

KINGDOM OF CAMBODIA
Nation Religion King

Case number: 17/03 & 18/03
Date of Award: 11-11-2003

ARBITRATION COUNCIL

ARBITRAL AWARD

Based on Article 313 of the Labor Law

Employer party : Ho Hing Garment. Registration No. Inv-690/00E of 23 May 2000
Representative : Si Chea Sean
Address : Village Trapang Chhouk, Sangkat Tek Thla, Khan Reussey Keo, Phnom Penh.
Telephone : (855-12) 606 440

AND

Employee party : Cambodia Labour Union Federation (CLUF) and Free Union of Khmer Workers
Representative : 1- Som Aun , President of CLUF
2- Mom Piseth , President of Free Union of Khmer Workers
3- Sak Narith, Vice President of CLUF
4- Ham Heng , Vice President of Free Union of Khmer Workers

Address : Sangkat Tek Thla, Khan Ressey Keo, Phnom Penh.
Telephone : (855-12) 866 682

Issues in dispute: (as set out in the non-conciliation report)

1. The company changed the work and the shift of two workers, Mr. Mom Piseth and Mr. Sun Sam Ath, without their agreements.
2. The workers demanded the company to pay pregnant workers 50% of three months salaries before maternity leave.
3. The workers demanded for having a childcare center of the company.
4. The workers demanded the dismissal of the head of administration, Mr. Thai Kem Ean, called Charly.

Jurisdiction of the Arbitration Council:

The Arbitration Council derives its power to make this Award from Section II B¹ of Chapter 12 of the 1997 Labor Law (Labor code); the Prakas on the Arbitration Council (No. 338, of 11 December 2002) and the Arbitration Council Procedural Rules.

An attempt to conciliate the collective dispute which is the subject of this Award was made in accordance with Chapter XII Section 2A of the Labor Law. That conciliation hearing was unsuccessful and non-conciliation report dated September 12, 2003 was sent to the Secretariat of the Arbitration Council on 15-09-2003.

¹ Art. 309 through 317 of Labor Law

Composition of the arbitration panel:

Arbitrator chosen by the employer party: Mr. Mar Samborana
Arbitrator chosen by the worker party: Mr. Tuon Siphann
Chaired arbitrator (chosen by the above two arbitrators): Mr. Sa Sovan

Hearing and Evidence:

Date and place of hearing: November 4th 2003 at 14.00pm, Arbitration Council Secretariat, Phnom Penh Center (A), Sothearos Blvd., Sangkat Tonlebasak, Phnom Penh.
Witness and experts: none

Documentary and other evidences considered by the arbitration panel are as follows:

Received from employer party:

1. Certificate of registration [of the company] in Ministry of Commerce No. Inv-690/00E dated May 23, 2000.
2. Nomination letter of the company dated November 4, 2003 to nominate Mr. Si Chea Sean as its representative.
3. Internal rules of Ho Hing company registered on December 25, 2002.
4. Letter replying to the 13 points of employee demands dated October 13, 2003.
5. The explanation letter of the three points of demands and the three categories of mistakes dated October 21, 2003.
6. The explanation of the company for workers dated October 16, 2003.
7. Announcement on the work suspension of workers in groups B1 & B2 dated August 08, 2003.
8. Declaration on calling the workers in groups B1 & B2 to come back to work dated September 09, 2003.
9. Declaration on the extension of reinstatement of the workers in groups B1 & B2 dated 1 October 2003
10. Employment contracts and CV of Mom Piseth and Sun Sam Ath.

Received from employee party :

1. Registration request of Free Union of Khmer Worker and union documents.
2. CLUF notification on union election dated September 15, 2003.
3. Letter with thumbprint of workers to demand for dismissing Mr. Charly, a letter without date.
4. Letter proving the irregular actions of Mr. Charly consisting of 14 points, made by Mom Piseth, Ham Heng and Sun Sam Ath.

Summary of the Case:

Mr. Khem Bun Chhean, head of labor inspection of Khan Ressey Keo, tried to conciliate on 13th October 2003 in the office of the company between employer and CLUF and Free Union of Khmer Worker representing the workers in Ho Hing Garment Factory. The problem at that time was the change of works and shifts of Mr. Sun Sam Ath, the secretary of Free Union of Khmer Workers and Mr. Mom Piseth, President of Free Union of Khmer Workers. This conciliation failed to resolve the dispute and the case was sent to the Arbitration Council by case number 17/03.

In October 17, 2003, both parties met for conciliation again in the department of labor inspection on some other issues. And after this conciliation at the Department of labor inspection there were 3 more issues to be sent to the Arbitration Council by case number 18/03. These 3 issues are:

1. The workers asked the company to pay to the pregnant workers 50% of three months salaries in advance before the start of maternity leave.
2. The workers demanded for child-care center in the factory in conformity with the Labor Law.
3. The workers demanded for dismissing administration manager, Mr. Thai Kem Ean, called Charly.

The Arbitration Council decided to hear the case No. 17/03 and 18/03 together.

In October 24, 2003, the Arbitration Council summoned both parties to conciliate as a first step at the Arbitration Council Secretariat and to provide documents related to the demands and the dispute before the official hearing. Through this first conciliation, both parties reached an agreement on one point, that is to set up a temporary child-care center in the factory as set out in the Labor Law and the other 3 problems could not yet be resolved.

On November 04, 2003, the Arbitration Council summoned both parties again to the hearing in the Arbitration Council Secretariat.

During the hearing, both parties decided to choose **Non-Binding Award**.

Facts:

After considering the minutes of non-conciliation of the collective dispute and having heard the testimony of the parties and having considered the documents listed above, Arbitration Council has found out that:

Issue 1

1. On 9 August 2003 the company suspended temporarily 2 groups of work i.e. B-1 and B-2 by a letter dated 8 August 2003 and kept the employees going with 50% of wage. Among those there were 2 workers namely Mom Piseth and Sun Sam Ath, the shop stewards in the company. With respect to the above suspensions the company did not have any official document showing the approval of the labor inspector. After that the company invited the workers to return to work assigning the workers to the other groups and different sections and different shifts, as at that time the company understood that there were jobs for the previously suspended employees.

In these two groups of work there were some workers who agreed to work as assigned by the company to various areas such as the sewing section (most workers were reassigned to sewing), mending section, sample shirt sewing section, assistant and so on, and some workers (18 persons) had their employment terminated and left for other places, and some workers were dismissed (7 persons). However, 2 workers, Mr. Sun Sam Ath and Mr. Mom Piseth, did not agree with the change of their places, section, and shifts.

The company asked these two workers to work temporarily in the store section in night shift, without specifying the period, until such time as there was work in the sewing section whereupon the two workers would be recalled to the sewing section as a priority. The reason stated was that there was currently neither sewing work nor machines for them to work on. However the two workers did not agree with the company claiming that there was sufficient work in sewing section, and sewing work was also sub-contracted to other factories. They contended that the reason for the employer not accepting the two workers to return to work in this section was because they were the workers' representatives and the union office-bearers. They claimed that this was the reason why the two workers were continuously suspended until now. The company denied this and claimed that the reason for suspension was that there was no work for them do. With regard to the allegation that the company had sent sewing work out another factory the company claimed that this was not correct, but the company had a contract on cutting work and then the goods were to be returned to that company and it was not true that the company sub-contracted sewing work to another factory. The company asked the two workers to choose: (1)- come to cooperate with the company to work on the work available currently such as in store section or mending section and they could choose any shift and the wage was to remain the same or (2)- the wage will remain

normal and they could rest at home and wait until the sewing work was available, then the company would give the two workers the first priority. However the two workers did not agree.

2. Issue 2

Regarding the wage of 50% of three months to be paid before maternity leave the company has agreed in writing to pay as requested in order to reduce the difficulties of the women workers during their delivery and child care without borrowing money with interest from any one or to save the monthly trip expenses of coming and going back for receiving wages during maternity leave for 3 months.

3. Issue 3

The company has agreed to build a temporary child-care center for a period of up to one year in the factory under the control and recognition of the Labor Health inspectors. After this one year the company would build a regular child-care center for women workers who have young children to be able to leave their children there properly.

4. Issue 4

The 460 employees had printed their thumbs on a letter without date for the company to dismiss Mr. Thai Kim Ean, called Charly from the position of Administration Head for failure to take care of sick employees, and of security and hygiene of workers and for creating problems with the union representatives in the company. Whereas Mr. Charly claimed that he had discharged his role and duties very properly and what he had issued and announced to the employees were the ideas and problems of the company. Mr. Si Chea Sean, the new director who just came to supervise the company claimed and promised that he would review the activities of Mr. Charly and if he could find his mistakes as pointed out by the employees, he would correct him. Mr. Si Chea Sean promised to facilitate the better relations between the employees and the employer and the administration section. He also promised that he would make more progress of the company and secure more purchase orders so that all workers have work and will be happy. He also requested that if any employee had problem with Mr. Charly please communicate to him so that he would solve it well.

The worker representative raised an issue relating unfairness on the part of the company on rules for dismissal. He stated that if the normal employees have committed serious misconduct the company applies the internal rules and Article 83 of the Labor Law and dismisses with notification beforehand but without any compensation. However, in the case of Mr. Charly or the higher officers of the company who have committed serious misconduct the company does not apply the policy of dismissal in the same way. The company claimed that it maintained the fairness for all employees irrespective of fact whether they were workers or Chinese management officials. If the mistake existed there is always a warning and if there was a serious misconduct, the fine or termination applied to everybody alike.

Reasons for Decision

1. For the decision on issue 1, Article 293 of the Labour Law is relied on. It states that: "The dismissal of a shop steward can take place only after authorization from the labour inspector. The same protective measures apply to former shop stewards three months following the end of their terms and to unelected candidates during three months following the proclamation of the results of the ballot. Any reassignment or transfer that would end the shop steward's term is subject to the same procedure. ..." Although Article 293 does not clearly state about suspension of work the Arbitration Council finds that the suspension of work, especially the suspension for an undetermined duration as occurred in this case, has the same effect as *the change or transfer of work* that may effectively prevent the shop steward from carrying out his duties.

Therefore the Arbitration Council feels that the employer has violated Article 293 by suspending Mr. Mom Piseth and Mr. Sun Sam Ath's works. Owing to this violation the Arbitration Council is of the view that both workers should be reassigned and put to their original places. The Arbitration Council finds that the employer had sufficient time by now for adjusting its operation to assign immediately these two workers to the sewing section. In making this decision the Arbitration Council is mindful not to interfere with the right of

supervision and management of activities for business and general authorities of the company as employer in managing and changing the works of employees of the company provided it does not result into reduction of wage, changing of working place to the far place from original one, changing of day shift to night shift or night shift to day one and does not affect the specific professional skills. If these things are affected, it is considered as a violation of employment contract that requires to be respected. If the change of shift is made without reduction of wage, if it does not affect the time and place of work and if the change of work involves use of similar (and not complex) skills by the employee, the employer can lawfully do so. However, there has to be training beforehand of new skill for employees who are changed so that they can perform the new job. However, for the shop stewards or union representative, the termination and work change can be made if it is in accordance with the legal procedure in addition as described above.

2. For the decision 2, it is based on the agreement of the two parties.
3. For the decision 3, it is based on the agreement of the two parties.
4. For the decision on issue number 4, we refer to the Award of the Arbitration Council in the case No. 04/03 (Lida Garment) and the Award in the case No. 14/03 where it was observed that Article 65 of the Labor Law provides that the employment contract is a contract which arises out of the employment relationship between employee and employer. Thus, generally speaking, it is only the parties to the contract who can terminate the contract. This means that hiring or firing an employee is the prerogative of the employer. Although some of acts of Mr. Charly were deficient or incorrect in some respect in managing job and administration work of the company, the Arbitration Council understands that Article 83 B(4) of the Labor Law does not require the employer to fire any employee at all. This Article merely indicates the right to dismissal of the employer without notification in advance and compensation for severance pay and this right shall be lost if within a period of 7 days that the employer is aware of the misconduct and does not take action to dismiss immediately in conformity with article 26 of the Labor Law. The Arbitration Council may issue the Award to order the employer to transfer, or in most serious case to dismiss, any employee if the Arbitration Council discovered that this employee is a dangerous person or may cause hazard to health and safety of other employees. In this case, the Arbitration Council did not find evidence considered sufficient to prove that Mr. Thai Kim Ean, called Charly, was a person as described above. So the demand by the employees for the company to dismiss Mr. Thai Kim Ean called Charly was not founded well in law for the Arbitration Council to issue an Award to order the company to transfer or dismiss him altogether.

The Arbitration Council thus issues an Award based on the facts brought before it, the law and the principles of equity as follows:

Decision

1. Order the company to provide immediately the same work as before to the two employees whose names are Sun Sam Ath, a secretary of Free Union of Khmer Worker and Mom Piseth, President of Free Union of Khmer Worker.²
2. Order the company to pay wage of 3 months for women workers before maternity leave as defined in article 183 of 1997 Labor Law. The women workers concerned have to notify in writing to employer 7 days before proceeding on maternity leave (following the agreement of both parties).
3. Order the company to create immediately a temporary (makeshift) child care center to receive the children in the Ho Hing company under the control and recognition of the Labor Health Officer. The company has to establish completely a regular child care center within a period of 1 year at the latest commencing from the date this award comes into force (following the agreement of both parties).

² The word "immediately" means the employer must commence to take action to accept the two workers to assign the same original skill from the date of issuing of this award comes into force but the arrangement may require time of 2 or 3 weeks according to reality after this award comes into force.

4. Rejects the demand of employees who asked the company to dismiss the head of administration, Mr. Thai Kim Ean called Charly.

Signatures of Members of the Arbitration Panel:

Arbitrator chosen by the employer party:

name: Mar Samborana

Signed

Arbitrator chosen by the employee party:

name: Tuon Siphann

Signed

Chair of arbitration panel:

name: Sa Sovan

Signed

This Award will become binding after 8 days after 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 parties have agreed as such in writing before the notification of the Award, or if parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.