



THE ARBITRATION COUNCIL

THE ARBITRATION COUNCIL DIGEST

#1 OF 2004 (JAN - JUN 2004)

Introduction

In the period from 1 January to June 2004, the Arbitration Council received 49 cases. This number represented a significant increase in the caseload from 2003. The number of Arbitrators appointed also increased from 21 to 27 in 2004 in order to accommodate this growth. The Arbitration Council resolved the majority of cases through the issuance of arbitral awards, each of which provided clear findings of fact, legal reasoning and orders. As a consequence, a significant body of jurisprudence has developed in the area of industrial relations in Cambodia. This digest provides a summary of key points of jurisprudence for the period January to June 2004.

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

Number of cases received	49
Number of cases settled without an award	14
Number of cases in which an award was issued	35
Number of cases where objection was filed against award	16
Number of cases where strikes were involved	25

Figure 1 represents statistics from cases registered with the Secretariat of the Arbitration Council in the period from 1 January - 30 June 2004 only.

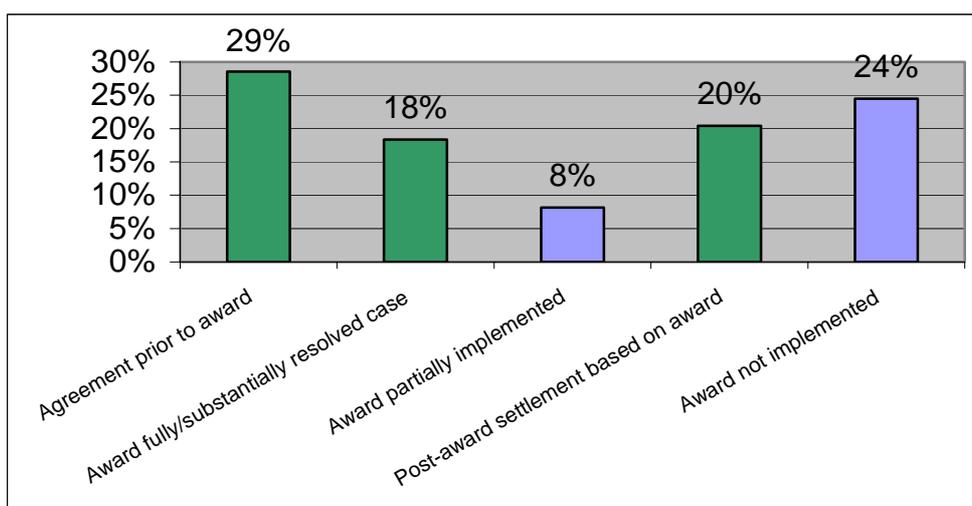


Figure 2 represents the outcome of cases registered with the Secretariat of the Arbitration Council in the period from 1 January - 30 June 2004.

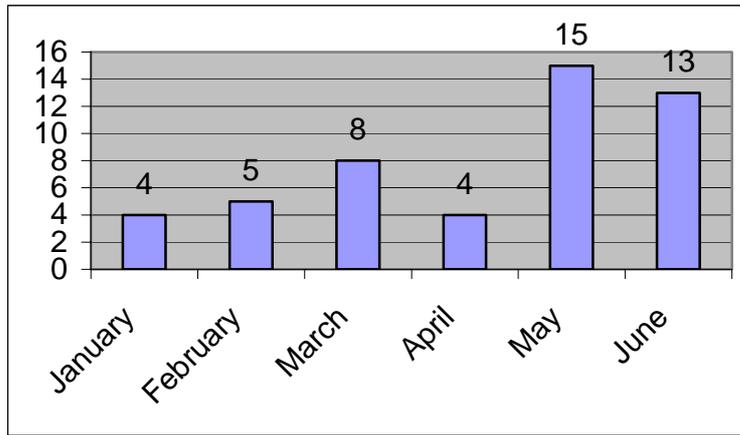


Figure 3 represents the percentage of cases registered with the Secretariat of the Arbitration Council each month during the period from 1 January - 30 June 2004.

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 2004. This summary is provided for informational purposes only and should not be considered legal advice. This summary contains key points of jurisprudence and therefore may not represent a complete summary of all legal points considered by the Arbitration Council.

Arbitration Council jurisdiction

AA = Arbitral Award (No.)

* The Arbitration Council will generally follow the determination of the Ministry of Labour as to whether a dispute is collective, unless there is a clear reason to object.

AA 02/04; 41/04

* In the event the Arbitration Council exceeds the 15-day time limit for issuing awards, the Arbitration Council still has jurisdiction and may issue an award.

AA 18/04 - Intercontinental;
22/04; 28/04

* Issue(s) additional to those in the non-conciliation report must have occurred subsequent to the report and be a direct consequence of the unsuccessfully conciliated issue, as per Article 312, in order to be considered within the jurisdiction of the Arbitration Council.

AA 18/04 - Intercontinental;
22/04; 28/04

Arbitration Council procedure

* As both parties did not appear at the scheduled hearing and the Arbitration Council received a letter from the claimant requesting that the case be withdrawn, the Arbitration Council dismissed the case.

AA 05/04

* The Arbitration Council has the power to order an immediate end to a strike and/or lockout.

AA 18/04 - Sunway Hotel

* Interim orders are not open to objection and are immediately binding upon the parties to the dispute.

AA 18/04 - Sunway Hotel

* Objections can only be made to final awards of the Arbitration Council and not to interim orders made in regard to the Arbitration Council's own proceedings.

AA 22/04

Classification of employment

* A "floating worker" classification (where a worker is employed but regularly suspended due to lack of work) is not a lawful employment classification.

AA 01/04

* The Arbitration Council considered the contracts in this dispute as unspecified duration because these contracts had been renewed repeatedly over a period of more than ten years; as per 10/03 - Jacqsintex.

AA 02/04

* Casual workers become regular workers if they work for the same employer at least 21 days/month for more than two consecutive months.

AA 26/04

* Casual workers are entitled to the same benefits as regular workers including minimum wage, annual leave, special leave and public holiday leave.

AA 26/04; 30/04

Collective bargaining agreements (CBAs)

* Parties can review or change clauses in a CBA by agreement.

AA 14/04

* The Arbitration Council will respect all provisions of a CBA and therefore will not issue an arbitral award to amend or change a CBA that is properly made.

AA 14/04

Disciplinary action

* Serious misconduct does not necessarily lead to dismissal, but merely gives the right to dismiss.

AA 06/04

* An employer can only suspend an employee's contract when it is legally justified to do so. The employer must have evidence that the employee has committed misconduct.

AA 08/04

* Shouting at another employee can constitute serious misconduct per Article 83(B)(4).

AA 13/04

* An employee's motivation for committing serious misconduct (i.e. provocation) should be considered when determining whether the disciplinary action imposed by the employer upon that employee is proportional to the misconduct.

AA 13/04

* Employees can complain to the employer about another employee, but the right to take disciplinary action is the employers.

AA 16/04

* Dismissal or indefinite suspension without pay is not a reasonable punishment to impose on employees who participate in a strike (and have not committed any other misconduct) that has not been declared illegal by the court.

AA 18/04 - Sunway Hotel

* Demotion is a form of punishment.

AA 18/04 - Intercontinental

* An employer cannot take disciplinary action against an employee if there is no provision for that disciplinary action within the company's Internal Work Rules.

AA 18/04 - Intercontinental;
19/04

Dismissal

* A downturn in the operation of the enterprise constitutes a "valid reason" for dismissal in accordance with Article 74.

AA 02/04; 17/04; 19/04

* Without the approval of the Labour Inspector the dismissal of a union leader is null and void, and therefore that employee must be reinstated. A union leader includes only the following positions: President, Vice President and (first) Secretary.

AA 02/04; 17/04; 19/04

* The Arbitration Council does not generally have the power to order an employer to terminate a worker's contract. However the Arbitration Council may consider doing so in some circumstances, for example if the Arbitration Council considers the employee dangerous.

AA 06/04; 15/04, 16/04,
32/04, 34/04, 47/04

* If a dismissal is not in accordance with the law, the dismissal is null and void and the employee(s) will be considered to have remained employed by the company.

AA 17/04; 19/04

* Employees dismissed for discriminatory reasons (e.g. union affiliation) are entitled to damages (although damages were not awarded in this case as the employees did not claim damages).

AA 17/04

* Payment of indemnity for dismissal should be based on the monthly average of total remuneration (including overtime and bonuses) received over the previous year.

AA 27/04

* An employer must dismiss any employee found to have committed serious misconduct within seven days from the date of which the conduct was learned. If a dismissal is made on the eighth day or later after an employee was found to have committed serious misconduct, the employee can no longer be dismissed, but the employer can take other disciplinary action.

AA 36/04

Election of workers' representative

* If the employer does not consult a union, which has representative status within the workplace, before choosing worker representatives, the election will be considered unlawful.

AA 22/04; 28/04

Leave

* The three-year time limit prescribed in Article 120 in respect of claims for unpaid annual leave, will commence at the conclusion of the employment contract and not at the date the leave was accrued.

AA 27/04

* The Labour Law and/or Prakas do not obligate employers to provide wages during sick leave.

AA 30/04

* Seniority and attendance bonuses are included in the amount that should be paid to women employees while on maternity leave.

AA 49/04

* The 50% payment paid to women while on maternity leave, as per Article 183, should be calculated by finding the average monthly wage using the previous year's wage payments.

AA 49/04

Employers' right to manage

* Employees do not have a right to interfere in the lawful management of the company unless the management decision will affect their interests.

AA 28/04; 49/04

Mass layoff

* The dismissal of 51 employees, 13 employees and seven employees over three consecutive months for reasons of economic downturn constituted a mass layoff.

AA 02/04

Night work

* If there is night work undertaken, the employer must designate a period of 11 consecutive hours as "night work".

AA 47/04

Occupational safety and health

* A workplace without a canteen may cause disorder and bad sanitation which may constitute a contravention of the working conditions required by Article 229.

AA 35/04

Overtime

* Employers cannot require employees to work more than ten hours/day (including normal and overtime hours).

AA 10/04

Strikes

* The Arbitration Council will not issue an award or resolve a collective labour dispute if a party strikes or locks out during the Arbitration Council process.

AA 04/04

* Protections for striking workers will only apply when the workers go on strike in compliance with the law; as per AA 04/03 Lida Garment.

AA 08/04; 15/04

* The right to strike can only be exercised when all peaceful methods of dispute resolution have been completed; this includes the arbitral process at the Arbitration Council.

AA 15/04

* If the employer does not contravene legal requirements in respect of strikes (such as not hiring new workers during the strike) then the employer is not required to pay wages (including any bonuses) to the striking employees.

AA 16/04; 25/04

* All employees, no matter their position, have an equal right to participate in strike action.

AA 18/04 - Intercontinental

* Employees may not incite or threaten other workers to take part in a strike.

AA 18/04 - Intercontinental

* A requirement for workers to sign a register promising not to participate in future strikes is not reasonable, as workers have a right to strike in accordance with the Labour Law.

AA 22/04

* The placing of students and staff from a partner hotel for the purposes of training cannot be considered as hiring of new staff in contravention of the Labour Law in respect of strikes.

AA 22/04

* An employee who does not return to work within the time frame ordered in a Return to Work Order from the court has committed serious misconduct. If there is a delay in posting and announcing the Return to Work Order, this may constitute a valid reason for an employee not returning to work within the specified time frame. The employee is obliged to return to work within the specified time frame from the posting/announcing of the Return to Work Order.

AA 28/04

* An employer has the power to require employees to register instead of returning to work, as long as the employer facilitates the registration and the conditions of that registration are reasonable.

AA 28/04

* Employees who are taking authorized leave during the full period of a strike cannot be classified as striking employees.

AA 28/04

* If an employee is on authorized leave during the timeframe ordered by the court in a Return to Work Order, this is a valid reason for not returning to work during the court's timeframe.

AA 28/04

* Switching off a company's electricity by employees during a strike is unlawful, as this causes damage to the company and is contrary to employees' obligation to strike peacefully. Such behavior can be considered serious misconduct.

AA 36/04

Suspension

* During a suspension conducted for reasons of economic difficulty but not under the control of the Labour Inspector as required by Article 71(11), employees are entitled to salary and benefits as though their contract had not been suspended.

AA 01/04

* Suspension of workers by an employer while proceedings are before the Arbitration Council falls within the terms of Article 20 of Prakas 99/04 as "any other action likely to aggravate the situation", and as such is prohibited. All employees suspended in this period should be allowed to return to work.

AA 18/04 - Sunway Hotel;
28/04

* There are circumstances where an employer has the right to suspend an employee pending the outcome of an investigation as to whether an offense has been committed. In these circumstances the employee is entitled to be paid wages for the suspension period.

AA 18/04 - Sunway Hotel;
28/04

* As employees failed to abide by an agreement to return to work, which consequently negatively affected the company's business, these employees were not entitled to wages for the period of unlawful suspension resulting from the strike action.

AA 33/04

* An agreement, which provides that employees will be paid 50% of wages during suspension due to a lack of work, is only valid in so far as the suspension has conformed to the procedures set out in the Labour Law. If the suspension does not conform to the Labour Law, employees are entitled to 100% of wages for the period of unlawful suspension.

AA 46/04

Union discrimination

* The provision of a wage increase to members of one union and not to the members of other unions in the workplace constitutes union discrimination.

AA 15/04

* The following constitutes union discrimination: dismissal of two employees standing for election; prioritizing the existing union representative over other workers; discussing with the existing union representative the employees' intention of establishing another union; and the unequal application of Internal Work Rules to staff based on their union affiliation.

AA 17/04

* Employees dismissed for discriminatory reasons (e.g. union affiliation) are entitled to damages (but damages were not awarded in this case as the employees did not make such a claim).

AA 17/04

* An employer, who organized an unlawful election of worker delegates after dismissing union members and leadership, was prohibited from negotiating or resolving disputes with the new workers' delegates. The CBA, which the employer made with the new workers' delegates, was found to be invalidly made.

AA 22/04; 28/04

* An employer cannot dismiss a worker because of union affiliation or because the employee participates in union activities. If an employee is so dismissed, the employee must be reinstated and receive payment of full wages from the date the dismissal took place.

AA 41/04

Wages and deductions

* An employer cannot decrease a bonus that is an established practice unless both parties agree.

AA 06/04

* Employers must pay wage increases in accordance with the requirements of the company's Internal Work Rules.

AA 06/04

* The Arbitration Council will not consider demands for an increase in wages when a relevant CBA is in force.

AA 11/04

* In respect of the principle of equal wages, Article 106 means that differences in wage rates should not be based on discriminatory reasons (as listed in Article 12). Wage levels can be set in consideration of professional skill, output and seniority for example.

AA 14/04

* It is reasonable for an employer to apply its own evaluation policy to determine the appropriateness of a wage increase. In the interests of fairness, it is appropriate for the employer to provide employees with that evaluation criteria.

AA 14/04

* In respect of claims of discrimination in wage payments, the employee must provide clear or detailed evidence as proof that wages for the same task are not equal.

AA 14/04

* Employers should calculate wages in consideration of the requirements of the task.

AA 21/04

* Employers cannot collect money from employees for the benefit of a third party, unless there is a prior written agreement from the workers or the law requires the employer to undertake this collection.

AA 48/04