

KINGDOM OF CAMBODIA

Nation King Religion

ARBITRATION COUNCIL

Case number: **Khbal Koh II (#19/04)**

Date of Award: **May 5, 2004**

ARBITRAL AWARD

Issued under Article 313 of the Labour Law

Employer party :

Employer representative : Mr. Lim Sambo, Administrator

Address : New Road, Sandkat Toul Sangke, Khan Russey Keo,

Telephone : (855-23) 990 645

AND

Employee party:

Worker Representative : Miss Sam Srey Mom, Acting President of Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC),

Address : # 28B, Street 222, Sangkat Boeung Rang, Khan Daun Penh,

Telephone : 012 212 812

ISSUES IN DISPUTE:

(as set out in the non-conciliation report)

1. The employees ask the factory to reinstate Mr. Seng Sam Ol, the Union President in Khbal Koh II. The factory does not agree because it says that Mr. Seng Sam Ol had faults which led to his dismissal and the factory did not know he was the union president.
2. The employees ask the factory to pay back medical examination fees. The factory cannot decide on this issue and is waiting to consult with its owner in China.

JURISDICTION OF THE ARBITRATION COUNCIL:

The Arbitration Council derives its power to make this Award from Section II B of Chapter 12 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 Prakas on the nomination of Arbitrator No. 103, April 26, 2004.

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 a non-conciliation report, dated April 20, 2004, was submitted to the Secretariat of the Arbitration Council on April 20, 2004.

COMPOSITION OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party	:	Mar Samborana
Arbitrator chosen by the worker party	:	Tuon Siphann
Chair arbitrator (chosen by the two arbitrators)	:	Kong Phallak

HEARING AND EVIDENCE:

Date and place of hearing: Monday 26th April 2004 (14.00 – 17.00), Arbitration Council Secretariat, Phnom Penh Center (A), Sothearos Blvd., Sangkat Tonlebasak, Phnom Penh.

Evidence:

Provided by employer party:

1. Authorization letter, dated April 26, 2004
2. First employment contract, dated September 29, 2003
3. Pay slip dated March 2004
4. Verbal evidence presented during the course of the hearing

Provided by employee party:

1. Registration certificate, dated March 19, 2004
2. Employment contract, profile, and apprenticeship contract of Mr. Seng Sam Ol
3. Verbal evidence presented during the course of the hearing

SUMMARY OF THE CASE:

Employees demand the following from the employer:

1. Reinstatement of Mr. Seng Sam Ol, Union President at Khbal Koh II.
2. Payment of the cost of medical examination fees incurred by workers.

The employer party refused for the following two reasons:

- i. Mr. Seng Sam Ol had faults which led to his dismissal and the employer did not know he was a union leader at the time he was dismissed.
- ii. The employer cannot decide this issue and is waiting to consult with the factory owner in China.

Accordingly, the non-conciliation points were sent to the Arbitration Council on 20 April 2004. and the Arbitration Panel invited the parties to attend a hearing on 26 April 2004 at 2:00 p.m. The Arbitration Panel sought further information and tried to conciliate but was unsuccessful and therefore proceeded to hear the case on the same day. The parties failed to reach agreement during the course of the initial hearing on 26 April and the Arbitration Council gave time to both parties to continue negotiating until 30 April 2004. The parties could not reach agreement by 30 April 2004.

FACT FINDING:

1. Mr. Seng Sam OI was the Worker Representative at the factory for the union and he was responsible for resolving problems with the employer on behalf of workers when disputes took place.
2. As the Worker Representative, Mr. Seng Sam OI had not informed the employer of the names of the union's leaders at the factory prior to receiving the union registration certificate from the Ministry of Labor. The day that the employer announced the dismissal of Mr. Seng Sam OI, Mr. Seng Sam OI verbally informed the employer that he was a union leader.
3. The factory has no Internal Work Rules.
4. The factory is not registered at the Ministry of Commerce and at the time of the dispute in 2004 had no license to operate.
5. Mr. Seng Sam OI had worked in the factory for more than one year, from 23 January 2003 until the employer announced his dismissal on March 16, 2004. On his dismissal the employer offered to pay severance pay to Mr. Seng Sam OI. Mr. Seng Sam OI refused the severance pay and contested the legitimacy of his dismissal on the basis that he had not been dismissed on legitimate grounds but rather because he was a union leader. Mr. Seng Sam OI further alleged that the employer had not complied with the proper procedure for dismissal of employees.
6. The employer party did not notify the Department of Labor Inspection of Mr. Seng Sam OI's dismissal.
7. Prior to his dismissal, Mr. Seng Sam OI had submitted a direct written request to the employer's Director seeking permission to attend his brother's engagement. The Director refused Mr. Seng Sam OI's request, but offered him an amount of \$1.00 extra to remain at work. Although there was no permission, Mr. Seng Sam OI took leave from March 11-12, 2004 to attend his brother's engagement. Mr. Seng Sam OI often protested on behalf of workers and was active as a Workers' Representative in solving problems with the employer in this factory.

8. The union had drafted a letter for registration on February 8, 2004 and received a registration certificate on March 19, 2004.
9. The factory requires workers to have medical examinations before they are allowed to start work. The cost of a medical examination conducted by the Labor Medical Department is 10,100 riel, however the factory required employees who had not had a medical examination to be examined at the factory where the cost was 15,000 riel. The factory stated that it did not want workers to be checked at the Labor Medical Department because it led to a greater loss of working hours.

REASONS FOR DECISION:

Issue 1:

Mr. Seng Sam Ol had been working in Khbal Koh II factory since January 23, 2003. At that time he signed an employment contract with the employer. This contract was an *Undetermined Duration Labor Contract* because it did not have specified commencement or termination dates.

According to Article 74 of the Labor Law, an employer can terminate a worker who has an Undetermined Duration Labor Contract if an employer gives prior notice and a valid reason relating to the worker's aptitude or behavior, with regard to the requirements of the operation in the enterprise. If there is no suitable reason for dismissal, the workers have the right to compensation (Article 91 of the Labor Law). Moreover, for either a fixed duration contract or undetermined duration contract, the employer is strictly banned from terminating or recruiting workers because of union membership or union activity, according to Article 12 and Article 279 of the Labor Law.

In the hearing, the employer party agreed that Mr. Seng Sam Ol worked well which meant that neither his aptitude nor behavior were reasons for his dismissal. In the hearing, the employer party said that it took Mr. Seng Sam Ol only 45 seconds to iron one suit, while other workers spent 108 seconds to iron the same suit.

According to Articles 169 and 171 of the Labor Law, each worker is entitled to at least 7 days special leave per year for family-related activities such as engagements of brothers or sisters or sick parents, etc. Therefore, Mr. Seng Sam Ol should have been granted permission to attend his brother's engagement. The procedure for permission must be clearly stated in the Internal Work Rules of the factory.

The disciplinary action against Mr. Seng Sam Oi for attending his brother's engagement is not considered to be fair because the disciplinary action was not proportionate to his mistake (Article 27 of the Labor Law). The discipline should be stated in the Internal Work Rules of the factory. However, the factory did not address this disciplinary action in the Internal Work Rules.

Therefore the Arbitration Council finds that the dismissal of worker Mr. Seng Sam Oi for attending his brother's engagement for two days without permission of the factory was unlawful.

Mr. Seng Sam Oi said that he believed he was dismissed because he acted as the Workers' Representative to solve problems and because the employer accused him of inciting other workers to take industrial action. Earlier the employer was obliged to make an agreement with Mr. Seng Sam Oi dated 19 September 2003 which stated that:

- a. When workers who are in another group have a problem with the employer, their group leader will solve the problem;
- b. When the group leader cannot solve problem, Mr. Seng Sam Oi will attempt to solve the problem;
- c. When workers are in Seng Sam Oi's group and they have a problem with the employer, he will solve the problem directly.

In the hearing, the employer's representative, Mr. Lim Sambo, said that he had thought that Mr. Seng Sam Oi might have been a union leader, but the employer had never received any official letter until Mr. Seng Sam Oi was dismissed, at which point the employer learnt that he was union president. Mr. Lim Sambo clarified that Mr. Seng Sam Oi was dismissed on 16 March 2004 and the union certificate was dated 19 March 2004, therefore the employer did not know he was the union president at the relevant time.

The Arbitration Council finds that:

- The factory knew that Mr. Seng Sam Oi was a union president even though it had not yet received a union certificate.
- The registration certificate, No. 567, MoSALVY, dated 19 March 2004 shows that Mr. Seng Sam Oi sent a letter to the Department of Labor Inspection to register his union on February 8, 2004. Union activities took place during this time and these were in fact the primary reason why the employer dismissed Mr. Seng Sam Oi rather than the fact that he had attended his brother's engagement.

- Article 282 of the Labor Law addresses discrimination against unions and Article 293 of the Labor Law addresses the dismissal of union leaders or shop stewards. The employer must send a letter to the Department of Labor Inspection for permission in advance. Moreover, Prakas No. 305, MoSALVY, dated November 22, 2001, Article 4 states that when they ask to register union certificates, workers who are the union founders or workers who volunteer as members in this union during this time (union registration), are protected in the same way as shop stewards. This protection lasts 30 days after the union certificate's date. As for shop stewards, they have not been chosen in this factory and this is the first union and has just been created to protect workers' rights and resolve problems with the employer.
- The employer party did not respect the procedure for dismissal of union leaders as stated in the law. After receiving information that Mr. Seng Sam Ol was a union president, the employer should have contacted the Department of Labor Inspection to clarify this problem before deciding to dismiss him.

Based on the evidence and the above reasons, the Arbitration Council finds that Seng Sam Ol's dismissal was related to discrimination against a union rather than his mistake and it was wrong according to the procedures in the Labor Law. Thus, the Arbitration Council considers Seng Sam Ol's dismissal unlawful and decides that the employer must reinstate Mr. Seng Sam Ol with full salary from the time he was dismissed. (*See Chhea View Textiles, Case No. 17/04; Cambodiana Hotel, Case No. 02/04; Standard Garment, Case No. 27/03; Ho Hing Garment; Case No. 17/03 and 18/03*).

Issue 2:

The condition requiring workers to pay for their own medical exams prior to starting work is against the Labor Law, Article 247-a and c. Article 247-a of the Labor Law states that the Ministry of Labor is required to issue a Prakas establishing "the conditions under which pre-employment, re-employment, periodical, and special physical exams are to be given". Article 247-c(4) states the Ministry will also issue Prakas addressing "the medical exams of workers as stipulated in point (a) of this article".

The Secretary of State of the Ministry of Social Affairs, Labor and Veteran's Affairs and the Ministry of Health issued Joint Prakas No. 9, dated January 9, 1994 on Medical Examinations for Cambodian and Foreigners who come to Work in Cambodia. Some articles in this Joint Prakas state the following:

Article 1: Any Cambodian or foreigner of either sex who does any work within the Kingdom of Cambodia as provided in Article 1 of the Labor Law is required to pass a medical examination.

Article 3: Prior to the commencement of employment, Cambodians and foreigners are required to take medical examinations at the Labor Medical Department located at No. 482, Street: 2, Sangkat Chak Angre, Srok Meanchey, Phnom Penh.

Article 5: The medical examination may include more specific examination based on the actual skills and profession.

Article 7: The cost of the employee's medical examination shall be paid by the owner of the enterprise, as determined in Article 5 above, in accordance with the actual case.

Article 395 of the Labor Law states: "All provisions contrary to this law shall be abrogated". It is assumed that Prakas, No. 09 does not contradict the 1997 Labor Law, which the Ministry of Labor is still implementing.

Moreover, Article 13-1 of the Labor Law states "The provisions of this law are in the nature of public order." Thus all decisions that are created by a party, by a contract or a CBA, that do not comply with this provision must be abrogated. The condition requires workers to have a medical exam prior to starting work; the employer cannot be free from paying this fee. (*Please see Chusing Garment, Case No. 02/03; Loyal Cambodia, Case No. 21/03*).

Therefore, the factory has an obligation to reimburse the medical exam fee of 10,000 riel to workers who paid the fee because they were required to have a medical exam. In future the factory must pay the medical exam fees of workers who are required to have medical exams.

DECISION & ORDERS :

According to the facts, evidence and law as referred to above, the Arbitration Council decides to issue the decision and award as follows:

1. Order the factory to reinstate Mr. Seng Sam Ol and pay him full salary from the date that the factory dismissed him. This reinstatement must be done immediately after this award comes into effect.

2. Order the factory to reimburse the medical examination fees of all workers who paid their own medical fees in the amount of 10,000 riel. This fee must be paid within 2 weeks of the date this award comes into effect.
3. Order the factory to pay the medical examination fees of all workers who have not yet undergone a medical examination.

Signatures of Members of the arbitration panel:

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signed:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signed:

Chair of arbitration panel:

Name: **Kong Phallack**

Signed:

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.