

KINGDOM OF CAMBODIA

Nation King Religion

THE ARBITRATION COUNCIL

Case number: 09/05

Date of Award: March 22, 2005

ARBITRAL AWARD

Issued under Article 313 of the Labor Law

Kin Tai Co. Ltd

(The employer party)

C.CAWDU Federation and Union

(The employee party)

Details of the employer party

Representative:

- 1- Mr. Sar Samneang, lawyer for the company
- 2- Mr. Long Heang, GMAC representative

Address: #1567, National road No. 2, Tuolraka village, Sangkhat Chakangrek krom,
Meanchey, Phnom Penh.

Telephone: (855) 23 425 168

Fax: (855) 23 425 169

Details of the employee party:

Representative:

- 1- Att Thon, President of C.CAWDU
- 2- Sok Vy, C.CAWDU officer
- 3- Mean Vanny, C.CAWDU officer
- 4- Khim Vanny, President of factory union, C.CAWDU
- 5- Oum Savoeun, worker in sewing section
- 6- Sophea, worker in cutting section
- 7- Doung Vannak, worker in sewing section
- 8- Toeung Sreyna, worker in sewing section
- 9- Sout Kimheang, worker in sewing section
- 10- Dy Neal, worker in sewing section
- 11- Lonn Sam, mechanic
- 12- Mean Puktheavy, P12

- 13- Hong Sovan, QC
- 14- Chan Sophea, worker in sewing section
- 15- Chun Sokthun, worker in sewing section
- 16- Sroun Kanha, worker in sewing section
- 17- Oun Sophea, worker in sewing section

Address: # 6F, St. 476, Toultapong I, Chamkamorn, Phnom Penh.

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Issues In Dispute

- 1- The employee party demanded the employer terminate their employment contract and pay termination compensation to the workers because the company had already terminated workers in the cutting, laundry and packing sections. The company cannot pay any compensation under Article 75, 89 and 91 of the Labor Law to any worker who resigns from work or cancels his/her contract individually.
- 2- The employee party demanded the employer pay compensation under Article 75, 89 and 91 of the Labor Law to any worker who resigns from work individually. The company maintains the same position as with the 1st non-conciliated issue (in individual cases)

Jurisdiction¹ of the Arbitration Council

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B² (Article 309 to 317) of the Labor Law (1997); the Prakas on the Arbitration Council #99 of 2004; the Prakas on the Appointment of Arbitrators No. 103 dated April 26, 2004 and No.265 dated July 13, 2004 and the Arbitration Council Procedural Rules (attached as an Annex to the Prakas No. 099 dated April 21, 2004).

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 Labor Law. However the parties did not conciliate, and the non-conciliation report number 304 L.V.T/LI dated March 01, 2005 was submitted to the Secretariat of the Arbitration Council on March 02, 2005.

Arbitration Panel

Arbitrator chosen by the employer party: Mr. Kao Thach

Arbitrator chosen by the worker party: Mr. Ven Pov

Chair arbitrator (chosen by the two arbitrators): Mr. Pen Bunchhear

¹ Jurisdiction means power that the Arbitration Council receives under the law to settle labor dispute which were referred to the Arbitration Council.

² Article 309 to 317 of the Labor Law.

Hearing and Summary of Procedure before the Arbitration Council

Place of hearing: Secretariat of the Arbitration Council

Date of hearing: 04 March 2005 at 08:00 a.m. to 12:00 p.m.

Evidence

Witnesses and experts: *None*

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

- 1- Internal work rules of the company dated November 28, 1998;
- 2- Certificate dated November 25, 1998;
- 3- Certificate of company registration and business license dated August 14, 1997;
- 4- Authorization letter to an attorney dated March 03, 2005;

Provided by the worker party:

- 1- Letter of union federation and union requesting a union - union federation representative participate in the hearing on March 04, 2005.

Provided by the Ministry of Labour and Vocational Training [MoLVT]:

- 1- Report on conciliation of collective labor dispute of Kin Tai Cambodia Garment Co., Ltd. dated March 01, 2005;
- 2- Order No. 01 MoLVT dated February 24, 2005;
- 3- Collective labor dispute conciliation record dated February 24, 2005
- 4- Complaint of workers dated February 24, 2005.

Letter of the Arbitration Council

- 1- Interim order of the Arbitration Council ordering a stop to the strike and return to work dated March 03, 2005.

Presentation and testimony of employee party and employer party at the hearing

Both parties agreed to a non-binding award

Case summary:

Kin Tai Cambodia Garment Co., Ltd. is located at #1587, National road No. 2, Toulraka village, Chak Angreakrom commune, Meanchey district, Phnom Penh and employs approximately 800 workers. On February 24, 2005 the Labor Inspection Department received a complaint from worker representatives asking for help to resolve their three issues. After

receiving this complaint, the department appointed the labor inspector in Meanchey district to resolve the issues at the company location on February 24, 2005. The parties agreed on one issue out of the three. The other two non-conciliated points were referred to the Arbitration Council on March 2, 2005.

After the Arbitration Panel was formed to settle the two non-conciliation points, on March 2, 2005 the panel issued an interim order ordering workers of the above factory to stop striking immediately and return to work on March 3, 2005 at 8:00 a.m. working their normal shifts until the arbitral award was issued. On March 4, 2005 the disputing parties were called by the Arbitration Council to a hearing at 8:00 a.m. At the beginning of the proceeding the Arbitration Council asked for more information in order to try to mediate; however mediation was not successful so the Arbitration Council decided to continue hearing the case on the same day.

Findings of Fact

- After having seen conciliation report on collective labor dispute
- After having heard to employee party and the employer party
- After having reviewed the above documents

The Arbitration Council finds the facts as follows:

- 1- Previously the factory employed approximately 1000 workers; and currently there is a total of approximately 800 workers.
- 2- Both parties argued that all workers have undetermined duration contracts.
- 3- The company has already terminated employment contracts of approximately 350 workers in the cutting, packing and laundry sections and the company has already paid [them] compensation under Article 75, 89 and 91 of the Labor Law.
- 4- In regard to approximately 800 workers in the sewing section, the company did not terminate their employment contracts and did not pay any compensation as above. The employees argued that the actions and implementation by the company did not provide fairness and equality to all workers.
- 5- The employees argued that the company pressured them to work two or three different tasks until they would be forced to quit their jobs by themselves. For this argument the employees did not prove how many workers were forced by the employer to quit their jobs nor such workers' names.
- 6- Employees argued that to be fair the company must terminate the employment contract of all workers in the sewing section and pay them compensation in the same amount as the other workers in cutting.

- 7- The union in this dispute did not have most representative status and there is only one union in the factory.
- 8- The company argued that the above demands and arguments of the employees had no legal basis because the company terminated the employment contracts of approximately 350 workers in the cutting, laundry and packing sections with the clear reason that the company was not able to provide work to the workers in the above three sections because of the economic situation of the company; and the company was the one who decided to terminate the workers, not the workers themselves, therefore the company followed the Labor Law in providing compensation in accordance with the law []. For workers in the sewing section the company does not have any policy or any intention to terminate their contracts as they still need them; therefore the demand for the termination of the sewing section workers' contract is not possible for the company because the company still needs them to maintain the sustainability of the company. The company did not therefore agree with the demand.
- 9- The employee party and employer party did not prove how many workers resigned from their work individually; however the employees still demand that the company pay compensation under Article 75, 89 and 91 of the Labor Law.

Reasons for Decision

1st Issue:

Article 65 of the Labor Law 1997 states that "A labor contract establishes working relations between the worker and the employer." In this case although the parties did not provide any employment contract to the Arbitration Council, they confirmed that the contracts made by the parties were undetermined duration contracts. According to the findings of fact in this case the employees sought --by going on strike-- to have their undetermined duration contracts cancelled by demanding the employer dismiss them and pay them compensation for such termination under Article 75, 89 and 91 of the Labor Law. The employees made such demand because in the past the company had terminated workers in three sections and already paid them compensation under the law.

The Arbitration Council finds that each party to an undetermined duration contract can cancel the contract individually but cancellation of this type of contract shall follow the Labor Law procedures; this is a right as set forth in Article 74 of the Labor Law 1997 which states that "[t]he labour contract of unspecified duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party." Under the meaning of Article 74 the Arbitration Council finds that the employee party has sufficient rights under the law to

cancel an undetermined duration contract by only giving written notice within the period required by the law. However the employee cannot force the employer to cancel the employment contract because the employer can hire, rehire or terminate the employment contract of any worker under the law; and in this case the company argued that they still wish to employ all the workers and were not willing to terminate any worker. Therefore the Arbitration Council finds that the demand to force the employer to cancel the employment contract in this dispute is not in accordance with legal rules and the Labor Law. Regarding the workers' question, as to why the company terminated workers in three sections and did not terminate other sections and pay them compensation under the Labor Law, the Arbitration Council finds that the termination or rehiring of any employee is the right of the employer. In cases where the company does not have jobs to offer the workers, the employer can terminate the employment contract and pay them compensation in accordance with the Labor Law; thus the termination of the three other sections is the right of the employer according to the Labor Law and the reason for not terminating approximately 800 workers is that the company still wishes to continue to employ them. This continuation of employment does not violate the Labor Law unless the company forces any worker who wants to resign from work to continue working for the company. Or if the company pushes workers by negative behaviour to resign from work (Article 90 of the Labor Law); in such cases the employees have the right to claim for termination compensation. However in this case none of the workers cancelled their contracts individually.

Therefore in this dispute the Arbitration Council rejects the demand of workers that the employer terminate their employment contracts.

2nd Issue:

In regard to the second issue, the Arbitration Council finds that if the company terminates a contract by its own intention and the termination does not follow the Labor Law procedures, the employees have sufficient rights under the law to demand the employer pay termination compensation under Article 75, 89 and 91 of Labor Law.

Article 75 of the Labor Law requires a party who terminates an [employment] contract to give prior notice within the time limit required by law. If the employer does not give notice he has to pay compensation as provided in Article 77.

Article 89 requires the employer to pay termination compensation in addition to notice compensation unless the employee commits serious misconduct.

Article 91 requires the party who intentionally terminates a contract to pay damages to the other party.

The Arbitration Council finds that in this case the employer party did not intentionally terminate the employment contract, and also maintains and provides work to employees, and the employer did not force any employee to resign from work as stated in Article 90.

The Arbitration Council finds that the workers' demand for the company to pay termination compensation under Article 75, 89 and 91 of the Labor Law for those who resign individually is above the law because a resignation is a right of the employees but they do not receive benefits under Article 75, 89, and 91 of the labor Law. The benefits, which are received by the employees under Article 75, 89, and 91, apply only in cases where the employer alone terminates the labor contract. Therefore the Labor Law gives workers the right to receive these benefits in cases where the employer terminates their employment contracts without notice and valid reasons but the workers are not entitled to these benefits when they resign from work voluntarily. Moreover the Arbitration Council finds that the demand for the company to pay termination compensation in the context of this case is contradicted by principles of the Labor Law.

In this case, the Arbitration Council finds that the employees did not offer sufficient evidence or legitimate reasons to support their demand for compensation for the resigning workers. Therefore, the Arbitration Council does not accept their demand on the second issue.

Moreover, in relation to interests disputes, in the past the Arbitration Council has always considered the representative status of the union which brought the case to the Arbitration Council to resolve, representative status. In previous awards of the Arbitration Council and in accordance with the jurisprudence of the Arbitration Council, the Arbitration Council always finds that the most representative status of the union gives a legal capacity to negotiate a Collective Bargaining Agreement with the company and provides legal standing to bring a dispute to the Arbitration Council to be settled. In order to receive most representative status under Article 277, the union shall register and shall follow the other conditions as stated in that Article.

In this case, the Arbitration Council finds that C.CAWDU in the Kin Tai Factory has not been recognised as having most representative status in the company. Therefore, this union did not have a legal right to make a Collective Bargaining Agreement on behalf of all

the workers in the factory. See Article 96(2)(B); Prakas 305, Article 9(1). This right belongs to the union which registers and has the majority of members in addition to following the other criteria stated in Article 277 of the Labor Law. Therefore, to be consistent with the previous cases the Arbitration Council finds that the union C.CAWDU in Kin Tai factory has not yet fulfilled sufficient criteria under the law to represent the workers in the whole factory or to resolve the dispute related to the common interests of the workers in the Kin Tai Company.

Moreover, Article 43 of the Prakas states that "an Arbitral Award that settles an interests dispute will take the place of Collective Bargaining Agreement for one year from the date the Award comes into effect, except if the parties negotiate for a Collective Bargaining Agreement to replace this Award." In the past, the Arbitration Council has found that if the Arbitration Council issues an Award on this issue it will become a Collective Bargaining Agreement which applies to all workers in the factory and it would also make the other workers lose the right to strike to demand interests disputes in the future, and it will become unfair for the other workers. See cases 04/03-Lida; 06/04-Chousing; 24/03-Top One; 61/04-Best Honor and 62/04-Ecent. Moreover, in the past the Arbitration Council also concluded that a union which does not have most representative status has no right to bring interests disputes to the Arbitration Council to be settled, see 31/03 Hung Wah; 60/04-United Art; 99/04-AIA. Therefore, to be consistent with the previous cases, the Arbitration Council declines to consider the claim of the worker for the company to pay compensation under Articles 75, 89 and 91 of the Labor Law to any employee who individually resigns from work.

Article 34(E) of Prakas 99 provides that the Arbitration Council has the power to order the parties to bargain. Because the Arbitration Council finds that cancellation of an undetermined duration contract by the employee is the same as resignation from work, it is a legal right as provided in the Labor Law and the cancellation of the employment contract is related to the interests of both parties; and furthermore the Arbitration Council finds that in the hearing the parties did not really understand each other, [and as a consequence the employee party did not understand] why the company terminated the employment contracts of workers and paid compensation in the three sections nor why the company did not terminate the employment contracts of the sewing workers, causing workers to wonder whether the factory general manager committed inappropriate acts especially as they never see the foreign manager. The employees wanted to know the real intention of the company in regard to the termination of the employment contracts of the workers in the three sections and their rehiring; thus the workers in the sewing section wanted the company to terminate their contracts too. Therefore the Arbitration Council orders the employee party and the

employer party to negotiate to settle the interests dispute in respect of the second issue of this case.

Based on the facts, law, evidence and reasoning, the AC decides and issues orders as follows:

Decision

The Arbitration Council decides as follows:

- 1- Reject the workers' demand for termination by the company.
- 2- Decline to consider the demand of the workers for the company to pay compensation under Articles 75, 89 and 91 of the Labor Law for any employee who resigns from work individually, and order the employer and employees to bargain to settle the second issue in this dispute.

Signatures of Members of the Arbitration Panel:

Arbitrator chosen by the employer party:

Name: Mr. Kao Thach

Signature:

Arbitrator chosen by the worker party:

Name: Mr. Ven Pov

Signature:

Chair of arbitration panel:

Name: Mr. Pen Bunchhea

Signature:

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.