Vol 4, No 1, January - June 2019, pp: 47 - 54

Faculty Publications
ISSN: 3008-1017
Title DOI: https://doi.org/10.62458/021024

Expanding Cambodian Labor Law Through Jurisprudence

Virak Prum*

ABSTRACT

This review summarizes two critical issues in the jurisprudence of labor law which have long been subject of recurring conflicts. It begins with recent cases on contract suspensions triggered by the so-called economic hardship. Then it discusses subordination issue. Drawing on jurisprudential implications from suspension and subordination cases, and if comparative law can be of any guide, I conclude that Cambodia labor law will keep on expanding through interpretations.

Keywords: suspension; subordination; jurisprudence.

* Virak Prum
CamEd Business School
Email: pvirak@cam-ed.com

It is universally urged that "all men are properly to be treated alike in like circumstances."[2] This idea certainly advances a social value commonly known as equality, as justice. It is *just* to render similar decisions for cases involving very similar facts. A case law or a precedent refers to "a particular decision, or a collection of particular decisions [which] generate law—that is, rules of general application."[3] Thus when adjudicators base their decisions on a reasoning or an interpretation given or upheld in previous decisions, the adjudicators effectively ensure a certain level of consistency or predictability in the outcome. By so doing, they may, as we shall see, even expand further on those decisions.

Suspension of employment

Suspending employment contracts has been subject of recurring conflicts between employers and employees. Cambodian Labor Law of 1997 (art.71) provides a dozen grounds for suspension, the last of which reads "when the enterprise faces a serious *economic* or material *difficulty* or any particularly unusual difficulty which leads to suspension of the enterprise operations. The suspension shall not exceed two months and shall be under the control of the labor inspector." Apparently, this statutory provision must respect two conditions: 1) suspension cannot exceed a period of two months, and 2) suspension must remain under the control of an inspector

While the total two-month cap seems quite straightforward,[4] the "under the control of an inspector" condition required interpretations. The Arbitration Council has interpreted this clause as creating two requirements for the employer to fulfill: (1) notify the labor inspector of the intended suspension and (2) obtain a prior approval thereof. Missing either requirement would render the suspension unlawful which, in turn, shall entitle the unlawfully suspended employees to claim full pay. This unlawful-suspension-means-full pay jurisprudence has consistently been followed in the last ten years. For instance, in its arbitral award 19/13 dated 20 February 2013 the Arbitration Council ordered the employer to pay full wages to the employees (who were told to stay home for a few

[2] Karl Llewellyn (1930), case law, 3 Encyclopedia of the Social Sciences 249, *cited in* Jane Ginsburg (2014). *Legal Methods*. Foundation Press, p.2.
[3] Jane Ginsburg, *ibid,* at 1.
[4] There could be multiple suspensions in a single year as long as the combined periods of suspension are, when summed up altogether, do not exceed two months.

days due to insufficient work available) because the employer had failed to notify the labor inspector of the proposed suspension.[5] In effect,

> [T]he Council found that the fact that employees were asked to stay home due to insufficient work available without notifying the labor inspector is not a suspension case…Therefore, the employer must pay full 100% wages to the employees for the days the employer did not have work for them to do (19/13, p.22)

By saying that it was not a suspension case, the arbitrators essentially meant that it was an unlawful suspension. In another arbitral award 160/14 dated 9 July 2014 concerning a one-month suspension case, the Arbitration Council again used its familiar reasoning based on an older decision 08/07 dated 20 February 2007 which already interpreted the meaning of "under the control of the inspector" clause as incorporating two requirements, namely, notifying the inspector *and* obtaining a prior approval for the intended suspension. This often quoted 2007 arbitral award itself also had relied on the interpretations made in previous decisions made as far back as in 2005.[6] Thus, taken altogether, there are very well-established precedents that not only require notification to be served by an employer to a labor inspector in advance but also, and even more importantly, require the latter's *prior* approval before any suspension could lawfully take place. The Arbitrators even expanded further when they, in the 160/14 arbitral award, added another requirement that the inspector's approval be made in writing (p.11 of the award). A verbal approval would not be an available defense for the employer.

The jurisprudence on suspension went on to clear the doubt when it was decided in 2015 that partial remuneration from employer would not be enough to legalize suspension. Here, in the case 192/15 decided on 21 August 2015 the Arbitration Council further applied its jurisprudence in a case where an employer had suspended employment contracts not once or twice but as many as four times in less than two years. In this case, the employer paid 50% of the wages to employees and claimed that there were mutual agreements with the concerned employees to do so. As such, the employer argued that those were not suspension cases and, consequently, thought that the enterprise was not under the obligation to notify the labor inspector of any of those four instances. If only the arbitrators would agree! But no, they did not. In rejecting the argument of the employer, the arbitrators needed to define what would constitute an economic difficulty. They found that the fact that the employer had insufficient amount of purchase orders, as the employer claimed, necessarily constituted a serious economic difficulty, the very basis for triggering a suspension. Essentially,

[5] The Council also considered it unlawful for the employer to deduct the number of those days of staying at home from the employees' paid annual leave.

[6] This 08/07 of 20 February 2007 decision makes references to two previous decisions 22/05 in 2005 and 72/05 in 2005. Most arbitral decisions can be found on http://www.arbitrationcouncil.org/en/ac-decisions/arbitral-decisions

> [T]he Arbitration Council is of the opinion that the fact that the employer did not have sufficient amount of purchase orders which, in turn, created insufficient work for the employees and caused them to take days off four times was a clear factor confirming the serious economic difficulty facing the employer according to ...Article 71. Therefore, the Arbitration Council treats those four-time day-off takings as suspensions. (192/15, p.9)

In summary, the jurisprudence regarding suspension cases based on economic difficulty has advanced four conditions: two-month cap, notification, prior approval, and the written requirement for the approval.[7]

The quick review above reveals how the arbitrators have expanded the meaning of the law through interpreting the phrase "under the control of the labor inspector" as requiring a notification, a prior approval, and a written approval. Such expansion has been made possible only because the Council consistently applies the Stare Decisis principle by giving effect to its previous decisions.

Employer-employee subordination relationship

Another caselaw making can be found in disputes on the meaning of the employer's power to manage the company. In its very recent arbitral award 079/16 dated 27 May 2016, the Arbitration Council attempted to clarify what is meant by the power of the employer to manage employees or, more precisely, to what extent are employees subordinate to the employer's decisions. In this case, an employee was told that he was being transferred to another province. Unhappy, he sued the company. The issue was whether the company would need the employee's prerequisite agreement before the transfer to another province could happen. The company rightly asserted that the clause on such potential transfer in case of necessity was written in the employment contract to which the said-employee voluntarily agreed. Ultimately, the Arbitration Council ruled against a general need for a prior agreement but maintained that the employer may not assume that the employee had agreed to such geographical transfer clause unless the scope of the transfer was clearly defined and reasonable. The Arbitration Council, in this 2016 case, ordered the employer to further discuss the matter with the concerned employee.

This decision is jurisprudentially significant in three regards.

First of all, it declares that the scope of power an employer has over an employee is not automatic. For there to be an enforceable subordination, the exercise of the managerial right which would substantially affect the employee's livelihood must be clearly understood and clearly defined. In this 079/16 arbitral award, the Arbitration Council explained in these terms:

> In this case, the Arbitration Council has noticed that there is such transfer clause in case of necessity. However, the Arbitration Council believes that the clause was not

[7] For more, *See* my original article Virak Prum (2017). *Suspension of Employment Contract.* Available on https://drive.google.com/file/d/0BxOaYhs9pC6QWklrcV9UNGl4Z1k/view

> written in clear terms to define the degree or scope of the right of the employer to transfer employees to another workplace. Moreover, this clause also cannot confirm the employee's true agreement to a transfer to wherever. (Award, p. 24)

Secondly, in addressing the meaning of supervision and direction (art. 2 of the Labor Law), the Arbitration Council reiterated its established jurisprudence which recognizes that the right to manage staffers does indeed fall under the meaning of supervision and direction.

Third, equally important, the Arbitration Council also reaffirmed the scope of the right to manage. But the Council limits the exercise of this right to legal and *reasonable* grounds. The principle of reasonableness is recognized when dealing with a geographical transfer:

> Moreover, in our previous cases 17/03, 18/03, and 84/08, the Arbitration Council interpreted that the right to manage includes the right to make transfers but with several conditions: (1) no pay reduction, (2) no transfer to a very distant location (3) no change to work shift from day to night or from night to day, and (4) no significant change to skills. (Award 079/16, p. 25)

In a zealous demonstration of its jurisprudence, the Arbitration Council cited a separate but similar case involving a transfer of an employee from one province to another in which the Arbitration Council struck down the exercise of the right to manage as being unreasonable although the employer had agreed to cover the rent for the new home:

> The change of workplace […] from Kampot province to Phnom Penh is unreasonable because it involves a great distance from where he lives in Kampot […] despite the fact that the company covers the rent for the new place. The Arbitration Council believes that the change has violated the second condition of the abovementioned four conditions because this change involves a great distance […]. (p. 25-6) [8]

The principle of unreasonableness was thus used to strike down a transfer to a distant location. More cases are certainly required before one can discern the full meaning of "reasonableness" but it is foreseeable that this new principle will be relied upon in transfer cases in the future.

Reading the above cases demonstrates how adjudicators have expanded the meaning of a statute by way of interpretation. The originally undefined "right to manage" now includes the right to make transfers but not do so at will. The arbitrators have also reached out to the principle of reasonableness which is a dominant principle in another field of law.[9]

[8] For more, *See* my original article Virak Prum (2016). *Subordination in Employment Relationship*. Available on https://drive.google.com/file/d/0BxOaYhs9pC6QSzZGMHZsNlBVZ1U/view

[9] Precisely in administrative law. *See* for example, H.W.R Wade & C.F. Forsyth (2014). *Administrative Law*. Oxford: Oxford University Press, p. 293-305.

Insights from a comparative view

In the case of subordination, the French jurisprudence[10] has used the term juridical subordination since the famous decision *Bardou* in 1931 which characterized an employment contract on the basis of the employee's personal submission to orders and directives of the employer. But the French law has evolved, and it is now more appropriate to speak of functional subordination as a matter of being integrated in an organization. Over the years, the French jurisprudence has developed a technique to discern several objective indications or signs of the existence of subordination. This technique lists numerous signs, none of which is necessarily self-sufficient: imposition on the time and place to perform work, respect for procedures, obligation to report, modality of remuneration, provision of tools to perform work, exclusivity clause or non-competition clause.

All of those signs reinforce the idea of being integrated into an organized service, which, according to a quite recent case law in 1996, was only a sign of subordination and that the actual subordination remained "characterized by the execution of a contract under the authority of an employer who has the power to give orders and directives, to control the execution and to sanction any breaches committed by the subordinate." [11] Put differently, in France, the subordination of an employee occurs within three domains of power held by the employer: the employer holds the power to direct, power to regulate, and power to discipline.[12]

With regards to suspension, Article 72 of Cambodian labor law stipulates that during suspension the employee must still uphold the obligation of loyalty and confidentiality, whereas the employer must still continue providing accommodation, if any. While the Arbitration Council needs more cases to help provide answers to specific situations, the French jurisprudence has fittingly devised several practical solutions. Indeed, during the period of suspension, French courts would enforce the following [13]: employer has an obligation to pay employee's official paid holidays, employee must abide by the obligation of loyalty and may not perform professional activity for another employer including taking part in a training program with a competitor, employee must provide information necessary to the continuation of the professional activity of the employer (such as providing an access code to a computer, providing a file indispensable for performing a certain job…etc.), employee under suspension due to illness does not commit an act of disloyalty by simply announcing that he refuses some future working conditions upon his return to work, going on a pleasure trip or evading medical control of the employer may not lead to a sanction.[14]

[10] This section heavily relies on Alain Supiot (2011). *Le Droit du Travail*. Paris: Press Universitaire de France, 5e edition. (Que sais-je?)
[11] Cour de cassation (Soc., 16 Nov. 1996, *Société générale*), *in* Alain Supiot, *ibid* at 72.
[12] *ibid*, at 76-78.
[13] Françoise Favennec-Héry & Pierre-Yves Verkindt (2016). *Droit du travail*. Issy-les-Moulineaux: LGDJ, p. 450-51.
[14] The French courts make a distinction between loyalty and collaboration, by which the employee is required to demonstrate good faith while any complaint about disloyalty must be supported by a proof of damage. *Ibid*, at 451.

Conclusion

It is undeniable that conflicts contribute to the realization of the law because they bring life to abstract legal provisions, which is why it has been said that the jurisprudence, in France for instance, "effectively contributes a major part to the evolution of a law marked by conflicts."[15] Cambodian labor arbitrators have also rapidly expanded the meaning of labor law provisions through interpretations. They have demonstrated their upholding of the Stare Decisis principle. This trend has led to some predictability in the way the Council would reach its decisions. With regards to the extent of an employer's power in supervising and directing the company, the jurisprudence on subordination has been clear and expansive in nature. As for contract suspensions, the Arbitration's caselaw has also quickly expanded and is now founded on a rather complete set of requirements as shown above.

Other candidates for future expansion would be questions surrounding the equal pay for equal work, non-competition clause as well as other restrictive covenants an employer may like to impose upon a departing employee.[16] Without a doubt, the context surrounding labor anywhere is constantly changing. The economy, the demographics and policies[17] all have an impact on the interpretation of the law. Given the fast pace with which labor arbitrators have developed their jurisprudence, there is no stopping them from expanding labor law even further, for the better.

[15] Antoine Mazeaud (2014). *Droit du travail*. Issy-les-Moulineaux: LGDJ, p. 61.

[16] On equal pay for equal work, *See* for example, Virak Prum (2016). *A Note on Constitutional Principle: Same Work, Same Wage?* Available on https://drive.google.com/file/d/0BzHgXFrA8q7IUnlrTFI5RFFkaG8/view

On Non-Competition Clause, *See* for example, Virak Prum (2016). *Non-Competition Clause in the French Labor Law*. Available on https://drive.google.com/file/d/0BxOaYhs9pC6QMGY3MHVhVzNka3c/view

[17] For this changing context in the US, *See* Archibald Cox et al (2011). *Labor Law, Cases and Materials*. New York: Foundation Press, p. 1080-84.