

**KINGDOM OF CAMBODIA
NATION RELIGION KING**

THE ARBITRATION COUNCIL

CASE: 18/04

DATE OF AWARD: 06 SEPTEMBER 2004

ARBITRAL AWARD

(Issued under Article 313 of the Labor Law)

Sunway Hotel

(Employer party)

And

**Union of Employees of Sunway (UES) and
Cambodian Tourism and Service Worker Federation (CTSWF)**

(Employee party)

DETAILS OF EMPLOYER PARTY:

Address: #01, Wat Phnom Penh Commune, Daun Penh District, Phnom Penh

Tel: 023 430 333

Fax: 023 430 339

Representatives:

1. Mr. Jean Garblin, former General Manager;
2. Mr. Manfred Haeger, current General Manager; and
3. Mr. Bun Hun and Mr. Huon Chankakada, representative and defending attorneys.

DETAILS OF EMPLOYEE PARTY:

Address: #12, Street 618, Boeng Kak II Commune, Tuol Kok District, Phnom Penh.

Tel: 012 588 267

Fax: N/A

Representatives:

1. Mr. Ly Koam, CTSWF President;
2. M. Khim Linda, CTSWF General Secretary;
3. Mr. Damm Sophat, UES president;
4. Mr. Leum Choeun, President of Union of InterContinental Hotel; and
5. Mr. Sao Vanthan, President of Hotel Le Royal Union.

**ISSUES IN DISPUTE:
(In non-conciliation report)**

The employees demand the employer to:

1. collect and share service charge with all employees in the hotel in compliance with the Labor Law;
2. pay the employees who were suspended by the hotel during the Arbitral Proceeding, as of 12 April 2004; and
3. reinstate 28 suspended workers.

JURISDICTION¹ OF THE ARBITRATION COUNCIL:

The Arbitration Council derives its power to make this Award from Section II B2 Chapter 12 of the Labor Law (1997); the Prakas on the Arbitration Council (no. 338 of 11 December 2002), and the Arbitration Council Procedural Rules.

¹Jurisdiction means judicial power.

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 Labor Law. That conciliation hearing was unsuccessful and non-conciliation report dated 09 April 2004 was submitted to the Secretariat of the Arbitration Council on 09 April 2004.

COMPOSITION OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:	Mr. Mar Samborana
Arbitrator chosen by the worker party:	Mr. An Nan
Chair arbitrator (chosen by the two arbitrators):	Mr. Mathew Rendall

HEARING AND EVIDENCE:

Date and place of hearing:

12 April 2004 at 14h35 at the Secretariat of the Arbitration Council;
21 April 2004 at 14h30 at the Secretariat of the Arbitration Council; and
10 May 2004 at 14h30 at the Secretariat of the Arbitration Council.

Witnesses and experts: N/A

EVIDENCE CONSIDERED BY THE ARBITRATION PANEL:

Documents obtained from employer party:

1. Attorney Bun Hun's letter to the Secretariat of the Arbitration Council (SAC) dated 13 April 2004 in reply to the Arbitration Council's order dated 12 April 2004;
2. Attorney Bun Hun's letter to UES President dated 23 April 2004 deciding to suspend 28 striking workers for ten days;
3. Attorney Bun Hun's letter to the MoSALVY and SAC dated 28 April 2004 opposing the order by the Arbitration Council dated 22 April 2004;
4. Attorney Bun Hun's letter on wage payments for April 2004 to UES President dated 28 April 2004;
5. Attorney Bun Hun's letter to the Minister of MoSALVY and the SAC dated 28 April 2004 rejecting the request to delay proceedings in order to allow resolution through mediation;
6. Agreement between the employer and the worker representatives on the reinstatement of 18 workers dated 28 May 2004.

Documents obtained from employee party:

1. Letter of registration at MoSALVY (No. 471 SALVY) and certificate of registration (No. 507 dated 27 October 2003) regarding the recognition of CTSWF.
2. Certificate of most representative status of UES dated 17 November 2003;
3. Letter on the failure in negotiations with the hotel union from Sunway Hotel to the Minister of MoSALVY dated 09 April 2004;
4. Pay invoice of Sunway Hotel staff member called Damm Sophat for the month of June 2003 (before the collection of service charges was cancelled) and for the month of March 2004 (after the collection of service charges was cancelled); and
5. Request of UES dated 31 May 2004 and the name list of 10 workers to be suspended.

CASE SUMMARY:

Sunway Hotel is located near Wat Phnom, #1, Wat Phnom Penh Commune, Daun Penh District, Phnom Penh. The representatives and the employees of the hotel started a collective bargaining process on August 13, 2003. When the negotiation came to the issue of

² From Articles 309 to 317 of the Labor Law

the collection and distribution of service charges, a dispute began to occur. The hotel had collected the service charge since 1997; then on February 01, 2004, it stopped collecting it from its invoices. During the period when they collected the service charge the Hotel distributed an equal amount of between US\$20 and US\$50 per month to its employees depending on the number of guests. But since February 2004, it started to give each of its employees a fixed amount of US\$30 in addition to their basic salary, instead of the service charge which they used to get.

In February 13, 2004, the union of the employees of Sunway Hotel, together with other hotel unions and the Federation of Worker Union of Tourism and Services of Cambodia wrote a letter to the Minister of Social Affairs, Labor, Vocational Training and Youth Rehabilitation to demand that their employers collect and share the service charge with them and giving 7 days notice of their intention to hold a peaceful strike. On February 26, 2004, the Ministry organized a meeting to settle the collective labor dispute between the employer association and the union federation representing the hotel workers in the dispute. However, no agreement was reached because the workers insisted that their employers collect and share with them 75 percent of the service charges, with the remaining 25 percent to be kept by the employers. The employers did not agree, asking to give the employees a fixed amount of money in addition to the basic salary, but if they did collect it [the service charge], they could give the employees only 30 percent. On April 05, 2004, the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation and the Ministry of Tourism issued a dual Letter numbered 412 MoSALVY on the collection and sharing of service charges. The Letter requests that from April 2004 the seven hotels, including Sunway Hotel continue collecting the ten-percent service charge and share it as according to their previous custom. On April 5 and 8, 2004, the Sunway Hotel and their union met to talk about the joint Letter, but no solution was found. As a result, approximately 71 workers went on strike on April 9, 2004. The Arbitration Council, on April 12, 2004, issued an order for the hotel employees to conclude their strike and return to work and for the hotels to allow the workers to return to work without sanction. Nevertheless, 28 workers were suspended by the hotel for its own reasons in defiance of the Arbitration Council's order. On April 22, 2004, the Arbitration Council issued another order, ordering the employers to allow all of the workers who had been on strike back to work and failing this to pay those workers [who were not allowed back to work] their full payments, as well as other benefits. Meanwhile, the Arbitration Council ordered the hotel and its workers to engage in a further round of conciliation, with the Council to provide a mediator to assist in the resolution of the dispute. The employers refused to comply with these two orders or to take part in the conciliation process. The Council, on May 10, 2004, summoned the Hotel Sunway and their union for a hearing. The employer side failed to appoint a representative to participate in the hearing, so only the employees' representatives were present. As a result, the Arbitration Council decided to hear the case in the absence of the employers and in the presence of the representatives for the employees' union. Thereafter both parties requested the Arbitration Council to extend the time period [for the case] in order to allow them to conduct further negotiations. The parties did negotiate and they resolved all of their issues except one relating to three of the union leaders who remained on suspension. So finally the union asked the Arbitration Council to issue an award with regard to these final three workers.

Both sides agreed that this award is not binding.

FINDINGS OF FACT:

- After seeing the report on the collective reconciliation of the labor dispute,
- After hearing from the party to the company and that to the employees,
- After seeing the above documents,

We find:

- The union was registered at the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation and it had most representative status at the Sunway Hotel for two years, starting from November 17, 2003.
- The leadership of Sunway Hotel and the other unions, which are members of the CHTWF, union federation did, through their letter of February 13, inform MoSALVY and the seven hotels about their intention to go on strike about the issue of service charges. This letter was sent to the Ministry and to the management of the hotels including Sunway Hotel.
- Upon receiving the letter, the Ministry initiated a series of conciliation meetings.
- The conciliation was delayed with agreement from the workers until April 2, 2004 when a meeting was held with officials from the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation.
- The officials failed to attend the meeting, and then the federation made a final decision to go on strike about the service charges.
- The strikes started at the other hotels on April 05, 2004, but the workers at Sunway Hotel did not start the strike at that time because they were still negotiating with the employers.
- The negotiation eventually broke down on April 08, 2004, when no agreement could be reached on the issue of service charge.
- Over 70 workers from Sunway Hotel went on strike on April 09, 2004.
- On the same day, the hotel sent a letter both in Khmer and English to MoSALVY, outlining, "any strike at this moment is illegal".
- Some of the striking workers went back to work on April 10, 2004.
- The Arbitration Council on the evening of April 12, 2004, ordered the striking employees to return to work and that the employers accept their return without punishment on April 13, 2004.
- 28 of the workers at the hotel Sunway attempted to return to work on April 13, 2004 in accordance with the Arbitration Council's order, but their employer did not allow them to return to work starting from that time.
- On April 13, 2004, the lawyer for the Hotel Sunway, with the approval from the General Manager of the Hotel Sunway, wrote a letter to the Secretariat of the Arbitration Council, saying that the hotel would allow the employees to take leave during and after the Khmer New Year until the relevant institutions had decided on the case. During this period, the hotel promised to pay the workers if the relevant authorities ordered it to do so.
- On April 23, 2004, the lawyer for the Hotel Sunway, with the approval from the General Manager of the Hotel Sunway, wrote another letter to the leader of union of workers, stating, "the 28 workers who on April 10 and 11, 2004 refused to return to work can, with full payment, have another ten days off from April 23, 2004 to May 2, 2004 for the reconciliation process."
- On April 28, 2004, the lawyer for the Hotel Sunway, with the approval from the General Manager of the Hotel Sunway, wrote a letter to the leader of the union of workers, saying that the 28 workers would be paid until April 08, 2004 and that the hotel could not give the payment from April 13, 2004 onwards, awaiting the final court decision.
- On the same day, April 28, 2004, the lawyer for the Hotel Sunway, with the approval from the General Manager of Sunway Hotel, sent another letter to the Arbitration Council, informing that the hotel would not comply with the orders of the Arbitration Council and that it had canceled its offer made in the letter dated April 23, 2004.
- On May 28, 2004, the employers and the 28 employees held a negotiation and the former agreed to accept 18 of the 28 striking workers back to work and to pay half their salaries from April 13, 2004 to the day of the agreement which was to come into effect on June 3, 2004. The issue of the other ten workers who were still on suspension was set aside for later resolution.

- On May 31, 2004, the Union of Workers of Sunway Hotel requested the Secretariat of the Arbitration Council to hear the case of the ten suspended workers, including Dam Sophat, union leader; Bot Panha, vice leader of the union; Sin Sophat, General Secretary for the Union, Prak Sorphorn, advisor; Vann Sokha, advisor; and five other members of the union. However, the two sides called for a delay in order to resume the negotiations from 12 to 26 July 2004 and on 26 July 2004, the hotel accepted another seven workers back to work, leaving only three namely Dam Sophat, Bot Panha and Sin Sophat remaining suspended.
- On 2 August 2004, the three suspended leaders asked the Secretariat of the Arbitration Council to hear their case.

REASONS FOR DECISION:

1. Jurisdiction of the Arbitration Council:

In this case the Arbitration Council exceeded the 15-day period as is set out in the law without agreement from the parties. Thus the question arises as to whether the Arbitration Council has continued jurisdiction over the case or not.

This case was submitted to the secretariat of the Arbitration Council by the Ministry of Social Affairs, Labor Vocational Training and Youth Rehabilitation on April 09, 2004 and the arbitrators were selected on April 12, 2004. Therefore, the 15-day notice in Article 313 of the Labor Law expired on April 27, 2004.

Article 313 of the Labor Law provides that the Arbitration Council must send its decision to the Minister responsible for Labor within 15 days of receiving a case and that the Minister must send the decision immediately to the parties. Further, Article 320 of the Labor Law provides that the right to strike can be exercised if the Arbitration Council does not decide a case or does not notify the its decision within the timeframes set out in Chapter XII of the Labor Law.

Sunway objected to the request for extension of the 15-day deadline (See the letter dated April 28, 2004). The Labor Law 1997 does not say that exceeding the 15 day time limit set out in Article 313 results in the extinguishment of the Arbitration Council's jurisdiction. If the plaintiff in a case makes a reasonable request to extend this period the Arbitration Council can extend its hearings of a case and issue an award even though the 15 days has expired.

The plaintiffs in this case, the workers of the Hotel Sunway, agreed to extend the time limit in this case in order to participate in conciliation as ordered by the Arbitration Council. At hearing on 21 April 2004, Manfred Häger, representing the Hotel Sunway also undertook to participate in the conciliation process before further hearings but thereafter the Hotel Sunway reneged on this undertaking (See letter #28 dated 28 April 2004 of the lawyer of the Hotel Sunway).

The consequence of the Hotel's refusal to extend the time period for arbitration is that its employees, under Article 320 of the Labor Law, have the right to go on strike. But in this case, the employees have decided not to go on strike at this stage and instead asked the Arbitration Council to decide and issue an award.

Therefore, the employees' request for the Arbitration Council to decide on the case is still regarded as appropriate even though the 15-day period has expired. Thus the Arbitration Council finds that it still has jurisdiction over this case.

2. Service Charge

With regard to the question of service charge the employee party has agreed to wait for the issuing of a Prakas on the issue and then to negotiate on this basis. If there is no agreement once the Prakas is issued the parties can have the issue decided by the Arbitration Council so the Arbitration Council decided to suspend its hearing of the issue of service charge until there is a Prakas or other regulation on this point.

3. Suspension of workers who went on Strike

The absence of the employer lead the Arbitration Council to reach a decision, largely based on the evidence from the employees. However, when the employer submitted their documents, the Arbitration Council also took these into consideration.

The employees demanded that the 28 workers who have suspended and received no wages, be allowed to return to work without any punishment and that they receive their salary, as of April 13, 2004.

Article 20 of the Prakas on Arbitration Council provides that any strike, lockout or act that aggravates the situation shall be prohibited during the proceedings of the Arbitration Council. The suspension of the 28 workers including their union leaders was an act that aggravated the situation. On this basis, the Arbitration Council ruled that all the employees of Sunway Hotel return to work on April 13, 2004. Regarding the suspension, there is:

- an order of the Arbitration Council dated April 12, 2004, which states that:
 - (1) The employees of the four hotels (Sunway Hotel, InterContinental Hotel, Soffitel Angkor Hotel and Cambodiana Hotel) shall stop their strikes and return to work from 10:00 AM, April 13, 2004.
 - (2) The four hotels shall not punish or file a lawsuit, neither civil nor penal, against the workers who participated in the April 05, 2004 strike.
- The Arbitration Council's order of April 22, 2004 which states in Article 8 that during the reconciliation and until the Arbitration Council concludes the case, the employers:
 - a. are prohibited from taking any action against their employees who went on strike from April 05 to April 12, 2004,
 - b. are ordered to allow them back to work, as of April 23, 2004, and
 - c. must give the salary and other benefits to the workers for the duration from April 13, 2004 to April 22, 2004.

The Arbitration Council has the power to issue such orders, based on Rule 4.3 of the Procedural Rules of Arbitration Council (which form an annex to the Prakas on the Arbitration Council), which states that is "shall be entirely within the power and competence of the Arbitration Council to decide upon matters relating to the proper preparation of the dispute for hearing and regarding any aspect of a hearing." The power to issue such orders is also provided by Article 34-D of the Prakas on the Arbitration Council, which provides that the Arbitration Council can order an immediate end to a strike and lockout being staged by the party to the dispute.

Based on Article 40 of the Prakas on the Arbitration Council, a party to a dispute can oppose an Award of the Arbitration Council award (assuming that it does not have a prior agreement for binding arbitration). However, the Arbitration Council's order issued on April 12 and 22, 2004 requires the parties to comply with it so that the Arbitration

Council can effectively implement its jurisdiction. Such procedural orders are not open to objection and are immediately binding upon the parties to the dispute.

The Arbitration Council's orders with regard to this case were clear, requiring that the Hotel Sunway accept its employees' return to work, as of April 13, 2004 without penalty. However, the hotel did not carry out these orders. For these reasons, the hotel is required to pay its employees in full for the duration from April 13, 2004 until the award is issued. In a letter written on April 23, 2004, the hotel expressed its support for the principle that workers would be paid while awaiting the decision of the Arbitration Council, saying that the workers will be allowed to rest and get paid until May 02, 2004 to allow for the mediation.

However, the Hotel changed its position in a letter written on April 28, 2004 by the lawyer representing and defending the employer, which stated that the hotel would suspend the 28 employees until the court had made a final decision on their suspension over their participation in the illegal strike.

This action on behalf of the Hotel was supported by the hotel's internal rules which provide that:

In general facts may arise which are not clear and require further investigation or further questions before a final decision is made. If the investigation reveals that the staff member in question was not at fault, he/she shall receive pay during the period of suspension. However, if the investigation reveals the staff member was in fact at fault, but not at a level which would require dismissal, the suspension may be transformed into a punishment which results in a written warning.

The following are rules of conduct and internal rules of the hotel the breach of which will result in a penalty or termination from employment:

- participation in political activities or demonstrations which are against the law.

In order to rely on such rules, however, the employer must show that they represent a reasonable application of the Labor Law. As the Arbitration Council decided in Case #28/04 (Raffles Grand Hotel d'Angkor) the Labor Law allows an employer to suspend workers without pay only for the 11 reasons set out in Article 71. However, suspension of employment without wages to wait for the investigation results of whether the employees' activities were offenses or not, is not one of 11 conditions allowed by Article 71 of the Labor Law. Nevertheless, the Arbitration Council finds that there are circumstances where the employer does have the right to suspend an employer while awaiting the outcome of an investigation as to whether an employee has committed an offense or not. However, in such circumstances the employer party will be obliged to pay the employee their wages on a monthly basis (according to Art. 116 of the Labor Law), until such time as a final decision is made as to what disciplinary action will be taken.

Furthermore, Article 333 of the Labor Law prohibits an employer from "punishing an employee because of his or her participation in a strike."

Based on the jurisprudence in Lida Garment Factory case [#04/03] and others, the employee who takes part in an unlawful strike are not entitled to full legal protection provided in Chapter XII of the Labor Law to workers who participate in a lawful strike; however, this does not does not mean that workers who participate in a strike in contravention of the legal procedures loses all legal protection.

In all cases, the principle of proportionality in discipline as established by Art. 27 of the Labor Law must be respected. This Article states that: "A punishment must be balanced with how serious misconduct is."

Thus the Arbitration Council must consider if the suspension is proportionate to the alleged misconduct (engagement in illegal strike).

Article 337 of the Labor Law provides that an employee will be considered to have committed an act of serious misconduct if he/she does not return to work within 48 hours after a court declares a strike illegal. Further, according to Article 330 of the Labor Law, the commission of violent acts during a strike is also considered serious misconduct.

These Articles indicate that dismissal is an appropriate remedy for failing to return to work in accordance with a court order, or committing acts of violence during a strike. Applying to the principle of proportionality, a worker who commits acts of misconduct less serious than should receive a less serious punishment. This is particularly the case given the general prohibition against the punishment of workers for participation in strikes contained in Art. 333 of the Labor Law (mentioned above), and the generally accepted protection of the right to strike as set out in the Constitution of the Kingdom of Cambodia and International Labor Convention 98 to which Cambodia is a party.

In the case of the Hotel Sunway, there was no court decision declaring the strike illegal. Though the employer may also have been able to justify termination if they showed evidence of other misconduct, no such evidence was provided. As a result, the Arbitration Council finds that neither an indefinite suspension without pay or dismissal is a reasonable punishment for taking part in this strike which was never declared illegal by the courts⁴.

Based on the foregoing reasoning, the evidence and the law, the Arbitration Council decides as follows:

DECISIONS AND ORDERS :

1. Reject the Hotel Sunway's complaint which is objected to the Arbitration Council's order.
2. Order the employer re-employ three employees in the dispute immediately. The employer has to give full salary and benefits to the employees for the duration from April 13, 2004 to the day they are re-employed. The employer is not obliged to pay back pay those of them who are not prepared to return to work within 48 hours of the date on which this award comes into force.
3. Delay the arbitral proceedings on the issue of service charge until there is a Prakas on service charge issued by the Ministry of Social Affairs, Labor, Vocational Training and Youth Rehabilitation.

⁴ The Arbitration Council wishes to clarify two points of law in relation to this issue. (1) Even if the Hotel Sunway gets a order of the court at some time in the future declaring that the strike held in April 2004 was illegal, this will not give the Hotel the right to terminate these workers. The reason for this is that the justification for termination set out in Article 337 is not participation in an illegal strike, but rather the failure to return to work once the strike is declared illegal; and (2) In order to dismiss a worker for a breach of Art. 337, the Arbitration Council finds that an employer must have a final decision (*saal krom chong kraoy*) of the Municipal Court. The employer cannot rely on an emergency injunction (*deka taam peak som*) for this purpose.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature:

Arbitrator chosen by the employee party:

Name: **An Nan**

Signature:

Chair of Arbitration Panel:

Name: **Matthew Rendall**

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.

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.