



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 116/10- Whitex

Date of Award: 29 November 2010

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: **Tuon Siphann**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

DISPUTING PARTIES

Employer party:

Name: **Whitex Garment (Cambodia) Co., Ltd**

Address: Phum Trapang Thleong, Sangkat Chom Chao, Khan Dankor, Phnom Penh

Telephone: 023 995 558 Fax: N/A

Representative: Absent

Worker party:

Name: **Cambodian Federation for Workers' Rights (CFWR)**

Labour Union for Workers in Whitex Company (LUW)

Local Union of Cambodian Federation for Workers' Rights

Address: Phum Trapang Thleong, Sangkat Chom Chao, Khan Dangkor, Phnom Penh

Telephone: 012 533 832 Fax: N/A

Representative:

- | | |
|----------------------|---|
| 1. Mr. Chhum Veasna | President of CFWR |
| 2. Mr. Long Pagna | President of the Local Union of CFWR |
| 3. Mr. Seak Song | President of LUW |
| 4. Ms. Lon Sam | Vice-President of the Local Union of CFWR |
| 5. Mr. Chhean Sophat | Vice-President of LUW |

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|---------------------|--------------------------------------|
| 6. Mr. Pheap Bunly | Secretary of the Local Union of CFWR |
| 7. Mr. Prak Savuth | Activist of LUW |
| 8. Mr. Neng Thou | Activist of the Local Union of CFWR |
| 9. Mr. Cheng Puthou | Activist of the Local Union of CFWR |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the company dismiss Mr. Cheav Soktheng from the position of Chief of Administration according to the agreement, dated 21 July 2010.
- 2- The workers demand that the company reinstate the union leaders of CFWR, 10 workers' representatives, and 23 workers.
- 3- The workers demand that the company convert the status of workers who have worked for two months or more to that of regular workers.
- 4- The workers demand that the company install a water cooling system at the new building.
- 5- The workers demand that the company allow the workers who are more than two months pregnant to leave the workplace 10 minutes early.
- 6- The workers demand that the company arrange to have enough hot drinking water for the workers.

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. 133 dated 9 June 2010 (*Eighth 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. 1008 K.B/R.K/V.K dated 26 October 2010 was submitted to the Secretariat of the Arbitration Council on 26 October 2010.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, No. 72, Street 592 Corner of Street 327 (Opposite Indra Devi High School), Boeung Kak 2 Quarter, Tuol Kork District, Phnom Penh.

Date of hearing: 5 November 2010 at 2:30 p.m.

Procedural issues:

On 6 September 2010, the Department of Labour Disputes received a complaint from the Cambodian Federation for Workers' Rights (CFWR), regarding the demand for the company to improve working conditions. After receiving the claim, the Department of Labour Disputes assigned an expert officer to resolve this labour dispute and a conciliation session was held on 13 October 2010; as a result, six issues were not unresolved. The six issues were referred to the Secretariat of the Arbitration Council on 26 October 2010.

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 six non-conciliation issues on 5 November 2010 at 2:00 p.m. The workers party was present, but the employer party was absent on the hearing date. Thus, the Arbitration Council conducted the hearing *in absentia*. The Arbitration Council attempted to further the conciliation on the six issues; as a result, the workers withdrew issues 4, 5, and 6. Therefore, in this case, the Arbitration Council will consider issues 1, 2, and 3 based on evidence and reasoning as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

A. Provided by the employer party:

1. Letter from the Director of Whitex Company to the Secretariat of the Arbitration Council regarding a request to postpone the conciliation session on 12 November 2010, dated 2 November 2010.
2. Brief statement concerning a strike, dated 18 September 2010.
3. Notification 5/10, dated 4 September 2010.
4. Photograph of local union of CFWR and LUW inciting workers to go on strike.
5. Letter by the Director of Whitex Company objecting to the complaint of the Local Union of the CFWR and LUW, dated 10 November 2010.
6. Internal Work Rules of the Whitex Company, dated 17 August 2007.
7. List of names of union leaders, workers' representatives, and 30 workers who were suspended and terminated from the Whitex Company.

8. Letter of objection to union's claim from Khut Vanna, dated 17 July 2010.

B. Provided by the worker party:

1. Certificate of union registration of the LUW, dated 18 November 2008.
2. Letter, No. 1050 KB/RK/VK dated 17 September 2008, from the Head of the Department of Labour Disputes to the President of the Local Union of the CFWR regarding the recognition of the new union leaders.
3. Certificate of union registration of the Local Union of the CFWR, dated 21 December 2008.
4. Letter from the Director of the company to Mr. Long Pagna, regarding temporary work suspension, dated 2 September 2010.
5. Letter from the Director of the company to Mr. Lon Sam, regarding temporary work suspension, dated 2 September 2010.
6. Letter from the Director of the company to Mr. Pheap Bunly, regarding temporary work suspension, dated 2 September 2010.
7. Letter from the Director of the company to Mr. Seak Song, regarding temporary work suspension, dated 2 September 2010.
8. Letter from the Director of the company to Mr. Chhean Sophat, regarding temporary work suspension, dated 2 September 2010.
9. Letter from the Director of the company to Mr. Chheav Soktheng, regarding temporary work suspension, dated 2 September 2010.
10. List of names of union leaders, workers' representatives, and 30 workers who were suspended and terminated at Whitex Company.
11. Order of provisional relief, No. 10 T dated 15 September 2010, issued by the Phnom Penh Court of First Instance.
12. Letter, No. 1150 SCN dated 12 October 2010, by the Office of the Council of Ministers regarding the situation and a request to continue to implement the recommendation of the Prime Minister of Cambodia.
13. Letter, No. 1124 SCN dated 29 September 2010, by the Office of the Council of Ministers regarding a request from the Garment Manufacturers' Association in Cambodia (GMAC) to stop the strike led by Ath Thorn, President of the Cambodian Labour Confederation, and Morm Nhim, President of the Cambodian National Confederation.
14. Letter, No. 2018/10 SSSCK dated 27 October from the National Union Alliance Chamber of Cambodia to Excellency Ith Samheng and Vong Soth regarding a request to intervene in the case concerning the suspension of the five union leaders and 25 union activists at Whitex Company.

15. [Letter from] CFWR to the Head of the Secretariat of the Arbitration Council regarding the request to submit a brief report concerning the strike by the workers at Whitex Company, dated 2 November 2010.
16. List of names of the workers who volunteered to participate in the strike.

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

1. Report of collective labour dispute resolution at Whitex Company, No. 1008 KB/RK/VK, dated 26 October 2010.
2. Minutes of collective labour dispute resolution at Whitex Company, dated 13 October 2010.

D. Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 630 KB/AK/VK/LKA dated 28 October 2010 to invite the company to attend the hearing.
2. Invitation letter No. 631 KB/AK/VK/LKA dated 28 October 2010 to invite the workers to attend the hearing.

FACTS

- Having examined the report of collective labour dispute resolution
- Having listened to the statement of the worker, and
- Having reviewed additional documents

The Arbitration Council finds that:

- Whitex Company employs 1,800 workers.
- LUW and the local union of CFWR are the claimants in this case.
- The unions attended the hearing, but the employer was absent.

Issue 1: The workers demand that the company dismiss Mr. Cheav Soktheng from the position of Chief of Administration according to the agreement, on 21 July 2010.

- The workers stated the reason for this demand is that Mr. Cheav Soktheng, the Head of Administration use inappropriate language towards the workers. Moreover, it is alleged that he threw the workers' food away when they brought it into the workplace. Further, it is asserted that he took photographs of the workers who punched in the attendance cards of other workers on their behalf and posted it [on the wall] of the factory as well as distributed it to other workers.

- On 20 July 2010, the workers went on strike demanding the company dismiss Mr. Cheav Soktheng. At that time, the company agreed to the demand, but no written agreement was reached.
- On 21 July 2010, the company dismissed Mr. Cheav Soktheng and he had not come to work for one month following the dismissal.
- On 30 August 2010, the company reinstated Mr. Cheav Soktheng to the Marketing and Inspection Division.
- On 31 August 2010, the workers went on strike again because they saw Mr. Cheav Soktheng working at the Office of Administration even though he was transferred to the Marketing and Inspection Division. Moreover, Mr. Sokha was still the Head of this Division. Thus, the workers considered that Mr. Cheav Soktheng was still the Head of Administration. Therefore, the workers demand the company dismiss Mr. Cheav Soktheng, the Head of Administration, in accordance with the agreement on 21 July 2010.
- The Arbitration Council finds that the letter, dated 28 October 2010, of arbitrator selection specifies that Mr. Bon Sihata was the Head of Administration. The Arbitration Council asked the workers whether they knew Mr. Bon Sihata was the Head of Administration. The workers responded that Mr. Bon Sihata was an assistant to the Administrator.
- The Arbitration Council requested the workers to submit documents and evidence supporting the claim that Mr. Cheav Soktheng was still the Head of Administration by 11 November 2010. The Arbitration Council has not received any evidence from the workers before the due date; however, the Council received a notification, No. 5/10 dated 4 September 2010, of the company stipulating that *“Point 1: the company confirms that Mr. Cheav Soktheng has resigned from the Head of Administration and Human Resources since 20 August 2010. Point 2: He is transferred to the Marketing and Inspection Division. Therefore, he has stopped working with the workers”*. The workers did not lodge an objection to the said notification.

Issue 2: The workers demand that the company reinstate the union leaders, two worker’s representatives, and 23 workers.

- The workers stated that they demanded the company reinstate the five union leaders, two workers’ representatives, and 23 workers. Their names are as follows:

A- Local union of CFWR:

No.	Name	Sex	Local union of CFWR	Date of work commencement	Suspension Date
1	Long Pagna	M	President	24/12/05	3/9/10
2	Lon Sam	M	Vice-President	29/11/05	3/9/10
3	Pheap Bunly	M	Secretary	11/01/08	3/9/10

B- Labour Union for Workers at Whitex Company:

No.	Name	Sex	Labour Union for Workers' Rights	Date of work commencement	Suspension Date
1	Seak Song	M	President	23/6/08	3/9/10
2	Chhean Sophat	M	Secretary	18/12/07	3/9/10

- The workers stated that the company issued letters of suspension for the union leaders on 2 September 2010 and they were suspended on 3 September 2010.

C- Workers' Representatives:

No.	Name	Sex	Workers' Representative	Date of work commencement	Suspension Date
1	Neng Thou	M	Workers' Representative	5/8/08	6/9/10
2	Thorn Sopheap	F	Workers' Representative	4/1/06	25/9/10

D- Suspended workers (the union stated that they were union activists):

No.	Name	Sex	Date of work commencement	Suspension Date
1	Prak Savuth	M	5/8/08	6/9/10
2	Cheng Puthou	M	3/7/08	6/9/10
3	Pin Soklim	F	Not stated	7/9/10
4	Sambath Vanna	M	22/5/08	7/9/10

E- Dismissed/terminated workers (the union stated that they are union activists):

No.	Name	Sex	Date of work commencement	Dismissal Date
1	Chea Phon	F	Not stated	25/9/10

2	Im Thouch	F	Not stated	25/9/10
3	Oeun Sophal	F	Not stated	25/9/10
4	Soeun Seyha	F	Not stated	25/9/10
5	Long Sitha	F	19/1/10	25/9/10
6	Thorn Sophron	F	4/1/06	25/9/10
7	Chea Chantha	F	1/6/06	25/9/10
8	Cham Sorn	F	1/10/09	25/9/10
9	Chorn Seyha	F	Not stated	25/9/10
10	Oeun Reth	F	Not stated	25/9/10
11	Suon Ros	F	Not stated	25/9/10
12	Chem Chantha	F	Not stated	25/9/10
13	Sos Saora	F	16/2/06	25/9/10
14	Lim Raskmey	F	26/4/06	25/9/10
15	Long Hon	F	16/11/09	25/9/10
16	Sok Nith	F	Not stated	25/9/10
17	Sos Navy	F	12/1/08	25/9/10
18	Va Thea	F	Not stated	25/9/10
19	Om Sreyoun	F	Not stated	25/9/10

- The workers stated that some of the 30 workers mentioned above held fixed duration contracts and some held undetermined duration contracts. It is asserted that the reason for termination and suspension of these workers was their demand for the termination of Mr. Cheav Soktheng.

The workers stated the reason why the 30 workers were dismissed as follows:

- On 20 July 2010, the workers went on strike demanding the company dismiss Mr. Cheav Soktheng.
- On 21 July 2010, the company issued a letter of termination for Mr. Cheav Soktheng, to be effective from next month. This means that he would be dismissed from 21

August 2010 onwards. The workers added that he did not come to work from 21 August 2010 to 29 August 2010.

- On 30 August 2010, the company reinstated him to the Marketing and Inspection Division. The workers stated that they saw him working in the Office of Administration and they inferred that he was still the Head of Administration. Thus, on 31 August 2010 at 7:00 a.m. the workers went on strike again demanding the company dismiss Mr. Cheav Soktheng in accordance with the agreement on 21 July 2010, stipulated that the company had decided to dismiss Mr. Cheav Soktheng.
- On 31 August 2010, at 9:00 a.m., officers from the Ministry of Labour and Vocational Training conciliated the demand for the company to dismiss Mr. Cheav Soktheng. The conciliation was unsuccessful.
- On 3 September 2010, the Arbitration Council received a non-conciliation report from the Ministry of Labour and Vocational Training.
- On the same date, the Arbitration Council issued an interim order for the workers to return to work on 4 September 2010 that the employer must reinstate the workers on strike.
- On 13 September 2010, the Arbitration Council issued an award to terminate the arbitral process in case 103/10-Whitex (the reason was that the workers did not follow the interim order and continued to participate in the strike even though the workers and the employer held a meeting before the hearing at the Arbitration Council on 7 September 2010). (See Arbitral Award 103/10-Whitex)
- On 15 September 2010, the Phnom Penh Court of First Instance issued an order of provisional relief.
- On 16 September 2010, the workers returned to work and by 19 September 2010, all the workers returned to work, but the company dismissed 19 workers and one workers' representative [on 25 September 2010]. (See the list of names above)
- The workers argued that the company suspended the union leaders and workers' representatives contrary to the Law because it did not give them prior notice and the suspension was not authorised by the Labour Inspector.

- The workers added that the employer also dismissed 19 other workers and did not tell them the reason of termination. They claim that the workers did not commit an act of misconduct.
- In the non-conciliation report and brief statement of the company dated 18 September 2010, the employer did not agree to reinstate the union leaders, workers' representatives, and workers because it accused them of inciting other workers to go on strike from 31 August 2010 to 18 September 2010.

Issue 3: The workers demand that the company convert the status of workers who have worked for two months or more to that of regular workers.

- The workers stated that the company had three kinds of employment contracts: casual contract (for floating workers), probationary contract of 2 months, and fixed duration contracts of 6 months (for permanent workers). The casual workers also worked 8 hours, the same as permanent workers and even though they had worked for more than two months (some had worked for 5, 6, or 7 months), the company did not convert the status of the workers to that of permanent workers. The workers argued that nearly 200 casual workers had worked for more than 6 months.
- The workers stated the reason for the demand that the casual workers did not receive the same benefits as those of permanent workers; for instance, they were not entitled to paid annual leave, seniority bonus, 5% of wages for the severance payment, paid holidays and special leave. The workers stated that the casual workers did not receive wages when they did not come to work on paid holidays. Therefore, the casual workers had to work on paid holidays in order to receive wages. Therefore, they demanded the company convert the status of casual workers who had worked for more than 2 months to that of regular workers.

REASONS FOR DECISION

On the hearing date, the company was not present as invited by the Secretariat of the Arbitration Council. Therefore, before considering the issue, the Arbitration Council will determine whether it is able to conduct the hearing in the absence of the employer.

Clause 21 of *Prakas*, 99 dated 21 April 2004, states “[i]n the case that one of the parties, although duly invited, fails to appear before the arbitration panel without showing

good cause, the arbitration panel may proceed in the absence of that party or may terminate the arbitral proceedings by means of an award.”

Based on this clause, in previous Arbitral Awards, the Arbitration Council held that it can conduct the hearing *in absentia* in the case where the employer was duly invited, but failed to appear before the Arbitration Council without showing good cause. (See Arbitral Awards 53/04-Kuong Hong, 63/04-Shine Well, 148/07-Pay Her, 99/09-Kingsland and 118/09-Sou Fong)

In this case, the local unions attended the hearing, but the employer was absent on the grounds that it had to attend a meeting on [Garment] Import and Export and the Director also was abroad during this time. The workers argued that the employer wants to delay the hearing for its advantage and emphasized this dispute had not been resolved for 2 months. The workers, as the claimant, requested the Arbitration Council to consider the issues without waiting for the employer.

In this case, the Arbitration Council considers that the reason for the postponement hearing from the employer is not sufficient nor reasonable for the Arbitration Council to postpone the hearing and not to resolve the demand of the claimant.

Therefore, the Arbitration Council decides to continue its process *in absentia* and before the workers based on the legal principles, evidence and argument of the workers in the hearing.

Issue 1: The workers demand that the company dismiss Mr. Cheav Soktheng from the position of Chief of Administration according to the agreement on 21 July 2010.

The workers demand the company dismiss Mr. Cheav Soktheng from the position of Chief of Administration because he has used inappropriate language towards the workers. It is asserted that he has also thrown the workers' food away when they bring it into the workplace. Furthermore, it is alleged that he took photographs of the workers who punched in the attendance cards of other workers on their behalf and he had posted the photos [on the wall] of the factory as well as distributed them to other workers. The Arbitration Council considers whether the workers are entitled to demand the company dismiss Mr. Cheav Soktheng.

Article 65, paragraph 1, of the Labour Law, states “[a] labour contract establishes working relations between the worker and the employer. It is subject to common law and can be made in a form that is agreed upon by the contracting parties...”

Article 1 of the Decree 38 on Contracts and Other Liabilities, dated 28 October 1988, states “[a] contract is an agreement between two or more persons to create, change or terminate one or more obligations which bind them...”

Based on these articles, the Arbitration Council considers that only the parties to the contract can terminate the contract and that is the employer and each worker. The third party is not entitled to terminate employment contracts between the employer and the workers.

In the findings of fact, after the workers demanded the dismissal [of Mr Cheav Soktheng, the Head of Administration] on 20 July 2010, the employer agreed to dismiss him the one month later by letter dated 21 July 2010. On 30 July 2010, the company reinstated him to the Marketing and Inspection Division. On 31 August 2010, the workers went on strike again because they saw him working in the office of Administration even though he was transferred to another Division. Furthermore, the Head of the Marketing and Inspection Division remained unchanged and the company did not issue a job announcement for the new head of this Division. For the new head of Administration who came to choose the arbitrator, the workers considered him as an assistant to the Administrator. The workers still consider Mr. Cheav Soktheng as the Head of Administration.

The Arbitration Council considers that the issue is whether Mr. Cheav Soktheng is still working as the Head of Administration.

In the findings of fact, the Arbitration Council finds that the employer, the party to the contract with the Head of Administration, had dismissed him in accordance with the agreement on 21 July 2010 and transferred him to the Marketing and Inspection Division. During the hearing, the Arbitration Council finds that the workers did not know clearly about his current position, whether or not he is able to authorise the workers' leave and merely saw him sitting in the Administration office. The Arbitration Council considers the fact that he was sitting in the Administration office was not sufficient to confirm that he was still the Head of Administration. The Arbitration Council also requested the workers to submit documents and evidence supporting their claim by 11 November 2010. However, the Arbitration Council has not received any document or evidence by the due date.

The Arbitration Council considers that the workers have not provided sufficient evidence or argument proving that he really works in the Administration office. Since the employer has transferred him to another Division, the Arbitration Council considers that the workers do not have an issue concerning the transfer of the Head of Administration.

Therefore, the Arbitration Council rejects the workers' demand for the employer to transfer Mr. Cheav Soktheng.

Issue 2: The workers demand that the company reinstate the union leaders, two worker's representatives, and 23 workers.

A. Case of the five union leaders and two workers' representatives

Before considering whether the employer must reinstate the five union leaders, the Arbitration Council considers whether their suspension complies with the Labour Law.

Article 293 of the Labour Law states “[t]he dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector...

The Labour Inspector, who has been referred a request to authorise the dismissal of a worker covered by the present article, shall give his decision to the employer and to the worker in question as well as to the union organisation to which the worker belongs, within one month at the latest upon receipt of the case...

If there is no notification of the Labour Inspector's decision within the allotted time, or if there is no notification of the decision of Minister in Charge of Labour within two months upon receipt of the appeal, the case.. are considered to be rejected.”

Clause 4 of Prakas 305 SKBY dated 22 November 2001 issued by the Ministry of Social Affairs, Labour, Vocational Training, and Youth Rehabilitation states “*the protection will be granted to 3 syndicate leaders in terms set out in articles 282 and 293 of labour law.*”

Article 295 of the Labour Law states “[i]n the case of serious misconduct, the manager of enterprise can render the decision to instantly suspend the party in question pending the Labour Inspector's decision. If the Labour Inspector turns down the dismissal, the suspension is annulled and its effects are cancelled lawfully.”

Article 293 of the Labour Law requires the employer to send a request for termination of workers' delegates or union leaders to the Labour Inspector and Article 295 allows the employer to suspend the workers' contract if the workers have committed serious misconduct. So, the employer is able to suspend the workers' contract in case of serious misconduct, but the employer also must send a request for termination to the Labour Inspector if it intends to terminate the workers.

In this case, the employer suspended the five union leaders in accordance with the Labour Law, the Internal Work Rules, and the letter dated 2 September 2010 because they incited other workers to go on strike and shouted in the office, which was against the Internal Work Rules; however, the Arbitration Council did not receive any letter from the employer, certifying that the employer has sent a request for termination of the five workers to the Labour Inspector.

The Arbitration Council considers that the suspension of the five workers without sending a request to the Labour Inspector is not legitimate. If the company intends to terminate the five workers, it has to immediately submit a request for termination to the Labour Inspector to minimise the effect on their livelihood and work.

Article 295 of the Labour Law does not require the company to ask for approval from the Labour Inspector in order to suspend the workers, but Article 293 requires the employer to ask for approval from the Labour Inspector if it intends to terminate the workers.

In addition, the Arbitration Council considers that Article 83 B (5) of the Labour Law states “[t]he following are considered to be serious offenses: On the part of the worker: *Inciting other workers to commit serious offenses*”

In Arbitral Award 20/05-Fortune, issue 2, the Arbitration Council interpreted this article to mean that “*this shall not apply to inciting or calling workers to go on strike even if the strike did not follow the proper legal procedures (see AA 08/05-Winner Knitting dated 23 June 2005) unless the employer has evidence to prove that Mr. Sok Vy incited workers to use violence during the strike.*”

In this case, the Arbitration Council agrees with the above interpretation that even though the strike did not follow the proper legal procedures, an act of the union leaders could not be considered as serious misconduct unless the employer has evidence to prove that the union leaders incited the workers to be violent during the strike.

In conclusion, the Arbitration Council considers that the suspension of the five workers is not legitimate. Therefore, the employer must reinstate the union leaders.

B. Case of the 23 workers

In previous Arbitral Awards, the Arbitration Council held that “*participation in a strike is not a serious misconduct.*” (See AAs 76/04-M&V, issue 3; 70/04-Hana, issue 1; and 125/09-Wincam Corporation, issue 1)

In this case, the Arbitration Council agrees with the Arbitration Panels in previous Arbitral Awards. The Arbitration Council considers that the right to strike is provided for in the Labour Law and the Cambodian Constitution. Participation in a strike cannot be considered as serious misconduct and so it is not a legitimate basis for termination.

Moreover, Article 332, paragraph 2 of the Labour Law, states “*[t]he worker shall be reinstated in his job at the end of the strike.*”

Article 333 of the Labour Law states “*[t]he employer is prohibited from imposing any sanction on a worker because of his participation in a strike. Such sanction shall be nullified and the employer shall be punishable by a fine in the amount set in Article 369 of Chapter XVI.*”

In Arbitral Award 01/06-Goldtex Hing Shing, issue 7, the Arbitration Council held that “*the termination of the workers based on their participation in the strike is illegal.*”

In this case, the employer began to dismiss the workers who returned to work after the court issued an order of provisional relief and it accused the workers of abandoning their work; however, the Arbitration Council considers that the termination contradicts Articles 332 and 333 of the Labour Law and previous jurisprudence of the Arbitration Council. Thus, the Arbitration Council considers that the termination is not based on a valid reason.

Clause 34 of *Prakas* 99, SKBY dated 21 April 2004, states “[i]n matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of

provisions provided in the Labour Law, implementing regulations under the Labour Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labour 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;”*

Thus, based on the above interpretation and clause, the Arbitration Council orders the employer to reinstate the 19 workers.

Issue 3: The workers demand that the company convert the status of workers who have worked for two months or more to that of regular workers.

In this case, the workers demand the company to convert the status of casual workers to that of regular workers because they work eight hours, the same as the regular workers and they also have worked for more than two months, but the company has not changed them to be regular workers. The workers state the casual workers do not receive benefits as those of the regular workers; for instance, they are not entitled to paid annual leave, seniority bonus, 5% of wages for severance payment, paid holidays and special leave. Therefore, they demand the company convert the status of casual workers who have worked for more than two months to that of regular workers. Thus, the Arbitration Council considers this case as follows:

Article 9 of the Labour Law states *“[i]n accordance with the stability of employment, it is distinguished:*

- *regular workers*
- *casual workers, who are engaged to perform an unstable job.*

Regular workers are those who regularly perform a job on a permanent basis.

Casual workers are those who are contracted to:

- *perform a specific work that shall normally be completed within a short period of time.*
- *perform a work temporarily, intermittently and seasonally.”*

Article 10 of the Labour Law states *“[c]asual workers are subject to the same rules and obligations and enjoy the same rights as regular workers, except for the clauses stipulated separately.”*

Based on the previous jurisprudence and Articles 9, 10, 166, and 168 of the Labour Law, the Arbitration Council held that when the employer calls the worker as a casual worker or [any name] like that, or if any worker has been working for at least 21 days on average for a period of two months without interruption, then those workers shall be deemed to be

regular workers. (See AAs 26/04-Cambodia Sport Ware and 10/08-GHG and 111/09-Hoyear, issue 1)

The Arbitration Council has decided on new jurisprudence concerning casual workers in Arbitral Award 97/08-Eternity Apparel, issue 10, in which it interpreted Articles 9 and 10 of the Labour Law to mean that “...casual workers and regular workers are entitled to the same rights and obligations. This means that, based on an interests perspective, it is not an issue whether the workers are called casual workers or regular workers, because Article 10 of the Labour Law clearly provides guidance concerning this matter. The present dispute concerns the legal effect of the conversion of casual workers to regular workers. However, changing the type of worker does not have any legal effect. The most important thing is workers’ benefits according to the Law...”

In this case, the Arbitration Council agrees with the above jurisprudence that the most important thing is the workers’ benefits and rights. Thus, both casual and regular workers are entitled to the same rights, benefits, and obligations according to the law, such as wage, attendance bonus, seniority bonus (in case the casual workers continue to work until they are entitled to this bonus), annual leave, severance payment, and other benefits.

The Arbitration Council finds that the company employed casual workers and some of them had worked for 6-7 months, and they were still casual workers; the company did not provide them with paid annual leave, seniority bonus, 5% of wages for severance payment, paid holidays, and special leave. Thus, the Arbitration Council considers that this practice is not consistent with Article 10 of the Labour Law. Therefore, the Arbitration Council considers that the employer must provide benefits to the casual workers the same as those of the regular workers.

In conclusion, the Arbitration Council orders the employer to convert the status of casual workers (floating workers) who have worked consecutively for more than two months to that of regular workers (permanent workers) and to provide rights and benefits to the casual workers as those of the regular workers.

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 for the employer to transfer Mr. Cheav Soktheng.
- Issue 2:** Order the employer to reinstate the five union leaders.
Order the employer to reinstate the 19 workers.
- Issue 3:** Order the employer to convert the casual workers (floating workers) who have worked consecutively for more than two months to that of regular workers (permanent workers) and to provide rights and benefits to the casual workers as those of the regular workers.

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: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature:



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

The Arbitration Council

would like to inform:

- The Director of Whitex Company
- Labour Union for Workers at Whitex Company, and
- Local union of Cambodian Federation for Workers' Rights

Subject: That this addendum is issued to supplement the Arbitral Award 116/10

- to provide more reasons for decision on issue 2 concerning the termination of the two workers' representatives, and
- to rectify the number of the workers from 19 to 23 for reinstatement.

Due to an oversight, the Arbitration Council would like to correct the Arbitral Award 116/10 as follows:

Reasons for Decision:

Issue 2: The workers demand that the company reinstate the union leaders, two workers' representatives, and 23 workers.

B. Case of the 23 workers

"...The Arbitration Council orders the company to reinstate the 19 workers." The Arbitration Council would like to rectify this statement to ***The Arbitration Council orders the company to reinstate the 23 workers.***

C. Case of the two workers' representatives

In previous Arbitral Awards, the Arbitration Council held that *“participation in a strike cannot be considered as serious misconduct”* (See Arbitral Awards 76/04-M&V, issue 3; 70/04-Hana, issue 1; and 125/09-Wincam Corporation, issue 1)

In this case, the Arbitration Council agrees with the Arbitration Panels in previous cases. The Arbitration Council considers that the right to strike is provided for in the Labour Law and the Cambodian Constitution. Participation in a strike cannot be considered as serious misconduct and that is not a valid basis for termination.

In addition, Article 332, paragraph 2, of the Labour Law states, *“[t]he worker shall be reinstated in his job at the end of the strike.”*

Article 333 of the Labour Law states, *“[t]he employer is prohibited from imposing any sanction on a worker because of his participation in a strike. Such sanctions shall be nullified and the employer shall be punishable by a fine in the amount set in Article 369 of Chapter XVI.”*

In this case, the employer suspended Mr. Neng Thou on 6 September 2010 and Mr. Thorn Sopheap on 25 September 2010 and accused them of abandoning their work. The employer did not provide sufficient evidence to prove that the two workers really abandoned their work, such as an attendance sheet which proved that they were absent without a proper reason. Moreover, the suspension of these workers took place after they joined the strike and the employer dismissed other 23 workers after the strike. The Arbitration Council considers that the facts presented by the workers are more consistent than those provided by the employer because the employer only asserted that the termination was on the ground of abandonment of duties.

Thus, the Arbitration Council considers that the employer's practice contradicts Articles 332 and 333 of the Labour Law. Therefore, the Arbitration Council holds that the employer's suspension of the labour contract is not legitimate.

Clause 34 of *Prakas*, 99 SKBY dated 21 April 2004, states *“[i]n matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of provisions provided in the Labour Law, implementing regulations under the Labour Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labour 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;”

In conclusion, based on the said interpretation and clause, the Arbitration Council orders the company to reinstate Mr. Neng Thou and Mr. Thorn Sopheap.

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

DECISION AND ORDER

Issue 2:

- Order the employer to reinstate the 23 workers.
- Order the employer to reinstate the workers' representatives: Mr. Neng Thou and Mr. Thorn Sopheap.

Note: This modification does not affect the merit of the decision and other orders of the Arbitration Council, which were issued on 29 November 2010.

The Arbitration Council would like to offer an apology to the Director of the Whitex Company, the President of Labour Union for Workers, and the President of Local union of Cambodian Federation for Workers' Rights.

This addendum will be attached to Arbitral Award 116/10-Whitex issued by the Secretariat of the Arbitration Council.

Phnom Penh, 2 December 2010

Arbitrators' signatures

Pen Bunchhea

Ing Sothy

Tuon Siphann

