



The Arbitration Council Digest Volume 11 (1 July to 31 December 2008)

Introduction

Number of cases filed	78
Number of cases settled without an arbitral award	31
Number of cases in which an arbitral award was issued	47
Number of cases in which the parties chose a binding arbitral award	5
Number of cases where strikes were involved	13
Number of cases where 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 July to 31 December 2008.

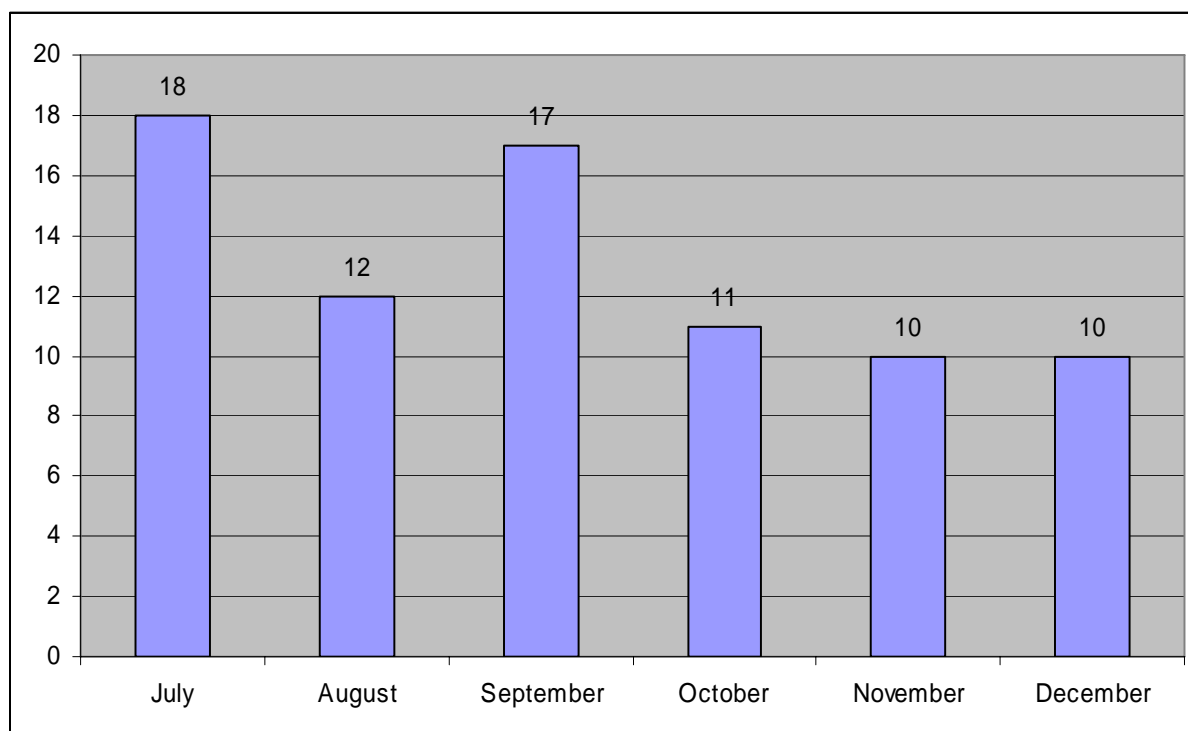


Figure 2 represents the number of cases registered with the Secretariat of the Arbitration Council each month during the period from 1 July to 31 December 2008.

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 arbitral awards issued by the Arbitration Council in respect of cases registered with the Secretariat of the Arbitration Council from 1 July to 31 December 2008. 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

In order for a dispute to be a collective dispute, it must fulfill three conditions: (a) the dispute is between one or more employers and a certain number of their staff; (b) the dispute is related to working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers; and (c) the dispute could jeopardise the effective operations of the enterprise or social peace.

AA 83/08; 152/08

Although a dispute is not brought by a union, it may still be a collective dispute based on a legal analysis of the issue.

AA 83/08

Claims in the non-conciliation report of the Ministry of Labour that are forwarded to the Arbitration Council are presumed to be collective disputes; the Arbitration Council will generally follow this presumption, unless there are obvious reasons for reconsideration.

AA 83/08; 152/08

The Arbitration Council has a right to inquire into, and determine whether or not to accept, the status and authorisation of a party's representative who appears at arbitral hearings; if there is a question about the status of such representative, the Arbitration Council can review relevant evidence and arguments to make its determination, including: whether written authorisation is required from the parties (and if required but not submitted, whether there is a good cause for such failure to submit authorisation); whether any of the parties object to such representation; and the history and extent of the representative's involvement in the case.

AA 83/08

The claimant party is generally required to provide sufficient evidence to support his/her claim; otherwise the Arbitration Council can reject the claim for lack of evidence.

AA 83/08; 101/08; 115/08; 139/08; 147/08; 154/08

The Arbitration Council is endowed with broad legal and equitable powers to provide any civil remedy or relief which it deems just and fair, including providing the aggrieved party choices in the arbitral order.

AA 84/08

Generally, one party cannot unilaterally change an agreement, including an agreement for a binding arbitral award, that has already been made between two parties unless both parties agree to such change.

AA 84/08

The Arbitration Council generally follows the legal interpretations expressed in prior arbitral awards when the facts of a case are reasonably similar.

AA 84/08

The Arbitration Council has the freedom to determine the admissibility, relevance, materiality and weight of evidence, including the freedom to accept testimony which is consistent, logical and supported by other evidence and the freedom to reject testimony which is inconsistent, illogical or not supported by other evidence.

AA 84/08; 85/08

Where a complainant, who has been duly notified of the hearing date, fails to appear without providing a reason, the Arbitration Council may decide to close the case.

AA 95/08; 132/08; 138/08; 145/08

Generally, the Arbitration Council can decline to consider any interests dispute brought by a union that does not have the most representative status in the enterprise because the union does not have the requisite legal standing.

101/08; 108/08; 110/08; 114/08; 117/08; 134/08; 139/08; 143/08; 152/08

The Arbitration Council was established to resolve extant labour disputes, not to resolve disputes that have not yet occurred; therefore the Arbitration Council will generally decline to consider future disputes.

AA 112/08; 136/08; 141/08

The Arbitration Council will decide an interests claim on the basis of equity only when the claimant party is able to show that: the parties have made their best attempt to negotiate a collective bargaining agreement; and the claimant has provided credible testimony to show that the basis for the demand is reasonable and the other party is capable of providing the demand.

AA 114/08

The Arbitration Council can decline to resolve a collective dispute when the worker party continues to strike during the arbitration process.

AA 116/08

Worker delegates can represent the workers to bring a claim to the Arbitration Council.

AA 128/08

In order to represent workers, a union must have either a certificate of union registration or a written authorization letter from workers.

AA 136/08

The Arbitration Council can consider to reject the demand brought to the Arbitration Council if the demand fulfills three conditions: (1) the parties were involved in this demand before, (2) the nature of issue is the same as in dispute before, and (3) the Arbitration Council already made a decision on the issue.

AA 153/08

The legal principle of *res judicata* cannot be applied in case the Arbitration Council has not made a decision.

AA 153/08

The Arbitration Council has jurisdiction to consider the demand in the non-conciliation report forwarded by the Ministry in charge of Labour and issues arising subsequent to the date on which the non-conciliation report was made which are the direct consequence of the original dispute.

AA 153/08; 159/08

Discipline and termination

A refusal to implement the terms of an employment contract can be an act of sabotage which amounts to serious misconduct.

AA 83/08

Workers who end their undetermined duration contracts instead of agreeing to a work transfer by the employer which violates their contract may be entitled to indemnity for dismissal because their termination is provoked by the action of the employer.

AA 84/08

Although in some situations workers can be entitled to indemnity for dismissal and other termination payments for termination related to a work transfer, workers are generally not entitled to damages if the employer has a reasonable basis for requiring such transfer.

AA 84/08

Generally, workers are not entitled to be paid the 5% severance pay at the expiration date of a fixed duration contract when such contract is renewed and the employment relationship continues.

AA 87/08

If the Labour Inspector does not approve the termination of a worker under suspension for serious misconduct, the suspension is annulled and its effects are cancelled by law.

AA 107/08

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

AA 108/08

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 behavior or the operation of the enterprise.

AA 134/08

Disciplinary action applied to workers must be proportional to the misconduct.

AA 134/08

The employer shall be considered to renounce his right to dismiss a worker for serious misconduct if this action is not taken within a period of seven days from the date on which the employer has learned about the serious misconduct in question.

AA 134/08

To terminate a worker, the employer is required to have reasonable basis; termination of a worker at the employer's will for the reason of minor misconduct may entail the worker the entitlement to indemnity for dismissal and payment in lieu of prior notice.

AA 157/08

Employment status

When an employment contract is required to be implemented at a specific location, a unilateral change of the location by the employer may violate the contract.

AA 84/08

The employer has the obligation to provide the same benefits and rights to casual workers as are provided to regular workers such as wages, attendance bonus, seniority bonus, annual leave, and other rights that the regular workers have.

AA 97/08

A change in the employer's legal status generally does not affect the worker's employment contract.

AA 100/08; 143/08

Workers' seniority shall continue even though there is the change of employer if the change of the employer occurs with the evidence of clear termination of the employment contract.

AA 100/08

The employer can change from providing transportation to giving an accommodation allowance if the employer has a reasonable basis for such change.

AA 143/08

General working conditions

If workers choose not to work overtime they should not be required to obtain a permission letter to leave the factory at their regular finishing time.

AA 107/08

Workers' regular working hours should not exceed 8 hours per day or 48 hours per week.

AA 114/08

If workers agree to work on Sunday and it is not a normal working day for them, it is considered to be overtime work.

AA 114/08

If workers work on a public holiday they are entitled to double pay but it is not considered to be overtime work.

AA 115/08

To amend internal work rules, the employer must satisfy the following two conditions: (1) consultation on the amendment with workers' representative, and (2) receipt of a visa from the Labour Inspector before implementing the internal work rule.

AA 141/08

The employer's right to manage and direct the company includes the transfer of workers from one place to another but the employer shall comply with certain conditions, including: 1) no reduction of wage, 2) no change in workshift (from day to night or from night to day) and 3) the new position shall not require substantially different skills of the worker 4) workers shall not be transferred to far-away places.

AA 153/08

Employer's management rights do not include the right to select names of specific workers for a transfer from one work station to another; transfer of work station shall follow a fair and equal procedure for all workers.

AA 155/08

Although the workers work on piece rate together with other piece rates, at the calculation of piece rate the company should ensure that the workers with average ability working for 8 hours per day, excluding of overtime payment and payment for work on Sundays and holidays, can earn at least the minimum wage.

AA 159/08

The conditions to be working regularly means workers come to work according to the number of days required for work per month and respect the direction and internal work rules regarding permission for leave; failure to fulfill such conditions can mean workers do not have a right to receive the attendance bonus.

AA 159/08

Labour and other contracts

A fixed duration contract for employment is extended for the period of its original term if the worker is given no prior notice of the expiration of the contract or its non-renewal and the employer has agreed for workers to continue working.

AA 83/08

Fixed duration contracts for employment are converted into undetermined duration contracts when a renewal causes the total length of the employment to exceed two years.

AA 87/08

The employer cannot force workers to remain on probationary contracts longer than three months during which time they are paid probationary rates that are less than normal workers.

AA 92/08

An employment contract is an agreement between a worker and an employer, and must be in accordance with provisions of general contract law.

AA 113/08; 115/08

Although the Arbitration Council generally will order the employer to convert fixed duration contracts (FDC) into unlimited duration contracts (UDC) when the term of an FDC has exceeded two years, the Arbitration Council can decline to issue such an order if the union does not provide a list of workers who are demanding to convert to a UDC.

AA 113/08

Generally, none of the contracting parties may force the other party to sign the contract or accept the conditions that the other party finds unacceptable; any contract made by force will be considered null and void under the law or can be nullified by the other party.

AA 113/08; 115/08; 128/08

To determine the existence of relationship between workers and employer, the Arbitration Council has to find out if those workers are under direction and control of employer by considering factors such as who determines working hours, work place conditions, wages, leave, etc.

AA 130/08

In order to lawfully change from an undetermined duration contract to a fixed duration contract, there must be a true and free agreement from both parties.

AA 141/08

Where the employer makes a unilateral decision to change the company's location and there is no provision in the employment contracts which would require workers to move to the new location with the company, then such decision may be equivalent to a termination of the employment contract by the will of the employer and could give rise to an entitlement for damages.

AA 153/08

Labour rights of women

An employer who employs more than 100 women workers, is obligated to build a daycare center; if the employer cannot build the daycare center for children above 18 months old, the employer can pay for the external daycare center services to the women workers based on a receipt from the daycare provider.

AA 103/08; 115/08

An agreement to provide for payment in lieu of building of a required daycare center is not in accordance with the purpose of the Law as well as the government's public policies.

AA 103/08

An employer may not provide payment in lieu of building a nursing room as the purpose of Article 186 of the Labour Law is to enable the mother to breastfeed and be close to her child during the first six months of the child's life.

AA 108/08; 115/08

Female workers have the right to receive 50% of wages and perquisites prior to the commencement of their 90 day maternity leave.

AA 114/08; 139/08

Female workers who take one month unpaid leave after the end of their 90 day maternity leave, are not entitled to be paid their seniority bonus for the one month period of unpaid leave.

AA 119/08

Female workers who are on maternity leave are entitled to full US\$ 6 living allowance without any condition.

AA 139/08

Maternity leave payments are calculated by taking the wage the worker earned in the twelve months prior to taking leave, divided by twelve to find the average wage per month, then dividing that sum by two to find 50% of the wage; then multiplied by three (three months), which is the duration of the maternity leave.

AA 139/08

The period of 90 days for maternity leave is inclusive of Sundays and holidays.

AA 152/08

Leave

Workers who take leave with proper permission from the employer have a right to receive their attendance bonus in proportion to the number of days they attend work each month.

107/08; 143/08

Special leave can be deducted from annual leave if workers have not used all their annual leave.

AA 109/08

Prohibiting an employee from taking his/her annual leave and providing payment in lieu of such leave is unlawful.

AA 109/08

When taking sick leave, an employer shall not mandate that a worker must provide a medical certificate from a state hospital but should also recognize medical certificates from city and provincial hospitals, district referral hospitals, and commune health centers.

AA 119/08

Occupational safety and health

Accidents that may be considered work-related accidents are as follows: (1)- accidents happening to a worker working or during working hours, regardless of the cause and whether or not the worker was at fault; (2)- accident happening to the working during the commute to work and back home without interruption or detours for personal interest or non-work-related reason; and (3)- all occupational illnesses.

AA 101/08

Workers who claim reimbursement of their medical check fee should provide evidence and names of workers who have had a medical check.

AA 136/08

Strike

Workers who are no longer employed and go on strike are not entitled to any wages during the period of such strike.

AA 83/08

Striking workers are not entitled to their wages during the strike period.

AA 127/08

When workers conduct an unlawful strike, they do not come to work regularly for the employer and therefore are not entitled to a regular attendance bonus.

AA 127/08

Unions and worker delegates

When workers who are members of unions have requested in writing to have their wages deducted by the company to pay for union contribution fees, then the employer must comply as required by the law and make such deduction.

AA 94/08

If there is no union with most representative status in the factory, then a combination of unions, whose members total more than 50% of workers in the factory, can jointly bring an interests dispute before the Arbitration Council.

AA 114/08

The complainant worker party has the burden of proof to establish that the employer has engaged in union discrimination.

AA 115/08; 141/08; 158/08

A registered union enjoys the rights and benefits recognized by the Labour Law to represent its members.

AA 143/08

An employer must notify and receive approval from the Labour Inspector before terminating a worker entitled to special protections regarding dismissal; if the Labour Inspector does not respond within one month, it means that the request for termination is rejected.

AA 149/08

An employer is entitled to suspend the employment contracts of union leaders while waiting for a decision from the Labour Inspector regarding dismissal of the workers; in case the Labour Inspector does not approve the termination, the suspension shall be considered null and void.

AA 149/08

Termination of union leaders (president, vice-president and secretary of a union) shall follow the legal procedure of the Labour Law; upon failure by the employer to fulfill this obligation, the Arbitration Council may decide to order the employer to reinstate the dismissed worker and back pay the workers from the date of termination to the date of reinstatement.

AA 154/08

When there is no evidence to prove that the employer is aware of the workers' union status, the Arbitration Council may reject a claim of union discrimination.

AA 158/08

Wages and bonuses

In a dispute about whether or not wages have been paid by the employer to workers, the employer has an obligation to prove he/she has made the payment; such proof can take the form of a payroll with the signatures of workers.

AA 83/08

The elements that make up "wages" are not necessarily limited to the items described in Article 103 of the Labour Law

AA 83/08

Money given by clients to staff, which are not "service charge" and not included in the bill, can be considered part of the wage the employer should pay to workers if it is clearly mentioned in the employment contract or the general practice at the company is for the employer to collect the money on behalf of staff and share it amongst the staff.

AA 83/08

The employer may be entitled to withhold the attendance bonus from workers who fail to attend and perform their work without any good reason.

AA 85/08

Generally, workers who fail to perform their work are not entitled to wages; the employer can decide not to pay workers wages for the days they fail to perform their work and such decision is not a fine, unlawful sanction or unlawful wage deduction under the law.

AA 85/08

While workers who complete part of their work responsibilities may not be entitled to their full payment, they may be entitled to partial payments for the work they complete.

AA 85/08

The employer generally cannot withhold the US\$5 attendance bonus from workers who have come to work as usual but are told by the employer to return home because there is no work to perform.

AA 92/08

When calculating overtime for workers, an employer does not need to include a worker's seniority bonus in the calculation.

AA 111/08

An employer's right to supervise and direct includes the right to provide an incentive bonus to workers who have performed well.

AA 113/08

An employer may make payment of an incentive bonus contingent upon certain requirements, as long as the requirements do not affect the worker's main wage and bonuses required to be paid by law.

AA 113/08

When workers work overtime, they are entitled to demand that the employer provide one free meal.

AA 115/08; 117/08

The attendance bonus is an incentive to encourage and praise workers who have come to work regularly for one full month and are not absent without a valid reason.

AA 115/08

Workers are entitled to attendance bonus in proportion to the number of days worked when they take leave with permission from the employer; conversely, the employer has the right to deduct the entire amount of attendance bonus when the workers are absent without permission from the employer.

AA 115/08; 128/08; 152/08

A demand for a meal allowance greater than the 1000 riel is an interests dispute.

AA 117/08; 152/08

The employer has the right to determine or modify the piece rate, as long as it is determined in a way that allows workers with average skill who work for eight hours per day to receive the minimum wage.

AA 119/08

If workers claim that piece rate workers working for eight hours per day earn less than the minimum wage, they should provide evidence to support their claim such as a list of the names of workers who they say were unable to earn less than the minimum wage and the actual wages paid to them.

AA 119/08

A worker has the right to receive the attendance bonus in proportion to the number of days worked if he/she takes a medically certified sick leave.

AA 121/08

The demand for an additional US\$ 2 per month every year as seniority bonus for up to 10 years of employment is an interests dispute.

AA 152/08

Regarding the determination of the piece rate, the Arbitration Council may considers two factors: (1) any test by the company for the workers to perform test work prior to determination of the rate and (2) actual result in relation to wage after the piece rate was set. However, as a result of the rate determination, in case workers can earn less than the minimum main wage, the workers are entitled to receive a wage at least equal to the minimum wage.

AA 159/08

Work suspension

In order to suspend the employment contract, an employer needs to notify and obtain approval from the Labour Inspector; failure to follow such procedure renders the suspension illegal and the workers are entitled to 100 percent of wage.

AA 105/08; 154/08

Generally, agreements that provide less than 100 percent of wages during periods of unlawful work suspension violate the Labour Law and are not enforceable.

AA 154/08