

**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**THE ARBITRATION COUNCIL**

Case: 111/04

Date of award: 12 January 2005

**ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

**Sun Shiny Cambodian Garment manufacturing called Sean Chin**

(Employer party)

**AND**

**Trade Union Workers Federation Progress Democracy of Sean Chin Company  
(TUWFPD)**

(Employee party)

**DETAILED INFORMATION OF EMPLOYER PARTY:**

**Representatives:** 1- Chen Lihua, Company's Director  
2- Sek Sok Heng, Translator

**Address:** Village Dam Nak, Phnom Penh Tmey quarter, Rousey Keo district,  
Phnom Penh city.

**Tel:** N/A **Fax:** N/A

**DETAILED INFORMATION OF EMPLOYEE PARTY:**

**Representatives:** 1- Kim Chan Samnang, Trade Union President of TUWFPD  
2- Sen Samnang, Trade Union Officer of TUWFPD  
3- Din Sam At, Union President  
4- Phoeuk Sophea, Union Secretary  
5- Thach Chan Pagna, Union Vice President  
6- Aour An, worker representative  
7- Khhout Sichan, worker representative  
8- Bun Nouen, worker

**Address:** #197 Village Chong Thnol Khang Lek, Tek Tla quarter, Rousey Keo  
district, Phnom Penh city.

**Tel:** N/A **Fax:** N/A

## **ISSUES IN DISPUTE:**

(In non-conciliation report)

- 1- The worker party demands that the employer reinstate Mr. Bun Noeun because he [did not] commit misconduct that [should result] in termination. But the company will not reinstate Mr. Bun Noeun because [it claims that] he makes the company's pants incorrectly. Regarding the termination of Mr. Bun Noeun, the company agrees to comply with the Labour Law.
- 2- The employer party demands the company apply point 9 of the agreement made on 13 January 2004. In contrast, the company cannot apply this agreement because the company does not know this issue.
- 3- The worker party demands the company pay back-pay when the company allowed the workers to take annual leave during [periods of] no work. The company will not pay the back-pay because the workers agreed with the company.
- 4- The worker party demands the company maintain wages and bonuses of US\$5 for the strike days of 16-18 December 2004. The company will not pay wages and US\$5 bonus in compliance with the Labour Law.

### **JURISDICTION OF THE ARBITRATION COUNCIL :**

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labour Law (1997); the Prakas on the establishment of the Arbitration Council 338/02; the Prakas on the Arbitration Council 99/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Nomination of Arbitrators 103/04 and 265/04.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labour Law. That conciliation hearing was not successful. The non-conciliation report dated 21 December 2004 was submitted to the Secretariat of the Arbitration Council on 22 December 2004.

### **COMPOSITION OF THE ARBITRATION PANEL :**

Arbitrator chosen by the employer party:	<b>Mr. Ing Sothy</b>
Arbitrator chosen by the worker party:	<b>Mr. An Nan</b>
Chair arbitrator (chosen by the two arbitrators):	<b>Mr. Ang Eng Thong</b>

**HEARING AND EVIDENCE:**

**Date and place of hearing:** 29 December 2004 at 2:00 p.m. at the Secretariat of the Arbitration Council.

**Witnesses and Experts:** N/A

**EVIDENCE THAT WAS CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:****Provided by the employer party:**

- 1- The summary of the dispute without a date
- 2- Labour contract between the company and Mr. Din Sam At dated 15 March 2004
- 3- Labour contract between the company and Ms. Tek Sophine dated 20 March 2004
- 4- The Internal Work Rules of the company without the Labour Inspector's approval and date
- 5- Certificate of business registration dated 2 January 2004
- 6- Certificate of business registration in MFN list dated 16 April 2004
- 7- Annual 2004 tax certificate dated 19 January 2004
- 8- Statute of the Sun Shiny Company (Cambodia) dated 29 September 2003
- 9- Certified letter from the line supervisor with no date
- 10- Certified letter from the security guard chief dated 30 December 2004
- 11- Monthly pay slip for November 2004

**Provided by the employee party:**

- 1- Registration Certificate of the Trade Union Workers Federation Progress Democracy of Sean Chin Company (TUWFPD)
- 2- Conciliation minutes of the collective labour dispute dated 13 January 2004
- 3- List of workers' demands
- 4- Statute of union dated 14 January 2004

**Received from Minister of Labour and Vocational Training MoLVT:**

- 1- Report from the Labour Inspection Department dated 16 December 2004
- 2- Report from the Labour Inspection Department sent to the Minister of Labour and Vocational Training dated 21 December 2004.

**CASE SUMMARY:**

Sean Chin Company is located at Domnaki Village, Phnom Penh Thmei, Rousey Kao, Phnom Penh. This company employs a total of 600 workers. On 16 December 2004 the Labour Inspectors in Resey Kao received a complaint from workers on strike who were

demanding that the company reinstate Mr. Bun Neun and apply appropriate labour conditions in accordance with the Labour Law. After learning about this information, the Labour Inspectors in Resey Kao came to settle the dispute at the factory on 16 December 2004 with the result of successfully conciliating nine out of thirteen issues. The four non-conciliated issues are mentioned above. The case was sent to the Arbitration Council on 22 December 2004. The Secretariat of the Arbitration Council invited both parties to appear in a hearing on 29 December 2004 at 2:00 p.m.

**FINDINGS OF FACT:**

- Having examined the minutes of the collective labour dispute conciliation
- Having listened to both parties
- Having checked all relevant documents above

**We find that:**

***First Issue***

- Mr. Bun Neun, dismissed by the company, started his job at the company on 13 October 2003 pursuant to an undetermined duration contract.
- Mr. Bun Neun did not hold a leadership [position] in the union.
- The company dismissed Mr. Bun Neun on 13 December 2004.
- Mr. Bun Neun's basic [monthly] wage is US\$45.
- The company did not have a written document providing that Mr. Bun Neun received an oral or a written warning. But, the company alleged that Mr. Bun Neun received many warnings.
- Both parties agreed that Mr. Bun Neun made a stain on a [pair of] trousers because he drew a picture on the ironing cover and when he ironed the trousers, it became a stain on the pair of trousers. He did not commit serious misconduct as defined in Article 83 of the Labour Law.
- In the Internal Work Rules of the company, Clause 10 on disciplinary sanctions states that when employees commit misconduct intentionally and there is specific evidence [of this], the company will take disciplinary measures in accordance to the level of misconduct as follows:

- Minor misconduct: first misconduct must receive an oral warning and documentation in the employee's paper file. If s/he commits misconduct a second time, s/he will receive a written warning. If the conduct occurs a third time, the employee will be dismissed.

- Medium misconduct: first misconduct will receive an oral warning and documentation in the employee's paper file. For the second time, s/he will be suspended without wages for a period not exceeding seven days. If the conduct occurs a third time, the employee will be dismissed.

- Serious misconduct: As mentioned in the Labour Law; the employee will be dismissed.

- The company side has a strong position against reinstating Mr. Bun Neun, however the employer agreed to pay wages and other indemnities for dismissal in accordance with the Labour Law.

- A Chief of Security, Sous Socheath, said in his letter that Mr. Bun Neun committed many [instances of] misconduct and was warned directly by him.

### ***Second Issue***

- The workers demand that the company comply with point 9 of an agreement dated 13 January 2004. The company could not comply with [this point] because the company was not aware of this issue.

- Point 9 of the agreement of 13 January 2004 states that, "For the workers who took leave for three days with authorization, the company agrees not to cut their bonus." This agreement was made with the Union for an indefinite period of time.

- The agreement has the signature and stamp of Mr. Vorng Yi, a director of the company, and has thumbprints of workers' representatives, signatures of the conciliators, and a signature of an interpreter as well to certify that he/she completed an accurate interpretation.

- The company said that the company renegotiated with the workers' representative about this issue, but when the Arbitration Council asked [to see] the new agreement however, the company did not have it.

- The company said that the company has never applied this agreement. However, the workers demanded that this agreement should have been applied for a long time, but the company refused.

### ***Third Issue***

- The worker demands that the company pay back-pay [for the period] when the company allowed the workers to take annual leave when the company had no work. The company will not pay back-pay to the workers because the workers already agreed with the company on this issue.
- Both parties acknowledged that the employees took 15 days of annual leave in August 2004, which the company deducted from [the employees'] accrued annual leave.
- Both parties also agreed that they did not object when the company asked the workers to take annual leave and when the company did not have work in August 2004.

### ***Fourth Issue***

- The worker party demands that the company maintain their wages and attendance bonus of US\$5 [for the period] when the workers went on strike from 16-18 December 2004. The company party will not provide wages and attendance bonus of US\$5 to the workers; it means to comply with the Labour Law.
- The workers went on strike from 16-18 December to demand the company reinstate Mr. Nun Neun and comply with some [requested] labour conditions.
- On 21 and 22 December 2004 the company did not open the door to admit most of the workers because the issues were not yet resolved, but some workers were allowed to work that day.
- The workers said that the issues were settled on 19 December 2004 and agreed to go back to work on 21 December 2004, and the remaining issues must be sent to the Arbitration Council to continue to resolve (19 December 2004 was Sunday).
- The company did not pay wages to the workers who did not come to work on 21 and 22 of December 2004 because those days the workers did not work.
- The workers demanded the company pay wages on 21 and 22 of December because the company shut the door and did not allow the workers to return to work.

## **REASONS FOR DECISION:**

### ***First Issue***

Based on the facts, Mr. Bun Neun committed a mistake by staining a pair of trousers. The employer party dismissed this worker based on this mistake. The company did not have clear documents or evidence such as a warning or notification of termination. The security guard chief wrote that Mr. Bun Neun committed many mistakes; however, this argument did not say that the company used to give written warnings in the past.

The employer can terminate any worker without giving prior notification if this worker committed serious misconduct (see Articles 73 and 82). Article 83(2) of the Labour Law concerns serious misconduct of workers. The behavior of this worker in making the trouser spotted was not serious misconduct as established in Article 83(2).

Under Article 27 of the Labour Law, disciplinary sanctions must be proportional to the seriousness of the misconduct. Because Mr. Bun Neun intentionally stained a pair of trousers, the Arbitration Council finds that the dismissal of Mr. Bun Neun was not proportional to his misconduct based on Article 83(2). In addition, the company did not follow its Internal Work Rules (as required by Chapter 2, Section 3 of Labour Law).

As mentioned above, the misconduct of Mr. Bun Noeun was not serious misconduct. Under the Internal Work Rules of the Company regarding minor misconduct, verbal and written warnings must exist before termination. Regarding medium misconduct, a written warning is also required. Based on the above facts, the employer party did not provide clear evidence that she/he warned Mr. Bun Noeun about his misconduct.

Because this worker did not commit serious misconduct according to Article 83 of the Labour Law and also the employer did not apply its Internal Work Rule, the termination of Mr. Bun Noeun is invalid. Generally, when the employer terminates the worker without a valid reason, the Arbitration Council can issue an award ordering reinstatement or payment of indemnity for dismissal in accordance with the Labour Law, depending on the context.

In this case, the worker is a normal worker and based on the employer's ultimate position of not accepting the reinstatement, the Arbitration Council will not issue the award ordering the reinstatement of this worker. But if the company wants to terminate Mr. Bun Noeun, the company has to pay appropriate indemnity for his dismissal according to the Labour Law [as follows]:

- An amount of money for prior notice in accordance with Articles 75 and 77 (equal to 15 days of wages and other benefits);
- Indemnity for dismissal in accordance with Article 89 (equal to 15 days of wages and other benefits);
- Damages in accordance with Article 91 (because of invalid reason for termination as required by Article 74, paragraph 2); and
- [Unused] annual leave paid in accordance with Article 167.

Regarding the damages, the Arbitration Council considers that 15 days of wages and other benefits is a reasonable indemnity for dismissal (adding to his indemnity for dismissal and prior notice paid). The Arbitration Council bases its decision on Article 73, paragraph 3, which allows the worker to demand the total amount of payment equaling his or her indemnity for dismissal without providing evidence regarding damages.

Therefore, the Arbitration Council considers that, Mr. Bun Noeun is entitled to 15 days of paid prior notice and 15 days indemnity for dismissal, which is a total of 45 days. The total payment to this worker is calculated based on his average daily wages applying the following formula:

$$\text{Average daily wage} = \frac{\text{The amount of money received within the last 12 months}}{\text{Remuneration earned over 12 months}} \\ \text{12 months x 26 working days}$$

The total payment received ~~within 12 months including overtime payments and other benefits, which were received by him during that time.~~ ~~12 months multiplied by 26 working days~~ The total amount of money that he earned is equal to 45 days multiplied by the average annual wage paid. See 27/04 and 29/04 in respect of this calculation. Further, Mr. Bun Noeun is entitled to be paid annual leave owed to him by the company (according to the minutes of the company).

### **Second Issue**

The workers demanded the company follow the agreement signed on 13 January 2004, which states that "For the workers who take leave for three days with authorisation, the company agrees not to deduct the attendance bonus." In the agreement there was a signature and stamp from the Director of the company and the workers' representative, the conciliators and the interpreter of the company saying that the translation was correct. Also, none of the parties rejected the agreement within the last year. Article 307 of the Labour Law states that "A conciliatory agreement, signed by the parties and visaed by the conciliator, has the same force and effect of a collective agreement between the parties and the persons

they represent." Article 96(3) of the Labour Law [states], "... when the collective agreement is concluded for an indefinite term, it can be cancelled, but it continues to be in effect for a period of one year to the party that forwarded a complaint to cancel it. The notice of cancellation does not prevent the agreement from being implemented by the other signatories." In this case, although both parties did not apply [the agreement], the employer did not notify or file a rejection to the agreement. In addition, both parties do not have any new agreements to replace this agreement; therefore, both parties remain bound by it.

### ***Third Issue***

The workers demand the company pay back-pay [for the period] the company allowed the workers to take annual leave when the company did not have work in the past. According to the facts, the Arbitration Council finds that the company authorised all workers to take annual leave for 15 days in August 2004 when the company did not have work. All the workers agreed with the company's organisation at that time. Article 170 of the Labour Law states that, "in principle, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the worker. In this case, the employer must inform the Labour Inspector of this arrangement." In every case of paid annual leave exceeding fifteen days, employers have the right to grant the remaining days off at another time of the year, except in respect of leave for children and apprentices less than eighteen years of age. The Labour Law does not state clearly about annual leave taken apart from in this [circumstance].

The Arbitration Council considers that the purpose of annual leave is to allow the workers to take leave from their work and generally, the employee should have the right to choose their leave time. But there is a limitation as well, if it is necessary, that the annual leave taking must not affect the company's operation. For example, if most workers ask for annual leave at the same time, the employer does have a valid reason to reject the workers' request. However, in this case, the Arbitration Council believes that there was an agreement between both parties related to annual leave; therefore, the Arbitration Council rejects the worker's claim in respect of the third issue.

### ***Fourth Issue:***

The workers demanded the company pay wages and attendance bonuses for the strike day of 16, 17 and 18 December 2004. The employees did not give prior notice of the strike in accordance with Article 324 of the Labour Law which sets out the procedures [relating to strikes and] requires prior notice. According to the facts, the workers really went on strike for

three days, so Article 332 of the Labour Law states "A strike suspends the labour contract. During the strike the allowance for work is not provided and the salary is not paid." Article 3 of Notification Number 017/MoSALVY, states that workers who regularly come to work on regular working days of a month shall receive a bonus of at least US\$5 per month. In this case both parties did not have an agreement or collective bargaining agreement requiring that benefits beyond the minimum level of the law [be paid], thus the Arbitration Council rejects the workers' demand on the fourth issue because the workers went on strike illegally, and therefore they are not entitled to the US\$5 attendance bonus for December. Please see 22/04 - Le Royal.

*In particular:*

In the hearing the worker party said that on 21 and 22 December 2004, the company did not open the door to allow the workers to work because the company said that the issues had not yet been resolved and the company would not pay wages to the workers for 20 and 21 [December]. The company also acknowledged what the workers said. The worker party asked the Arbitration Council to settle this issue also. Article 312 of the Labour Law states that "The Arbitration Council has no duty to examine issues other than those specified in the non-conciliation report or matters, which arise from events subsequent to the report, that are the direct consequence of the current dispute."

The issue is whether or not the Arbitration Council has a duty to examine the issues raised by the employees. Therefore, the Arbitration Council will discuss whether the issue is a direct consequence of the dispute. If we examine the facts, we will find that the conciliation of the Labour Inspector was finished on the evening of 18 December, and both parties agreed to send the remaining issues to the Arbitration Council and that the workers must return to work on 20 December 2004 (the 19<sup>th</sup> was a Sunday). On 20 and 21 December 2004, the company did not allow the workers to return to work because the company said that the issues that spurred the strike had not yet been settled. The Arbitration Council considers that this is a direct consequence of the dispute. Thus the Arbitration Council has a duty to examine this issue.

Article 322 of the Labour Law states, "the right to a lockout shall be exercised under the same provisions as the right to strike." According to the facts, the employer locked out without notification under Article 324 of the Labour Law. Article 335 states that, "a lockout undertaken in violation of these provisions obligates the employer to pay the workers for each day of work lost thereby."

According to the facts, the company acknowledged that it did not open the door to let the workers back to work on 20 and 21 December 2004 and the labour contract was not suspended in accordance with the Labour Law during this period. Thus both parties have an obligation to follow their agreement. Thus the Arbitration Council considers that the employer must pay wages to the workers on 20 and 21 December 2004.

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

**DECISION:**

1: Order the company to pay severance pay to Mr. Bun Noeun as below:

- Prior notice paid in accordance with Articles 75 and 77 (equal to 15 days of wages and other benefits);
- Indemnity for dismissal in accordance with Article 89 (equal to 15 days of wages and other benefits);
- Damages in accordance with Article 91 (because the company terminated without valid reasons under Article 74(2), which is equal to 15 days); and
- Annual leave paid in accordance with Article 167.

Average daily wage = 
$$\frac{\text{The amount of money received within the last 12 months}}{12 \text{ months} \times 26 \text{ working days}}$$
  
$$\frac{\text{Remuneration earned over 12 months}}{12 \text{ months multiplied by 26 working days}}$$

2: [Order that] the company must respect the agreement signed on 13 January 2004 saying that "if the workers take leave for three days with the authorisation, the company will not deduct their attendance bonus."

3: Reject the workers' demand that the company pay back-pay for the time the company approved annual leave in the past when the company did not have work.

4: Reject the workers' demand that the company maintain their wages and attendance bonus of US\$5 [for the period] when the workers went on strike on 16, 17 and 18 December 2004.

5: Order that the company must pay wages to all the workers who were not permitted to work on 20 and 21 December 2004.

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:**

**Arbitrator chosen by the employer party:**

Name: **Ing Sothy**

Signed: .....

**Arbitrator chosen by the worker party:**

Name: **An Nan**

Signed: .....

**Chair of arbitration panel:**

Name: **Ang Eng Thong**

Signed: .....

*This Award will become binding after eight 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.*

*This Award is immediately binding upon the parties if the parties have agreed as such in writing before the notification of the Award, or if the parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.*