pro rata for the time the employees worked, but not for the time spent striking. If the strike is unlawful, the employees are not entitled to any such bonus, because they did not attend work regularly.

02/06; 16/06; 36/06

Striking employees are not entitled to their wages during a strike period even if the strike follows the legal procedures set out in the Labour Law.

02/06; 16/06; 36/06

When the wage of an employee changes, the employer must take measures to inform the employee of the wage (whether hourly or piece rate) s/he will be entitled to receive (as per Article 112 of the Labour Law). With respect to piece rate, the employer must inform the employees about the new rate for each new model but it is reasonable that this notification occur a short time after the sewing trial of each model.

05/06

Employees are entitled to 200 per cent of their normal wage when working on holidays. 07/06

The Arbitration Council will only consider a demand for a wage increase if the party has sufficient evidence to support its demand. 07/06

Although no written contract exists, evidence of a verbal agreement regarding the employee's wage rate may be found by examining the routine of work and payments made by the employer over a period of time. 14/06

The employer must pay the attendance bonus to an employee who is absent with the employer's permission, in proportion to the number of days that the employee has worked per month. 48/06