

**KINGDOM OF CAMBODIA**  
**Nation King Religion**

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**THE ARBITRATION COUNCIL**

**Case number:** 20/05

**Date of Award:** 21 April 2005

**ARBITRAL AWARD**

(Issued under Article 313 of the Labor Law)

**Fortune Co., Ltd**

(The employer party)

**C.CAWDU**

(The employee party)

**Detailed information of employer party**

Representatives:

- 1- Mr. Long Heang, GMAC labor resolution officer
- 2- Mr. Ly Lang, the company representative

Address: National road No. 21, Phum Prek Ksave, Khum Rakar, Saang district, Kandal province.

Telephone: 855-23 425 021 Fax: N/A

**Detailed information of employee party:**

Representatives:

- 1- Mr. Sok Vy, Union president
- 2- Mr. Lork Simeat, Union vice president
- 3- Mr. Ly Lay, union advisor
- 4- Mr. Oum Visal, C.CAWDU labor resolution officer

Address: # 6F, St. 476, Toultapong I, Chamkamorn, Phnom Penh.

Telephone: 012 650 013, 012 282 653, 023 210 481

### **Issues In Dispute**

- 1- The workers demanded that the company arrange mass lay offs according to procedures under the law. The employer did not conduct mass lay offs but terminated contracts by his own will.
- 2- The workers demanded that the company pay compensation for mass lay offs correctly. The employer already pays compensation for contract termination.
- 3- The workers demanded that the company post an announcement or make an agreement on mass lay offs and the rehiring of workers when the company hires workers. The employer argued that he never conducted a mass lay off but terminated contracts by his own intention and in case of a mass lay off or rehiring the company will follow the procedures under the law.
- 4- C.CAWDU demanded that the company reinstate Mr. Sok Vy, Local Union president and stop interfering with the union. The employer could not negotiate this issue and left this issue to the Minister of Labor and Vocational Training to decide under the law.

### **Jurisdiction<sup>1</sup> of the Arbitration Council**

The Arbitration Council derives its power to make this Award from Section 2B (Article 309 to 317), Chapter XII of the Labor Law (1997); the Prakas on the Arbitration Council No. 099 dated April 21, 2004; the Prakas on the Appointment of Arbitrators No. 103 dated April 26, 2004 and No. 265 dated July 13, 2004 and the Arbitration Council Procedural Rules which form an Annex to the same Prakas No. 099 dated April 21, 2004.

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 Labor Law. However the parties did not conciliate, and the non-conciliation report No. 304 L.V.T dated March 17, 2005 was submitted to the Secretariat of the Arbitration Council on March 29, 2005.

### **Arbitration Panel**

Arbitrator chosen by the employer party: Mr. Mar Samborana

Arbitrator chosen by the worker party: Ms. Sin Kim Sean

Chair arbitrator (chosen by the two arbitrators): Mr. Pen Bunchhea

### **Hearing and Summary of Procedure before the Arbitration Council**

**Place of hearing:** Secretariat of the Arbitration Council

**Date of hearing:** 05 April 2005 at 14:00 to 15:00

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<sup>1</sup> Jurisdiction means power that the Arbitration Council receives under the law to settle labor dispute which were referred to the Arbitration Council.

## **Evidence**

**Witnesses and experts:** Mr. Sok Vy and Ly Lay

### **Documents, Exhibits and other evidence considered by the Arbitration Council**

#### **Provided by the employer party:**

- 1- Authorization letter to Mr. Ly Lang dated March 05, 2005 to settle collective disputes;
- 2- Letter of the company on suspension of Mr. Sok Vy for a period of time dated December 7, 2004;
- 3- Letter of the Company to Chief Department of Labor and Vocational Training of Kandal Province, on termination of Mr. Sok Vy working at laundry ID number BM 09 dated December 7, 2004;
- 4- Letter on calculation of compensation of contract termination of Mr. Ly Lay in the amount of US \$312.64;
- 5- Residential certificate of Mr. Sok Vy dated June 20, 2002 by chief of village, Mr. Sum Khun and chief of Chak Angrekleu commune, Mr. Sok Vy born on March 3, 1981;
- 6- Election card of Mr. Sok Vy No. 8621125 dated August 1, 2001 indicating that Mr. Sok Vy was born in 1981;
- 7- Residential book No. 2370 dated August 3, 1999 indicating that Mr. Sok Vy was born on March 3, 1979; and
- 8- New ID card of Mr. Sok Vy dated November 8, 2004 indicating that Mr. Sok Vy was born on March 3, 1979.

#### **Provided by the employee party:**

- 1- By-law of C.CAWDU of Fortune factory dated August 8, 2004;
- 2- Registration application of union dated August 8, 2004;
- 3- Letter of C.CAWDU complaining to the Director of Fortune factory that the termination of workers did not follow legal procedures dated February 10, 2004;
- 4- Letter of C.CAWDU complaining to the Director of Fortune factory about interfering with the union and suspending work of the union president;
- 5- Letter of C.CAWDU dated December 2, 2004 to the Minister of the Ministry of Labor and Vocational Training (MoLVT), complaining about the Fortune factory suspension of Mr. Sok Vy who is the union president; and
- 6- Letter of C.CAWDU dated January 10, 2005 to the Minister of MLVT objecting to the letter of Mr. Touch Phun, chief Department of Labor and Vocational Training of Kandal province dated December 21, 2004 allowing the dismissal of Mr. Sok Vy who is the union president.

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

- 1- Report on conciliation of collective labor dispute between Mr. Sok Vy and the company dated February 2, 2005;
- 2- Minutes of the meeting discussing the company's request to dismiss Mr. Sok Vy dated February 7, 2005;
- 3- Record on conciliation between the company and Mr. Sok Vy undated;
- 4- Letter No. 305 LVT of the Department of Labor and Vocational Training of Kandal Province on the dismissal of Mr. Sok Vy dated February 20, 2005;
- 5- Collective labor dispute conciliation record dated March 16, 2005; and
- 6- Letter No. 063 LVT on the application for registration of C.CAWDU of Fortune factory dated March 24, 2005.

**Presentation and testimony of employee and employer parties at the hearing**

**Both parties at the hearing agreed to have a NON-BINDING award.**

**Case summary:**

Fortune Co., Ltd. is located on National road No. 21, Phum Preak Ksave, Khum Rakar, Saang district, Kandal province and employs approximately 3700 workers. On February 2, 2005 an officer of the Department of Labor and Vocational Training of Kandal Province received a complaint from C.CAWDU requesting the employer resolve their four issues as mentioned above. After receiving the complaint on March 11, 2004, the labor inspector of Kandal province made an appointment with both parties to come to the office for a conciliation meeting. Because the timing of the negotiation was very difficult both parties agreed to a postponement until March 16, 2004. On March 16, 2004 the result of the conciliation was that four issues were not successfully conciliated. The worker representative and the company requested that the non-conciliation issues be referred to the Arbitration Council for further settlement.

On April 5, 2005, all disputing parties were called by the Arbitration Council to come to a hearing at 14:00h. After the Arbitration Council asked for further information on the four non-conciliation issues the employer and the employee party agreed that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> issues should be considered as one issue regarding termination of approximately 100 workers, who were employed under undetermined duration contracts, by the employer's own intention without a valid reason. According to the workers' argument the termination of the many workers was a mass lay-off, but, according to the employer's argument, it was a termination of contracts by the employer's intention without any valid reason. Among those terminated workers one worker, Mr.

Ly Lay, disagreed with the termination and demanded reinstatement; however more than 100 workers agreed with the termination and have already received all their compensation.

The fourth issue is the termination of Mr. Sok Vy who is the union president of C.CAWDU at Fortune factory for which the employer based the termination on two reasons: that he incited workers to go on strike which did not follow the legal procedure and that he gave fake documents during the implementation of the employment contract.

Therefore the issues that the Arbitration Council will consider and settle are the two as mentioned above.

**Findings of Fact:**

- having seen the conciliation report on the collective labor dispute
- having heard the employee party and the employer party
- having reviewed the above documents

The Arbitration Council finds the facts as follows:

**1<sup>st</sup> issue:**

The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> issues all regard the termination of employment contracts of approximately 100 workers whom the employer terminated in 4 separate phases. Among approximately 100 workers terminated by the employer, one of them, Mr. Ly Lay, who is an advisor of C.CAWDU of Fortune factory did not agree to the termination and did not accept the compensation. The other one hundred workers already received the compensation for the contract termination from the company. All the workers who were terminated, including Mr. Ly Lay, had undetermined duration contracts. Mr. Ly Lay started working for the company on October 28, 2001 and was terminated on January 31, 2005. Mr. Ly Lay's basic wage is USD45. The company argued that the company terminated all 100 workers without any valid reason but the company agreed to pay damages to those workers, including Mr. Ly Lay, in accordance with the law. The company calculated and paid those workers compensation for notice, dismissal, damages and unused paid annual leave. Among those terminated workers, most of them were members of this union and some of the other regular workers were members of other unions in the factory. Mr. Ly Lay demanded reinstatement and has not yet accepted the compensation from the employer. The employer maintained his position of terminating the employment contract of Mr. Ly Lay and agreed to pay compensation under the law. In this case his compensation is US \$312.64.

**2<sup>nd</sup> issue:**

Sok Vy, who is a president of C.CAWDU union of Fortune factory, was elected by Fortune workers on August 8, 2004. Mr. Sok Vy was a Chinese translator for the company. Mr. Sok Vy was suspended by the company through a letter dated December 7, 2004 because of inciting workers to go on a strike which did not follow the law and making fake documents during the employment contract. The company submitted a letter requesting the termination of Mr. Sok Vy to the Department of Labor and Vocational Training of Kandal Province dated December 7, 2004 for the above two reasons. The Department of Labor and Vocational Training issued a letter No. 305 LVT dated December 21, 2004 allowing the company to terminate Mr. Sok Vy based on the reason that Mr. Sok Vy committed serious misconduct as provided in Article 83-2 and 5 of the Labor Law. C.CAWDU twice filed complaints to the Ministry of Labor and Vocational training on December 22, 2004 and January 10, 2005. The letter dated January 10, 2005 was a complaint of the union objecting to the decision of the Department of Labor and Vocational Training of Kandal Province allowing the employer to dismiss Mr. Sok Vy. At the hearing the union representative argued that this letter was submitted to the Minister of Labor on the next day, January 11, 2005. Regarding this dispute, both parties were called for the process of conciliation by the Ministry leader and Labor Inspector of Kandal Province.

At the hearing before the Arbitration Council both parties recognized that when Mr. Sok Vy first applied for work he had an election card in which his birthday was March 3, 1981. In November 2004, Sok Vy had his birth certificate, new residential certificate and new national ID card made by changing his birthday to 1979. On August 8, 2004, Mr. Sok Vy, as the elected Union president, submitted an application to the Ministry to register C.CAWDU of Fortune factory. On January 13, 2005 the Labor Inspection Department of the MoLVT refused the standing of Mr. Sok Vy as union president because his age was not 25 years old (according to his election card he was born in 1981) under Article 286 of the Labor Law. The employer argued that Mr. Sok Vy changed [his year of birth] shown in the election card to the new birth date in order to legally stand for union elections to become a union president. Therefore the company filed a complaint to the Kandal Department of Labor and Vocational Training and suspended the work of Mr. Sok Vy in order to terminate his employment because of serious misconduct as provided in Article 83 b (2) of the Labor Law.

The employer maintained his position of terminating Mr. Sok Vy. C.CAWDU and Mr. Sok Vy demanded reinstatement by the employer.

## **Reasons for Decision**

### **1<sup>st</sup> Issue: (1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> issue)**

Article 74 of the Labor Law states that "[t]he employment contract of undetermined duration can be canceled by the intention of any party. ... however no dismissal can be made without any valid reason...". Article 91 of the Labor Law also states "[t]he termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages...The worker, however, can request to be given a lump sum equal to the dismissal indemnity."

In this case the Arbitration Council finds that the termination of approximately 100 workers in four phases in the past by the employer was a termination of undetermined duration contracts based on the intention of one party, the employer party, without any valid reason. Such a termination gives workers the right to damages equal to lay off compensation [dismissal indemnity] as provided in Article 91 of the Labor Law.

In this case the over 100 workers whom the employer fired agreed and have already taken the compensation except Mr. Ly Lay.

Mr. Ly Lay demanded reinstatement by the employer because the termination of his employment contract by the company was not correct under the procedures of the law. To consider the complaint of Mr. Ly Lay who disagreed with the termination, the Arbitration Council has to consider whether the Council has jurisdiction regarding this dispute or not. That is, is this an individual dispute or a collective dispute?

Article 302 of the Labor Law states that "[a] collective labor dispute is any dispute that arises between (a) one or more employers and a certain number of their staff over; (b) working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and (c) this dispute could jeopardize the effective operation of the enterprise or social peacefulness."

The Labor Inspector and the Minister for Labour have a duty to decide whether a dispute is an individual dispute or a collective dispute before referring the dispute to the Arbitration Council. For this reason, the Arbitration Council will generally follow the decision of the Labor Inspector and the Minister of Labor unless there are compelling reasons not to do so. (See cases 10/03-Jacsintex, 07/05-Coca Cola, 41/04-Mikasa, and 02/04-Hotel Cambodiana)

In this case the Arbitration Council finds that the termination of Mr. Ly Lay is not a collective dispute because the dispute does not meet condition (c) for collective disputes as provided in Article 302 of the Labor Law. Actually [the reasons] are as follows:

- Condition (a) was fulfilled because this issue was claimed by C.CAWDU who is a representative for workers. A union is an organization representing a group of workers;
- Condition (b) was also met because this dispute is related to the relationship between the employer and employee, termination of employment contract;
- Condition (c) was not met because at the hearing the Arbitration Council finds that there was no evidence to show that this dispute could jeopardize the effective operation of the enterprise.

Therefore the Arbitration Council finds that this dispute is an individual dispute in accordance with Article 300 of the Labor Law which states that, "an individual dispute is one that arises between the employer and one or more workers ... individually, and relates to the interpretation or enforcement of the terms of a labor contract ...".

Moreover, Article 301 states that, "... in case of non-conciliation, the interested party can file a complaint in a court of competent jurisdiction within two months, otherwise the litigation will be lapsed." Therefore Mr. Ly Lay can file complaint to the Kandal provincial court within two months after date of non-conciliation report.

Therefore the Arbitration Council decides not to consider the complaint regarding Mr. Ly Lay's issue.

## **2<sup>nd</sup> issue:**

Article 293 of the Labor Law states that "[t]he dismissal of a shop steward or a candidate for shop steward (including the union organization) can take place only after authorization from the Labor Inspector...The Labor Inspector...shall give his decision to the employer and to the worker who is fired...On receipt of the decision, the employer, the worker in question, or the union organization to which the worker belongs has a period of two months to appeal to the Minister in charge of Labor. The Minister in charge of Labor can cancel or reverse the decision of the Labor Inspector...[I]f there is no notification of the decision of the Minister in charge of Labor within two months upon receipt of the appeal, the case and the appeal are considered to be rejected."

In this case the employer party suspended Mr. Sok Vy's work on December 7, 2004 and on the same day, the employer also sent a letter to the Labor Inspector of Kandal province requesting permission to dismiss Mr. Sok Vy who is a union leader because he committed serious misconduct as provided in Article 83 (2 and 5) of the Labor Law: (1) inciting workers to go on strike without following legal procedures and (2) making a fake document during the implementation of the employment contract. The Department of Labor and Vocational Training issued a letter No. 305 LVT dated December 20, 2004 approving the request to dismiss Mr. Sok

Vy based on the above reasons. C.CAWDU filed complaints with the Minister of Labour [and Vocational Training] through a letter dated January 10, 2005 and another letter dated January 11, 2005 objecting to the above decision of Mr. Touch Phun, Department Chief of Labor Inspection and Vocational Training of Kandal province. As from January 11, 2005 until now, two months has passed by, but the Minister has neither replied to C.CAWDU's complaint as regards the dismissal of worker Mr. Sok Vy nor to Decision No. 305 LVT dated December 20, 2004 by the Department of Labour and Vocational Training. Therefore, the complaint of C.CAWDU objecting to the decision No. 305 dated December 20, 2004 of Kandal Department of Labour [and Vocational Training] was considered to be rejected under Article 293 of the Law. Therefore the company has the right to fire Mr. Sok Vy under the procedures of the law.

The Arbitration Council finds that the Ministry had tried to conciliate this dispute however the parties could not reach any agreement.

Moreover the Arbitration Council finds that Mr. Sok Vy definitely presented records with two different birth dates: 1981 and 1979, which are different by two years. Producing personal identification which has two different birth dates causes a question as to which birth date is real. When Mr. Sok Vy argued that the new ID in which his birth date is March 3, 1979 as his real birth date and therefore the letter and document given by him to the company when he applied for a job is not his real birth date. In this case the employer can accuse and fire Mr. Sok Vy from work because of fraudulent acts, specifically presenting false documents, as stated in Article 83(B)(2) which could be considered as serious misconduct.

Therefore the employer can fire Mr. Sok Vy under the rule of Article 83 of the Labor Law.

The Arbitration Council notes that Article 83(B)(5) states that, "[t]he following are considered to be serious offenses: ...Inciting other workers to commit serious offenses;" this shall not apply to inciting or calling workers to go on strike even if the strike did not follow the proper legal procedures (see case 08/05-Winner Knitting dated June 23, 2005) unless the employer has evidence to prove that *Mr. Sok Vy incited workers to use violence during the strike*. The strike, though wrong in terms of the legal procedures, was not an act of serious misconduct; it was just procedurally improper, which could result in the workers' failing to get the full protection of certain benefits during the strike under the labour law. Therefore, the Arbitration Council finds that the demand of C.CAWDU for the company to reinstate Mr. Sok Vy has no legal basis.

Therefore, the Arbitration Council decides to reject the demand of C.CAWDU for the company to reinstate Mr. Sok Vy.

Based on the facts, law, evidence and reasoning, the Arbitration Council decides and issues orders as follows

**Decision**

- 1- Decline to consider the workers' demand for the employer to reinstate Mr. Ly Lay.
- 2- Reject the C.CAWDU's demand for the employer to reinstate Mr. Sok Vy.

**Signatures of Members of the Arbitration Panel:**

Arbitrator chosen by the employer party:

Name: Mr. Mar Samborana

Signature: .....

Arbitrator chosen by the worker party:

Name: Ms. Sin Kim Sean

Signature: .....

Chair of arbitration panel:

Name: Mr. Pen Bunchhea

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.*