



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 46/11-San Lei Fung

Date of Award: 6 May 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Mar Samborana**

Arbitrator chosen by the worker party: **Liv Sovanna**

Chair Arbitrator (chosen by the two Arbitrators): **Ang Eng Thong**

DISPUTANT PARTIES

Employer party:

Name: **San Lei Fung Garment & Woolen Knitting Factory Ltd (the employer)**

Address: National Road 2, Chak Angreloeu Commune, Meanchey District, Phnom Penh

Telephone: 012 222 879

Fax: N/A

Representatives:

1. Mr Sok Hak Representative of the employer
2. Mr Kong Kimchi Representative of the employer
3. Mr Long Heang Officer of the Garment Manufacturers Association in Cambodia

Worker party:

Name: **Cambodian Labour Union Federation (CLUF)**

Local Union of CLUF

Address: #788, St.474, Boeung Trabek Commune, Chamkamorn District, Phnom Penh

Telephone: 077 776 181

Fax: N/A

Representatives:

1. Mr Chhay Sophea Deputy General-Secretary of CLUF
2. Mr Seng Menghong Officer of CLUF

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| 3. | Mr Heng Thyda | President of the Local Union of CLUF |
| 4. | Mr Prum Sovanasa | Vice-President of the Local Union of CLUF |
| 5. | Mr Men Yuthy | Assistant to the Local Union of CLUF |
| 6. | Mr Sun Sovandeth | Assistant to the Local Union of CLUF |
| 7. | Mr Van Veasna | Assistant to the Local Union of CLUF |
| 8. | Mr Lak Pov | Advisor to the Local Union of CLUF |
| 9. | Mr Sen Pithna | Member of the Local Union of CLUF |

ISSUES IN DISPUTE

(From the Non-Conciliation Report from the Ministry of Labour and Vocational Training)

1. The workers demand that the employer provide them with sufficient work. Otherwise, it should allow the workers to take paid leave at a rate of 100% of their wages. The employer has not provided them with work since November 2010. However, it has paid 50% of the workers' main wages.
2. The workers demand that the employer renew their employment contracts with contracts of at least one year's duration. The employer states that it cannot renew the current contracts with one year contracts. The employer's practice is to offer three month employment contracts, and the workers agreed to these contracts before starting work.
3. The workers demand that the employer provide an additional US\$ 6 of wages per month to group leaders. The employer states that it is not possible to increase the group leaders' wages because they are already being paid above the minimum wage.

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. 408 KB/RK/VK dated 8 April 2011 was submitted to the Secretariat of the Arbitration Council on 8 April 2011.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 22 April 2011 at 8:30 a.m.

Procedural issues:

On 24 February 2011, the Department of Labour Disputes received a complaint from the Local Union of CLUF outlining the workers' demand that the employer improve working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to resolve the dispute and the last conciliation session was held on 7 April 2011. As a result, five of the eight issues were conciliated. The three non-conciliated issues were referred to the Secretariat of the Arbitration Council on 8 April 2011 via non-conciliation report No. 408 KB/RK/VK dated 8 April 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the three non-conciliated issues, held on 22 April 2011 at 8:30 a.m. Both parties were present at the hearing. The Arbitration Council attempted to conciliate the three issues, resulting in issue one being resolved.

Since both parties are signatories to the *Memorandum of Understanding On Improving Industrial Relations in the Garment Industry* (MoU), dated 28 September 2010, the Arbitration Council will divide the issues into two types: rights disputes and interests disputes. In accordance with the MoU, both parties have agreed to choose binding arbitration on rights disputes. [However, this does not apply to interests disputes.] The parties are able to choose non-binding arbitration on interests disputes, and can object to an arbitral award on such disputes.

Such an objection will not affect the parties' obligation to implement an award on rights disputes in accordance with the spirit of the MoU.

The Arbitration Council will consider the remaining issues in dispute [issues two and three] 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. Authorisation letter from the Director of the employer to Sok Hak, Kong Kimchi, and Long Heang, dated 20 April 2011.

2. Letter from the employer to the Arbitration Council dated 26 April 2011 [submitted after the hearing], objecting to the Local Union of CLUF's claim of Most Representative Status.

B. Provided by the worker party:

1. Certificate of registration of the Local Union of CLUF, dated 30 August 2002.
2. Letter, No. 110 KB/RK/VK, dated 26 April 2011, from the Head of the Department of Labour Disputes to the President of the Local Union of CLUF, regarding its request for recognition of the new union leaders and its fourth term.
3. Certificate of Most Representative Status (MRS) of the Local Union of CLUF, No. 083 SKBY, dated 6 March 2003.

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

1. Report of collective labour dispute resolution at San Lei Fung Garment & Woolen Knitting Factory Ltd, No. 408 KB/RK/VK, dated 8 April 2011.
2. Minutes of collective labour dispute resolution at San Lei Fung Garment & Woolen Knitting Factory Ltd, dated 7 April 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend to the hearing, No. 266 KB/AK/VK/LKA, dated 12 April 2011, addressed to the employer.
2. Notice to attend the hearing, No. 267 KB/AK/VK/LKA, dated 12 April 2011, addressed to the workers.
3. Agreement on a binding award on rights disputes, dated 22 April 2011.

FACTS

- Having examined the report of collective labour dispute resolution;
- Having listened to the statements of the representatives of the employer and the workers; and
- Having reviewed the additional documents;

The Arbitration Council finds that:

- San Lei Fung Garment & Woolen Knitting Factory Ltd employs a total of 176 workers.
- There is only one union at San Lei Fung, the Local Union of CLUF, which is the claimant in this case.
- The union represents 19 workers. Although the union had a certificate of MRS, dated 6 March 2003, it has now expired.

Issue 2: The workers demand that the employer renew the employment contracts of casual workers (floating workers) with contracts of at least one year's duration.

- The employer previously employed casual workers under three month fixed duration contracts.
- The employer has now stopped hiring casual workers.
- The workers demand that the employer sign one year fixed duration contracts with casual workers in the future, in the interest of a long-term employment relationship.
- The employer claims that it cannot accommodate the demand.

Issue 3: The workers demand that the employer provide an additional US\$ 6 of wages per month to group leaders.

- There are six group leaders receiving US\$ 89 of main wages per month.
- The workers make this demand because in the past six months the employer has not had enough work for them, and consequently they have not received a sufficient wage to meet their daily living expenses.
- The employer asserts that it will not agree to the demand, on the grounds that the existing wage for group leaders exceeds the minimum wage provided for by law.
- The parties do not have Internal Work Rules, an agreement, or collective agreement stipulating payment of an additional US\$ 6 of wages per month to group leaders.

REASONS FOR DECISION

Since both parties are signatories to the MoU, in which they have agreed to choose binding awards on rights disputes, the Arbitration Council will consider whether each demand gives rise to an interests dispute or rights dispute.

In previous Arbitral Awards, the Arbitration Council has held that “a rights dispute is a dispute concerning entitlements in the law, an agreement or a collective agreement” (see AA 05/11-M&V 1, reasons for decision, issue 1 and 5; 13/11-Gold Kamvimex, reasons for decision, issue 1 and 2; 14/11-GHG, reasons for decision, issue 4; and 37/11-ASD, reasons for decision, issue 1).

In this case the Arbitration Council agrees with the above interpretation; a rights dispute is a dispute concerning entitlements in the law, an agreement, or a collective agreement.

Issue 2: The workers demand that the employer renew the employment contracts of casual workers (floating workers) with contracts of at least one year's duration.

This dispute arises from a valid and enforceable contract and has a basis in the Labour Law and Decree 38 on Contracts and Other Liabilities. Therefore, the dispute is a rights dispute.

The employer and its casual workers signed three month fixed duration contracts. The workers demand that the employer sign one year contracts with casual workers in the interest of a long-term employment relationship.

The Arbitration Council considers whether the employer is required to renew the contracts of casual workers with one year contracts.

Article 65 of the Labour Law states:

A labour contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties.

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

Article 22 of Decree 38 states “[a] contract is a legally binding agreement between the parties.”

In previous Arbitral Awards, the Arbitration Council has interpreted the above articles as follows:

Article 65 of the Labour Law places an employment contract under the general provision of Civil Code, meaning that the employment contract is of lesser authority than Decree 38 on Law Referring to Contract and Other Liabilities. Based on Articles 1 and 22 of Decree 38 on Law Referring to Contract and Other Liabilities, the employment contract can be made so long as there is an agreement between the employer and the workers, not the third party- beside the employer and the workers- who forces the parties to the contract to enter into the employment contract” (see AA 131/09-Medcrest, reasons for decision, issue 3; 54/10-USA, reasons for decision, issue 6; 68/10-USA, reasons for decision, issue 4).

In this case, the Arbitration Council agrees with this interpretation: a contract can be formed so long as there is an agreement between the worker and the employer. Neither party to a contract can force the other to enter into a contract without consent.

In light of the interpretation above, the Arbitration Council is of the view that the workers' demand is legitimate only if the employer agrees to the new contracts or the law requires the employer to do so. In this dispute, the employer did not agree to the demand, asserting that its practice is to sign only three month fixed duration contracts with casual workers. The Arbitration Council cannot compel any party to sign a contract which is against their will, for which they do not give prior consent and/or where there is no basis in the law.

In conclusion, the Arbitration Council rejects the workers' demand that the employer sign one year fixed duration contracts with casual workers.

Issue 3: The workers demand that the employer provide an additional US\$ 6 of wages per month to group leaders.

Before deciding on this issue, the Arbitration Council considers whether the demand gives rise to an interests dispute or rights dispute.

The workers demand that the employer increase the wages of six group leaders by US\$ 6 per month. The group leaders receive more than the minimum wage provided for by law.

The Arbitration Council finds that the demand has no basis in the Labour Law, Notifications, Internal Work Rules, an agreement or a collective agreement, thus making it an interests dispute.

With respect to an interests dispute, the Arbitration Council considers MRS of the union that is a disputant party. In this case, the Arbitration Council finds that the Local Union of CLUF has an expired certificate of MRS.

In previous Arbitral Awards, the Arbitration Council has declined to consider an interests dispute if the union bringing the dispute to the Council does not have MRS (*see Arbitral Awards 81/04-Evergreen, reasons for decision, issue 4; 09/05-Kin Tai, reasons for decision, issue 2; 84/07-Yung Wah 2, reasons for decision, issue 1; 108/07-8 Star Sportswear, reasons for decision, issue 3; 135/07-Wilson, reasons for decision, issue 1; 14/08-Quicksew, reasons for decision, issue 3; 101/08-GDM, reasons for decision; 42/09-River Rich, reasons for decision, issue 2*).

In previous Arbitral Awards, the Arbitration Council has considered that having MRS gives a union the legal qualification to negotiate with an employer to establish a collective agreement and legal standing to bring an interests dispute before the Arbitration Council for resolution.

The Arbitration Council agrees with the interpretation above.

In this case, the Arbitration Council finds that the claimant union does not possess MRS. Moreover, Article 277 of the Labour Law stipulates that "the union shall be registered and have fulfilled other requirements stated in this article".

Accordingly, the Arbitration Council holds that the Local Union of CLUF does not have legal standing to bring an interests dispute before the Arbitration Council for resolution.

In conclusion, the Arbitration Council declines to consider the workers' demand that the employer provide an additional US\$ 6 of wages to group leaders.

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

DECISION AND ORDER

Part I. Rights dispute:

Issue 2: Reject the workers' demand that the employer sign one year fixed duration contracts with casual workers.

Type of Award: Binding award

The award of the Arbitration Council in Part I will be final and is enforceable by the parties in accordance with the MoU, dated 28 September 2010.

Part II. Interests dispute:

Issue 3: Decline to consider the workers' demand that the employer provide an additional US\$ 6 of wages to group leaders.

Type of Award: Non-binding award

The award in Part II will become binding eight days after the date of its notification unless one of the parties lodges a written opposition with the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL:

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Ang Eng Thong**

Signature: