



Kingdom of Cambodia
Nation Religion King



**The Arbitration Council Digest
Volume 7 (1 July to 31 December 2006)**

Introduction

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| Number of cases filed | 69 |
| Number of cases settled without an arbitral award | 24 |
| Number of cases in which an arbitral award was issued | 45 |
| Number of cases in which the parties chose a binding arbitral award | 10 |
| Number of cases where strikes were involved | 17 |
| Number of cases where a return to work order was issued | 12 |

Figure 1 represents statistics from cases registered with the Secretariat of the Arbitration Council during the period from 1 July to 31 December 2006.

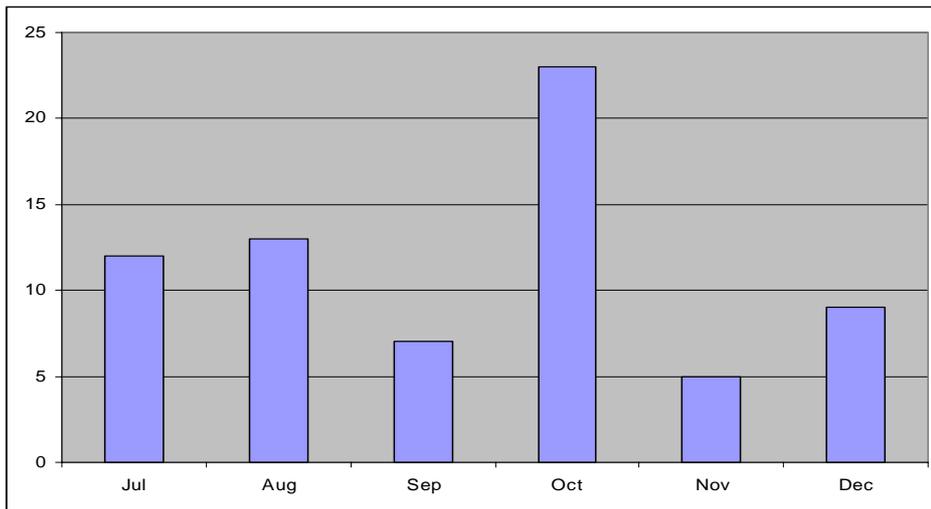


Figure 2 represents the number of cases registered with the Secretariat of the Arbitration Council each month during the period from 1 July to 31 December 2006

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/>.

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 July to 31 December 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.

54/06; 56/06; 60/06; 62/06; 64/06; 66/06; 68/06; 84/06; 96/06; 99/06

In principle, the Labour Inspector and the Minister of Labour and Vocational Training are obliged to decide whether a dispute is individual or collective before submitting it to the Arbitration Council. The Arbitration Council will generally follow their decision, unless there is a clear reason not to.

57/06; 77/06; 81/06; 83/06; 103/06; 119/06

The first condition set out in Article 302 of the Labour Law that a collective dispute must be a “dispute that arises between one or more employers and a certain number of their staff” is satisfied if a union is party to the dispute.

57/06; 103/06; 112/06

A reinstatement claim satisfies the second condition set out in Article 302 of the Labour Law as reinstatement relates to “issues regarding relations between employers and workers”.

57/06; 103/06; 112/06; 114/06

In accordance with Chapter 12, Section 2 of the Labour Law, the Arbitration Council has jurisdiction over collective labour disputes.

57/06; 77/06; 81/06; 83/06; 114/06

The Arbitration Council may terminate the arbitration process if the parties in dispute do not stop all industrial action, such as strikes, lock outs or any other action that may aggravate the dispute during the arbitral process.

59/06; 117/06

Based on Article 13 of the Labour Law, the Arbitration Council is not empowered to provide benefits and rights through an Arbitral Award which are below the benefits and rights provided in the Labour Law.

66/06

The Arbitration Council may continue the arbitral process and issue an Arbitral Award even where a party to the dispute has withdrawn itself from the arbitral proceedings.

68/06

Where one party does not appear, the Arbitration Council may make a decision based solely on evidence provided by the party who did appear.

68/06

The Arbitration Council does not have jurisdiction to resolve an objection to an issued Arbitral Award or any other complaint in respect of the implementation of its own Award.

68/06

According to the principle of *res judicata* (referring to the principle of not considering the same issue in the same dispute when it had already been decided in order to avoid producing two opposite results for the same dispute settlement and to have the dispute at an end with a final decision), the Arbitration Council does not reconsider the same issue between the same parties.

68/06; 106/06

In determining if a dispute may jeopardize the effective operation of the enterprise or social peace, the Arbitration Council may consider: a) the nature of the dispute, b) the proportionality between the number of workers making the claim and the number of workers who make up the workforce, c) whether the relevant worker(s) are skilled and are a classification of worker that the company cannot operate without, d) whether the relevant worker is supported by other workers, e) whether the issue in dispute affects many workers and/or is a current and ongoing issue, and f) any evidence provided by the parties.

77/06; 81/06; 83/06

The Arbitration Council may decline to settle a wrongful termination claim in respect of workers with special protection, if this dispute remains under the authority of the Labour Inspector who is making a decision on whether the employer can terminate that worker.

79/06

The Arbitration Council may make a ruling based on principles of equity if the subject matter of the dispute is not expressly provided for in the law, regulations or the company’s internal work rules.

89/06; 97/06

The Arbitration Council retains jurisdiction to consider the lawfulness of dismissals of workers with special protection after their special protection has been lost because the Labour Inspector has approved the dismissal.

96/06

A claim which seeks benefits more than those provided in law will be considered an interests dispute.

99/06

The Arbitration Council may reject a demand based in an alleged rights dispute where there has not been any alleged violation of a legal right (that is, where the alleged violation is at the time of the hearing hypothetical only).

99/06

Where the parties have been properly informed of the hearing and seek a postponement, in the absence of agreement from the other party and the absence of proper reasons from the party seeking postponement, the Arbitration Council may deny the postponement request.

102/06

Where a dispute concerns only a small proportion of the workforce and not all members of the union support the claim, the Arbitration Council may determine that the third condition set out in Article 302 of the Labour Law defining collective disputes, is not satisfied

103/06; 114/06

Any permission, interpretations or legal advice provided by the Labour Inspector does not necessarily bind the Arbitration Council.

106/06

The Arbitration Council may dismiss a proceeding where the worker party does not provide requested evidence certifying that the union has the requisite legal status to represent a case before the Arbitration Council.

118/06

A termination of an individual employee is an individual dispute except where that person is a union leader or a person who is supported by many workers.

119/06

Where the Arbitration Council finds that a dismissed worker does not have special protection against termination, this may constitute a reason to not accept the Labour Inspector and Minister of Labour's determination that a dispute is collective.

114/06

The departure of a party from the Arbitration Council before the commencement of the hearing process may be considered a failure to appear in person or to be represented at an Arbitration proceeding.

115/06

Conciliation and Collective Bargaining Agreements

A conciliation agreement will have the same force and effect as a collective agreement if the following two conditions are met: (1) the conciliation agreement is signed by both parties and (2) the agreement is visaed by the Conciliator.

89/06

A conciliation agreement which is agreed in front of and signed by a Conciliator is considered to be visaed for the purpose of Article 307 of the Labour Law.

89/06

A collective bargaining agreement which states that it covers all workers in an enterprise and is agreed between the employer and a union with most representative status shall cover all workers in the enterprise, including workers who are members of other unions.

89/06

Deposits

The requirement for workers to pay a deposit for work equipment at the time of signing the contract is contradictory to Article 44 of the Labour Law which prohibits the employer from taking money from the workers.

86/06

Discipline and termination of employment

An employer may legally terminate a worker employed pursuant to an undetermined duration contract by fulfilling the following conditions: (1) providing notice of the dismissal to the employee, and (2) having a proper reason regarding the employee's aptitude or behaviour or the operation of the enterprise.

53/06; 68/06; 73/06; 93/06

Where the employer no longer allows an employee to enter the workplace, this indicates that a dismissal has occurred.

53/06

The employer has the burden of proving that a worker committed misconduct justifying dismissal.

53/06

Clause 5 of Notification No. 006 dated 3 June 1997, regarding notice of termination to be provided to probationary workers, has been abrogated by the Labour Law. The employer is therefore not obliged to give prior notice of termination of a probationary contract.

53/06

The employer is not obliged to ask for permission from the Labour Inspector when deciding not to renew a worker delegate's expired employment contract.

53/06

Pursuant to Article 65 of the Labour Law, only the parties have the right to make decisions in relation to an employment contract, including termination of the contract.

58/06; 67/06; 79/06; 88/06; 106/06

Workers employed pursuant to fixed duration contracts are entitled to severance pay at the end of the employment relationship. If the employment contract is renewed at the expiration of the contract, the employment relationship has not been severed and therefore severance pay is not due.

60/06; 76/06; 99/06; 112/06

If an employer fails to dismiss a worker for misconduct within the statutory time frame, the employer will be considered to have renounced its right to dismiss such worker and will therefore no longer have the right to do so.

64/06

An employer can only terminate a worker because of poor performance or mistake when it has warned the worker a series of times and the worker has not improved their performance.

73/06

Discipline imposed by the employer must be in accordance with the company's internal work rules and the Labour Law.

73/06

The Arbitration Council can order the employer to terminate or transfer a worker from work if the Arbitration Council finds that the employee is a danger to the health and safety of other workers.

79/06; 88/06

In determining whether a worker committed serious misconduct, the Arbitration Council may consider whether the conduct was knowingly committed.

96/06

Failure of the employer to provide a proper reason for terminating an undetermined duration contract gives rise to a worker's entitlement to damages, in addition to indemnity for dismissal and other termination payments.

96/06

Article 293 of the Labour Law is intended to protect union leaders and worker delegates from union discrimination and victimization, by requiring the employer to request permission from the Labour Inspector in advance of the dismissal in order to avoid terminations which relate to union rights and freedoms and to ensure that the termination is not related to their positions as union leaders or worker delegates.

96/06

In cases where the Labour Inspector agreed with a dismissal, dismissed workers are not entitled to the protection provided by the provisions of Article 293 of the Labour Law.

96/06

In order to get special protection against dismissal, the employee must satisfy three conditions: (1) they are within the categories of protected employees; (2) the dismissal falls within the period of special protection and (3) the union has notified the employer of the position by any reliable means.

99/06; 112/06; 114/06

A worker entitled to special protection will generally be reinstated by the Arbitration Council where a dismissal is found to be unlawful, but not where a dismissal has not occurred and the worker's contract has merely expired.

112/06

Termination of a fixed duration contract before the expiry date entitles the employee to an amount equal to the wage which workers would have received until the end of the contract plus severance pay and other benefits as stated in the law.

112/06

Regarding the requirements to obtain special protections against dismissal, notification to the Labour Inspector rather than the employer does not constitute "... *inform[ing] the employer about the names of people having to receive [special protection] by any reliable means.*"

112/06

Discrimination

The party bringing a claim of union discrimination has the burden of proof regarding the claim.

62/06; 93/06; 112/06; 114/06

Where there is no evidence to prove that an employer knew of the worker's participation in a union, the worker's discrimination claim will fail.

62/06; 93/06

Termination of employment because of union membership constitutes union discrimination.

68/06

Employee status and Labour contracts

A probationary contract is a fixed duration employment contract.

53/06

One party cannot force another party to sign a contract or to accept conditions unacceptable to that party.

56/06; 68/06; 106/06

A contract which is made by coercion will be considered null and void.

56/06

Workers who have been working eight hours per day, 26 days per month for two consecutive months will be considered regular workers.

57/06; 66/06

A fixed duration contract becomes an undetermined duration contract if any renewal of the contract results in the total duration of the employment relationship exceeding two years.

57/06; 76/06; 93/06; 96/06

Any provision in a contract which is under the law is considered null and void.

62/06

A sewing machine worker will be classified a “specialized worker” for the purposes of determining an appropriate duration of probation.

62/06

A valid contract cannot be made unless the contract complies with the law, both parties agree to the terms in that contract and none of the contracting parties forces the other party to sign the contract.

73/06

A verbal contract will be considered an undetermined duration contract.

73/06

Ironers and fray trimmers are non-specialized workers and should therefore have only a one month probationary period.

73/06

Internal Work Rules

Any provision in an enterprise’s internal work rules which provide less benefits to workers than those conferred by law will be considered null and void.

56/06

In order to create or revise internal work rules, the employer must satisfy the following three conditions: consultation on the amendment with workers’ delegates (consent from the worker delegates is not required), receipt of a visa from the Labour Inspector and posting of the amendment where it is easily read and on the door of the hiring office.

63/06

Labour rights of women

Women workers who have at least one year of service are entitled to 50 percent of their wages and perquisites for the 90-day duration of maternity leave. This payment should be made in advance of the leave commencing.

57/06; 96/06; 97/06

Calculation of payments during maternity leave shall be done by taking the worker’s total remuneration (including wages, bonuses and all other benefits) during the 12 months preceding maternity leave, divided by 12, in order to find the monthly average. This monthly average should then be divided by two to determine the maternity leave monthly wage (50 percent) which should be paid.

66/06; 96/06

Attendance and seniority bonus are “wages” for the purpose of calculating maternity leave payments.

96/06

The employer must provide a day care center for children, for use from the date a woman worker returns to work after giving birth; this means that the employer must provide on-site day care for children under 18 months of age, but the employer may pay for off-site daycare for children over 18 months of age.

96/06

Leave

The Labour Law does not allow parties to enter into a collective bargaining agreement which provides payment in lieu of annual leave or any agreement to abandon or abstain from using annual leave.

56/06

Payment in lieu of annual leave during maternity leave is unlawful.

96/06

Management prerogative

The employer's management prerogative includes management and direction of the company as well as the division of work shifts for workers.

54/06; 63/06

Article 2 of the Labour Law means that the employer has the right to manage and arrange their workplace as long as those methods are reasonable and in accordance with the law.

60/06; 63/06; 82/06; 108/06

The arrangement of working hours and the establishment of security checkpoints are within the purview of management prerogative.

62/06

The employer can unilaterally transfer a worker if conditions such as the following are satisfied: (1) there is no reduction in wages, (2) the transfer is not to a far place, (3) there is not a change from the day shift to the night shift or vice versa, and (4) there is not a significant change in the skill set required of the worker.

63/06

Moving the location of a factory 100 meters, which does not affect workers' wages or other conditions of employment, is within the purview of management prerogative and does not constitute a change to the employment contract which would require an agreement from the worker concerned.

63/06

When there is no work, the company has the right to arrange alternative work for workers as long as that arrangement does not affect the safety and health of workers or require the workers to do work incompatible with their current skill set.

82/06

The employer has the right to manage work, supervise the production line and manage company property in accordance with the Labour Law and in a reasonable manner.

106/06

An employer may unilaterally transfer a worker where the transfer does not affect the workers' wages, position or time of work and therefore does not affect the workers' rights set out in the employment contract.

108/06

The employer may continue past practice where it has not openly declared a stop on that practice.

109/06

Medical check fees

The employer is obliged to pay for workers' pre-employment medical check fee.

57/06; 66/06; 86/06; 88/06; 89/06; 91/06; 92/06; 99/06

A new employer will remain liable for unpaid medical check fees where they have taken over operations from a previous employer.

57/06

Demands for reimbursement of medical check fees are limited to a three year time period, pursuant to Article 120 of the Labour Law.

57/06; 66/06; 92/06

For those employees who paid for their pre-employment medical check prior to their employment commencing, the three-year statute of limitations timeframe pursuant to Article 120 of the Labour Law commences on the day of signing the labour contract or the date when the worker started work.

88/06; 99/06

For those employees who paid for the medical check fee themselves after they were employed, the statute of limitations for a demand for reimbursement is three years counting from the day of paying the fee.

88/06

For those employees whose wages were deducted by the employer in order to pay for the medical check fee, the statute of limitations for a demand for reimbursement is three years counting from the day of the deduction.

88/06

Overtime

The closing of the factory gates in order to prevent workers from leaving and verbally warning workers who did not want to work overtime, contradicts the legal requirement that overtime be voluntary.

68/06

Strike

During a strike, workers are not entitled to payment, even when the strike was conducted in compliance with legal procedures; however According to Article 334 of the Labour Law, if the employer recruits other workers to replace workers who join the strike, the employer is required to provide wages to all workers during the strike.

58/06; 69/06; 80/06

The employer has the right to deduct the whole month's attendance bonus in the event workers cease work because of an unlawful strike.

58/06

An act will be considered a strike where the following components are satisfied: (1) the act was conducted by a group of workers, (2) the workers stopped working and (3) the purpose of the act was to receive satisfaction for their demand.

80/06

Striking workers will receive their regular attendance bonus in proportion to the number of days they come to work in that month if the strike was conducted according to the procedures set out in the law.

80/06

The deduction of the attendance bonus from striking workers by the employer will not be considered an unlawful punishment if the strike does not follow lawful procedures.

80/06

Suspension

The employer is obliged to put any suspension of its production activities under the control of the Labour Inspector, when suspending pursuant to Article 71(11) of the Labour Law. Failure to do so will entitle the workers to full payment of wages from the company throughout the duration of the unlawful suspension.

60/06; 82/06; 119/06

When the company has no work for workers to do for a short period of time because of late transport of materials, this can be considered as a "particularly unusual difficulty" under Article 71(11) of the Labour Law.

82/06

If the suspension of work is not conducted according to the legal procedures it will be considered unlawful, therefore entitling workers to 100 percent of their wages during the period of the work suspension.

82/06; 86/06; 107/06; 119/06

The content of an agreement which provides less than 100 percent wages to workers during an unlawful work suspension violates Article 13 of the Labour Law and cannot be applied

82/06

The employer can legally suspend work pursuant to Article 71(11) of the Labour Law when it meets the following three conditions; (1) the enterprise faces serious economic, material or special difficulties; (2) the work suspension does not exceed two months (3) the suspension is under the control of the Labour Inspector.

107/06

Labour contract suspensions pursuant to Article 71(11) of the Labour Law may not exceed a two month period, whether in one suspension or consecutive suspensions.

107/06

Unions and worker delegates

The employer is obliged to make deductions from workers' wages for union contribution fees when the employer receives a request to do so in writing from members of the union.

57/06; 62/06

Unions which have not yet been registered do not have the right to demand that the company make deductions from workers' wages for union contribution fees.

62/06

Workers have the right to establish a union without asking for prior permission from the employer.

68/06

The employer is obliged by labour regulations to provide two hours per week for worker delegates to fulfill their obligations as worker delegates.

68/06

As required by labour regulations, the employer must have at least one copy of the Labour Law on-site and this copy must be kept in a place where workers and worker delegates can access it.

68/06

Evidence regarding irregularities in a union election can be reason for the Arbitration Council to determine that a so-called 'committee of union leaders' does not properly represent a whole union but only represents individuals who specifically delegated authority to the committee.

88/06

If an issue is raised regarding the qualifications for union leadership, the Arbitration Council may take note of whether the Ministry of Labour has registered a union and recognised its leaders.

89/06

Legally registered unions have equal rights to work in the factory for the benefit of workers

99/06

The employer is obliged to make deductions from workers' wages for union contribution fees when the employer receives a request to do so in writing from the union, a list of names of workers who demand the company to deduct the union contribution fee, and a letter in writing by each member of the union to the company requesting that union contribution fees be deducted

99/06; 106/06

The employer is not required to provide a meeting room for the purposes of union meetings.

106/06

The employer is obliged by labour regulations to provide a proper place for worker delegates and the union to post names, photos, positions, and activities of worker delegates and union leaders.

106/06

A worker delegate can only be dismissed from the worker delegate position if s/he does not fulfill her/his work. In the event of such a dismissal, the assistant worker delegate will replace the worker delegate until the new election at the completion of the mandate.

106/06

Workers have the right to request that the company arrange for an election to dismiss a worker delegate from the worker delegate position when s/he does not fulfill her/his obligations. The company must accede to this request.

106/06

A demand requesting additional worker delegates before the expiry of a current mandate is an interests dispute.

106/06

The appropriate number of worker delegates and assistants required by the Labour Law and associated regulations should be calculated at the time of each election (and not continually throughout an existing worker delegate mandate).

106/06

Once a union has applied for registration to the Ministry of Labour and Vocational Training and received the certificate of registration, the union is fully entitled to request that the company deduct union contribution fees from member workers' wages from the date of the certificate of registration.

106/06

The employer is obliged to deduct union contribution fees from the wages of each member employee who have made a written request to the employer to do so and the union is properly registered.

110/06

Wages and bonuses

Workers who take leave (including sick leave) with permission from the company are entitled to a regular attendance bonus in proportion to the number of days the workers performed their work.

56/06; 86/06

Workers are entitled to equal wages, pursuant to Article 106 of the Labour Law if there are equal working conditions, equal professional skills and equal labor output.

64/06; 86/06

The employer has the right to provide workers recruited at different times with a wage level based on economic factors and the income level of the company as long as the wage is set in compliance with minimum wage regulations.

64/06

When workers are paid according to piece rate, then the rate of the wage for Sunday and holiday work should be calculated according to the amount produced, not according to the minimum wage; this means that the employer should calculate the payment for Sunday and holidays by adding 100 percent of the rate earned on that day to the amount the workers produced (and not just adding the daily minimum wage rate).

82/06

When all workers receive at least minimum wage when calculated according to the piece rate, then a demand for an increase in the piece rate is an interests dispute

84/06

Workers paid by piece rate who do not work on public holidays are entitled to receive the minimum wage for that day.

92/06

The payment of wages in accordance with the law does not depend on the number of actual working days in each month. The payment of wages is stable at 26 days per month even if the number of working days in each month varies in comparison with the average monthly number.

109/06