

**KINGDOM OF CAMBODIA
NATION KING RELIGION**

THE ARBITRATION COUNCIL

Case number and name: 33/06-South Bay

Date of Award: 25 May 2006

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: Ing Sothy

Arbitrator chosen by the worker party: Sin Kim Sean

Chair Arbitrator (chosen by the two Arbitrators): Tan Try

DISPUTING PARTIES

Employer party:

Name: South Bay Enterprise Co. Ltd. (South Bay Company)

Address: Vathanak Park, Building E, Sangkat Chom Chao, Khann Dangkor, Phnom Penh

Telephone: 023 955 636, 012 838 094 Fax: 023 985 635

Representative:

1. Mr. Li Bin Chief of Accounting
2. Mr. Li Er Yong Chef of Production
3. Mr. Dong Sokchea Delivery Department staff member

Worker party:

Name: South Bay C.CAWDU

Address: Vathanak Park, Building E, Sangkat Chom Chao, Khann Dangkor, Phnom Penh

Telephone: 012 988 62375

Representative:

1. Ms. Meas Vannei Officer of C.CAWDU
2. Ms. Lim Thida Officer of C.CAWDU
3. Mr. Heang Ren President of South Bay C.CAWDU

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The workers demand that the Company re-instate Mr. Heng Ren, the President of the union, because the suspension of his work by the Company was not in conformity with the Labour Law.
2. The workers demand that the Company arrange proper annual leave, as stated in the Labour Law, for those workers who have been working for one year or more or alternatively to provide payment to compensate for the holiday time.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Article 309 to 317) of the Labour Law (1997); the Prakas on the Arbitration Council 099/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators 513/05 (Third 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 hearing was unsuccessful, and the non-conciliation report No. 544 dated 19 April 2006 was submitted to the Secretariat of the Arbitration Council on the same date.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center Building "A", Sothearos Blvd, Sangkat Tonle Basac, Khan Chamkamorn, Phnom Penh

Date of hearing: 4 May 2006 (2:30 p.m to 6:15 p.m.)

Procedural issues:

On 27 March 2006, the Department of Labour Disputes received a petition from workers demanding that the company improve three working conditions. Following receipt of the case, the Department designated its labour dispute settlement officer in Khann Russey Keo to conciliate this dispute at the factory. One issue was successfully conciliated while the other two were not.

On 19 April 2006, the Arbitration Council received the case and non-conciliation report No. 544 dated 19 April 2006 by Mr. Koy Tepdaravuth, Chief of the Labour Dispute Department. After receiving the case, the Secretariat of the Arbitration Council invited the employer party and the workers and union at the factory to attend the hearing and to conciliate the two non-

conciliated issues remaining on 4 May 2006 at 2:00 p.m. Both parties attended the hearing. On the hearing day, the Arbitration Council attempted to further conciliate but could not conciliate any of the remaining issues.

Therefore, in this award, the Arbitration Council will consider both non-conciliated issues on the basis of the evidence and the findings of fact as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Confirmation letter by some workers about Mr. Heang Ren leading workers to conduct a five minute strike on 13 March 2006 from 9:00 a.m. to 9.05 a.m.
2. The Company's Internal Work Rules registration No. 47, registered on 4 May 2005.
3. Notification dated 4 April 2006 about the suspension of Mr. Heang Ren.

Provided by the worker party:

1. Letter No. 199 dated 8 February 2006 by the Chief of the Labour Dispute Department to the President of the South Bay C.CAWDU about recognition of the new union leader.
2. Letter from C.CAWDU dated 20 April 2006 summarizing the labour dispute at the South Bay Factory.
3. Thumbprints of 326 workers to attest that the two minute suspension of work on 13 March 2006 was a voluntary act without coercion or order from the leader of the union.

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

1. Letter requesting resolution of a collective dispute at South Bay Company, No. 424 dated 27 April 2006 by H.E Nhep Bunchin, Minister of Labour and Vocational Training
2. Report on collective dispute resolution at South Bay Company, No. 544, by Mr. Koy Tepdaravuth, Chief of the Labour Dispute Department, dated 19 April 2006
3. Minute of collective dispute conciliation, dated 3 April 2006.

Provided by the Secretariat of the Arbitration Council:

1. The Secretariat of the Arbitration Council's letter of invitation to the worker party to attend the hearing, No. 173, dated 27 April 2006
2. The Secretariat of the Arbitration Council's letter of invitation to the employer party to attend the hearing, No. 172, dated 27 April 2006

FACTS

- Having examined documents submitted to the Arbitration Council
- Having examined the report of the collective labour conciliation
- Having listened to arguments raised by the employer party and the worker party

The Arbitration Council finds that:

Issue 1:

- South Bay is located at Vathanak Park, Building E, Sangkat Chom Chao, Khan Dangkor, Phnom Penh. This company employs approximately 670 workers.

- At the hearing, Mr. Heang Ren (I.D. 420) accepted that during lunch time he went around to persuade workers to stand up. The purpose of standing up was to show solidarity in the union because the local union and the union federation were worried that the employer of South Bay Company would follow the management policy of Dragon Fly II, a policy which they considered as a management policy that violated workers' rights.

- The worker party asserted that on 13 March 2006, workers in the sewing and ironing sections, approximately 40 percent of the workers, stood up during working hours. The employer party mentioned that about 500 workers participated in the standing up. In the list of names provided by the union, there are 326 thumbprints of workers who volunteered to stand up. Based on this list of names, the Arbitration Council determines that there were 326 workers who stood up.

- The worker party said that the standing up during working hours lasted about two minutes. But the employer party argued that it was five minutes. The Arbitration Council therefore considers that the standing up lasted from two to five minutes.

- The union did not inform the Manager of the company in advance about the standing up.

- The local union and the union federation explained to the Manager of the company, the reasons which led the workers to stand up during working hours and apologized to the company for the incident.

- Right after the incident, the Manager of the company asked to see the President of the union, Mr. Heang Ren. [The Manager] blamed him and moved him from the cutting group to the finishing group. After that, on 20 March 2006, the company suspended Mr. Heang Ren. However, the notice of job suspension was issued on 4 April 2006 after a negotiation with the union in the presence of the Labour Inspector on 3 April 2006.

- At the hearing, the company asserted that in the case of Mr. Heng Ren, the Company cannot forgive him and he has to be punished. For this reason, the company suspended his work until resolution of the dispute by the Labour Inspector is settled or when money in the amount of US\$3,500.00 (which the company has paid to workers) is returned to the company.

The Company argues that this demand was reasonable, that is, that it is equal to the monies [lost] in the amount of US\$3,500.00. However, the Company does not provide any basis for the calculation to the Arbitration Council in order to show the legitimacy of the demanded US\$3,500.00.

- The Company says that it has continued to pay 50 percent wage to Mr. Heang Ren until the cancellation of the work suspension.

- The Company did not cut the attendance bonus from the workers, instead paying it to all workers including those who stood up on 13 March 2006.

Issue 2:

- The worker and employer agreed, as a practice, that every August the company pays the workers instead of allowing them to take annual leave.

- At the hearing, the workers clarified their demand by stating that the company should arrange the annual leave according to the Labour Law by determining workers' annual leave accrual with reference to the date on which they commenced work up to August; and that the employer should then provide payment instead of annual leave to them if they choose to work instead of taking annual leave. The employer did not object to the Arbitration Council considering this clarification of the workers' demand.

- The workers said at the hearing that the Company pays annual leave only for one full year up to August every year; it does not pay for any additional months over 12 that have been accrued by August, instead it keeps this period of time for paying workers when they have finished their employment contract. The Company did not object to this statement raised by workers on this point.

- The workers also demanded that in cases where the workers work for more than one year up to August, the Company should pay according to the excess months over one year by adding the number of excess months to calculate the number of days to take leave or alternatively pay for the excess months.

REASONS FOR DECISION

Issue 1:

In this point of dispute, the workers demand that the Company reinstate Mr. Heng Ren, the President of the union, because the suspension of his work by the Company was not in conformity with the Labour Law. The Company, on the other hand, claims that it cannot reinstate Mr. Heang Ren as he incited other workers to conduct a five minute strike on 13 March 2006.

1. Did Mr. Heang Ren and the other workers commit misconduct?

Article 10 of the Internal Work Rules of the South Bay Company, registered with the Department of Labour Inspection on 4 May 2005 state, "... the Company will discipline according to the level of [the worker's] misconduct as follows:

- Light misconduct: coming to work late, leaving before time, absence without permission for less than two days, stamping piece rate for someone else, eating, quarrelling, not listening to the advice of the foreperson.
- Medium misconduct: being lazy at work, fighting, absence from two to less than six days, stamping piece rate for absent worker(s), taking bribes when bringing in new workers to work, not following a change in position of the Company, not paying attention to work, causing damage to clothes, wrongly checking the quality of clothes, the wrong use of material and equipment, making many mistakes in the cutting section, mistakes at the finishing section which may affect the sending off of the product, etc....
- Serious misconduct: as stated in the Labour Law."

The Arbitration Council sees that the purpose of Article 10 of the Internal Work Rules of the South Bay Company was to prohibit workers from doing something which may cause damage to production at the factory. Mr. Heang Ren and other workers used working hours to stand up to show their solidarity among themselves which affected the assembly line of the factory. The discontinuity of the assembly line caused damage to the employer. Therefore, Mr. Heang Ren and other workers did commit misconduct which resulted in this damage.

2. Did Mr. Heang Ren commit a serious misconduct?

The Internal Work Rules of the South Bay Company do not define serious misconduct but refers to the definition provided in the Labour Law. Section B of Article 83 of the Labour Law which states:

"...

B. On the Part of the Worker

- Stealing, misappropriation, embezzlement.
- Fraudulent acts committed at the time of assigning (presentation of false documentation) or during employment (sabotage, refusal to comply with the terms of the employment contract, divulging professional confidentiality).
- Serious infractions of disciplinary, safety and health regulations.
- Threat, abusive language or assault against the employer or other workers.
- Inciting other workers to commit serious offense.
- Political propaganda, activities or demonstrations in the establishment.

The Arbitration Council finds that Mr. Heang Ren's conduct was not serious misconduct as stated in points 1, 2, 3, 4, and 6 of Article 83(B) mentioned above. Of note, point 5 of Article

83(B) mentions “Inciting other workers to commit a serious offense” as an act of serious misconduct. In order for Mr. Heang Ren’s actions to constitute this particular type of serious misconduct, the act needs to have two elements: 1) that there was an **“incitement”** and 2) that there was **“serious misconduct by workers caused by that incitement”**.

At the hearing, Mr. Heang Ren accepted that during lunch time he went around to persuade workers to stand up to show the solidarity of the union because the local union and the union federation were worried that the employer of South Bay Company would follow the management policy of Dragon Fly II. However, his persuasion did not lead workers to use violence or cause turmoil or destroy the company’s property. Nevertheless, his persuasion did lead to 326 workers to stop work from two to five minutes which then affected the assembly line of the factory. As discussed above, the workers committed misconduct by causing damage to the company. Therefore, whilst the Arbitration Council considers that Mr. Heang Ren did incite other workers, the question remains: was the misconduct of the workers serious?

Again, the company based its argument on Article 10 of the Internal Work Rules which is based on the definition provided in the Labour Law. Thus, the Arbitration Council, again, bases its decision on Article 83(B) of the Labour Law in considering whether workers who stood up to show their solidarity did commit serious misconduct. [Again] Article 83(B) states:

“...

B. On the Part of the Worker

- Stealing, misappropriation, embezzlement.
- Fraudulent acts committed at the time of assigning (presentation of false documentation) or during employment (sabotage, refusal to comply with the terms of the employment contract, divulging professional confidentiality).
- Serious infractions of disciplinary, safety and health regulations.
- Threat, abusive language or assault against the employer or other workers.
- Inciting other workers to commit serious offense.
- Political propaganda, activities or demonstrations in the establishment.

Based on the above Article, the Arbitration Council considers that the standing up to express solidarity by the workers did not violate any part of the definition in Article 83(B). A lack of violation by the workers therefore means that they did not conduct any serious misconduct stated in Article 83(B). Moreover, the employer did not punish any of the other workers who stood up.

In summary, Mr. Heang Ren did incite workers to stand up but the incitement did not lead any worker to commit serious misconduct. Based on this, the Arbitration Council finds that Mr. Heang Ren’s misconduct was not serious misconduct based on point 5 of Article 83(B) (see 08/05 - Winner Knitting).

3. If the misconduct was not serious misconduct, how significant was the misconduct committed by Mr. Heang Ren?

Point 10 of the Internal Work Rules state:

- Medium misconduct: being lazy at work, fighting, absence from two to less than six days, stamping piece rate for absent worker(s), taking bribes when bringing in new workers to work, not following a change in position of the Company, not paying attention to work, causing damage to clothes, wrongly checking the quality of clothes, the wrong use of material and equipment, making many mistakes in the cutting section, mistakes at the finishing section which may affect the sending off of the product, etc....

This point provides some examples of behaviour which can be considered medium misconduct, such as causing damage to clothes, wrongly checking the quality of clothes, many mistakes in the cutting section and mistakes at the finishing section which may affect the sending off of the product, etc. The word “**etc.**” shows that there are other things which the company considers as medium misconduct which may affect the benefit of the company. Hence, point [10] does not restrict medium misconduct only to actions of workers as stated, to be considered medium misconduct. In this manner, the point does not state that inciting standing up which then affects the assembly line of the factory cannot be considered medium misconduct. The Arbitration Council finds that the definition of medium misconduct in the Company’s Internal Work Rules aims at preventing large scale damage to the Company, such as many mistakes at the cutting section and mistakes at the finishing section which may affect the sending off of the product, etc. The Arbitration Council finds that incitement leading to a mass stand up which affected the assembly line, falls into the definition of medium misconduct stated in point 10 of the Internal Work Rules. Because Mr. Heang Ren incited others to commit misconduct which affected the benefits of the employer, the Arbitration Council considers that he also committed medium misconduct as stated in point 10 of the Company’s Internal Work Rules.

4. Is the Mr. Heang Ren’s punishment demanding him to pay back US\$3,500.00 or unlimited suspension appropriate?

The Arbitration Council will now consider the proportionality of the punishment imposed on Mr. Heang Reng in consideration of the seriousness of his misconduct. Article 27 of the Labour Law states: *Any disciplinary sanction must be proportional to the seriousness of the misconduct...*

During the hearing, the Company demanded that Mr. Heang Ren pay back US\$3,500.00 because this amount of money is proportional to his misconduct. The Company however, did not provide any evidence to the Arbitration Council as a basis for calculating the Company’s demand

for an amount of US\$3,500.00. Therefore, the Arbitration Council cannot believe that the demand of the employer is appropriate because the employer failed to provide the Arbitration Council evidence to show any basis of the demand for the amount of US\$3,500.00 sought from Mr. Heang Ren. Even if the demand for US\$3,500.00 has some basis, the Arbitration Council considers that the act of standing up by the workers on 13 March 2006 could not have caused damage in that amount because it was too short a time. The Arbitration Council finds that the damage must have been very little; therefore, if this is compared with the amount of US\$3,500.00 which the Company demands from Mr. Heang Ren, there is no proportionality.

Further, the Arbitration Council finds that the Company did not cut the bonuses of other workers who committed misconduct by standing up. On the contrary, the company maintained the workers' regular attendance bonus. Yet, the Company demands that Mr. Heang Ren alone should pay back the whole sum of US\$3,500.00 to the company.

Based on this, the Arbitration Council considers that the punishment imposed by the Company requiring that Mr. Heang Ren pay back US\$3,500.00 as compensation before his return to work is not proportionate to his medium misconduct (see 76/05-Global Footwear).

Similarly, the Arbitration Council considers the unlimited suspension of Mr. Heang Ren unlawful.

Article 10 of the Company's Internal Work Rules regarding the punishment for workers who commit misconduct states:

"...the first time [the worker] will receive a written warning which is recorded in the personnel file. The second time [the worker] will be suspended without payment for a period of time (of not more than 7 days). The third time, in cases where the misconduct continues, [the worker] will be terminated."

The company punishes Mr. Heang Ren by suspending him for an unlimited time. By punishing the worker in this way, the Company does not follow its Internal Work Rules. Therefore, the Arbitration Council considers that the punishment of suspending Mr. Heang Ren for an unlimited period is not lawful (see 08/05-Winner Knitting). According to the non-conciliation report by the Ministry of Labour and Vocational Training, in non-conciliated issue number 1, the employer considered the standing up of workers on 13 March 2006 as a strike.

Article 318(1) of the Labour Law states: "A strike is a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work."

The Arbitration Council found that during the short time the workers stood up, they did not raise any request or demand to the employer. The only purpose of the short standing up was to show solidarity amongst workers in South Bay Company. In addition, during that time, the workers did not put any condition or demand to the company in order to solve a problem and

have them come back to work. On the other hand, after the workers rose up and stood for two to five minutes, all the workers returned to their normal work and nothing happened after that. Based on this fact, the Arbitration Council considers that the standing up of workers on 13 March 2006 was not a strike according to the definition of strike mentioned in Article 318(1) of the Labour Law. Therefore, there was no serious misconduct, as stated in Article 330 of the Labour Law, and Article 330 cannot be applied in the case of Mr. Heang Ren.

In respect of the question of whether Mr. Heang Ren should receive 50 percent of his wages or a full wage during his suspension, the worker party did not raise this issue in order that the Arbitration Council could consider it in the hearing. Because this point is not mentioned in the non-conciliation report, issue 1, by the Labour Dispute Department, the Arbitration Council cannot consider what should be the appropriate amount of wages from 20 March 2006 to the date the award is in effect.

Nonetheless, the Arbitration Council notes that Mr. Heang Ren incited other workers to stand up during working hours which caused a disturbance in the factory's assembly line. The Arbitration Council considers that Mr. Heang Ren should receive some disciplinary sanction related to his misconduct. Therefore, this award of the Arbitration Council is also a written warning to Mr. Heang Ren for his misconduct.

Issue 2: The Workers demand that the Company provide annual leave to the workers in consideration of their actual start date to August; and demand that the Company allow the workers to choose between taking annual leave or working to receive payment instead of taking the holiday time.

In determining the workers demand, the Arbitration Council will consider whether the old policy of the company follows the Labour Law.

A. The workers demanded that the company provide annual leave to the workers in consideration of their actual start date to August.

Article 166 of the Labour Law states that "...all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half work days of paid leave to be given by the employer at the rate of one and a half work days of paid leave per month of continuous service...", and Article 167(1) of the Labour Law reads: "The right to use paid leave is acquired after one year of service."

The current practice of counting the number of days of paid annual leave at South Bay Company does not include the number of months beyond the twelve months that the workers have worked (prior to August). The exclusion of the months exceeding twelve months from the annual leave is not in compliance with the law; therefore, the practice of following the old policy of the Company is not in accordance with the Labour Law.

B. The workers demanded that the company allow the workers to choose between taking annual leave or receiving a payment in lieu of the annual leave.

Article 167(3) of the Labour Law provides, "...any collective agreement providing compensation in lieu of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void."

Article 13 of the Labour Law specifies that "The provisions of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void."

Therefore, any agreement, policy or other document which provides for payment instead of annual leave between the workers and the employer does not conform with the Labour Law (see 62/04-Ecent; 94/04-Eternity and 45/05-B&N). The Arbitration Council therefore rejects this demand raised by the worker party for payment instead of annual leave.

Both the worker party and the employer party do not have total rights to determine when the workers will take annual leave. Both parties have an equal right to negotiate when such annual leave should be taken (see 45/05-B&N).

In managing the production line, the employer has a duty to manage his or her production process to ensure non-interruption to the production. Similarly, the workers have the right to request or consult with the employer on the issue of annual leave. Therefore, the employer has an obligation to arrange the annual leave for the workers while ensuring that the production of the factory is not interrupted (see 21/05-Sinomax; 27/05-Jung Min and 39/05-Wing Tai II).

In cases where there is no agreement on annual leave between the employer and the workers, Article 170 of the Labour Law requires the employer to allow the workers to take annual leave on the occasion of Khmer New Year. Therefore, the Arbitration Council rejects the demand raised by the workers to allow them to take annual leave as they wish.

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

DECISION

- Order South Bay Company to reinstate Mr. Heang Ren, union President, from the date this award is put into effect.
- Order the company to calculate annual leave from the commencement of the workers' employment.
- Reject the demand by the workers for payment instead of annual leave and the demand to take annual leave whenever they wish.

Type of Award: Non binding

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.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: Mr. Ing Sothy

Signature:

Arbitrator chosen by the worker party:

Name: Ms. Sin Kim Sean

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: Mr. Tan Try

Signature: