

KINGDOM OF CAMBODIA
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ARBITRATION COUNCIL

Case number and name: 08/06-Himawari Hotel Apartments

Date of Award: 3 March 2006

ARBITRAL AWARD

Issued under Article 313 of the Labour Law

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Mr. Ouk Ry**
Arbitrator chosen by the worker party: **Mr. An Nan**
Chair Arbitrator (chosen by the two Arbitrators): **Mr. Koy Neam**

DISPUTING PARTIES

Employer party:

Name: **Himawari Hotel Apartments**
Address: #313, Sisowath Blvd, Chamkamorn, Phnom Penh
Telephone: 023 214 555 Fax: 023 217 111 and 023 213 071
Email: sakhoeun@himawari.com.kh / reservation@himawari.com.kh
Representative:
 Mr. Ly Sakhoeun Resident Manager, Himawari Hotel Apartments

Worker party:

Name: Cambodian Tourism and Service Workers Federation (CTSWF)
Address: #245B, Street 63, Beung Kang Kong 1, Chamkarmorn, Phnom Penh
Telephone: 012 588 267 or 012 959 535 Fax: 023 221 474
Email: ctswf@online.com.kh
Representatives:

1. Mr. Ly Korm President of CTSWF
2. Mr. Sok Thol Union President at Micasa Hotel
3. Ms. Lean Chinda Attorney
4. Mr. Eang Kimhun Advisor of the worker union at Micasa Hotel

ISSUES IN DISPUTE

(in the non-conciliation report)

According to the minute of the non-conciliation report, the following non-conciliation issue is the workers' demand in this case.

The workers demand that the hotel reinstate Mr. Sok Thol, Mr. Eang Kimhun, Mr. Kram Sokheang and Mr. Oul Sereivathana who are union leaders or provide other benefits in accordance with the Labour Law including back pay from the time of their dismissal until the end of the dispute.

The hotel side did not join the conciliation process in accordance with the invitation letter No. 086/MoLVT dated 18 January 2006 of the Labour Dispute Department. The company sent letter ref/001/01/05 dated 19 December 2005 in which it stated that the four workers are not employees of the Himawari Hotel Apartments.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labour Law (1997); the Prakas on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators No. 513 dated 9 April 2005 (Third Term).

An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. But the conciliation hearing was unsuccessful and the non-conciliation report No. 121/MoLVT dated 23 January 2006 was submitted to the Secretariat of the Arbitration Council on 26 January 2006.

HEARING AND SUMMARY OF PROCEDURE BEFORE THE ARBITRATION COUNCIL

Place of hearing: The Arbitration Council, Building "A," Sothearos Blvd; Tonlebasak; Chamkamorn; Phnom Penh.

Date of hearing: 20 February 2006 (at 2:00 to 4:00 p.m.)

Procedural issues:

On 26 April 2005, the Labour Dispute Department received a complaint from the Cambodian Tourism and Service Workers [Union] (CTSWF) dated 18 April 2005 demanding that the hotel reinstate Mr. Sok Thol, Mr. Eang Kimhun, Mr. Kram Sokheang and Mr. Oul Sereivathana who are union leaders. After receiving this complaint the Labour Dispute

Department appointed a conciliator to help resolve the labour dispute who conducted the last conciliation on 20 January 2006. The conciliation was in respect of one issue of the workers' demand to the Himawari Hotel Apartments.

On 20 January 2006 Mr. Houn Seu, an official from the Labour Dispute Department was appointed to conduct a conciliation which was unsuccessful in respect of the one issue of the workers' demand. This non-conciliation issue was sent to the Arbitration Council on 26 January 2006.

On 27 January 2006, H.E. Nhep Bunchin, Minister of the Ministry of Labour and Vocational Training sent a letter to the Arbitration Council asking for settlement of this collective labour dispute at Himawari Hotel Apartments. After receiving the case, the Arbitration Council invited both parties to appear at a hearing on 20 February 2006 at 2:00 p.m. but representatives of the hotel party did not attend the hearing. The hotel only wrote letters dated 17 February 2006 to the Arbitration Council stating that Himawari Hotel Apartments was not a party to the dispute.

EVIDENCE

Witnesses and experts: N/A

DOCUMENTS, EXHIBITS AND OTHER EVIDENCE CONSIDERED BY THE ARBITRATION COUNCIL

Provided by the employer party:

1. Letter from Mr. Ly Sakhoeun sent to the Secretariat of the Arbitration Council dated 1 February 2006 refusing to come to select an Arbitrator;
2. Letter from Mr. Ly Sakhoeun sent to the Secretariat of the Arbitration Council dated 17 February 2006 refusing to appear as a disputing party;
3. Letter of trademark registration of Himawari dated 23 October 2004;
4. Letter from Mr. Ly Sakhoeun sent to the Chief of the Labour Dispute Department of the Ministry of Labour and Vocational Training with an unclear date;
5. Tourism license of Himawari with an unclear date;
6. Letter from Mr. Ly Sakhoeun sent to the Arbitration Council dated 6 February 2006 saying that Himawari Hotel had never encountered a labour dispute with its employees.

Provided by the worker party:

1. Minute on the conciliation labour dispute between the Tourism Federation and Himawari Hotel dated 29 April 2005;
2. Letter from Mr. Oul Serivathana, Mr. Kram Sokheung, Mr. Eang Kimhun and Mr. Sok Thol sent to the owner of Himawari Hotel dated 5 March 2005;

3. Employment contract between Himawari Hotel and employees;
4. Employment contract between Micasa Hotel and employees;
5. Letter sent to the owner of the Micasa Hotel informing them about the establishment of the Himawari union at Micasa Hotel dated 29 March 2004;
6. Certificate of professional organization named Himawari union dated 18 May 2004;
7. Newsletter informing clients about changing the name from Micasa Hotel into Himawari Hotel dated 12 July 2004;
8. Minute on the conciliation labour dispute dated 20 January 2006;
9. Objection letter of Micasa's representative dated 12 August 2004 lodged against Arbitral Award dated 6 August 2004;
10. Letter from Mr. Sok Thol requesting an attorney, Ms. Lean Chinda dated 8 February 2006;
11. Letter from Mr. Ly Korm, president of CTSWF dated 16 February 2006 asking for an extension of the hearing.

Provided by the Ministry of Labour and Vocational Training:

1. Letter to ask for resolution of the collective labour dispute of Himawari Hotel No. 069/MoLVT from the Ministry of Labour and Vocational Training dated 27 January 2006;
2. Report on the collective labour dispute at Himawari Hotel No. 121/MoLVT from Mr. Huon Seu dated 23 January 2006;
3. Minute on the collective labour dispute dated 20 January 2006.

Provided by the Secretariat of the Arbitration Council:

1. Letter of the Secretariat of the Arbitration Council sent to the owner of Himawari Hotel dated 3 February 2006 requesting the provision of documents/evidence and to appear in the hearing;
2. Letter of the Arbitration Council dated 16 February 2006 on participation and response before the Arbitration Council on 20 February 2006;
3. Letter from the Secretariat of the Arbitration Council sent to Mr. Ly Sakheoun, resident Manager at Himawari Hotel dated 10 February 2006 on the labour dispute resolution procedure at the Arbitration Council;
4. Minute on selection of the Arbitrator from the employer list by lot dated 30 January 2006.

FACTS

Himawari Hotel Apartments is located at 313 Sisowath Quay, Chaktomok, Daun Penh, Phnom Penh.

- Having examined the report on the collective labour dispute's conciliation;
- Having listened to the workers' arguments;
- Having reviewed all additional documents.

The Arbitration Council finds that:

- Himawari Hotel changed from Micasa Hotel on 1 January 2005;
- The workers named Mr. Sok Thol, Mr. Eang Kimhun, Mr. Kram Sokheang and Mr. Oul Sereivathana were dismissed by Micasa Hotel in March and April 2004;
- On 6 August 2004 the Arbitration Council issued an Arbitral Award in case 41/04-Micasa ordering the reinstatement of the workers: Mr. Sok Thol, Mr. Eang Kimhun, Mr. Kram Sokheang, and Mr. Oul Sereivathana;
- On 12 August 2004 Mr. Ly Sakhoeun, Micasa Hotel's representative objected to the Arbitral Award issued on 6 August 2004;
- On 26 April 2005 Mr. Ly Sakhoeun, Himawari's representative, joined the conciliation process at the Ministry of Labour and Vocational Training under the auspices of H.E. Prak Chantha, Secretary of State of the Ministry of Labour and Vocational Training;
- Himawari's representative declined to choose an Arbitrator or to appear at the arbitral hearing;
- In their legal memo the workers argued that Micasa and Himawari are MCHA firms. Moreover the employment contract of Himawari has recognized seniority for staff since 2000;
- The workers demand that the Arbitration Council [order] the employer to apply the Arbitral Award in case 41/04-Micasa dated 6 August 2004 in which the Arbitration Council ordered the employer to reinstate four workers.

REASONS FOR DECISION

In this case the employee party, Mr. Sok Thol, Mr. Eang Kimhun, Mr. Kram Sokheang, Mr. Oul Sereivathana, demand that Himawari Hotel Apartments reinstate them and pay them back pay [for the period] until their reinstatement date. The Himawari's representative denied that Himawari was a party to the dispute.

The Arbitration Council considers whether Himawari Hotel Apartment is a party to the dispute or not?

- According to the minute of the collective labour dispute conciliation dated 26 April 2005 Mr. Ly Sakhoeun, Himawari's representative admitted that Himawari Hotel was a disputing party because he stated that he would take this request and consult with the management of the company.

- Moreover the worker party argued that Micasa and Himawari is owned by the same person or the same company, it has just changed its name.

- Himawari Hotel declined to attend the hearing to show evidence or to send witnesses in order to support their argument which made the Arbitration Panel not believe what was said in the letter.

- The newsletter to clients dated 12 July 2004 published by Micasa clearly states that it was simply a change of name from Micasa to Himawari Hotel Apartments effective from 1 January 2005 onward.

As described above the Arbitration Council notes that Himawari Hotel has only changed its name from Micasa Hotel.

Therefore, in this case the Arbitration Council finds that (1) Himawari Hotel has only changed [names] from Micasa Hotel; (2) the employees involved with this labour dispute consist of the same four workers previously named as Mr. Sok Thol, Mr. Eang Kimhun, Mr. Kram Sokheang, Mr. Oul Sereivathana; (3) the issue is related to reinstatement through enforcement of Arbitral Award number 41/04 issued on 6 August 2004. The Arbitration Council concludes that case 08/06-Himawari concerns the same issue and the same party as case 41/04-Micasa in which the Arbitration Council had already issued its award on 6 August 2004 (see case 41/04).

According to Article 40, paragraph 2 of the Prakas 99/04 states that *"If either party to a dispute lodges such an opposition within the specified timeframe, the award shall be unenforceable. In this case if the dispute is about a right relating to the application of a rule of law (for example, a provision of the Labour Law, of a collective bargaining agreement, or an arbitral award that takes the place of the collective bargaining agreement) the disputant party may bring the case before the court of competent jurisdiction for final resolution"*.

When the Arbitral Award number 41/04 was objected to by the employer on 12 August 2004, the award ceased having effect from that time. In addition, the Arbitration Council does not have the power to order the party to implement the award (see 54/04 - Cambodia Sportswear). Again Article 40 of this Prakas states that the party can bring this case to the court for settlement.

Further, the principle of *res judicata* prevents the Arbitration Council from reconsidering the same issue between the same parties (see 18/04-Raffles Le Royal and

Raffles Grand D'Angkor and 10/06-North Gaiety). Thus the Arbitration Council will not decide this issue between the parties again and does not have power to enforce award 41/04.

Based on the above facts, legal principles, and evidence the Arbitration Council makes its decision as follows:

DECISION

Dismiss case 08/06-Himawari Hotel Apartments.

TYPE OF AWARD: NON BINDING AWARDS

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition with the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ouk Ry**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair of arbitration panel:

Name: **Koy Neam**

Signature: