

KINGDOM OF CAMBODIA
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THE ARBITRATION COUNCIL

Case number and name: 12/06 - HS ENT

Date of Award: 15 March 2006

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

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

Arbitrator chosen by the worker party: **Tuon Siphann**

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

DISPUTING PARTIES

Employer party:

Name: HS ENT (Cambodia) Co., PTE Ltd

Address: National Road No. 4, Bak Chaan village, Bak Chaan commune, Ang Snoul District, Kandal province.

Telephone: 024 394 888 012 522 266 Fax: 024 393 999

Representative:

- | | |
|--------------------|---------------------------------------|
| 1. Mr. Long Heng | Company's representative |
| 2. Mr. Chan Sothea | Administration officer of the company |

Worker party:

Name: Khmer Youth Federation Trade Union (KYFTU) at HS ENT [(Cambodia) Co., PTE Ltd]

Address: Bak Chaan village, Bak Chaan commune, Ang Snoul District, Kandal province.

Telephone: 092 902 569 Fax: n/a

Representative:

- | | |
|--------------------|---|
| 1. Nov Titha | Official from KYFTU |
| 2. Mr. Ou Pheun | Official from KYFTU |
| 3. Mr. Bek Ton | Official from KYFTU |
| 4. Mr. Sok Sophal | President of KYFTU at HS ENT (Cambodia) Co., PTE Ltd |
| 5. Mr. Mong Vannak | Vice President of KYFTU at HS ENT (Cambodia) Co., PTE Ltd |
| 6. Mr. Ka Sokha | Worker at HS ENT (Cambodia) Co., PTE Ltd |
| 7. Mr. Dim Phat | Worker at HS ENT (Cambodia) Co., PTE Ltd |

8. Mr. Chhoun Sambo Worker at HS ENT (Cambodia) Co., PTE Ltd.

ISSUES IN DISPUTE

(In the non-conciliation report)

According to the report of non-conciliation, the following issues are the workers' demands in this case:

1. The workers demand that the company reinstate 131 workers from building 2 whom the company terminated on 6 June 2005. The employer argued that they did not currently have permanent jobs yet and if there is a need the company will recruit temporary workers through a job announcement posted on its board outside the factory and then those workers [who were previously dismissed] can apply for these positions.
2. The workers demand that the company convert workers who have worked longer than two months to permanent worker [status]. The employer argued that the recently recruited workers are casual workers who perform work for a short time and intermittently pursuant to a written labour contract. There are no workers who have performed work for longer than two months.
3. The workers demand that the company reimburse their unused annual leave . The employer did not agree to reimburse, but to commence paying this after this negotiation.
4. The workers demand the company provide hygienic materials to protect the workers' health in the machinery, polish and trimming sections. The employer agreed to provide protective equipment to protect their health during working hours, but the workers must use this equipment, if [the workers] do not use the equipment they will be warned verbally on the first occasion. If [they do] not [correct their behaviour] then they will get a first written warning, if this happens three times, the worker will be dismissed.

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. 513 dated 19 April 2005 (Third 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. But the conciliation hearing was

unsuccessful, and the non-conciliation report number 023/MoLVT dated 21 February 2006 was submitted to the Secretariat of the Arbitration Council on 21 February 2006.

HEARING AND SUMMARY OF PROCEDURE BEFORE THE ARBITRATION COUNCIL

Place of hearing: The Arbitration Council, Phnom Penh Center Building “A”, Sothearos Blvd;
Tonlebasac; Chamkamorn, Phnom Penh.

Date of hearing: 27 February 2006 (at 2:00 to 5:00 p.m.)

Procedural issues:

On 17 February 2006, the Labour and Vocational Training Office in Kandal province conducted a conciliation to resolve a labour dispute concerning 11 issues, of which four issues were successfully resolved, three issues were withdrawn and four issues remained as non-conciliation issues.

On 21 February 2006 the Arbitration Council received the case and non-conciliation report on the collective labour dispute numbered 023/06/MoLVT dated 21 February 2006 from Mr. Thong Neang, Bureau Chief of the Office of Labour and Vocational Training in Kandal province. After receiving the case both parties to the dispute were invited by the Arbitration Council to conduct a conciliation and hearing in relation to the four issues on 27 February 2006 at 2:00 p.m. Both parties were present at the arbitral hearing. The Arbitration Council attempted to conciliate the non-conciliation issue again, but it was unsuccessful.

EVIDENCE

Witnesses and experts: n/a

Documents, Exhibits and other evidence considered by the Arbitration Council

A. Provided by the employer party:

1. Delegating letter from the company to Mr. Long Heang dated 21 February 2006
2. Minute of collective labour dispute conciliation dated 17 February 2006
3. Certificate of business registration dated 9 February 2004
4. Internal Work Rules of the company numbered 064/MoSALVY dated 21 May 2004
5. Labour contract of 144 casual workers.

B. Provided by the worker party:

1. List of 39 workers' names who have worked for longer than two months
2. List of eight former workers' names that the company had not accepted to reinstate
3. Payroll slip that was paid to the workers
4. Letter from KYFTU addressed to the Manager of the HS ENT company to inform the employer about candidates who voted to change the KFYTU committee at HS ENT (Cambodia) Co., PTE Ltd

5. Minute of inquiry from union representatives dated 12 January 2006
6. Letter numbered 262/MoLVT dated 21 February 2005 from the Labour Inspection Department addressed to the President of HS ENT requesting the recognition of the new union leaders.
7. Receipt of the case of Labour Dispute Department requesting to change the union committee at HS ENT company dated 11 January 2006.

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

1. Report on the collective labour dispute resolution at HS ENT Co., PTE Ltd numbered 023/06/MoLVT dated 21 February 2006 from Mr. Thong Neang Bureau Chief of the Labour and Vocational Office in Kandal province.
2. Minute on collective labour conciliation dated 17 February 2006.

D. Provided by the Secretariat of the Arbitration Council:

1. Invitation letter number 073/SAC dated 22 February 2006 inviting the employees to appear at the hearing.
2. Invitation letter number 072/SAC dated 22 February 2006 inviting the employer to appear at the hearing.

FACTS

- Having examined all relevant documents sent to the Arbitration Council
- Having listened to both parties, employer and employees
- Having checked the report on the collective labour dispute conciliation

The Arbitration Council finds that:

HS ENT (Cambodia) Co., PTE Ltd. is located at Bek Chann village; Bek Chann commune; Ang Snoul district; Kandal province and employs a total of 609 workers.

Issue 1:

On 6 May 2005, the employer dismissed 131 workers from building 2 (or Building B) because the company did not have work for those workers and required the temporary closure of the factory. But during the period of the closure the company still hired some workers to look after its machines and make sure that the machines started sometimes. There were four machines which needed to be protected. After this dismissal some workers gave their address to the company, some did not.

One month later after the closing of building B, the employer began to make announcements inside and outside of the company in order to recruit new workers to work in the re-opened building B. The Arbitration Council finds that the company posted former workers' pictures in the security guard room of the company in order to stop the security guards receiving

applications from the 131 former workers. Mr. Sok So Phal, who worked as a line leader of group A in the polish section (since 18 February 2006 he had been a normal worker), said at the hearing that the *Chinese chief told him to recruit workers to work in the factory, but if former workers applied, they would be refused*. Upon seeing the job announcement, new workers applied for jobs and there were also about 20 former workers from among the 131 workers who also applied for jobs too, but the company refused to accept [their applications]. During this recruitment for workers in building B, the company offered a job to some of the workers among the 131 former workers. However after the recruitment was completed, the company found that [one of the workers was] the worker named Mr. Yon Young, ID WH 074, a former worker among the 131 workers [previously dismissed], the company dismissed him [once again] two days later. In the hearing the employer did not deny the workers' argument in respect of this issue, the company only said that it did not know. Both the employer and the employee parties agreed that building B has recommenced operations. Up to now there are some workers who have worked for nearly one year, and the workers argued without any specific evidence that there are about 100 workers currently working in building B.

Some workers who are working in building B are [employed] pursuant to written labour contracts with short durations of two months only and the employer considers that those workers are irregular or casual workers comprised of about 50 workers. When each contract is terminated the employer makes new contracts with those workers, but the employer never pays indemnity for dismissal to any worker.

Issue 2:

The workers demand that workers who have worked for more than two months should become regular workers and there are many such workers. 34 workers have signed as proof that among them, some have worked for nearly two years. The company asks each worker to sign a contract with a period of less than one or two months, then when the old contract is terminated, the company makes a new contract over and over again. Further the company never gave written contracts to those workers, the company kept the only copies.

Issue 3:

Both parties agreed to the following facts:

- The company did not provide annual leave and special leave for casual workers even though they had worked for the company for longer than one year.
- With respect to special leave relating directly to the family of casual workers, the company always cut wages without making calculations based on their annual leave.

- The company only calculated annual leave for casual workers when their job was terminated. However the company does provide annual leave to permanent workers during Khmer New Year.

Issue 4:

- The workers demanded that the company provide equipment to protect workers' health in the machinery, polish and trimming sections.
- The employer agreed to provide protective equipment to protect their health during working hours, but the workers must use this equipment, if [the workers] do not use the equipment they will be warned verbally on the first occasion. If [they do] not [correct their behaviour] then they will get a first written warning, if this happens three times, the worker will be dismissed.
- KYFTU's representative disagreed over the language of dismissal included in the Internal Work Rules because such dismissal was too heavy a penalty for workers. [The Union argued that] some workers cannot use this protective equipment due to health issues.
- The company disagreed that it should draft clearer or more specific disciplinary rules than what it already has in its internal rules today. The company agreed that for those workers who cannot use the equipment because of their health, they do not need to use such equipment; but for those workers who demand to use such equipment, then they must be use [the equipment] according to the company policy, if the policy is violated, the workers will be punished: first, with a verbal warning, then with a first written warning, and then two more which will result in dismissal.

REASONS FOR DECISION

Issue 1:

Must the employer reinstate the 131 workers who were dismissed on 6 June 2005 from building B?

To resolve this issue, the Arbitration Council considers the third issue of case 32/05 and the first issue of case 12/06 that concerned disputes in HS ENT company and whether the issue in this present case is the same or not. If we find that the issue is the same and the demand is also the same, the Arbitration Council does not have jurisdiction to re-consider this issue, however if it is different, the panel will make a decision. (See Arbitral Award 10/06-North Gaiety.)

In the previous case the Arbitration Council found that case 32/05-HS ENT, issue 3 concerns a demand from the workers that the employer allow them to continue working. The workers disagreed with their dismissal, this means in English that [this demand was a] **Reinstatement Claim**. But in issue 1 of this case, 12/06, concerns a demand from the workers

that the employer rehire them at their previous skill level and positions as priority [rehires], this means in English that [this demand related to] **Rehiring**. Thus the Arbitration Council finds that this issue is not the same as the previous demand made in case 32/05. Therefore the Arbitration Council will consider and make its decision on this issue as follows:

The Arbitration Council finds that the dismissal of the 131 workers in case 32/05 is a collective labour dispute that is under the power of Article 95 of the 1997 Labour Law.

Article 95 of the 1997 Labour Law states that:

Paragraph 5: "The dismissed workers have, for two years, priority to be re-hired for the same position in the enterprise".

Paragraph 6: "Workers who have priority for re-hire are required to inform their employer of any change in address occurring after the layoff".

Paragraph 7: "If there is a vacancy, the employer must inform the concerned worker by sending a recorded delivery or registered letter to his last address. The worker must appear at the establishment within one week after receiving the letter".

According to the facts, we find that the dismissal of 131 workers at building B from the period 6 May 2005 up to the present, was a mass layoff. It has been less than one year since that mass layoff and the employer recruited new workers one month after the mass layoff.

After the dismissal, some workers gave their address to the company and some did not. According to Article 95 above the employer must inform those workers [about vacancies] at their last address by recorded delivery or registered letter with a signature certifying that the letter has been received. In this case the Arbitration Council finds that the employer failed to fulfill this task.

When the employer party wished to recruit new staff it posted the job announcement at the factory. The company also posted pictures of all the former workers in the security guard room of the company so that they would not accept applications from the 131 former workers. In addition, the Chinese Chief told the Chief of the polishing section in group A to recruit new workers to work in the factory, but if any former workers applied, they should be refused.

Upon seeing the job announcement there were about 20 former workers, amongst the 131 workers who applied to be rehired but the company refused to accept them. However, some former workers among 131 workers were offered their job back. However when the company found out that worker, Yon Yong, ID WH 074, was a former worker, dismissed amongst the 131 workers, the company dismissed him again two days later

The Arbitration Council finds that the employer's action in preventing the recruitment of former workers and [in particular] the dismissed former workers, contravenes Article 95 of the Labour Law [which states] that according to the Law the employer must give priority of re-hiring to those employees within two years [of their dismissal]. Thus, the employer must accept the 131 former building B workers' as priority [re-hires] if there is a requirement for workers in building B.

In addition, the employer must continue to inform the former employees throughout the period of two years each time the employer needs workers to perform the same job as the 131 workers.

Therefore, the Arbitration Council decides that the company must re-hire all 131 workers on a priority [basis], if there is a requirement for workers at the factory, especially regarding building B.

Issue 2:

Must the employer accept workers who have worked longer than two months as regular workers or permanent workers?

Article 73 of the Labour Law:

Paragraph 1 states that *“A labour contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in form of writing in the presence of a Labour Inspector and signed by the two parties to the contract”*.

Paragraph 7 states that *“If a contract of unspecified duration replaces a contract of specified duration upon the latter’s expiration, the employment seniority of the worker is calculated by including periods of both contracts”*.

Article 166 of the Labour Law:

Paragraph 2 states that *“Any workers who has not worked for two continuous months is entitled, at the termination of his labour contract, to compensation for paid leave calculated in proportion to the amount of time s/he worked in the enterprise”*.

Paragraph 3 provides that *“For jobs that are not performed regularly throughout the year, a worker is considered to have met the condition of continuous service if s/he works an average of 21 days per month”*.

In the facts we see that the worker party demanded that workers who have worked more than two months should become regular workers; 34 workers signed as proof [of the claim]. Among these workers, some have worked for nearly two years. The company makes each employment contract with the workers last less than one, or at most two months, then when the former contract terminates, the company makes a new contract. The employer never provides termination compensation for these short-term contracts. Moreover the company never provides [copies] of the employment contract to the workers; the company keeps the sole copy.

Thus, the Arbitration Council finds that the employer’s action is not in accordance with Articles 73 and 166 as stated above. Because of this, the employer must consider any workers who have worked for the company for at least 21 days per month and has worked longer than two months, as regular or permanent workers. (See 69/04-Common Way.)

The Arbitration Council notes that in 23/05-Jung Min, the Arbitration Council rejected the conversion of casual workers who had worked for longer than two months to full-right workers because casual workers are subject to the same rules and obligations [of regular workers] ([pursuant to] Article 10 of the Labour Law). In the present case the Arbitration Council decides that it is reasonable that casual workers be converted to regular workers ([in accordance with] 69/04-Common Way).

Issue 3:

Article 166 states in the first and second paragraphs that, *“Unless there are more favorable provisions in collective agreements or individual labour contracts, **all workers are entitled to paid annual leave to be given by the employer** at the rate of one and half work days of paid leave per month of continuous service. Any worker who has not worked for two continuous months is entitled, at the termination of his labour contract, to compensation for paid leave calculated in proportion to the amount of time he worked in the enterprise”*. According to this Article, all kinds of workers, including casual workers, are entitled to take their annual leave [as paid leave] paid by the employer.

In this present case, the employer does not provide annual leave to casual workers even though some casual workers have worked longer than one or two years at the company. However the employer keeps records of the annual leave in order to pay severance pay to casual workers at their termination only.

Article 167 states that *“The right to use **paid leave is acquired after one year of service**”*. The second and third paragraphs state that, *“If the contract is terminated or expires before the workers have acquired the right to use his paid-leave, an indemnity calculated on the basis of Article 166 above is granted to the worker. Apart from this, any collective agreement providing compensation in lieu of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void”*. According to this Article all workers are entitled to annual leave after one year of service. Any arrangements that provide for payment instead of annual leave must be null and void. Any extension of leave cannot exceed three years of continuous service.

In this case, the workers emphasized that their demand has been amended from [a demand for] payment of annual leave to an arrangement for taking annual leave for casual workers who have worked longer than one year. The employer party did not object to this amended demand. However, the company refused [the demand] by stating that, “with respect to casual workers, the company would pay their annual leave to them when the employment contracts with the company were terminated and this method of payment would started from the [date of the] negotiation.”

Therefore, the Arbitration Council finds that casual workers in this case have the right to, [(1)] demand and use their annual leave when they have worked for one year with the company and, [(2)] they have right to demand that the company [allow them to take] their annual leave in the three years preceding the date of their demand (Note also the same meaning of Article 120 on the extinguishment of the right to sue for wages). Article 170 of the Labour Law states that, *“In principle, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the worker. In this case, the employer must inform the Labour Inspector of this agreement.”*

In every case of the paid annual leave exceeding fifteen days, employers have the right to grant the remaining days-off at another time of the year, except for the leave for children and apprentices less than eighteen years of age”. According to this Article, in general the company must arrange accrued leave for the workers who have worked for the company for one year [or more], during Khmer New Year. If this annual leave does not fall during Khmer New Year, [the employer] must discuss with the employees in order to have an agreement on the annual leave to be taken at another time.

Thus, the Arbitration Council determines that the employer must [allow] annual leave during Khmer New Year to all workers, including casual workers, who have worked for one year. The company and employees can negotiate for an arrangement to take annual leave at times other than the occasion of Khmer New Year.

Issue 4:

Article 229 of the Labour Law states that, *“All establishments and work places must always be kept clean and must maintain standards of hygiene and sanitation or generally must maintain the working conditions necessary for the health of the workers.”*

The Ministry in charge of Labour and other relevant ministries shall prepare a Prakas to monitor the measures for enforcing this article in all establishments subject to the provisions of this Chapter, particularly regarding:individual protective instruments and work clothes”.

Article 230 also provides that *“All establishments and work places must be set up to guarantee the safety of workers. Machinery, mechanisms, transmission apparatus, tools, equipment and machines must be installed and maintained in the best possible safety conditions. Management of technical work utilizing tools, equipment, machines, or products used must be organized properly for guaranteeing the safety of workers”.* Accordingly, the employer has a duty to arrange and to manage [the workplace] in order to guarantee the safety and security of the workers.

Moreover, clause 12 point B of the Internal Work Rules of the company states that, “the workers who work in dangerous or high risk areas that harm their health must use protection

equipment according to the company's standards upon which [they have been] trained by the company for the purpose of avoiding work related-accidents during working hours."

In this case the workers had previously demanded that the company provide health equipment such as masks and gloves to protect their safety and security in the machinery, polish and trimming sections. The company agreed to provide [this equipment] and required the workers to use them regularly. If they did not [they] would be disciplined as follows: if the employee does not use the equipment the company will verbally warn them on the first occasion, if repeated, the company will issue a written warning. There will only be three written warnings, after this they will be dismissed. The worker's representative disagreed with this disciplinary procedure set out by the company because there may be some workers who do not want to or cannot use the equipment due to health reasons such as an allergy to these equipments. Therefore, in cases [where an employee] makes a mistake with regard to this equipment, the employees ask the company to follow its Internal Work Rules. The company argued that it allows those workers who are allergic to the equipment to not use it and these employees therefore, do not need to take the equipments. Other workers however, who have been provided equipment must use this equipment as determined [by the employer]. If they do not they will be disciplined as stated above.

Thus, the Arbitration Council must consider whether this discipline determined by the employer above, is proper and can be applied or not when compared with the company's Internal Work Rules?

According to clause 10 of the Internal Work Rules on disciplinary sanctions against workers, Point A states that a light mistake will receive a verbal warning and noted in the records. If the same mistake is repeated for a second time then a written warning will be issued. In case there has not been a change [in behaviour and the mistake is made] for a third time the employee will be dismissed. The warning procedure in the Internal Work Rules consists of only two warnings (the first warning is verbal and the second warning will be written) and upon the third warning the worker will be dismissed.

In comparison, the new disciplinary sanction of the company that applies to the workers who do not follow clause 12 of the Internal Work Rules is that the workers get four warnings (one verbal warning and three written warnings).

The Arbitration Council finds that the above disciplinary procedure is better than what is stated in the company's [Internal Work] Rules for the workers. Thus the company can impose the disciplinary procedure that states, "In cases where the workers do not use protection equipment ([such as] masks and gloves etc) that have been provided by the company, the company will verbally warn [the worker] on the first occasion, if repeated the worker will receive a first written warning. Upon the third written warning the company will dismiss [the worker]."

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

DECISION

1. The employer must continue informing the former workers [of employment opportunities] and accept them as priority [re-hires] if there is further work; and must accept the application forms from the 131 workers from building B [who were dismissed], when there is a requirement for additional workers in building B. The employer must consider re-hiring, as a priority, all 131 workers who have applied for jobs and were objected to by the employer.
2. Order the employer to accept the workers who have worked for the company for at least 21 days per month, for longer than two months, as regular or permanent workers from the time this award comes into effect.
3. Order the employer to [allow all employees], including casual workers, who have worked for longer than one year and less than three years to take annual leave during the occasion of Khmer New Year. The company and the workers can negotiate with each other for an arrangement of annual leave that does not occur during the occasion of Khmer New Year.
4. A. The company must provide enough protection equipment to the workers in the machinery, polish and trimming sections.
B. The workers must use the protection equipment in order to guarantee their safety and security.
C. In cases where the workers do not use this equipment as determined by the company, the company can verbally warn [the worker] on the first occasion. If repeated the company can issue a written warning three times and if [the behaviour is not rectified], the company can then dismiss the 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 with the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature:

Chair of Arbitration Panel:

Name: **Ang Eng Thong**

Signature: