

THE ARBITRATION COUNCIL DIGEST

#3 OF 2004 (JULY - DECEMBER 2004)

Introduction

In the period from 1 July to 31 December 2004, 65 cases were filed with the Arbitration Council, more than triple the amount received during the same six-month period in 2003. Most notably, there was a 19 percent decline in the number of cases with strikes involved from the first six-month period in 2004. Whilst a considerable body of jurisprudence in Cambodia has developed in the area of industrial relations, significant legal development in the form of jurisprudence resulted in this six-month period, including jurisprudence relating to the Arbitration Council's jurisdiction, labour contracts and union discrimination.

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	65
Number of cases settled without an award	23
Number of cases in which an award was issued	42
Number of cases where objection was filed against award	28
Number of cases where strikes were involved	21
Average number of workers involved in a dispute where an award was issued	365
Average number of workers involved in a dispute where an award was not issued	241

Figure 1 represents statistics from cases registered with the Secretariat of the Arbitration Council during the period from 1 July - 31 December 2004 only.

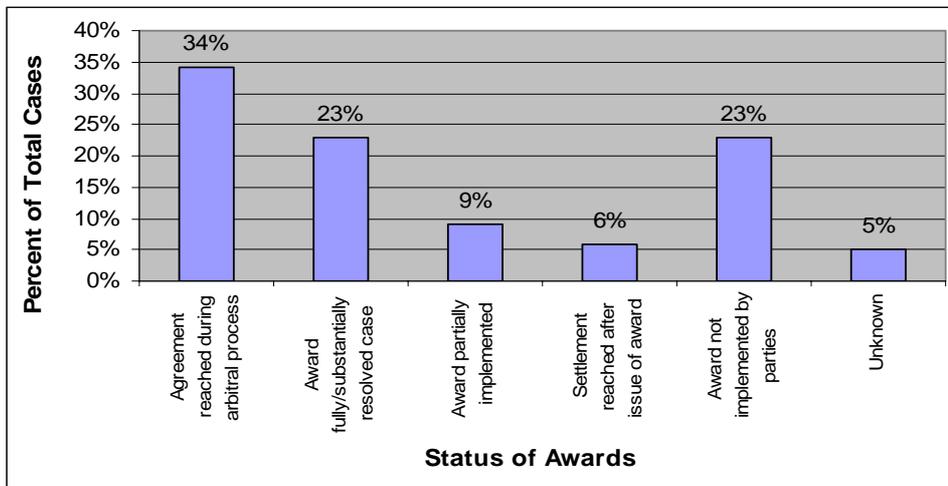


Figure 2 represents the outcome of cases registered with the Secretariat of the Arbitration Council each month during the period from 1 July - 31 December 2004.

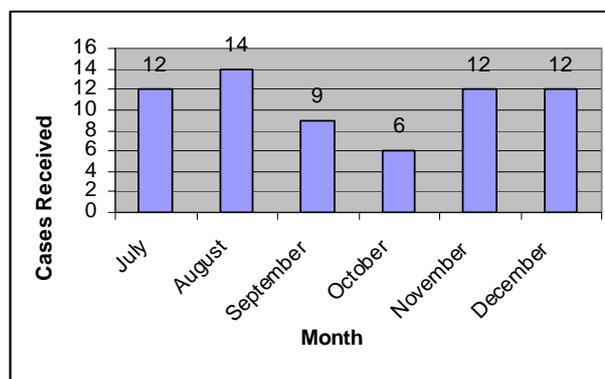


Figure 3 represents the number of cases registered with the Secretariat of the Arbitration Council each month during the period from 1 July - 31 December 2004.

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 July to 31 December 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 does not have jurisdiction to order the dismissal of employees (there may be an exception to this rule where an employee endangers the health and security of other employees).

AA 52/04; 56/04; 73/04; 83/04;
87/04

* The Arbitration Council does not have jurisdiction to re-decide or enforce an arbitral award that has been objected to within the eight-day prescribed limit for objections.

AA 54/04

* The Arbitration Council does not have jurisdiction to hear issues that are not included in the non-conciliation report and that are not a direct consequence of the dispute.

AA 56/04; 62/04; 70/04

* Generally the Arbitration Council will accept the Ministry of Labour's determination of whether the dispute is collective or individual.

AA 63/04; 113/04

* The Arbitration Council has jurisdiction to hear disputes related to worker representative elections.

AA 66/04

* When the Labour Inspector approves the dismissal of a worker delegate or union representative, the worker loses his or her immunity and becomes a normal worker. The Arbitration Council has jurisdiction over the dismissal of normal workers and thus has jurisdiction over worker delegates or union workers whose dismissal has been approved by the Labour Inspector.

AA 91/04

* Whilst the Arbitration Council has jurisdiction to consider whether a suspension is lawful, the Arbitration Council will not review the decision of the Labour Inspector in order to consider whether the suspension is lawful.

AA 91/04; 95/04; 105/04

* An employer not allowing employees to return to work directly after conciliation by the Labour Inspector, constitutes an event that is a direct consequence of the dispute, and is therefore within the Arbitration Council's jurisdiction even if this issue is not included in the non-conciliation report.

AA 111/04

* The Arbitration Council does not have jurisdiction over individual disputes.

AA 113/04

Arbitration Council procedure

* The Arbitration Council will apply the equity principle as long as the employees can persuade the Council that: (1) the employee party has taken efforts to reach a collective bargaining agreement, and (2) the party has proved that the demand is reasonable.

AA 73/04

* If a party fails to provide evidence, the Arbitration Council can accept the other party's evidence as true.

AA 91/04

Annual leave

* Upon the termination of a contract, if an employee has untaken annual leave, the employee is entitled to be compensated for the untaken accrued leave based on the full-time period of the employment relationship; as per Articles 166 and 167.

AA 51/04; 107/04

* If the employer wants to arrange annual leave of 15 days or more for a time other than Khmer New Year, there must be an agreement with the employees.

AA 53/04

* Employers must add one additional day to their workers' annual leave for every three-year period of employment; as per Article 166.

AA 62/04

* Employees are entitled to leave from the past three years in the form of days off, but not monetary compensation; as per Article 167.

AA 62/04; 94/04

* Employers must allow six days of paid leave for Khmer New Year if requested by employees; this includes one day before and one day after the holiday.

AA 62/04

* Employees may take annual leave at any time during their second year of work, and the number of days of leave accrued is proportional to the time worked; as per Article 167.

AA 94/04

Damages

* The termination of an undetermined duration contract without a valid reason by one party obligates a damages payment to the other party; however, an employee's failure to provide evidence of damage may result in the rejection of the claim.

AA 51/04

* There is a three-year time limitation on filing complaints for damages.

AA 78/04

Dismissal

* When an employee, employed pursuant to an undetermined duration contract is dismissed for reasons other than serious misconduct, employers must give employees proper notice.

AA 51/04

* When prior notice of dismissal is not given, employees are entitled to compensation for the appropriate notice period, calculated in reference to the average monthly wage (average

monthly wages equal overtime wages and bonuses for the 12 months prior to the dismissal divided by 12).

AA 51/04

* When an employee, employed pursuant to an undetermined duration contract, is dismissed for reasons other than serious misconduct, the employee receives the full dismissal indemnity; as per Article 89.

AA 51/04

* The indemnity for dismissal is calculated in reference to the monthly average wage based on the wages of the 12 months prior to the dismissal date.

AA 51/04; 54/04

Disciplinary action

* An employer cannot suspend an employee's labour contract indefinitely as this cannot be proportional to the seriousness of the misconduct.

AA 54/04; 55/04

* Even in the event that an employer can demonstrate that an employee committed misconduct, the employer's disciplinary action must be in accordance with the Internal Work Rules of the enterprise.

AA 70/04; 111/04

* In the event that a dispute between employees and their team leader is serious enough to cause harm to the workplace, the employer should transfer the relevant team leader to another group in order to ensure safety and security in the workplace.

AA 71/04

* An employer should be able to justify a finding of serious misconduct by providing evidence to prove an employee has committed the misconduct.

AA 91/04

* Staining a pair of trousers does not constitute serious misconduct.

AA 111/04

Employment books

* Employees are obliged to pay for their own employment book, however the employer must reimburse employees any amount overcharged for employment books (taking into account associated costs borne by the employer in order to organize employment books for employees).

AA 106/04

Employment classification

* "Floating workers" classification is not provided for in the Labour Law. Employees referred thus are generally "casual workers".

AA 53/04

* A casual employee is considered a regular employee if s/he has worked for the employer for 21 days per month for at least two consecutive months and is, in any event, entitled to the same benefits as a regular employee.

AA 53/04; 55/04; 69/04; 85/04

Labour contracts

* An employer cannot enter into a contract with an employee that would result in that employee being provided with rights/conditions inferior to those defined in the Labour Law.

AA 53/04

* As Article 13 invalidates any rule that is inconsistent with the Labour Law, a conciliated agreement to which the employees agree, which allows for conditions below the legal minimum, is void.

AA 62/04

* Any transfer of employees to a new location can only be done by agreement with these employees. If there is no agreement those employees are entitled to termination benefits.

AA 65/04

* Employment contracts in effect on the day of ownership change remain binding between the new employer and the employees of the former enterprise; as per Article 87. Conciliation agreements also remain in effect after the change of ownership.

AA 95/04

* A fixed duration contract becomes an undetermined duration contract if any renewal (including contract renewal after probation) results in the total length of time of the labour contract exceeding two years.

AA 81/04; 98/04; 113/04

Labour rights of women

* If a factory employs more than 100 women, it must establish a nursing room and day care center, or reimburse female employees for their expenses related to placing their children in external day care centers.

AA 53/04; 55/04; 63/04; 68/04;
83/04; 94/04; 99/04; 107/04

* Giving milk formula or payment instead of providing a nursing room is prohibited.

AA 63/04; 68/04; 99/04

* The Arbitration Council estimates the cost of general babysitting costs, through an external child care provider, is US\$15/month per child.

AA 56/04; 68/04; 83/04

* The employer must provide two hours for mothers to breast-feed their children, one hour in the morning and one hour in the afternoon or at any other time during working hours that is mutually agreed upon, because there was no operational nursing room provided by the employer.

AA 83/04

* The employer must pay female employees taking maternity leave an amount at least equal to half their wages, including half the seniority and attendance bonuses.

AA 68/04

* To calculate monthly wages for maternity leave, the employer must add the wages and benefits from the 12 months prior to the maternity leave and divided by 12; the average is then divided in half to compute the 50 percent monthly wage.

AA 68/04

* Payment in advance for maternity leave is an internal management decision of the factory. There is no legal basis for requiring employers to pay maternity leave in advance.

AA 94/04

Management prerogative

* It is the employer's right to schedule working hours (although working hours should be set in accordance with the requirements of the Labour Law).

AA 57/04

* It is within the employer's management prerogative to set policies in respect of wage increases.

AA 68/04

* Whilst employees have the right to choose the time of their annual leave, the employer has the right to reject or accept the request for leave in order that the taking of leave does not affect the company's operation.

AA 111/04

Medical checks

* The employer is required to pay for employees' pre-employment medical check. Therefore if the employer did not pay for the medical check, the employer must reimburse employees who paid for the check themselves.

AA 53/04; 60/04; 62/04; 63/04;
64/04; 68/04; 78/04; 98/04;
106/04; 107/04

* If employees do not make a demand of reimbursement for the cost of the medical check to the employer within three years of the employee payment, employees lose their right to demand said reimbursement from the employer.

AA 68/04; 78/04

* An agreement that requires the employees to pay medical check fees does not comply with the Labour Law.

AA 78/04

* Article 395 of the Labour Law does not abrogate Prakas 9/94 on medical checks of workers.

AA 53/04, 60/04, 62/04; 63/04;
68/04, 78/04

* Article 247 of the Labour Law gives sufficient legal basis to conclude that the employer has an obligation to pay medical check fees of employees before accepting them for work.

AA 63/04; 64/04; 78/04; 98/04;
106/04; 107/04

Occupational health and safety

* An enterprise that employs more than 100 female employees must install one toilet for every 50 employees; as per Prakas 52/00.

AA 94/04

* While it is the right of female workers to wear skirts, the employer may establish Internal Work Rules to prohibit the wearing of skirts, if the wearing of skirts causes accidents.

AA 94/04

* Employers must provide chairs in proportion to the number of workers who have to sit to do work in order to avoid harm to the worker's health; as per Prakas 53/00.

AA 94/04

Piece rate work

* If employees are paid on a piece rate basis, the employer should provide the table of piecework rates to workers at the beginning of each month.

AA 53/04

* The employer must inform employees about the sewing piece rate in advance of the assignment.

AA 62/04

* Pieceworkers have the right to a 50 percent rate increase of normal wage when they work overtime (paid as 50 percent of the average wages per hour).

AA 78/04

Probation

* The employer must pay the travel costs for probationary employees terminated by the employer, if the employees were recruited far from the workplace and the employer took responsibility to transport them to the workplace at the commencement of work.

AA 63/04; 66/04

* The maximum probationary period for sewers in the garment industry is two months because they are considered to be specialist workers.

AA 69/04

* Probationary workers are generally employed pursuant to fixed duration contracts.

AA 55/04; 113/04

Representative status of unions

* A company cannot deny a union participation in worker delegate elections (after the two months has passed) impinges on the rights of that union, in circumstances where the Ministry of Labour has not responded to a union filing for representative status within two months.

AA 66/04

* A union is considered legally representative two months after it submits a registration form to the Ministry of Labour, when it has not yet received approval from the Ministry.

AA 67/04; 73/04

* The Arbitration Council can decline to decide a dispute if it is an interests dispute brought by a union without most representative status.

AA 57/04; 60/04; 78/04; 81/04;
83/04; 86/04; 94/04; 96/04;
98/04; 99/04; 105/04; 109/04

Sick leave

* Where the Internal Work Rules give better protection to employees than does the Labour Law, but do not state clearly the payment of wages during sick leave, the company should include a clause regarding paid sick leave. Wage rates should be determined through reasonable negotiations and set in reference to existing business practices.

AA 55/04

* Sick employees with a valid doctor's certificate, are entitled to US\$5 attendance bonus in proportion to the number of days the employees worked in the month.

AA 62/04; 63/04

* Employers must recognize doctor's certificates issued by hospitals or clinics with legal recognition from the competent authority, unless otherwise stipulated in the Internal Work Rules of the company.

AA 62/04; 68/04

Special leave

* In the event an employee has already used up their annual leave for the year, special leave cannot be deducted from employees' wages or their annual leave for the following year.

AA 99/04

Strikes

* If employees go on strike without following the procedures in Article 324 they lose their legal protections in respect of that strike action.

AA 56/04; 73/04; 111/04

* Employees engaging in unlawful strike action are not entitled to be paid wages, including the US\$5 attendance bonus for that month. Employees engaging in lawful strike action are entitled to pro rata payment of the attendance bonus for the days worked.

AA 70/04; 71/04; 73/04; 111/04

* The Labour Law does not include strike action, unlawful strike action, or inciting others to strike within the definition of serious misconduct in Article 83.

AA 70/04; 76/04

* An employer loses their right not to pay workers during a strike if they hire other workers during a strike, or have the work usually done by the striking workers completed by other factories.

AA 73/04

Suspension of labour contracts

* The employer cannot deduct days from annual leave when the employer has no work for employees to perform.

AA 53/04

* Article 71 does not apply as a means of discipline when there is not provision in the employer's Internal Work Rules for suspension of an employee as punishment.

AA 54/04; 55/04; 69/04

* Even if there has been a suspension of the labour contract, employees are considered to have regularly attended work if they have attended regularly apart from the period of suspension and are therefore entitled to an attendance bonus paid on a pro rata basis.

AA 55/04

* If a suspension is not in accordance with Article 71, the employer is required to pay full wages.

AA 60/04; 62/04; 78/04; 92/04;
95/04

* As employees may demand wages three years after an agreed payday, the employer is legally obliged to pay employees' wages for the past three years when the employers improperly suspended the employees' contracts.

AA 62/04

* Employer is not required to pay employees full back pay for a period of work suspension when employees agree to a policy of 50 percent pay and to not come to work during such period.

AA 78/04

Union dues

* In order for an employer to withhold union dues from employees' wages, the union must submit the written agreement to the employer, and the union must inform the employer in writing about any changes to that agreement; as per Article 129 and Prakas 305/01. If these documents are received by the employer, the employer is required to make the union fee deduction.

AA 62/04; 94/04; 99/04

Union protection

* An employer who changed a union Vice President's work position without agreement and suspended the employee without reason was found to have discriminated on the basis of union membership in violation of Article 279.

AA 52/04

* An employer cannot terminate a union leader without permission from the Labour Inspector, as per Article 293.

AA 65/04; 66/04

* If the Labour Inspector has not responded to an employer's request in respect of the termination of union leaders, it is assumed that such request is declined.

AA 76/04

* If an employer terminates protected employees (i.e. union leaders) without the approval of the Labour Inspector, the employer must reinstate the employees and pay full wages until their contract ends; or, if it is impractical for the employer to reinstate, the employer must pay the employees' full wages until at least the Labour Inspector's decision is issued.

AA 92/04

Wages and benefits

* The employer should specify clearly in the employment contract the wage that each employee will receive and whether that wage is paid on an hourly, daily, weekly, monthly or piece rate basis.

AA 53/04

* Employees who work between 10:00 p.m. and 5:00 a.m. must receive double pay.

AA 53/04

* When the factory moves to a new location, the employer must provide transportation for employees with fixed duration contracts until the end of their contracts.

AA 65/04

* An employer cannot make a claim for the return of monies intentionally overpaid (i.e. above the law) to employees.

AA 78/04

* An employer cannot deduct wages if an employee resigns without notice.

AA 94/04

* A company's overtime policy where workers are paid a cooperative bonus of US\$5 for two hours of overtime work per month was found inappropriate because it put indirect pressure on employees to work overtime.

AA 96/04

* Employers cannot deduct double the employees' wages when they are absent without permission, as this is not proportional to the seriousness of the misconduct and is contradictory to the company's Internal Work Rules.

AA 99/04

Worker delegate elections

* If there is not a most representative union at an enterprise, the employer must accept nominations for worker representative from any union or from any employee who is not a member of a union. If this does not occur, the employer must organise a new election to elect worker delegates.

AA 66/04

* The Arbitration Council is not prevented from attempting to resolve disputes relating to worker delegate elections before such disputes may be referred to court.

AA 66/04; 67/04; 99/04

* A dispute related to an employer's decision to not allow union members to participate fully in worker delegate elections constitutes a collective dispute.

AA 66/04

* A union federation or individual union does not have the right to decide whether another union may or may not participate in worker delegate elections.

AA 67/04