

**KINGDOM OF CAMBODIA
NATION RELIGION KING**

THE ARBITRATION COUNCIL

Case: 92/04

Date of award: 1 December 2004

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

C.H.P. Garment Factory

(Employer party)

AND

Khmer Youth Union Federation and Khmer Youth Union of C.H.P. Garment Factory

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representatives:

1- Mr. Sar Samnang, Lawyer representing the company.

Address: Newly-built Street Prey Tea Commune, Cham Chao quarter, Dankau district, Phnom Penh.

Tel: 023 368 181 Fax: 023 368 585

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representatives:

1- Mr. Mai Vathana, Official of Khmer Youth Federation

2- Mr. Yun Vanna, Official of Khmer Youth Federation

3- Mr. Mom Sovann, President of Khmer Youth Union of C.H.P. Garment Factory

4- Ms. Kin Sok, Secretary of Khmer Youth Union of C.H.P. Garment Factory

5- Mr. Sum Chanthea, Advisor of Khmer Youth Union of C.H.P. Garment Factory

6- Mr. Sim Sarith, Treasurer of Khmer Youth Union of C.H.P. Garment Factory

7- Mr. Ou Phoeun, Commissioner of Khmer Youth Union of C.H.P. Garment Factory

8- Mr. Sann Phann, Commissioner of Khmer Youth Union of C.H.P.
Garment Factory

9- Ms. Mam Oeun, Member of the Union

10- Mr. Nouv Titha, Official of Khmer Youth Federation.

Address: Newly-built Street Prey Tea Commune, Cham Chao quarter, Dankau district, Phnom Penh.

Tel: 012 435 466.

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The employees demand that the employer provide full basic wages when the employer does not have work for them (regardless of whether the workers come to factory or not) and must pay remanded wages in accordance with the law. On the other hand the employer says that in case of no work, the employer shall apply the Labour Law in effect.

- 2- The employees demand that the company reinstate Mr. Sum Chanthea, Sim Sarith, Sann Phann, Mom Sovann, Ms. Mam Oeun and Ms. Kim Sok, who are Union leaders, to work in the same place and positions. On the other hand, the employer states that it shall not reinstate them because their contracts were terminated according to the Labour Law.

JURISDICTION OF THE ARBITRATION COUNCIL :

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labour Law (1997), the Prakas on the Arbitration Council 99/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas and the Prakas on the Nomination of Arbitrators 103/04.

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 Labour Law on 11 June 2004. The attempt to conciliate the six point demand of the employees by the Ministry of Labour and Vocational Training was unsuccessful. The non-conciliation report, no. 2218 dated 13 August 2004 was submitted to the Secretariat of the Arbitration Council on 16 August 2004.

COMPOSITION OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:	Mr. Hem Hour Narith
Arbitrator chosen by the worker party:	Mr. Liv Sovanna
Chair arbitrator (chosen by the two arbitrators):	Mr. Kong Phallack

HEARING AND EVIDENCE:

Date and place of hearing: 19 November 2004, at 2:30 p.m. at the Secretariat of the Arbitration Council.

Witnesses and experts: N/A

EVIDENCE THAT WAS CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:

Provided by the employer party:

- 1- Registration certificate of the Factory no. 680 dated 3 June 2003
- 2- Internal Work Rules dated 20 February 2004, registered on 13 June 1997
- 3- Patent year 2003

Provided by the employee party:

- 1- Letter no. 440 informing the General Manager of the C.H.P. Company of the election dated October 2004
- 2- Receipt of acceptance of a registration request dated 18 October 2004, signed by Mrs. Koch Sothann
- 3- Letter no. 123 MoLVT to H.E. Minister of Labour dated 5 October 2004
- 4- Minutes on the election dated 5 October 2004
- 5- List of names commissioner of Khmer Youth Union dated. 5 October 2004
- 6- List of voters dated 5 October 2004
- 7- Certificate of the criminal record and resumé of Mr. Mom Sovann dated 5 October 2004
- 8- Certificate of the criminal record and resumé of Mr. Man Borey dated 5 October 2004
- 9- Certificate of the criminal record and resumé of Mrs. Kim Sok dated 5 October 2004

Received from MoLVT:

- 1- Non-conciliation report on the collective dispute conciliation no. 2721 dated 5 November 2004 of the Director of the Labour Inspection Department
- 2- Minutes on collective dispute conciliation, dated 2 November 2004
- 3- Letter from H.E. Minister of Labour

Presentation by both parties in the hearing.

The two parties decided in the hearing that: THIS AWARD IS NOT IMMEDIATELY BINDING.

CASE SUMMARY:

C.H.P. Company located at Newly-built Street Prey Tea Commune, Cham Chao quarter, Dankau district, Phnom Penh employs a total of 740 workers. On 27 October 2004, Labour Inspectors at the Dankau District Office received a complaint of issues from the employees.

On 2 November 2004, Labour Inspectors of the Dankau District Office conciliated both parties, the Khmer Youth Federation representing the workers and the employer. During the conciliation process, both parties reached an agreement on eight points out of ten points. The two remaining are mentioned in the issues in dispute above.

The Secretary of the Arbitration Council invited both parties to the hearing on 19 November 2004 at the Secretary of the Arbitration Council at 2:30 p.m. On 29 October 2004 both parties attended the hearing at the Secretary of the Arbitration Council.

FINDING OF FACT:

- Having examined the minutes on collective conciliation
- Having listened to the presentation of the employee party as mentioned above and the minutes on the hearing
- Having checked the above documents

We find that:

First issue:

- The workers demand that the company calculate the full wages for the workers when there is no work for them and remanded wages when there was no work during August and September 2004.
- The employer does not agree because there is a verbal agreement with the workers that the company shall provide a bonus of US\$5 a month for each worker.
- The company has not informed the Labour Inspector about the no work periods in the company.
- Sometimes, the company has not informed the workers in advance. When workers arrive to punch their time cards, the employer tells them to return home.

- Almost all workers do not have a job to do. If there is job, the job is changed based on the shift. For instance, Mr. Ou Phoeung has worked only 17 days for August and only 10 days for September.
- The Internal Work Rules of the Company do not mention anything about the work suspension.
- Both parties agree that there was no work during August and September and recently. Sometimes there are jobs, sometime there are no jobs; it is difficult to say when because the company gets jobs from other companies.

Second issue:

- Six workers whose contracts were terminated were employed under undetermined duration contracts.
- Three workers whose contracts were terminated on 21 October 2004 are as follows:
 1. Mr. Sim Sarith, Treasurer of the Union, hired by C.H.P. Company on 15 October 2004
 2. Mr. Sum Chanthea, Advisor of the Union, hired by C.H.P. Company on 18 August 2003
 3. Mr. Sann Phann, Member of the Union commission, hired by the C.H.P. Company on 22 August 2003
- The other three workers whose contracts were terminated on 27 October 2004 are as follows:
 1. Mr. Mom Sovann, President of the Union, was just elected and hired by the C.H.P. Company on 18 August 2003
 2. Ms. Kim Sok, Secretary of the Union, was just elected, and was hired by the C.H.P. Company on 10 September 2003
 3. Ms. Mam Oeun, member of the Union, was hired by the C.H.P. Company on 22 August 2003
- The Khmer Youth Union of C.H.P. Company held its election on 5 October 2004
- The Union informed the company about the election on 5 October 2004 via letter no.123 dated 5 October 2004. Until the hearing date, the Union had not yet received the registration letter recognizing the Union.
- Khmer Youth Federation attended the negotiation meeting in order to solve the problem with the lawyer Samnang representing the C.H.P. Company on 25 October 2004 and introduced Mr. Mom Sovann and Mrs. Kim Sok who are Union leaders to Mr. Samnang. But Mr. Samnang said that the Union did not inform in writing about the Union to the company.
- No shop stewards work at the company.

- The federation confirms that it is composed of around 400 members in the factory but does not provide evidence [of this number].

REASONS FOR DECISION:

First issue:

The employees demand that the employer provide full basic wages to them even though there is no job for them.

Article 71 of the Labour Law provides some conditions for suspension of the labour contract. Point 7 and 11 of this Article 71 state that:

“The following reasons serve to suspend a labour contract:

- *Point 7- suspend temporarily a worker with the appropriate reasons set in the Internal Work Rules.*
- *Point 11- In the case of serious financial difficulties, when the operation of the enterprise is rendered economically and materially impossible or unusually difficulty. This suspension should be less than or equal to two months and is subject to review by the Labour Inspector.”*

Hence the Labour Law clearly states the conditions for labour contract suspension. Concerning this case, Article 71 of the Labour Law allows the employer to suspend a labour contract using the following means:

A. Via the Company’s Internal Work Rules, Article 71 point 7

B. Via the Labour Inspector’s review when suspending the enterprise’s operation based on Article 71 point 11 stating that the labour contract is suspended when the operation of the enterprise is rendered economically and materially impossible or unusually difficult.

The Company’s Internal Work Rules submitted to the Arbitration Council do not contain any terms telling about the labour contract suspension in accordance with Article 71 point 7. And the company does not inform the Labour Inspectors of this suspension; therefore, the Arbitration Council does not find that this suspension is permitted by Article 71 point 11.

If the company applies in the future Article 71 of the Labour Law relating to the labour contract suspension, it means that:

A. workers will not show up to work

B. The employer will not pay wages to the workers (according to Article 72 of the Labour Law).

If the company suspended the contract in accordance with Article 71 of the Labour Law and the employer requires workers to show up at the workplace during the suspended period, the Arbitration Council finds that the payment of 50 percent of basic wages to the workers who show up is acceptable. But if the employer does not suspend the contract in conformity with Article 71, the employer has to pay full wages to the workers based on the labour contract (See Arbitral Awards 21/03 - Wonrex, 46/04 - M.N.A and 60/04 - United Art).

Second issue:

The employer dismissed six workers whose contracts are undetermined duration contracts. Can the employer dismiss these six workers? Besides serious misconduct, the company can terminate the labour contract of a worker for the following reasons:

A. In case of the requirements of the operation of the enterprise

B. Based on the provisions of the Labour Law

1. In regard to fixed duration contract, Article 73 must apply

2. In regard to undetermined duration contracts, the following Articles must apply:

- Article 116 about the wages

- Articles 75 and 77 about the prior notice

- Article 89 about the dismissal compensation

- Article 91 about the damages

- Articles 166 and 167 about the annual leaves

C. The termination of the employment contract for the reasons of point A and point B above can be done as long as it does not contradict the Labour Law:

- Article 12 about the non-discrimination

- Article 279 about the protection of the Union freedom

- Article 74 about the dismissal without valid reason

- And Article 95 about the mass layoff due to the reduction of the operation

Based on Article 74 of the Labour Law, the employer can terminate a worker under an undetermined duration contract if the employer gives prior notice and has appropriate reason relating to the attitude or behavior of the worker or based on the operation requirement of the enterprise or establishment. If there is no valid reason for the termination, the worker is entitled to damages (Article 91 of the Labour Law). In this case (both undetermined and fixed duration contracts), the employer is strictly prohibited from terminating or hiring workers in reference to union membership or participation according to Article 12 and 279 of the Labour Law. For these circumstances, the decision to renew the fixed duration contract or the decision to terminate a worker under an undetermined duration

contract should be made by assuring that this termination is not made based on one's affiliation with a Union.

Regarding the six workers mentioned above, the employer says that there is no reason relating to the Union or serious misconduct, but the employer has the intention to terminate them and pay compensation in accordance with Articles 75 and 77 (regarding the prior notice), Article 89 (regarding the dismissal compensation), Article 91 (regarding the damages equal to the dismissal compensation), Articles 166 and 167 (regarding annual leave) and the wages for the last month worked.

The workers do not object to the statement by the employer for this termination but they still insist the employer reinstate them and demand the company provide any evidence to prove that this termination is not based on the belonging of the workers to the Union. The Arbitration Council introduces these issues, attitudes or behaviors of the workers and the problem of serious misconduct but no one has given any support to these. The employer just gives the answer that the company does not have much work to do that is why the employer decided to terminate them. The attorney Samnang adds more clarification that the employer is willing to terminate more workers and may close the factory because there is no work. The worker party also agrees that recently there is no work and the worker party does not raise additional reasons.

Based on the above facts, the employer has enough rights to terminate the employees if the employer can meet the following conditions:

- A. If this termination is based on no work, the employer has to select the workers who will be terminated in accordance with the procedure provided in Article 95 (see Arbitral Award - 01/03 Cambodiana)
- B. Inform the Labour Inspectors about the termination of the six workers who are specially protected by the law because these six workers are protected by Article 4 of Prakas 305/04. Article 4 of Prakas 305 provides that since the date of submitting the proposal for Union registration, all workers who are founders of the Union and who voluntarily enter the Union during this registration request are specially protected by law, the same as shop stewards. This protection is valid until 30 days after the date of Union registration given.

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

The same procedure applies to former shop stewards during the three months that follow the end of their terms, as well as to the losing candidates within the three months following the ballot. Any transfer that would end the shop steward's term is subject to the same procedure."

Since the Union submitted its registration request on 18 October 2004, all Union members are protected by law until 60 days when registered and 30 days after registration. Therefore all six workers are protected by law and their dismissal must be submitted to the Labour Inspector in order to get his approval. Though there is no discrimination made against the Union, this termination must be approved by the Labour Inspector in advance to be in conformity with the procedure set in the Labour Law.

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

DECIDES :

1. Orders the employer to continue paying full wages to all workers regardless of whether there is work, unless the contract is suspended in accordance with Article 71 of the Labour Law. If the contract is suspended in conformity with Article 71 and the employer requires the workers to show up at the workplace during the contract suspension period, the employer has to pay 50 percent of wages as compensation to those who show up while waiting for work.
2. Orders the employer to pay the remaining wages to all workers who did not receive wages in August and September 2004 when the company was incapable of providing work.
3. Orders the employer to reinstate the six workers above while waiting for the control and the decision of the Labour Inspector and to pay full wages to these six workers from the date the contract ends. If the employer refuses to reinstate them, the employer has to pay them full wages until the Labour Inspector's decision is made.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: Hem Hour Narith

Signed:

Arbitrator chosen by the worker party:

Name: Liv Sovanna

Signed:

Chair of arbitration panel:

Name: Kong Phallack

Signed:

This Award will become binding after eight 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 the parties have agreed as such in writing before the notification of the Award, or if the parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.