



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាគណ្តារ
THE ARBITRATION COUNCIL

Case number and name: 11/08- Tai Yang

Date of Award: 18 February 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

Arbitrator chosen by the worker party: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Ang Eng Thong**

DISPUTING PARTIES

Employer party:

Name: **Tai Yang Enterprises Co. Ltd.**

Address: Tnot Muy Deum Village, Bek Chan Commune, Ang Snoul District, Kandal

Telephone: 092 899 898

Fax: N/A

Representative:

1- Lei Sokchea

General Administrative Assistant (Company Representative)

2- Buth Thoeun

General Administrative staff

Worker party:

Name: **Local union of Cambodian Labour Union (CLU) at Tai Yang Factory**

Address: Tnot Muy Deum Village, Bek Chan Commune, Ang Snoul District, Kandal

Telephone: 012 837 768

Fax: N/A

Representative:

1- Khit Sokhon

Secretary General of Cambodian Labor Union Federation

2- Chey Sovann

Official of Cambodian Labor Union Federation

3- Bo Buntha

President of Cambodian Labor Union at Tai Yang Factory

4- Saing Phearith	Vice-President of Cambodian Labor Union at Tai Yang Factory
5- Bo Bunthoeun	1 st Vice-President of Cambodian Labor Union at Tai Yang Factory
6- Phor Sok Kong	Union's Assistant

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The company does not agree to the request to open gate numbers 7 and 8, as stated in issue 3 of the claim, because it wants to prevent the loss of the company's goods. Currently the company loses a high percentage of goods and therefore, the company wants to prevent this loss; the company is considering building a wall to block these gates.
2. The workers demand that the company terminate the fixed duration contracts it has just made because when the workers started working the company did not require them to sign such contracts. In addition, the workers demand that the company reinstate Mr. Saing Phearith, union vice-president, and Mr. Phor Sok Kong, union assistant. The company argues that it has never practiced such thing as stated in the first part of the claim of Cambodian Labor Union Federation. The company will consider the demand for reinstatement of Mr. Saing Phearith and Phor Sok Kong and provide a response next week.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor 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. 076 dated 10 May 2007 (Fifth 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. The conciliation hearing which took place on 16 January 2008 was unsuccessful, and the non-conciliation report No. 16/08 was submitted to the Secretariat of the Arbitration Council on 17 January 2008.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khann Chamkarmorn, Phnom Penh.

Date of hearing:

- 28 January 2008 (from 2:00pm to 5:00pm)
- 11 February 2008 (from 3:00pm to 5:00pm)

Procedural issues:

On 31 December 2007, the Kandal Department of Labour and Vocational Training received a complaint from workers at the Tai Yang Company demanding that the company improve some working conditions. The Department of Labour and Vocational Training assigned its official to conciliate the dispute and the last conciliation took place on 9 January 2008; as a result six out of eight issues were conciliated. The two remaining issues were sent to the Arbitration Council on 17 January 2008 through the non-conciliation report number 16/08 dated 16 January 2008.

After receiving the case, the Secretariat of the Arbitration Council summoned the employer and employee parties to a hearing and conciliation on the two remaining issues on 28 January 2008 at 14:00 and on 11 February 2008 at 15:00.

Both parties were present as summoned by the Arbitration Council. The Arbitration Council requested more information related to this dispute and conciliated issue 1. Therefore, the Arbitration Council will only consider issue 2 based on the evidence and testimonies of parties in the hearing as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party: N/A

- Letter authorising Mr. Lei Sokchea to resolve labour dispute dated 21 January 2008.

Provided by the worker party:

- License registration certificate of Cambodian Labor Union at Tai Yang number 1310 dated 21 December 2007.
- Worker's card with contract number 050120026 of Mr. Phor Sok Kong.
- Worker's card with contract number 050120025 of Mr. Saing Phearith.
- Letter number 1848 on the notification of the election to recruit leaders of Cambodian Labor Union at Tai Yang Factory dated 01 November 2007.

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

- Report on the collective labour dispute settlement at Tai Yang Company number 16/08 dated 16 January 2008.
- Minute of the collective labour dispute conciliation at Tai Yang dated 09 January 2008.

Provided by the Secretariat of the Arbitration Council:

- Invitation letter number 051 to the company party to attend the first hearing dated 21 January 2008.
- Invitation letter number 052 to the employee party to attend the first hearing dated 21 January 2008.
- Invitation letter number 087 to the company party to attend the second hearing dated 1 February 2008.
- Invitation letter number 088 to the employee party to attend the second hearing dated 1 February 2008.

The Arbitration Council finds that:

- Tai Yang Company employs 3,648 workers.

Issue 2: (a) The workers demanded that the company place any workers, whose contracts had been changed from undetermined duration contracts to fixed duration contracts, on undetermined duration contracts

- The union stated in the hearing that there were [a number of] workers whose contracts had been changed from undetermined duration [contracts] to fixed duration contracts but it did not provide a list of names of the workers. The union promised to submit the relevant documents to the Arbitration Council, but did not provide them.

(b) The workers demanded that the company reinstate Mr. Saing Phearith, union vice-president, and Mr. Phor Sok Kong, union assistant

- The union said in the hearing that Mr. Saing Phearith and Mr. Phor Sok Kong are both Electricians. Mr. Saing Phearith is the union vice-president and Mr. Phor Sok Kong is an assistant of the Cambodian Labor Union at Tai Yang II Factory, which was registered on 21 December 2007. The two workers started working on 17 March 2004 as white card workers with a two-month labour contract at Tai Yang I Factory. The workers stated that they had signed two-month labour contracts only during their first year but after this they did not sign any contract with the company. The employer did not object to this claim.
- At the beginning of 2005, the company transferred the two workers to work at Camwell Factory, which is owned by the same owner as of Tai Yang I. Neither worker signed a new contract with the company they were transferred to.
- After Mr. Saing Phearith and Phor Sok Kong had worked for one year, the company converted them to regular workers and they were not required to wear a white card again, but they did not sign any contract with the company.

- In mid 2005, the company transferred both workers to work at Tai Yang II Factory, which is owned by the same owner as of Tai Yang I.
- The company party said at the end of 2006, the company informed both workers that their one-year labour contracts would expire at the end of 2006. The company party stated in the hearing that both workers had already thumb-printed their one-year labour contracts.
- The workers denied the allegation arguing that the one-year fixed duration contracts were fake contracts. They did see the contracts but did not thumb-print them.
- The company party said that if the workers did not thumb-print them, why did they accept the contract termination payment. The company said that it would check with the Administration Department to find those contracts, but the Arbitration Council did not receive the contracts of these two workers.
- The union said that Mr. Saing Phearith and Mr. Phor Sok Kong did not acknowledge that they had one-year labour contracts.
- The company party terminated both workers at the end of December 2006 because the one-year contracts had expired.
- The union said that after the negotiation, in which the FTU was involved, both workers agreed to accept 5 percent severance pay and stopped working for a period of time. Then both workers signed one-year labour contracts with the company commencing on 8 January 2007 and ending on 8 January 2008.
- Mr. Saing Phearith and Mr. Phor Sok Kong claimed that they signed the contracts because they had no choice and were afraid of losing their jobs; that was why they agreed to sign the contracts.
- The union did not provide other evidence to support this claim and the union did not specify that both workers were forced to sign the one-year labour contracts with the company.
- The workers did not provide the contracts to the Arbitration Council. However, both parties agreed that the two workers had signed one-year contracts with the company.
- The worker party acknowledged that the employer had complied with the law and agreed to pay the five percent severance pay in accordance with Article 73 of the Labour Law, but the workers had not yet accepted the offer and demanded reinstatement.
- The employer party said it terminated labour contracts of Mr. Saing Phearith and Phor Sok Kong because the contracts had expired and it had notified [the Labour

Inspector] of the termination of their labour contracts in accordance with the Labour Law.

- The workers claimed that the one-year labour contracts were not valid because they have more than two years seniority and they signed the one-year labour contracts because they had no choice.
- The worker party did not mention anything about union discrimination.

REASONS FOR DECISION

Issue 2: (a) the workers demand that the company place any workers, whose contracts had been changed from undetermined duration contracts to fixed duration contracts, on undetermined duration contracts

In the hearing, the workers did not provide specific facts and enough relevant evidence [to support their claim].

In previous Arbitral Awards, the Arbitration Council decided to reject the demand, if the claimant did not provide specific relevant evidence to the Arbitration Council sufficient to allow it to make a decision (please see Arbitral Awards 63/04-Shine Well, Issue 4; 99/06-South Bay, Issue 5; and 74/07-Global Apparel, Issue 2).

In this case, the Arbitration Council agrees with the previous interpretation of the Arbitration Council. Therefore, the Arbitration Council decides to reject this demand.

(b) The workers demand that the company reinstate Mr. Saing Phearith, union vice-president, and Mr. Phor Sok Kong, union assistant

Based on the facts, Mr. Saing Phearith and Mr. Phor Sok Kong claimed that their labour contracts were undetermined duration contracts; therefore, their dismissals were illegal.

The Arbitration Council will consider what type of labour contracts Mr. Saing Phearith and Mr. Phor Sok Kong had? Were the dismissals of Mr. Saing Phearith and Mr. Phor Sok Kong illegal or not?

The Arbitration Council finds that Mr. Saing Phearith and Mr. Phor Sok Kong commenced work at Tai Yang Factory on a two-month probationary contract and continued employment on two-month contracts until mid 2005. Mr. Saing Phearith and Mr. Phor Sok Kong did not have a written contract.

Article 67 of the Labour Law states that, "A contract of a fixed duration must be in writing. If not, it becomes a labor contract of undetermined duration."

Based on the content of Article 67, the Arbitration Council decides that the labour contracts of Mr. Saing Phearith and Mr. Phor Sok Kong were undetermined duration contracts commencing from mid 2005.

Based on the facts, the worker party said that at the end of 2006 the employer claimed that Saing Phearith and Phor Sok Kong had one-year labour contracts, which expired at the end of 2006. However, the worker party stated that they did not sign the one-year contracts. The Arbitration Council asked the company to provide the one-year contracts to the Council but the Arbitration Council never received the contracts. Therefore, the Arbitration Council finds that the company did not sign written one-year contracts with the workers. Therefore, Mr. Saing Phearith and Mr. Phor Sok Kong have had undetermined duration labour contracts since the end of 2006.

At the hearing both parties said that they had signed one-year written contracts for the period 8 January 2007 to 8 January 2008. The Arbitration Council will consider whether or not the company [lawfully] terminated the [workers'] undetermined duration contracts at the end of 2006? Are the one-year fixed duration labour contracts, which expire in January 2008, valid or not?

Article 74 of the 1997 Labour Law states that, "The labor 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. However, no layoff can be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group."

In the previous awards, the Arbitration Council has held that the termination of an [undetermined duration] labour contract must be conducted in accordance with Article 74 of the Labour Law and the employer shall provide other benefits to workers based on Article 75, 89, 91, and 167 of the Labour Law. Please see Arbitral Award 97/04-Grace Sun, Issue 1.

According to Article 74 of the Labour Law and Arbitral Award 97/04-Grace Sun, an undetermined duration labour contract can be terminated if:

- [there is a] valid reason
- prior notice [is given]
- If there is no valid reason, the employer shall provide a termination payment, compensation, and paid annual leave.

In this case, the Arbitration Council also agrees with the above interpretation. Based on the facts, the company did not have a valid reason to terminate Mr. Saing Phearith and Mr. Phor Sok Kong because the company claimed that their labour contracts were fixed duration contracts, but the Arbitration Council finds that they were not fixed duration contracts. Moreover, the company did not provide other benefits to Mr. Saing Phearith and Phor Sok Kong. Therefore, the company shall provide proper compensation to both workers,

which includes indemnity for dismissal, a prior notice payment (if the company did not inform them in advance), compensation and paid annual leave.

Were the one-year fixed duration labour contracts, which expire in January 2008, valid or not?

In Arbitral Award 69/04-Common Way Fashion, Issue 1 [the AC] states that, "In order to convert the type of labour contract from one to another especially the undetermined duration labour contract to become fixed duration labour contract, consent from both contracting parties is required." Please see Arbitral Award 03/06-Flying Dragon, Issue 1.

In this case, Mr. Saing Phearith and Mr. Phor Sok Kong said that they signed the new one year labour contracts in order to get the job. However, they did not provide any evidence to prove that they were forced to sign the contracts. Moreover, the Arbitration Council considers that Mr. Saing Phearith and Mr. Phor Sok Kong did not protest against the new labour contracts and accepted the termination payment [in conjunction with the termination] of their old contracts. Therefore, the Arbitration Council considers that Mr. Saing Phearith and Mr. Phor Sok Kong should have protested against the contracts if they were not satisfied with the contracts and should not have kept silent until the contracts had expired. Therefore, the Arbitration Council decides that the termination of the one-year labour contracts were valid. Therefore, the company shall pay both workers according to the law.

Since Mr. Saing Phearith was vice-president of the union and Mr. Phor Sok Kong was an assistant to the union, the Arbitration Council considers whether or not the contracts were terminated because of union discrimination.

Article 12 of the Labour Law states that, "... no employer shall consider on account of membership of workers' union or the exercise of union activities to be the invocation in order to make a decision on hiring, ... discipline or termination of employment contract."

In this case, the worker party did not mention that their union [leadership] lead to the non-renewal of their labour contracts nor provide any evidence related to union [discrimination]. Therefore, the Arbitration Council decides that the non-renewal of labour contracts was not related to union discrimination.

Based on the fact finding, legal principle, and reasons above, the Arbitration Council decides as follows:

DECISION & ORDERS

Issue 2:

- a. Reject the demand of workers that the company place any workers, whose contracts had been changed from undetermined duration contracts to fixed duration contracts, on undetermined duration contracts

- b. Reject the demand of workers that the company reinstate Mr. Saing Phearith and Mr. Phor Sok Kong, Electricians.

Type of Award: Non binding award

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

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Ang Eng Thong**

Signature: