Under the framework of the project "CAMELS – Sustaining GSP-Plus status by strengthened national capacities to improve ILS compliance and reporting – Mongolia" (MNG/15/50/EUR)

A Summary Note: A Review of the Implementation of the Labour Law of Mongolia[1] (April 2016)

The review

The review of the implementation of the Labour Law of Mongolia is intended to inform the International Labour Organization's (ILO) tripartite partners in Mongolia on the extent to which the fundamental principles and rights at work are upheld in the justice system, and provide recommendations to improve their application.

The review was implemented by a student research team, under the supervision of Drs Urantsetseg Baldan and Bolormaa Soloon, of the National University of Mongolia's (NUM) Law Department. Its objectives were to:

- understand how labour-related grievances are dealt with in practice in Mongolia;
- understand how the most commonly used provisions of the Labour Law (1999) are applied to labour disputes in court;
- understand what types of labour-related complaints are submitted to the National Human Rights Commission of Mongolia (NHRCM) and what actions are taken as a result; and
- propose changes to provisions and/or practices in relation to dealing with labour-related grievances.

The review is based on findings from archival research involving court judgments in labour cases and labour-related complaints submitted to the NHRCM.

Judgments were reviewed generally in respect of cases originating in 7 provinces[2] and 2 centrally located districts of Ulaanbaatar in which many different types of businesses are located.[3] Judgments were also reviewed specifically in respect of cases involving Khaan Bank that originated in 6 provinces.[4] Khaan Bank was selected as a large private enterprise with over 500 branches and over 5,000 workers across different parts of the country. Cases reviewed were those decided in the first instance court, appellate court and Supreme Court from 2010 to 2015. Employers covered by these cases were state-budgeted organisations, businesses with ownership of state property and private sector businesses. Employment sectors covered were education, health and culture/art. The total number of judgments reviewed was 281.

Labour-related complaints reviewed were those dealt with by the NHRCM from 2011 to 2015. The total number of complaints reviewed was 115.

[1] A full report of the review is available upon request
[2] Arkhangai, Bayan-Ulgii, Darkhan-Uul, Dornogobi, Orkhon, Selenge and Khuvsgul
[3] Sukhbaatar and Chingeltei
[4] Bayan-Ulgii, Khovd, Dundgobi, Zavkhan, Tuv and Umnugobi

Examples of specific judgments and complaints that were reviewed are included in the full report. Examples of specific judgments were chosen based on their representative value (i.e. they represent the most common violations of the Labour Law noted during the review), their seriousness (i.e. they represent less common but more serious violations of the Labour Law) or because they represent different cases engaging the same provisions of the Labour Law, in which those provisions were interpreted differently by the courts. Research was conducted in December 2015 and the final report was delivered in March 2016.

Findings: Court judgments

From a total of 281 judgments reviewed, 219 related to **wrongful termination of employment** and 7 related to **wrongful transfer of employment**. The remaining judgments related to various other disputes, including the payment of salary and compensation.

Termination means ending employment, and is governed by Articles 37 to 41 of the Labour Law. Transfer means moving the worker to another role, and is governed by Articles 32 to 34. Workers are required to file complaints at court of wrongful termination and transfer within 1 month of receiving their employers' decisions (Article 129.2).

In 133 termination cases, termination arose from disciplinary breaches. (Providing falsified professional/qualification documents was included within the category of disciplinary breaches because no separate ground for falsification exists in the Labour Law.)

Most cases involving termination due to disciplinary breaches were resolved in favour of workers. Employers sometimes terminated employment under this category in error when such action should have been taken under another category, resulting in successful challenges from workers. Employers also sometimes terminated employment after the period for taking disciplinary action has expired (within 6 months of the breach occurring and within 1 month of its detection), again, resulting in successful challenges from workers.

In 24 termination cases, termination arose from restructuring, for example, the abolition of a position or department.

In 11 termination cases, termination arose from unfitness to perform work due to a lack of qualifications or skills. It was observed that employers sometimes assigned workers to jobs for which they were under qualified according to the job description, only later to dismiss them.

In 7 cases, workers were transferred to different roles. Employers are prohibited under the Labour Law from requiring workers to perform work that is not specified in their

employment agreements (Article 31), except under limited circumstances in which workers can be transferred to another role.[5]

Employers sometimes transferred workers to different, lesser roles, demoting them as punishment for disciplinary breaches. This is not permissible disciplinary action under Articles 131.1 to 131.3, so it is unlawful. Employers also sometimes transferred workers to different roles as part of restructuring, but without first terminating their agreements under Article 40 and then entering into a new agreement.[6] Thus, these employers were not following correct procedures.

In 6 termination cases, termination was made after workers had continued to work beyond the expiry of their agreements. Half of these challenges were successful because, if termination is not proposed upon expiry of the agreement and the worker continues his or her work, it is considered extended for the initial term of the agreement.

In 5 termination cases, termination arose from unfitness to work for health reasons.

In general, there was sometimes confusion over whether workers had sought to terminate their employment (Article 39). Some courts required written notice of resignation, whereas others accepted verbal notice, leading to disputes over whether workers had actually resigned. This indicates differences in judicial interpretation and application of Article 39.

Some judgments related to **wrongful disciplinary action**. All such cases were combined with complaints about wrongful termination or transfer (see above).

Workers are required to file complaints about wrongful disciplinary action within 3 months of when they become aware (or should have become aware) of such action. Disciplinary action is governed by Articles 131.1 to 131.4. Employers' options include issuing a warning, reducing the worker's salary by up to 20 per cent for 3 months and termination. Disciplinary action must be imposed within 6 months of the breach occurring and within 1 month of its detection, but employers sometimes imposed disciplinary action outside this time limit.

Some judgments related to **non-payment of salary**. Most such cases were combined with complaints about wrongful termination. However, some workers initially pursued complaints about wrongful termination only, and then pursued further complaints about non-payment of salary after the resolution of the first complaint. This technically contravenes Article 129.2, which states that complaints other than those about wrongful termination shall be filed within 3 months of detecting the breach.

No judgments related to **discrimination**.

[5] Unavoidable work needs (to prevent/deal with natural disasters/industrial accidents/unforeseen circumstances that interrupt operations) for 45 days, during idle time and by mutual consent, or due to health reasons and by mutual consent (Articles 32 to 34)

[6] Termination due to abolition of a position/department is specifically provided for under Article 40.1.1

Note: Types of labour dispute that can be decided by a court are set out in Article 128. Other types of labour dispute can be decided by the labour dispute settlement committee (LDSC) (Article 126). The LDSC's decision can be appealed to the soum/district court within 10 days of receipt of the decision (Article 127). However, because workers spend time approaching the LDSC, by the time they appeal decisions to the soum/district court, the deadlines set out in Article 129 may have already passed. In some such cases, the court rejected the claim due to the deadline to appeal having passed, and in other such cases, the court deemed previously approaching the LDSC to be a justifiable reason to have missed the deadline to appeal. This indicates differences in judicial interpretation and application of Article 127.

Note: Mediation between parties is regulated by the Mediation Law (2012). However, temporary labour dispute immediate settlement committees (established 10 years ago following negotiations by the Confederation of Mongolian Trade Unions at the Tripartite National Council of Labour and Social Welfare) still operate in Ulaanbaatar and the provinces, and are not regulated by law. In 2 cases, workers had missed the deadline to appeal decisions to the soum/district court due to previously engaging with one of these committees.

Findings: Complaints to NHRCM

Labour-related complaints can be submitted to the NHRCM under Article 9 of the Labour Law, including complaints made by foreign workers. The NHRCM receives complaints, conducts inspections, and makes demands and recommendations, sometimes transferring complaints to other relevant authorities for resolution.[7] Businesses and organisations receiving demands and recommendations are required to provide written responses. The NHRCM made 78 demands to 78 different employers and 99 recommendations to 99 different employers from 2011 to 2015.

The total number of labour-related complaints submitted to the NHRCM from 2011 to 2015 was 115. Most complaints related to wrongful termination, non-payment of salary and failure to implement previous court decisions about reinstating workers in their previous jobs. Only 4 complaints related to workplace harassment, perhaps because colleagues may be reluctant to give witness evidence for fear of negative repercussions. Complaints in relation to wrongful termination were returned and workers were recommended to file their complaints at court.

Complaints were submitted to the NHRCM in relation to the non-implementation of court decisions. E.g. workers whose employment was wrongly terminated were not reinstated according to court orders.

Conclusions

[7] E.g. the state property commission, court decision implementation authority and social insurance authority

The majority of court judgments related to wrongful termination and transfer, and non-payment of salary. Relatively few other labour-related complaints were filed at court. However, the fact that there were no court cases involving discrimination, yet there were 4 complaints made to the NHRCM regarding workplace harassment may suggest the standard of proof required of employees is set at too high a threshold. The vast majority of complaints were made by workers, so most cases involved violations of their rights.

Most court judgments were decided against employers,[8] suggesting some misuse and/or misunderstanding of provisions of the Labour Law. Sometimes, even when termination was justifiable and workers' conduct had been poor, employers used the wrong provisions, so the workers' complaints were upheld. In respect of wrongful termination in particular, a significant amount of compensation was awarded to workers (over 330,000,000 MNT), indicating the significant level of damage caused to businesses and organisations through their non-compliance with the Labour Law. Although it is not known how often employers apply the provisions of the Labour Law correctly or incorrectly in cases that are not taken to court, this indicates that some training of human resources and legal staff at employers' businesses and organisations would be beneficial to improve the application of the fundamental principles and rights at work.

The current labour justice system is inadequate in various ways in terms of legislation and procedure. Future amendment of the Labour Law, guidance and training for judges, employers and workers, and review and regulation in respect of the issues below is required:

- Consideration should be given to shifting the burden of proof in discrimination cases, reducing the burden on the employee and increasing that on the employer.
- The Labour Law should cover termination due to workers falsifying professional/qualification documents under a separate provision.
- Provisions covering harassment should be included in the Labour Law.
- It should be clarified whether workers are required to give written or verbal notice of their resignation under Article 39.
- A unified practice should be established on how to deal with cases in which a complaint about wrongful termination is later followed by a related complaint of non-payment of wages, when the latter falls outside the statutory deadline.
- The Labour Law should be amended to prevent workers missing the deadline to appeal to court due to having previously approached the LDSC.
- The operation of temporary labour dispute immediate settlement committees should be reviewed and regulated.
- More severe punishments, or criminal liability, should be imposed for not properly implementing court decisions.

It would furthermore be beneficial to establish an information sharing network as regards labour rights violations between the NHRCM, prosecutors, police, courts, NGOs, and other relevant parties.

[8] 64 per cent of first instance court decisions and 60 per cent of appellate court decisions