



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអន្តរាជ្យកម្ពុជា**

**THE ARBITRATION COUNCIL**

**Case number and name: 48/08-Sinohydro Kamchay**

**Date of Award: 29 April 2008**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATION PANEL**

Arbitrator chosen by the employer party: **Hem H. Naryth**

Arbitrator chosen by the worker party: **Suong Sophal**

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

#### **DISPUTING PARTIES**

##### **Employer party:**

Name: **Sinohydro Kamchay Hydroelectric Project Co. Ltd**

Address: Snam Prampi Village, Snam Prampi Commune, Kampot District, Kampot Province

Telephone: 012 215 000

Fax: 023 994 447

Representative:

- |                      |                                  |
|----------------------|----------------------------------|
| 1. Mr. Chen Gang     | Manager of Commercial Department |
| 2. Mr. Yich Samithi  | Lawyer                           |
| 3. Ms. Theng Muyleng | Assistant to lawyer              |
| 4. Ms. Kim Theang    | Assistant to lawyer              |

##### **Worker party:**

Name: **Representative of workers**

Address: Snam Prampi Village, Snam Prampi Commune, Kampot District, Kampot Province

Telephone: 012 617 299

Fax: N/A

Representative:

- |                       |   |
|-----------------------|---|
| 1. Mr. Vann Reaksmey  | Mechanic                                    |
| 2. Mr. Seang Kimheang | Car tyre maintainer (worker representative) |
| 3. Mr. Lon Monykaruna | Car tyre maintainer (worker representative) |

## ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- [This issue is related to the] non-reinstatement of six workers who the Company terminated following an incident of fighting (three workers) and other three workers who signed the resignation letters written in a foreign language; and about the dismissal of only Cambodian workers but not foreigner workers.

### JURISDICTION OF THE ARBITRATION COUNCIL

*The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B 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 the Prakas on the Appointment of Arbitrators No. 076 dated 10 May 2007 (Fifth 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. 040 MKBV.KP 08, dated 17 March 2008, was submitted to the Secretariat of the Arbitration Council on 27 March 2008.*

### 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:** 07 April 2008 (from 2:00 p.m. to 4:30 p.m.)

**Procedural issues:**

On 9 March 2008, the Department of Labour and Vocational Training of Kampot Province received information through the telephone and a complaint letter from worker representatives regarding the demand for the Company to improve working conditions. Immediately after the receipt of the complaint, the Department of Labour and Vocational Training of Kampot Province assigned an expert officer to solve this collective labour dispute and the last conciliation was held on 14 March 2008 with a conciliation result of three of four issues. The one non-conciliated issue was referred to the Secretariat of the Arbitration Council on 27 March 2008.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party to the hearing and conciliation on the one non-conciliation point on 7 April 2008 at 2:00 p.m. Both parties were present as invited by the Arbitration Council.

In the hearing the Arbitration Council attempted further conciliation on the one non-conciliation issue but did not receive a conciliation result. Thus, in this case the Arbitration

Council will consider this issue in dispute based on the evidence and clarification of 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. Report regarding employee drank alcohol and had a fight, incited other workers to go on strike and destroy machine.
2. Description of the situation of fighting in March dated 8 and 10 of March 2008.
3. Cambodian citizen ID of Mr. Thy Sros.
4. Cambodian citizen ID of Mr. Van Reaksmeay;
5. Cambodian citizen ID of Mr. Van Vibol.
6. Clarification letter, dated 28 March 2008.
7. Report of collective labour dispute regarding strike conducted by workers of Sinohydro Kamchay Company, Kampot Province, No. 060 MKBV.KB08, dated 17 March 2008.
8. Minutes of collective labour dispute conciliation at Sinohydro Kamchay Company, dated 9 March 2008.
9. Certificate of registration of Value Added Tax of Sinohydro Kamchay Company, No. 458 PD, dated 28 March 2007.
10. Certificate of commercial registration of Sinohydro Kamchay Company No. 1993 PN.NK, dated 3 August 2006.
11. Patent of Sinohydro Kamchay Company No. MTU 012904.2007, dated 28 March 2008.
12. 11 photos.
13. Authorization letter by Sinohydro Kamchay Company, dated 4 April 2008.
14. Notification of the decision of the Company, dated 9 April 2008.

**Provided by the worker party:** N/A

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

1. Report of collective labour dispute resolution at Sinohydro Kamchay Company No. 060 MKBV.KP08, dated 17 March 2008.
2. Minutes of collective labour dispute conciliation, dated 9 March 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 241 KB/AK/LKA dated 1 April 2008 to invite the company party to attend the hearing.
2. Invitation No. 242 KB/AK/LKA dated 1 April 2008 to invite the worker party to attend the hearing.

**FACTS**

- Having reviewed report of collective labour dispute conciliation;
- Having examined documents submitted by the parties to the Arbitration Council;
- Having listened to the testimonies from both the worker party and the employer party.

**The Arbitration Council finds that:**

- Sinohydro Kamchay employs approximately 900 workers.
- The worker party who is the complainant in this case is not a union. According to the workers' testimony, in Sinohydro Kamchay Company there is no union, neither does it have worker delegates. The Company representatives who were present at the hearing did not respond to the claimed testimony.

**Issue 1: The workers demand the Company reinstate Vann Vibol, Vann Reaksmey and Thy Sros and reject signatures on resignation letters the Company made in a foreign language for three workers and the workers complain about the dismissal of only Cambodian workers but not foreigner workers.**

- The worker party states that there are six workers who demand reinstatement, including: 3 AC electricians, 2 mechanics and 1 DC electricians. Among the six workers, only one of them appeared in the hearing, Mr. Vann Reaksmey.
- Mr. Seang Kimheang and Mr. Lon Monykaruna state that they are worker representatives; but they do not have an authorization letter.
- Mr. Seang Kimheang and Mr. Lon Monykaruna, the worker representatives selected when the dispute happened who were present in the hearing, testify that among the six workers only three of them still continue to demand that the Company reinstate them; they are: Vann Vibol, mechanic; Vann Reaksmey, mechanic and Thy Sros, electrician.
- The workers demand that the Company reinstate Van Vibol, Van Reaksmey and Thy Sros because the termination was unreasonable and the Company terminated only Cambodian workers but not foreigner workers. In addition, the resignation letters were made in a foreign language.

- The Company testified that the reason that the Company terminated the three workers was because they had a quarrel with chief of group and destroyed the Company's property. The Company does not have other reasons.
- Mr. Vann Reaksmey of the worker party states that the chief of group started the fighting (beat Thy Sros); then he and his brother only went to intervene but both of them were also terminated. He asked if it was right that the Company did this. [He claims that] they did not destroy the Company's properties. The Company representatives do not respond to this as they were not present at the incident and do not know the story.
- Mr. Vann Reaksmey states that the conflict in which he intervened between the workers and the chief of group occurred on 7 March 2008. The Company terminated those workers involved in the conflict on 8 March 2008. A strike happened on 9 March 2008 as a reaction against the termination of workers but not the chief of group. The Company representatives do not respond to this as they were not present at the incident and do not know the story.
- Mr. Vann Reaksmey claims that he started work on 20 February 2008 and received a wage between US\$ 170-200 per month. He worked around 10 to 11 hours per day and 30 days per month. The Company calculates his wage based on the number of hours worked at a rate of 1,900 riel to 2,000 riel per hour. Mr. Vann Reaksmey states that he does not have a contract in writing and neither do other workers.
- For Vann Vibol, Mr. Vann Reaksmey states that he has been working for around 7 months but [Mr. Vann Reaksmey] does not remember the date [Mr. Vann Vibol] started his work. The Company calculates payment for Vann Vibol based on the number of hours worked at a rate 1,800 riel.
- For Thy Sros, Mr. Vann Reaksmey states that he does not know information about him because [Thy Sros] has gone back to his hometown. Thy Sros did not make an authorization letter to him or the worker representatives who appeared in the arbitral hearing.
- The employer party states that the Company does not have Internal Work Rules visaed by the Ministry in charge of Labour or the Department of Labour. In relation to this termination, the Company did not provide any notification, nor explain to the workers whether this was serious, medium or light misconduct.

### **REASONS FOR DECISION**

Before making consideration on the merit of this case, the Arbitration Council will consider the legal status of the representation of Mr. Seang Kimheang and Mr. Lon Monykaruna in the arbitral hearing.

Based on the findings of facts, the Arbitration Council found that the worker party does not have a union to represent them. Mr. Seang Kimheang and Mr. Lon Monykaruna states that they are worker representatives but they do not have an authorization letter to represent the workers.

Clause 19 of Prakas 099 SKBY, dated 21 April 2004 regarding the Arbitration Council states, *“A party may appear before the arbitration panel in person, be represented by a lawyer who is a member of the Bar Association of the Kingdom of Cambodia, or be represented by any other person expressly authorized in writing by that party.”*

Based on the content of Article 19 of the Prakas 099 SKBY, dated 21 April 2004 regarding the Arbitration Council above, the Arbitration Council considers that the disputing parties may appear before the Arbitration Panel (1) in person or (2) with accompanies or representatives or (3) by other people who are authorized in writing by the party. This Prakas means that even though the workers are not a party in dispute but they may represent the party in dispute to the Arbitration Council if the workers are authorized in writing from the workers who have made the complaint.

In the hearing, the Arbitration Council required the worker party to provide evidence to support its demand by 21 April 2008. The worker party promised to provide evidence or documents such as list of names of workers (with signatures or thumbprints) who have requested them for help to solve this dispute in order for the Arbitration Council to use as a basis for decision. However, the [worker party] did not provide evidence related to the authorisation as mentioned above to the Arbitration Council by the deadline.

Therefore, the Arbitration Council considers that Mr. Seang Kimheang and Mr. Lon Monykaruna are not representatives of the three workers. Thus, the Arbitration Council considers that it has an authority to settle this dispute only for one worker, Mr. Vann Reaksmey, who is the claimant who appears in the hearing.

In this case, the workers demand that the Company reinstate Mr. Vann Reaksmey because the termination was unreasonable and the Company terminated only workers but not the chief of group and it made resignation letter in foreign language. The Company party, on the other hand, states that the Company terminated the workers because they had a conflict with chief of group and destroy the Company's properties. Thus, the Arbitration Council will consider whether the termination of Mr. Vann Reaksmey was valid according to the Labour Law.

Based on the finding of facts above, Mr. Vann Reaksmey was employed without any contract in writing. Thus, based on Article 67, paragraph 7, of the Labour Law the Arbitration Council concludes that Mr. Vann Reaksmey has undetermined duration contract.

In relation to undetermined duration contract, Article 74 of the Labour Law states, *“The labour contract of unspecified duration can be terminated at will by one of the*

*contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party.*

*However, no layoff can be taken without a valid reason relating to the worker's aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group.*

Based on the contents of this Article, the Arbitration Council considers that the employer party has a right to terminate workers by its own will by providing prior notification and by mentioning valid reason relating to the worker's aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group.

In the hearing, the Company states that the reasons that the Company terminated Mr. Vann Reaksmeay were because he had a quarrel with chief of group and destroyed the Company's property. In relation to this claim the Company does not provide any evidence to prove that Vann Reaksmeay did beat the chief of group. It seems that the Company did not conduct a proper investigation to find out whether Mr. Vann Reaksmeay was involved in the fighting against the chief of group. Moreover, the Company did not elaborate in response to the worker's claim that he did not beat the chief of group but only went in to intervene. The Company representative only testified that he was not present at the incident and thus did not know about it. In addition, the Company does not mention nor does it have any internal work rules to confirm that this termination is based on either serious misconduct, medium misconduct or light misconduct.

In previous cases, the Arbitration Council interprets that the party making a claim has a burden to provide evidence against the other party. (See Arbitral Awards 17/07-Charm Textile, issue 1; 35/07-Flying Dragon, issue 2; and 109/07-Kingsland, issue 35).

In this case, the Arbitration Council agrees with the interpretation of the Arbitrators in previous cases. Thus, the Arbitration Council concludes that the employer does not have sufficient evidence to prove that the workers committed a serious misconduct proportional to termination from employment. Therefore, the Arbitration Council decides that there is not valid reason for the termination.

Clause 34 of Prakas 099 SKBY, dated 21 April 2004, states that *"In matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of provisions provided in the Labor Law, implementing regulations under the Labor Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labor Law and this Prakas, it has the power and authority to provide any civil remedy or relief which it deems just and fair, including:*

- A. orders to reinstate dismissed employees to their former or any other appropriate position;*

*B. orders to the immediate payment of back pay;*

...

*H. such other relief as is appropriate.”*

Based on the above clause, the Arbitration Council decides to order the employer to reinstate Mr. Vann Reaksmeay.

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

**DECISION AND ORDER**

- Order the employer to reinstate Mr. Vann Reaksmeay

**Type of Award: Non binding award**

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition to the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:**

Arbitrator chosen by the employer party:

Name: **Hem H. Naryth**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Suong Sophal**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....