

(Provisional Title)

Rules and Trends on Employment Termination and Dispute Resolution in Myanmar

Literature Review up to December 2020

Presentation of a draft study to the ILO Team

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OBJECTIVES

- ☑ **To identify employees' rights and employers' liabilities in relation to employment termination in law and in practice**
 - ▶ Overview of laws and regulations on employment termination and on dispute resolution
 - ▶ Quantitative and qualitative analysis of dispute settlement decisions in relation to employment termination
- ☑ **An ILO's contribution to the policy dialogues in the future**
 - ▶ Complimenting another ILO study “Rules of Employment Termination and monies on separation in Myanmar” by Tsuruga and Moo. Forthcoming.

SCOPE AND LIMITATIONS

- ☑ Scope: Review of relevant laws, regulations, policies, decisions of the dispute settlement bodies (some are extracts) and the existing literature prior to December 2020;
- ☑ Limitations:
 - ▶ None of ILO's stakeholders in Myanmar were contacted
 - ▶ Access to the decisions of the dispute settlement bodies (Township Conciliation Bodies, state/region Arbitration Bodies, national Arbitration Council and courts) was limited. Some ambiguities were left unaddressed in the case studies.

CHAPTER I: LEGISLATIVE AND REGULATORY FRAMEWORKS ON EMPLOYMENT TERMINATION IN MYANMAR

☑ Collective dismissals:

▶ Definitions:

- ☑ no definition in MM law.
- ☑ For this study, collective dismissals are defined as dismissal of more than one worker. But in reality, collective dismissals could be disguised as individual dismissals, either deliberately or for other unintended reasons ⇒ need to look at all dismissals

▶ Reasons:

- ☑ No specifications in MM law
- ☑ economic, structural or technological reasons (often the main focus from social insurance perspectives);
- ☑ reasons based on discrimination such as trade union membership and activities (strikes, etc), age, race, gender, maternity or childrearing, etc.
- ☑ violations of laws or workplace rules

Substantive and procedural requirements for dismissals in MM

☑ Lawful dismissals (dismissals are allowed only for these five prescribed reasons)

- ▶ Ordinary misconduct committed by employees
- ▶ Grave misconduct committed by employees
- ▶ Liquidation of business or factory closure
- ▶ suspension of business due to unforeseeable events
- ▶ Death of employee

Procedural requirements:

- 30 days of advance written notice
- coordination between employer and trade unions or Workplace Coordinating Committee (WCC)

☑ **Unlawful dismissals**

- ▶ TU membership or activities, participation in lawful strikes
- ▶ For opposing an illegal lock-out
- ▶ For taking maternity leave or medical leave prescribed by the law

☑ Monies on separation

- ▶ Unpaid salary
- ▶ Compensation for unused earned leave entitlement
- ▶ Severance pay
- ▶ Notice (unemployment) pay ← no legislative or regulatory source but is an established practice.

☑ CHAPTER II: DISPUTE SETTLEMENT MECHANISM FOR EMPLOYMENT TERMINATION IN MYANMAR

Classification of labour disputes

- ☑ Settlement of Labour Dispute Law (SLDL) 2012
 - ▶ 'Individual disputes' or
 - ▶ 'Collective disputes'.
 - ☑ And collective disputes were further broken down into 'Rights disputes' or 'Interest disputes'

- ☑ SLDL amendment 2019
 - ▶ 'Rights disputes' or 'Interest disputes'
 - ▶ No more distinction between individual or collective disputes

SLDL 2019 amendment

- ☑ **'Dispute of Rights'** is a “dispute that relates with rights entitled to employers and workers specified in a labour law” (art.2.(n));
- ☑ **'Dispute of Interests'** is a dispute that relates with collective agreement (or) a dispute that is not covered by the rights contained in a labour law but it relates with interests that is titled to workers (or) a dispute that relates with workplace relations” (art.2(o)).

Dispute Settlement Flowchart

	Mandates	Composition	Operation (including time frames)
WCC	Dual mandate: Platform for collective bargaining & dispute settlement	In unionized undertaking : 3 members nominated from each LO; equal number of employer reps. In non-unionized undertaking : 3 worker reps selected by workers; 3 employer reps Term : 2 years	No time limit for dispute settlement
TCB	Conciliation of Interest Disputes Separate Rights Disputes from Interest Disputes submitted before them and refer the parties to proper channels Conciliate individual grievance dispute	9 members composed of: 3 gov reps (Chair and Secretary) 3 employer reps selected by BEO/TEO* 3 worker reps selected by BLO/TLO** Term : 3 years	Keeps record of CAs. Conciliates a dispute within 7 days . In case of settlement, a contract of mutual agreement shall be concluded before TCB In case of non-settlement, hands over the case to AB.
AB	Arbitration of Interest Disputes	15 members composed of: 5 gov reps (Chair and Secretary) 5 employer reps selected by BEO/TEO/RSEO* 3 worker reps selected by BLO/TLO/RSLO** Term : 3 years	Arbitrates a dispute within 7 days and makes a decision. If both parties to the dispute agree or do not appeal the decision, the decision of the AB comes into force on that day. If either party to the dispute is not satisfied, can apply to AC or can carry out industrial action
AC	Arbitration of Interest Disputes based on “social justice, decent work and principles of equity” It is independent and impartial	15 “qualified persons of good standing from legal experts and experts in labour affairs” composed of: 5 gov reps (Chair and Secretary) 5 employer reps collectively selected from employers’ federations from the regions or states or RSEO/TEO*2	A 3-member Tribunal (tripartite) is formed and arbitrates a dispute within 14 days for general disputes and 7 days for essential services and makes a decision. The decision comes into force on that day.

<p>Labour departments</p>	<p>Receives Rights Disputes, including non-compliance with CA that concern rights Sues violator of contract of mutual agreement made before TCB</p>	<p>There are 4 departments in MOLIP: Department of Labour (DOL) Factories and General Labour Law Inspection Department (FGLLID) Department of Labour Relations (DLR) Social Security Board (SSB) In township labour offices, there are normally officials from all departments stationed.</p>	<p>Employers and workers would first bring their grievances to township labour office. Depending on the types and nature of grievances, corresponding department officials will handle the case: inspection matters by FGLLID official; wages and other working conditions by DOL; labour disputes by DLR; and social security issues by SSB. No time limit. Presumably, the parties who are not satisfied with the handling of their disputes by the labour departments could appeal to competent courts. They can also skip labour departments and directly go to court.</p>
<p>Competent Courts</p>	<p>Adjudicates Rights Disputes including non-compliance with CA that concern rights Also adjudicates individual grievance disputes</p>	<p>Following courts are established in Myanmar under the Constitution: The Supreme Court of the Union; High Courts of the Region/ High Courts of the State; Courts of the Self-Administered Division; Courts of the Self-Administered Zone; District Courts; Township Courts; The Other Courts constituted by law.</p>	<p>There are no specialized labour courts, so labour disputes are first brought to general civil court of first instance and ultimately could go up to the Supreme Court. No time limit for adjudication (in practice it could take up to a few years for a labour dispute to be settled)</p>

Enforcement and penalties

- ☑ Penalties for non-compliance with the contract of agreement that was concluded before a conciliation body: a fine of MMK 50,000 - 100,000; or lawsuit
- ☑ Penalties for non-compliance with the decisions of the AB and AC: a fine of MMK 100,000 - 300,000; or lawsuit
- ☑ Monetary penalties are applicable for any employer, in a course of settling a dispute, who reduces benefit(s) of a worker(s) or fail to do something without sufficient reason(s)

CHAPTER III: TRENDS OF CASES AND DECISIONS ON EMPLOYMENT TERMINATION IN PARTICULAR COLLECTIVE DISMISSALS

Quantitative and qualitative study

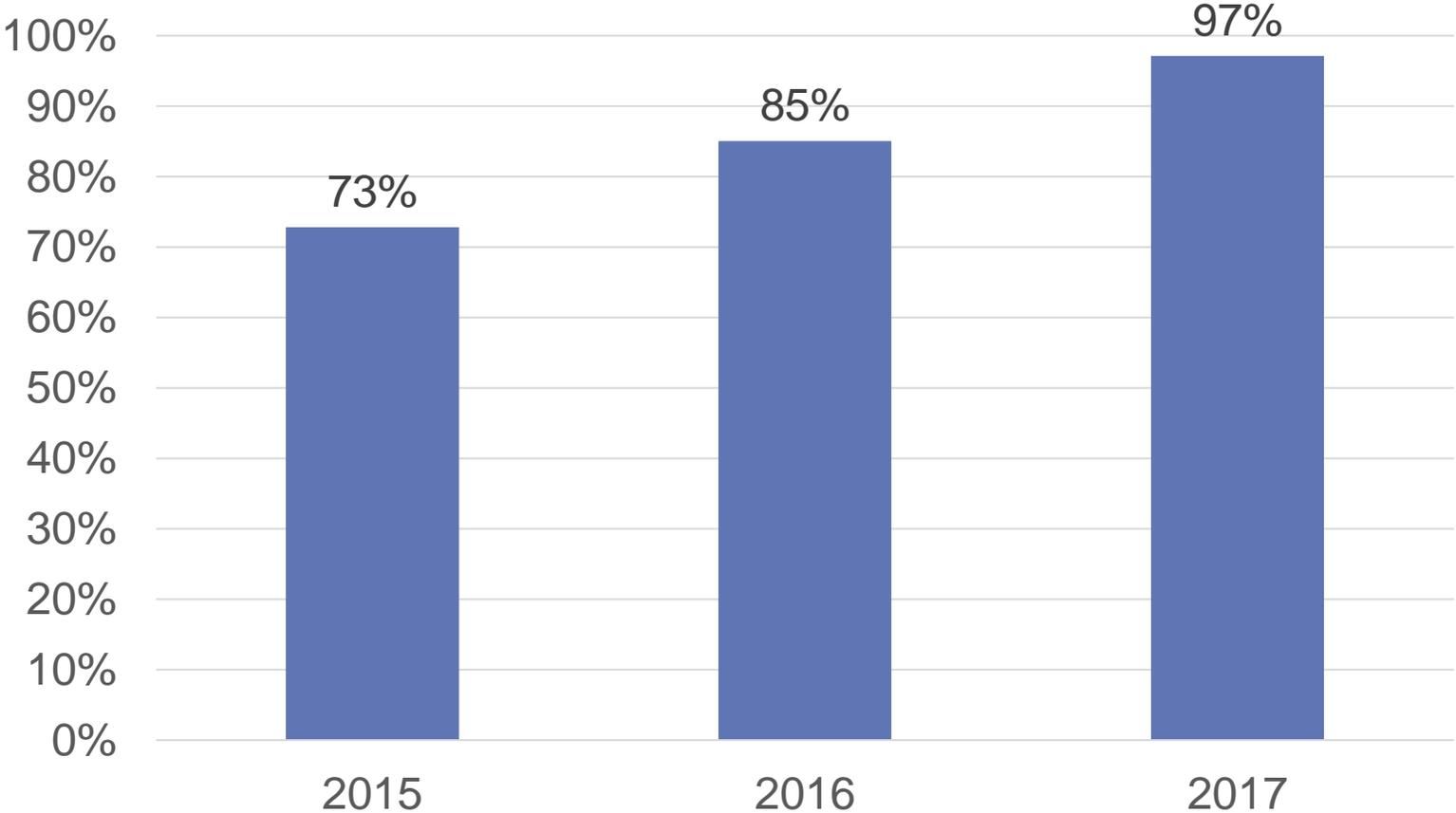
☑ Key questions to be answered

- ▶ Is employment termination the most common case? What are frequent cases dealt by the dispute settlement mechanism?
- ▶ Laws and regulations do not allow employers to refuse the extension of fixed-term contracts without valid reasons. Does it mean that fixed-term contracts are usually extended or de facto permanent in practice? Or what reasons may be considered valid or invalid?
- ▶ To what extent workers' rights on employment and compensations are granted?

- ▶ What procedures workers would have to take if employers do not comply with the payment of monies on separation (severance pay, etc)?
- ▶ How burdensome these procedures may be for the unemployed workers (i.e. how long it takes until they would get paid)?
- ▶ What is the priority for debt payment in case of bankruptcy between unpaid wages, other compensations to workers on separation and other employers' liability to debt payment?

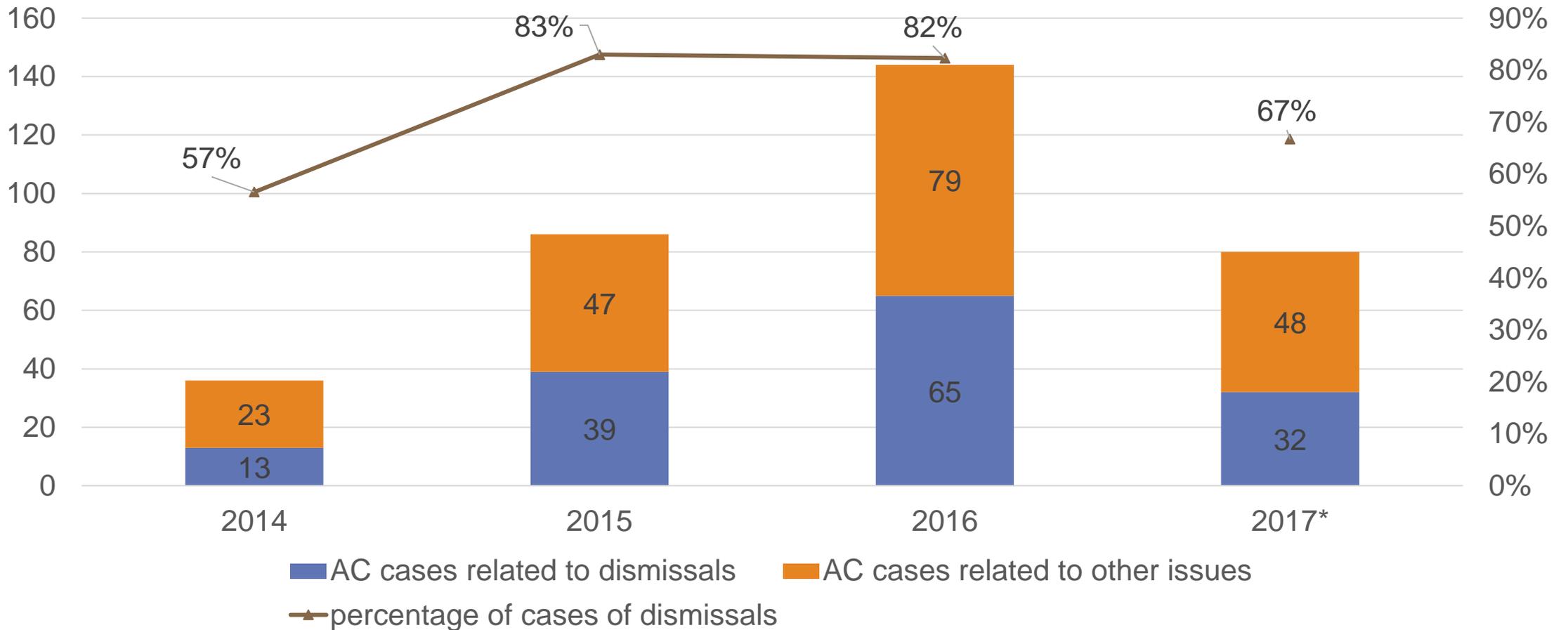
A snap shot between 2012-2017

Figure 2: Percentage of AB cases related to dismissals on workers per year



Source: Developed by Luka Bauer. Figure 10 in Bauer. 2017.

Figure 3: Arbitration Council cases of dismissals by year



Source: Developed by Luka Bauer. Figure 14 in Bauer. 2017.

Table: Number of dispute cases managed by the Arbitration Council in 2017

Sr. No	Month	last month case	current month case	Total	Completed	Referred to / Closed	un complete case (this month)	# workers
1	Jan	8	7	15	8	7	112	2.903
2	Feb	7	6	13	8	5	83	2.334
3	March	5	11	16	10	6	29	2.406
4	April	6	3	9	5	4	24	1.585
5	May	4	4	8	6	2	200	1.721
6	June	2	11	13	8	5	41	1.670
7	July	5	12	17	8	9	10	9.282
8	Aug	9	7	16	10	6	448	2.549
9	September	6	5	11	6	5	10	1.981
10	October	5	10	15	8	7	12	5.098
11	November	7	8	15	7	8	240	4.536
12	December	8	4	12	8	4	72	6.020
	Total	72	88	160	92	68	1281	42.085

Source: MOLIP

Enforcement and penalties

- ☑ Decisions of the AC can be appealed to the Supreme Court for writs (Constitution, 2008. Article 378(a).
 - ▶ In 2017, 5 decisions of the AC were appealed to the Supreme Court, all by the employers.
 - ▶ In practice, AC decisions are also appealed to lower courts

- ☑ In 2017, 41 lawsuits were filed against the employers for violating conciliation agreements (10 cases) and decisions of AB or AC (31 cases). Fines collected went to state coffers or paid to workers as cash benefits.

Case studies (qualitative analysis) 2014-2021

- ☑ Analysis of 24 cases of dismissals handled by AB, AC or SC between 2014-2021
 - ▶ Cases btw 2014-2016 were originally selected by ILO Yangon in 2017 randomly for translation. Reused for this study.
 - ▶ Cases btw 2020-2021 were selected by the ILO Social Protection Team specifically for this study.

24 cases: Analysis by Key Themes

- ✓ A) The number of workers dismissed
- ✓ B) Reasons for dismissals (alleged or confirmed)
- ✓ C) Disputes/claims over terms and conditions for dismissals
- ✓ D) Outcomes/Decisions of the dispute settlement bodies
- ✓ E) Key timeframes
- ✓ F) Enforcement

☑ **A) The number of workers dismissed:** ranged from minimum 1 workers to maximum 86 workers.

☑ **B) Reasons for dismissals (alleged or confirmed):**

- ▶ violation of laws and regulations;
- ▶ violation of employment contracts and/or workplace rules and regulations such as absence from work for 3 consecutive days;
- ▶ unsatisfactory performance;
- ▶ formation of a labour organization;
- ▶ workforce reduction or business closure due to economic, technological or structural reasons;
- ▶ occupational safety;
- ▶ work stoppage; and
- ▶ disagreements between management and workers.

☑ C) Disputes/claims over terms and conditions for dismissal

- ▶ Among at least 325 dismissed workers involved in these 24 cases:
 - ☑ 158 workers challenged the lawfulness of their dismissals and asked for reinstatement with back pay;
 - ☑ At least 147 workers accepted their dismissals but challenged the monies on separation that were given or not given by the employers.

D) Outcomes/decisions of the dispute settlement bodies

- ☑ Reinstatement with back pay was granted to 7 workers:
 - ▶ 1 worker was dismissed for causing workplace injury and death of another worker. However, AC found that the employer did not conduct any investigation into the incident
 - ▶ 2 workers were dismissed allegedly for violating employment contracts and internal workplace rules. However, AC concluded that the actual reason was for forming a trade union.

- ☑ Reinstatement was rejected to 151 workers:
 - ▶ 2 workers were dismissed after taking part in **the formation of a labour union**. AC decided that **the dismissals were illegal** but that the reinstatement would not work for the employer nor the other workers in the factory;
 - ▶ 22 workers were dismissed to be **replaced by a machine**. AC did not grant them reinstatement but instead granted monies on separation (severance, notice pay and gratuity);
 - ▶ 24 workers were denied reinstatement because of **violations of employment contracts**.

- ▶ 27 full-time workers were dismissed but later re-hired as daily wage labourers. They sought reinstatement as full-time workers but AC did not grant it to them, because they have received monies on separation for their dismissals and returned to work as daily wage labourers voluntarily;
- ▶ 45 daily wage labourers were dismissed without any compensation. AB ordered the employer to pay their daily wages x30 days as compensation.

Monies on separation: some ambiguities

☑ Notice (unemployment) pay

- ▶ There is no legislative or regulatory source. And yet, notice pay (1 month of last pay) was granted by AB and AC in many cases ⇒ precedence.
- ▶ In principle, it is supposed to be a **payment in lieu of notice**. In a few exceptional cases, the employers were ordered to pay it even though they did give a notice.

☑ Severance pay

- ▶ should be paid in the case of **non-fault involuntary** termination by the employer according to laws and regulations.
- ▶ Among the 24 cases, it was awarded in the following cases:
 - ☑ down-turn, workforce reduction, workplace replacement with machines, temporary or permanent closure of factories;
 - ☑ Formation of a labour organization;
 - ☑ No violations of employment contracts and/or workplace rules and regulations as alleged by the employers;
 - ☑ Dismissals following workplace disagreements or disputes with the employers.

- ☑ On the contrary, severance pay was denied if:
 - ▶ the workers were found to have violated employment contracts and/or workplace rules and regulations, such as for being absent from work for 3 days consecutively or for receiving 3 warnings for certain misconducts;
 - ▶ in one case in which the employment contracts between the employer and the 18 workers in the dispute had been concluded prior to the Notification No.84/2015 on severance pay came into effect and those ECs did not contain any provisions on severance pay

- ☑ Law and regulations do not say whether the type of contract - i.e. daily wage, pice rate, part-time, seasonal, etc - should affect the workers' eligibility for severance pay.
- ☑ But in once case, severance was not granted to the daily wage labourers even though some of them had been working in the factory for more than 2 years.

☑ Calculation of severance pay according to AB and AC decisions:

- ▶ the **probation period** should be included in the duration of services, on the basis of which severance pay is calculated;
- ▶ in the event of **change of employers**, severance should be calculated on **the total length of services** under different employers;
- ▶ severance pay should not be reduced even in the event of **temporary closure of factory**.

☑ Definition of “wage or salary” to calculate severance pay

- ▶ According to laws and regulations, the 'the latest monthly salary excluding overtime payment' is to be used to calculate severance pay. It is understood that 'salary' here means a '**basic component of monthly wage payment**'(Tsuruga and Moo).
- ▶ However, from the 24 cases analyzed, a question remained as to whether monthly 'no-leave incentive/bonus' should be part of the 'basic component of monthly wage payment' or not.

☑ Employment contract (EC)

- ▶ Mandatory between an employer and a worker (except for permanent gov workers or for establishments with less than 5 workers). **EC Template 2017**. And ECs must be submitted to Township Labour Offices for confirmation.
- ▶ However, in at least 4 cases, arbitration bodies have found that employment contracts were either absent or not concluded in accordance with the EC Template.
- ▶ How did arbitration bodies deal with these cases?

- ☑ AB and AC looked at applicable laws and regulations, and the workplace rules and regulations.
- ☑ AC also took into consideration 'social justice, decent work and principles of equity' (SLDL art.21(a)).
- ☑ The outcomes in these 4 cases did not seem inferior or compromised to the outcomes which would have been made had there been proper employment contracts.
 - ▶ except in one case, daily wage labourers not granted severance pay even though some of them had been workign in the factory for more than 2 years.

E) Key timeframes

- ☑ No significant delay for cases before 2020.
 - ▶ Most of the workers whose dismissals were overturned by the region/state Arbitration Bodies would have received their monies on separation within 2 months since either they were dismissed or their cases were brought to TCB.
 - ▶ This timeframe is **3-4 months** for AC cases.
 - ▶ 19 months in a case that went up to the Supreme Court
- ☑ Significant delay for cases after 2020 due to Covid-19 pandemic
 - ▶ many workers had to wait for **6 months** to receive compensation that was due.

F) Enforcement

- ☑ According to laws and regulations, decisions of the arbitration bodies must be implemented:
 - ▶ within 7 days for reinstatement;
 - ▶ within 30 days for payment of monies on separation
- ☑ In case of non-compliance, lawsuits shall be filed either by MOLIP or by the aggrieved for enforcement.
- ☑ In practice, data was available for:
 - ▶ the year 2017: 41 lawsuits, all against employers
 - ▶ btw Dec 2018-March 2021: 29 lawsuits against employers and 1 against workers.

Possible suggestions for future research

- ☑ **1. Employer liabilities and employee rights in insolvency cases**
 - ▶ It is not uncommon to hear events in which bankrupt foreign employers flee Myanmar without paying any compensation to the workers.
 - ▶ In this study, only once case was related to permanent closure of the factory. The AB granted notice pay of 1 month (but not severance) to all the 37 dismissed workers involved, and the case was closed without appeal.
 - ▶ Laws and regulations are clear that workers' wages are preferential payments: i.e. Myanmar Companies Law 2017; and the new Myanmar Insolvency Law and Rules 2020.
 - ▶ It may be worthwhile to look into how the new insolvency laws were implemented during and after the Covid-19 pandemic.

Possible suggestions for future research cont'd

☑ 2. Enforcement of the decisions of the dispute settlement bodies (TCB, AB, AC)

- ▶ Once access to court cases is restored, it may be worthwhile to look into whether MOLIP effectively file lawsuits against all the violators of the decisions of the dispute settlement bodies who are predominantly employers. It is the question of justice for the dismissed workers who may not have resources to file lawsuits on their own.

Thank you!

Look forward to your feedback