



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាគ្នា

THE ARBITRATION COUNCIL

Case number and name: 28/07- Dae Kwang

Date of Award: 10 April 2007

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Chhiv Phyrum**

Arbitrator chosen by the worker party: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Kong Phallack**

DISPUTING PARTIES

Employer party:

Name: **Dae Kwang Garment Co., Ltd.**

Address: No. 28&29 Canadia Industrial Park, Sangkat Chom Chao, Khann Dangkor, Phnom Penh.

Telephone: 023 720 617 Fax: N/A

Representative:

1. Mr. Kim Num Jum General Manager
2. Mr. Siet Riem Interpreter

Worker party:

Name: Cambodian Labour Union Federation and local Cambodian Labour Union at Dae Kwang Factory

Address: No. 30 C, Sangkat Boeung Keng Kang 3, Khann Russey Keo, Phnom Penh

Telephone: 016 657 556 Fax: N/A

Representative:

1. Mr. Khin Sakhan Officer of CLUF
2. Mr. Chum Rithy President of local CLU at Dae Kwang Factory

ISSUES IN DISPUTE

1. The workers demand the company to continue the eighteen months fixed duration contract. The company states that it will discuss with the worker delegates of the company first and it will discuss with the union afterwards.
2. The workers demand that the company maintain the wage and attendance bonus of US\$ 5 (five dollars) in cases where the workers ask for leave with permission from one day to three days. The company does not agree with this suggestion but it follows the Labour Law.
3. The union demands that the company reinstate Mr. Chum Rithy, who is the President of the Cambodian Labour Union at Dae Kwang Factory, alleging that the company terminated him [in order to discriminate against him] because he created a union and staged a strike on 27 February 2007. The company states that it cannot reinstate Mr. Chum Rithy because he was absent without permission from 27 February 2007 until 6 March 2007. Therefore, the company considers that Mr. Chum Rithy himself had given up his work.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labour 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 the Prakas on the Appointment of Arbitrators No. 099 dated 11 May 2006 (Fourth Term).

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 Labour Law. The conciliation was unsuccessful, and the non-conciliation report No. 253 K.K.B.V/AK/VK dated 19 March 2007 was submitted to the Secretariat of the Arbitration Council on 19 March 2007.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khann Chamkarmorn, Phnom Penh.

Date of hearing: 29 March 2007 (from 2:00 p.m. to 5:00 p.m.)

Procedural issues:

On 27 January 2007, the Department of Labour Disputes received a complaint from CLUF regarding a demand for the company to improve working conditions. After receiving this complaint, the Department of Labour Disputes assigned an officer to settle this dispute

and later a conciliation was held on 6 March 2007 with a result that 19 of 22 issues were conciliated. The three remaining non-conciliated issues were sent to the Secretariat of the Arbitration Council on 19 March 2007.

After receiving the case, the Secretariat of the Arbitration Council invited the employer party and the worker party at the factory to attend the hearing and conciliation on the three remaining issues on 29 March 2007 at 2:00 p.m. Both parties were present as invited by the Arbitration Council.

On the hearing day, the Arbitration Council attempted to further the conciliation on the three non-conciliation issues stated in the non-conciliation report by the Department of Labour Dispute with the result that two Issues, Issue 1 and Issue 2, were conciliated (see the agreement in the Findings of Fact section). Therefore, in this case, the Arbitration Council considers only Issue 3 based on the evidence and clarification [of the facts] by the parties in the hearing as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Two months fixed duration contract of Mr. Chum Rithy
2. Announcement by the Director of the company, dated 13 March 2007, regarding discontinuation of Mr. Chum Rithy's contract.
3. Letter of resignation from the union of 8 workers, dated 28 February 2007

Provided by the worker party: N/A

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

1. Report of the collective labour dispute resolution at Dae Kwang Company, No. 253 K.K.B.V/AK/VK by the head of the Department of Labour Disputes, dated 19 March 2007.
2. Minutes of the collective labour dispute conciliation, dated 6 March 2007.

Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 120 K.K.B.V/AK/VK/LKA dated 22 March 2007 to invite the worker party to attend the hearing.
2. Invitation letter No. 121 K.K.B.V/AK/VK/LKA dated 22 March 2007 to invite the employer party to attend the hearing.

FACTS

- Dae Kwang Company is located in Building No. 28-29, Canadia Industrial Park, Sangkat Chom Chao, Khann Dangkor, Phnom Penh and it employs 550 workers.

- Based on the minutes of the collective labour dispute conciliation, dated 6 March 2007, CLUF and local CLU at Dae Kwang Factory is the complainant in this case and this involves 50 workers.

Issue 1: Workers demand the company to continue the 18 month employment contract

The worker party agrees with the new practice of the company which started from the end of January 2007, i.e., a first time contract of 3 months, then 6 months and then 9 months.

Issue 2: Workers demand that the company retain the US\$ 5 wage in the case that the workers have personal commitments from 1 to 3 days

- The worker party and the company party agree to follow the Labour Law but the company will consider this on a case by case basis.

Issue 3: Workers demand that the company reinstate Mr. Chum Rithy

- Mr. Chum Rithy mentions that he started working for the company around May 2006. The last contract he made with the company had a two-month duration, from 23 January 2007 to 23 March 2003. His position is Head of cutting and he receives US\$ 140 per month. The company does not object to this.

- Mr. Chum Rithy adds that he was elected the President of the local CLU but that his union has not applied for registration at the Ministry of Labour yet. Mr. Chum Rithy does not remember the date of the union election. Yet, the company acknowledges Mr. Chum Rithy is the President of the union.

- The representative of the union federation mentioned in the hearing that the union has not applied for union registration yet. In the hearing the Arbitration Council asked the union to submit all relevant documents to the Arbitration Council by 30 March 2007. The Arbitration Council mentioned that if the union did not submit the required documents to the Arbitration Council, it will consider that the party does not have any such document. However, up to the day of the award issuance, the Arbitration Council has not received any document from the worker party to prove that it has informed the Ministry of Labour about the components of union leaders, candidates for union election and founding members of the union.

- Mr. Chum Rithy mentioned that the union informed the company about the union establishment on 19 February 2007. On 26 February 2007 the union summoned him to meet and paid his wage for his work from 1 to 26 February 2007 but the company did not allow him to enter the factory since that day on. The employer did not object to this claim.

- Mr. Chum Rithy asserts that altogether about 30 workers participated in a strike to support him in the afternoon of 26 February 2007 after learning that the company terminated him. Mr. Chum Rithy says that the workers continued the strike to support him on 27 February 2007. The company replied that Mr. Chum Rithy led workers to conduct an illegal strike.

- Mr. Chum Rithy mentioned that he attempted to come back to work on 27 March 2007 but the company did not allow him to come back to work. The company did not object to this.

- The representative of the union federation and Mr. Chum Rithy mentioned that after the strike was over, the employer brought in about 10 workers to make letters of resignation from the union in front of the CLUF's office. The employer did not object to this claim and added that the remaining members also resigned from the union.

- The union mentioned that it had 64 members but it did not show their names to the employer or the Arbitration Council. The Arbitration Council found that eight union members resigned from the union through letters dated 28 February 2007.

- The company mentioned that the reason that it dismissed Mr. Chum Rithy was because he led workers to conduct an illegal strike, attempted to establish a union, and attempted to attract workers to join the union by providing a salary of US\$ 30 to those workers who joined the union, as in the case of Mr. Som Siev. Mr. Chum Rithy does not object to the company's assertion.

- The company mentioned that it did not inform Mr. Chum Rithy regarding his dismissal and it did not receive permission from the Department of Labour Disputes before terminating Mr. Chum Rithy.

- The company asserts that it entered a request to terminate Mr. Chum Rithy with the Department of Labour Disputes on 15 March 2007 after attending a meeting to settle this dispute at the Department of Labour on 12 March 2007.

- The Arbitration Council requested the company provide a copy of that document and some other documents such as the Internal Work Rules, the company's statute, and the certificate of commercial registration to the Arbitration Council by 30 March 2007. The Arbitration Council mentioned that if the company did not submit the documents required to the Arbitration Council, it would determine that the party did not have the documents. Until the day of the award's issuance, the Arbitration Council did not receive this evidence from the company.

REASONS FOR DECISION

Issue 1: The demand for the company to continue the 18 months employment contract

The Arbitration Council will not consider [this issue] as both parties have already agreed.

(Please see the Findings of Facts section).

Issue 2: The demand for the company to retain wages and the US\$ 5 in cases where the workers have a personal commitments from 1 to 3 days

The Arbitration Council will not consider [this issue] as both parties have already agreed.

(Please see the Findings of Fact section).

Issue 3: The demand for the company to reinstate Mr. Chum Rithy

In this case, the workers demand the company to reinstate Mr. Chum Rithy because this termination was [due to] union discrimination. Therefore, the Arbitration Council will consider this issue as follows:

1. Is Mr. Chum Rithy a worker specially protected by the law?
2. Is the termination of Mr. Chum Rithy in accordance with the law?

1. Is Mr. Chum Rithy a worker specially protected by law?

The Labour Law and related regulations provide that, in some cases, workers are entitled to special protections in regards to procedures relating to dismissal. Therefore, in this point, the Arbitration Council will analyse the term “**Special Protection**” in order to see if Mr. Chum Rithy can receive this special protection.

Paragraph 1 of Article 293 of the Labour Law states, *“The dismissal of a shop steward or a candidate for shop steward can take place only after authorization from the Labour Inspector.”*

Clause 7 of Prakas 313, dated 27 November 2000 regarding the roles and work of worker delegate and union states, *“Union leaders in an enterprise establishment, normally including the president, first vice president, and first secretary registered at Ministry of Social Affairs, Labour, Vocation, and Youth Rehabilitation, are protected from termination in the same way as the personnel delegate.”*

In this case, both parties agreed that Mr. Chum Rithy was elected the President of local CLU at Dae Kwang Factory.

Paragraph 1 of Clause 4 of Prakas 305 SKBY, dated 22 November 2001 regarding the representative status of professional organizations of workers at the enterprise and

establishment level and the right to collective negotiation and to sign CBA at the enterprise and establishment level states, *“From the time of applying for registration of a union, all workers and employees that are founders or all workers and employees that are voluntary members of the syndicate, while asking for registration, also receive protection like personnel delegate. This protection lasts for 30 days after the date of registration of syndicate.”*

Paragraph 2 of Clause 4 of the same Prakas 305 SKBY states, *“Exceeding the period mentioned in the above paragraph, the protection will be granted to 3 union leaders in terms set out in articles 282 and 293 of labour law...To receive the protection, the union shall inform the employer about the names of people having to receive it by official means. A copy of this information shall be sent to the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation.”*

Based on Clause 4 of Prakas 305 SKBY, dated 22 November 2001 mentioned above, the Arbitration Council considers that workers who receive special protection according to this article are **all workers who are founders or workers who voluntarily joined as members of union**. This protection starts from the time the union applied for registration until 30 days after the date of union registration.

Paragraph 2 of Clause 4 of the Prakas 305 SKBY mentioned above states, *“Exceeding the period mentioned in above paragraph, the protection will be granted to 3 union leaders in terms set out in articles 282 and 293 of labour law...To receive the protection, the union shall inform the employer about the names of people having to receive it by official means. A copy of this information shall be sent to the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation.”*

Based on paragraph 2 of Clause 4 of the Prakas 305 SKBY mentioned above, the Arbitration Council considers that the content of this clause means that the special protection for union leaders also starts when the union applies for registration and continues until after 3 months when the union leaders have finished their terms as stated in Article 293 of the Labour Law. Based on paragraph 1 and paragraph 2 of Clause 4 of the Prakas 305 SKBY, dated 22 November 2001, mentioned above, in this case, the Arbitration Council considers that **the receipt of special protection** can exist only when the **union leaders have fulfilled 4 conditions**:

- Condition (a): Workers are the type of workers protected by the Labour Law
- Condition (b): The union has informed, by all reliable means, the employer about the identity of workers who should receive this special protection.
- Condition (c): The union has sent a copy of the notification to the employer and to the Ministry of Labour and Vocational Training.
- Condition (d): The union has applied for registration at the Department of Labour Dispute.

In this case, the Arbitration Council will determine whether Mr. Chum Rithy and the union has fulfilled the four above mentioned conditions.

The Arbitration Council considers that condition (a) is fulfilled because Mr. Chum Rithy is the type of worker who receives special protection because he was elected president of the union. Condition (b) is fulfilled because the union has informed the employer about Mr. Chum Rithy's position in the union. However condition (c) and (d) are not fulfilled as the union has not sent a copy of the notification letter to the employer and to the Ministry of Labour and Vocational Training and the union has not applied for registration at the Department of Labour Dispute.

In conclusion, the union has not fulfilled the required legal procedures in order for the union leader to receive special protections from the Law. Therefore, Mr. Chum Rithy does not receive special protection under the Labour Law.

2. Is the termination of Mr. Chum Rithy in accordance with the law?

Regarding the termination of workers who receive special protections from the Labour Law, in its previous decisions, the Arbitration Council considered the termination of workers who receive special protections as null and void and ordered the employer to reinstate the worker if the employer did not follow legal procedures and had not received prior permission from the Labour Inspector to terminate workers who [were entitled to] special protections from the Labour Law. (See award 02/04-Cambodiana Hotel, issue 1, 17/04-Cheer View, issue 1).

In this case, the employer terminated Mr. Chum Rithy who is a newly elected President of the union during the time when he received special protection. However, based on the above interpretation, the Arbitration Council considers that the union (Mr. Chum Rithy) did not fulfill all four conditions required by Clause 4 of Prakas 305 SKBY, dated 22 November 2001, mentioned above, in order to receive special protection. Therefore, the employer does not have an obligation to request permission from the Department of Labour Disputes in order to terminate Mr. Chum Rithy.

Although Mr. Chum Rithy is not a worker who should receive special protections from being dismissed, the Arbitration Council will consider if the employer's termination of Mr. Chum Rithy is in accordance with the law.

Article 12 of the Labour Law states, *"Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children, as well as provisions relating to the entry and stay of foreigners, no employer shall consider on account of...membership of workers' union or the exercise of union activities [or] be the invocation in order to make a decision on...discipline or termination of employment contract."*

In addition to Article 12, Article 369 of the Labour Law states, *“Those guilty of violating the provisions of Articles 12... are liable to a fine of sixty-one to ninety days of base daily wage or to imprisonment of six days to one month.”*

Similarly, Article 279 of the Labour Law states, *“Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration, and granting of benefits, disciplinary measures and dismissal.”*

In addition to Article 279, Article 373 of the Labour Law states, *“Those guilty of violating Articles 279... are liable to a fine of sixty one to ninety days of the base daily wage and to imprisonment of six days to one month, or to one of the both penalties.”*

In previous awards, the Arbitration Council ordered the employer to reinstate workers if the termination was related to union discrimination. (See awards 10/03-Jaquesintex, Issue 4; 41/04-Micasa, Issue 1; 17/07-Charm Textile, Issue 1).

The Arbitration Panel in this case agrees with the interpretation of the Arbitration Panels in the above mentioned cases. In the same way, in this case, the employer terminated Mr. Chum Rithy because he tried to form a union and joined in a strike.

Based on the above interpretation, the Arbitration Council considers that, in dismissing Mr. Chum Rithy, the employer did not follow the content of Article 12 and Article 279 (forbidding union discrimination) of the Labour Law because these two Articles prohibit the employer from terminating a worker based on his or her union activities.

Therefore, the Arbitration Council considers that the employer did not legally terminate Mr. Chum Rithy according to the Labour Law because the employer violated Article 12 and Article 279 of the Labour Law, as mentioned above.

However, in this case, Mr. Chum Rithy's employment contract was a fixed duration contract which expired on 23 March 2007, even before the arbitral hearing. Therefore, the Arbitration Council will consider this case as follows:

Article 73 of the Labour Law states, *“A labour contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in the form of writing in the presence of a Labour Inspector and signed by the two parties to the contract...”*

Based on Article 73, the Arbitration Council considers that Mr. Chum Rithy's contract has expired and thus the employer can terminate him, according to the principles set out for the termination of contracts with a fixed duration.

However, in this case, the employer terminated Mr. Chum Rithy's contract because he tried to form a union which contradicts Article 12 and Article 279 of the Labour Law which

prohibits the termination or discontinuation of an employment contract based on union discrimination.

In relation to this, in case 10/03-Jaquesintex, Issue 4, the Arbitration Council found that *“In this circumstance, both the decision to not continue a fixed duration contract and the decision to terminate workers who have undetermined duration contracts should be considered as types of decisions which the employer cannot make based on the reason of union membership or participation in union activities.”*

In the same way, in this case, the Arbitration Council determines that the employer should not have decided to terminate Mr. Chum Rithy’s contract because of his activities in creating a union. The termination of Mr. Chum Rithy’s contract by the employer based on such reasons is contradictory to Article 12 and Article 279 of the Labour Law. The Arbitration Council considers that even though his fixed duration contract has expired, Article 12 and Article 279 of the Labour Law prohibit the employer from making the decision to discontinue the contract [in order to discriminate against a] union.

Therefore, in Mr. Chum Rithy’s case, the Arbitration Council considers that even though his contract has expired, Article 12 and Article 279 prohibit the employer from making a decision to discontinue his contract for reason of union discrimination. Therefore, the Arbitration Council decides to order the employer to reinstate Mr. Chum Rithy.

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

DECISION

Order the employer to reinstate Mr. Chum Rithy.

Type of Award: Binding awards

This Award is immediately binding upon the parties after the notification of the award.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Chhiv Phyrum**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: