



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 98/07 - Sky Sino

Date of Award: 22 October 2007

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: **Ven Pov**

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

DISPUTING PARTIES

Employer party:

Name: **[Sky Sino Holdings (Cambodia) Ltd]**

Address: Por Prork Khang Tbong Village, Sangkat Kakab, Khan Dangkor, Phnom Penh

Telephone: 012 62 35 35

Representative:

Ms. Tea Chhean Por Administrative Manager.

Worker party:

Name: **Khmer Youth Federation Trade Union and Khmer Youth Trade Union at QSP**

Company (Sky Sino)

Address: Por Prork Khang Tbong Village, Sangkat Kakab, Khan Dangkor, Phnom Penh

Telephone: 012 919 714

Representatives:

1. Mr. Yun Vanna Coordinator of KYFTU;
2. Mr. Sam Saroeun Coordinator of KYFTU;
- 3- Mr. Nai Doeun Chhay President of KYTU at QSP Company (Sky Sino)

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The workers demanded that the company pay the five percent severance pay of the fixed duration contract including payment for unused annual leave because the company stops using the (three month) fixed duration contract. The employer party claimed that the company continues to implement the agreement between workers' representatives, KYTU and the company in August 2007.
2. The workers still demanded that the company reimburse each worker the medical check fee of \$3.88 that was deducted in 2006. The employer party claimed that the company cannot afford make this payment because the company is arranging for the workers to undergo medical checks again.
3. Khmer Youth Trade Union at the factory still demanded that the company deduct union contribution fees from Khmer Youth Trade Union's members who agreed that their wages be deducted as the company had done before. The company party cannot deduct the union contribution fee because the company's name was changed from QSP to Sky Sino, therefore the company will only deduct the union contribution fee for the union at Sky Sino.

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 hearing which took place on 18 September 2007 was unsuccessful, and the non-conciliation report No. 1013 was submitted to the Secretariat of the Arbitration Council on 18 September 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: 5 October 2007 (from 8:00 a.m. to 11:00 a.m.)

Procedural issues:

On 14 August 2007, the Department of Labour Disputes received a complaint from Khmer Youth Trade Union at Sky Sino factory demanding that the company improve some working conditions. Having received the complaint, the Department of Labour Disputes

designated its officials to resolve the dispute several times and the last conciliation session was held on 11 September 2007; as a result, seven of ten issues were conciliated. The three remaining non-conciliated issues were forwarded to the Secretariat of the Arbitration Council on 18 September 2007.

Having received the case, the Secretariat of the Arbitration Council summoned the employer and the worker parties to a hearing to conciliate the three remaining non-conciliated issues on 5 October 2007 at 8:00 a.m. Both parties were present as summoned by the Arbitration Council.

In the hearing, the Arbitration Council attempted to conciliate the three remaining non-conciliated issues stated in the non-conciliation report of the Department of Labour Disputes; as a result, Issue 3 was conciliated. Thus, in this case, the Arbitration Council will consider only Issue 1 and Issue 2 based on the evidence and parties' testimonies as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Letter authorizing legal rights to Ms. Tea Chhean Por dated 4 October 2007.

Provided by the worker party:

1. Letter No. 164 dated 13 February 2007 on the request for the deduction of union contribution fee of 1,000 riels from Khmer Youth Trade Union's members;

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

1. Report No. 1013 on the collective labour dispute conciliation at Sky Sino Factory dated 18 September 2007;
2. Minute of the collective labour dispute conciliation at Sky Sino dated 11 September 2007.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 449 to the worker party to attend the hearing dated 28 September 2007;
2. Invitation No. 448 to the employer party to attend the hearing dated 28 September 2007.

FACTS FINDING

- Having examined the documents submitted to the Arbitration Council
- Having examined the collective labour dispute conciliation report
- Having listened to the statements of employer and worker parties

The Arbitration Council finds that:

- Sky Sino Factory employs approximately 450 workers. The factory's name was changed from QSP to Sky Sino in July 2007.
- In this factory, there is only one union - Khmer Youth Trade Union, the claimant. The official name of this union is Khmer Youth Trade Union at QSP Factory, the company's old name. According to Khmer Youth Trade Union representatives, the union is preparing legal documents to change its name from Khmer Youth Trade Union at QSP Factory to Khmer Youth Trade Union at Sky Sino Factory.
- Among the 450 workers, most of them are former workers from QSP Factory and a small number of workers was recruited to work for Sky Sino Factory.
- According to both the worker party and the employer party, the company maintained the seniority for all former workers from QSP Factory.
- According to Khmer Youth Trade Union, there are approximately 160 members of Khmer Youth Trade Union who are working for Sky Sino Factory.
- In the hearing, the employer party rejected the discussion relevant to QSP Factory.

Issue 1: The workers demanded that the company pay the five percent severance pay of the fixed duration contract including payment for unused annual leave for any termination of the three-month probationary fixed duration contract

- The workers demanded that the company pay the five percent severance pay including payment for unused annual leave for any termination of three-month fixed duration contract of some 50 workers who started working from 1 February 2006 to 1 May 2006. These workers received US\$40 per month and they are currently working for the company and are members of Khmer Youth Trade Union. These workers do not have written contracts. The union argued that the company eliminated three-month seniority status of these workers upon issuing ID cards in May 2006; however, the workers did not provide any evidence.
- The employer rejected to discuss this issue arguing that this was the issue of QSP Factory, not of Sky Sino Factory. The employer party also mentioned that the seniority status of workers counts from the date workers become regular workers.
- The company did not include probationary period in the seniority status.
- The Arbitration Council directed the worker party to provide more evidence to support their demands including employment cards, pay slips, and name lists of workers involved in the complaint to the Arbitration Council by 9 October 2007. However, the worker party did not provide any document as directed.
- The Arbitration Council asked the employer representative whether the change of company's name was a buy-out or a bankruptcy. The company representative

answered that she did not know because she has just started her job half a month ago. The Arbitration Council directed the company to provide the buy-out agreement or the bankruptcy declaration to the Arbitration Council by 9 October 2007. However, the company party did not provide any of these documents as directed.

Issue 2: The workers demanded that the company reimburse the medical check fee of US\$3.88 that was deducted in 2006 to 160 workers

- In June 2006, the company asked the Labour Physician to undertake the medical check of workers at the factory and the company deducted the medical check fee from 160 workers.
- The employer rejected to discuss this issue arguing that this was the issue of QSP Factory, not the issue of Sky Sino Factory. The union claimed that when workers received medical checks, each of them was issued an employment book, but the union did not know the cost of the employment book nor the cost of the medical check fee either. The union only knew that the company deducted US\$3.88 from workers' wages. Therefore, [the union] requested the company to reimburse the fee. The worker party stated that payment for employment book is the burden of worker, not of the employer.

REASONS FOR DECISION

Issue 1: The workers demanded that the company pay the five per cent severance pay of the fixed duration contract including payment for unused annual leave for any termination of the three-month probationary fixed duration labour contract

In this case, the Khmer Youth Trade Union demanded that the company pay the five per cent severance pay including payment for unused annual leave for the termination of probationary oral labour contracts of 50 members of Khmer Youth Trade Union, who had worked from 1 February to 1 May 2006. However, in the hearing, the company party rejected to discuss the labour dispute with the worker party arguing that this labour issue was the issue of QSP Factory, not of Sky Sino Factory. Thus, the Arbitration Council will consider as follows:

1. Was Sky Sino Company obliged to take responsibility from QSP Factory or not when the company's name was changed from QSP Factory to Sky Sino Factory?
2. Were the workers entitled to the five per cent severance pay or not for the termination of probationary oral labour contract?
3. Were the workers entitled to the payment of unused annual leave for the termination of the probationary oral labour contract?

1. Was Sky Sino Company obliged to take responsibility from QSP Factory or not when the company's name was changed from QSP Factory to Sky Sino Factory?

Article 87 (1) of the Labour Law stipulates that, *"If a change occurs in the legal status of the employer, particularly by succession or inheritance, sale, merger or transference of fund to form a company, all labor contracts in effect on the day of the change remain binding between the new employer and the workers of the former enterprise."*

Paragraph 2 states that *the contracts cannot be terminated except under the conditions laid down in the present Section.*

Paragraph 3 states that, *"The closing of an enterprise, except for acts of God, does not release the employer from his obligations as stated in this section III. Bankruptcy and judicial liquidation are not considered as acts of God."*

Based on the Article 87 above, the Arbitration Council considers that in case a *change occurs in the legal status of the employer, particularly by succession or inheritance, sale, merger or transference of fund to form a company, all labor contracts in effect on the day of the change remain binding between the new employer and the workers of the former enterprise except for acts of God.*

In this dispute, the employer party did not provide any evidence to show how the factory was changed. Thus, based on Article 87 above, the Arbitration Council considers that *all labor contracts in effect on the day of the change remain binding between the new employer and the workers of the former enterprise except for acts of God.*

The workers claimed in the hearing that the name of the factory was changed from QSP Factory to Sky Sino Factory, but the owner remained the same.

However, based on Article 87 (3) of the Labour Law, the closing of an enterprise, except for acts of God, does not release the employer from his obligations as stated in this section III. Bankruptcy and judicial liquidation are not considered as acts of God.

Therefore, regardless of how the name was changed to Sky Sino Factory (except for acts of God), the company is still obliged to take the responsibility.

2. Were the workers entitled to the five percent severance pay or not for the termination of probationary oral labour contracts?

Article 67 (7) of the Labour Law stipulates that, *"A contract of a fixed duration must be in writing. If not, it becomes a labor contract of undetermined duration."*

Article 68 of the Labour Law provides that, *"A contract for a probationary period cannot be for longer than the amount of time needed for the employer to judge the professional worth of the worker and for the worker to know concretely the working conditions provided. However, the probationary period cannot last longer than three months*

for regular employees, two months for specialized workers and one month for non-specialized workers.”

Based on the above articles, if the labour contract is not in writing, the labour contract becomes a labour contract of undetermined duration. The probationary contract cannot exceed three months. In this case, all 50 workers had oral labour contracts; thus the labour contracts were labour contracts of undetermined duration. In the hearing, the workers said that all 50 workers had three-month probationary oral labour contracts and after the probationary oral labour contracts expired, they still continued to work for the company up until the name of the company was changed to Sky Sino.

Based on the previous Awards, the Arbitration Council interpreted that there is no case that a probationary labour contract can exceed three months. A worker, who still continues to work for the employer after the probationary period expires, shall be transformed into a regular worker and must have either a fixed duration contract or undetermined duration contract and be paid according to what the law provides; and those workers (probationary workers or other workers) are entitled to the minimum wage and other bonuses as stated in the Notification No. 017 dated 2000 and they are also entitled to annual leave as stated in the Labour Law. (See Award 55/04 - You Chheng, reason for decision on Issue 2)

Article 73 (7) of the Labour Law provides that, *“At the expiration of the contract, the employer shall provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract.”*

Based on the above Article, the workers were entitled to the five percent severance pay only when fixed duration labour contract is terminated. In this case, the 50 workers had oral labour contracts specifically undetermined duration contracts. In this case, the workers demanded that the company pay them the five per cent severance pay for the termination of fixed duration contract that was not stated in the law and the worker party did not provide any concrete evidence to support their claim.

Therefore, the Arbitration Council rejects the workers’ demand that the company pay the five per cent severance pay for the termination of undetermined duration contract of 50 workers.

3. Were the workers entitled to the payment of unused annual leave for the termination of the probationary oral labour contract?

Before going to this discussion, the Arbitration Council will consider the following questions:

- Could the workers use annual leave?
- Were the workers entitled to the annual leave?

Could the 50 workers use the annual leave?

Article 166 (1) of the Labour Law provides that, "*Unless there are more favorable provisions in collective agreements or individual labor contracts, 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 per month of continuous service.*"

Based on Article 166 (1) of the Labour Law, the Arbitration Council considers that workers are entitled to one and half day paid leave per month provided that they work continuously for one month.

Article 166 (2) of the Labour Law stipulates that, "*Any worker who has not worked for two continuous months is entitled, at the termination of his labor contract, to compensation for paid leave calculated in proportion to the amount of time he worked in the enterprise.*"

Based on paragraph 2 of Article 166, the Arbitration Council considers that any worker who has not worked for two continuous months is entitled to compensation for paid leave calculated in proportion to the amount of time he worked in the enterprise. In this case, even though the 50 workers were in their probationary period, they could use one and half day paid leave provided that they worked continuously for one month.

Were the workers entitled to the annual leave?

Article 167 (1) of the Labour Law stipulates that, "*The right to use paid leave is acquired after one year of service.*"

Based on Article 167 (1) of the Labour Law, the Arbitration Council considers that the workers could only take paid leave unless they had worked for one year, but the law does not prohibit the employer from providing annual leave to workers who have not worked for one year. The content of this paragraph is intended to show that workers can demand to use their annual leave as long as they have worked for the employer at least one year; however, if the employer agrees, workers can use the annual leave. (See Award 06/06 - MV, reason for decision on Issue 1)

In conclusion, the workers were not entitled to the annual leave, if they had not worked for one year; but the workers can use their paid leave, if they work one month continuously.

Were workers entitled to payment for unused annual leave?

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

Based on Article 167 (3) of the Labour Law, the Arbitration Council considers that the Labour Law prohibits compensation for the annual leave.

In the previous Awards, the Arbitration Council considered that, “*The demand for compensation for the annual leave is against the principle of the 1997 Labour Law. ... thus this demand is not reasonable and invalid.*” (See Awards 45/05 - B & N, reason for decision on Issue 1 and 94/04 – Eternity, reason for decision on Issue 2.)

In this dispute, the 50 workers still continued to work for the company, even though their oral labour contracts had been terminated; thus the workers could not demand for compensation for the annual leave because it does not comply with Article 167 (3) of the Labour Law.

In conclusion, the Arbitration Council rejects the workers’ demand that the company pay the five per cent severance pay including compensation for unused annual leave for the termination of the three-month probationary fixed duration contract.

Issue 2: The workers demanded that the company reimburse the medical check fee of US\$3.88 that was deducted in 2006, to 160 workers

In this case, the workers demanded that the company reimburse the medical check fee of \$3.88 to 160 workers that the company deducted workers’ wage for the medication check and the employment book in 2006. However, the company rejected to discuss this issue arguing that it was the issue of Q.P.S Factory, not of Sky Sino Factory. Thus, the Arbitration Council considers this case as follows:

Based on the interpretation in Issue 1 above, the Arbitration Council considers that the employer is obliged to take the responsibility because the 160 workers are currently working for the company and their seniority status remained.

Regarding the medical check, Article 247 (a) stipulates that, “*The Ministry in Charge of Labor shall issue a Prakas to determine the conditions under which pre-employment, re-employment, periodical, and special physical exams are given.*” Article 247 (b) states that, “*The Ministry in Charge of Labor shall issue a Prakas to determine the conditions under which employers are required to establish and provide at their expense as stated in point a of this article.*”

In the previous awards, the Arbitration Council considered that Article 247 of the 1997 Labour Law provides that the employer shall pay for the medical check fee for its workers. The Arbitration Council considers that Article 247 of the 1997 Labour Law provides enough basis to conclude that the employer is obliged to pay for the medical check fee for its workers. (See Arbitral Awards 21/03 – Loyal Cambodia, reason for decision on Issue 7, 19/04 – Kbal Koh II, reason for decision on Issue 2, 53/04 – Kong Hung, reason for decision on Issue 3, 64/04 – Mercury reason for decision on Issue 1, 78/04 – AIA, reason for decision on Issue 1, 106/04 – Suit Way, reason for decision on Issue 1, and 05/05 – GHG, reason for decision on Issue 1)

In this case, the Arbitration Council also agrees with the above interpretation that the employer shall pay for the medical check fee for its workers. In most cases including recent cases, the Arbitration Council finds that the employer is obliged to pay for the medical check fee of 10,100 riels for the medical checks undergone before 2007.

However, in this case the workers did not know how much it cost to undergo the medical checks. The workers just claimed that the company deducted \$3.88 from their wages of 160 members of Khmer Youth Trade Union for the medical examination fee and for getting a labour book issued in 2006.

Therefore, the Arbitration Council orders the company to reimburse the medical examination fee of 10,100 riels to the members of Khmer Youth Trade Union.

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

DECISION AND ORDER

Issue 1: Reject the workers' demand that the company pay the five per cent severance pay including the compensation for the unused annual leave when the three-month fixed duration contract is terminated.

Issue 2: Order the company to reimburse the medical examination fee of 10,100 riels to any worker who is able to prove that he/she is a member of the Khmer Youth Trade Union.

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: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: