



**KINGDOM OF CAMBODIA**

**NATION RELIGION KING**

**ក្រុមប្រឹក្សាពង្សាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 61/09-Cintri**

**Date of award: 17 June 2009**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRAL PANEL**

Arbitrator chosen by the employer party: **Kol Vathana**

Arbitrator chosen by the worker party: **Ann Vireak**

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

#### **DISPUTANT PARTIES**

##### **Employer party:**

Name: **Cintri (Cambodia) Ltd. (the employer)**

Address: No. 442D, Monivong Blvd, Tonle Bassac Commune, Chamkarmorn District, Phnom  
Penh

Telephone: 012 912 353

Fax: N/A

Representatives:

- |                     |   |
|---------------------|---|
| 1. Mr Kim Chan Seng | Vice-President of the Administration and Human Resources Department |
| 2. Mr Som Hun       | Vice-President of the City Cleaning Department                      |
| 3. Mr Kong Bopha    | Facilitation and Resolution Officer                                 |

##### **Worker party:**

Name: **Trade Union Federation for Increasing Khmer Employees Lifestyle (TUFIKEL)**

**Local Union of TUFIKEL**

Address: No. 27C, Street 376, Boeung Keng Kang III Commune, Chamkarmorn District,  
Phnom Penh

Telephone: 012 282 531

Fax: N/A

Representatives:

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|------------------|---|
| 1. Mr Mom Saron  | President of TUFIKEL                    |
| 2. Mr Mom Bona   | Officer of TUFIKEL                      |
| 3. Mr Mom Saran  | Officer of TUFIKEL                      |
| 4. Mr Chea Sitha | President of the Local Union of TUFIKEL |

#### **ISSUES IN DISPUTE**

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

1. The workers demand that the employer maintain the positions of Chea Sitha and Meak Reoun because they are both leaders of the Local Union of TUFIKEL. The employer states that it is necessary to make the changes and it cannot maintain their positions due to their good work performance.

#### **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. 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 was unsuccessful, and non-conciliation report No. 353 KB/AK/VK dated 6 May 2009 was submitted to the Secretariat of the Arbitration Council on 19 May 2009.

#### **HEARING AND SUMMARY OF PROCEDURE**

**Hearing venue:** The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd.  
Tonle Bassac Commune, Chamkarmorn District, Phnom Penh

**Date of hearing:** 1 June 2009 at 8:00 a.m.

**Procedural issues:**

On 24 April 2009, the Department of Labour Disputes received a complaint and strike notification in relation to the demand that the employer maintain the positions of Chea Sitha and Meak Reoun. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to resolve the labour dispute and the last conciliation session was held on 28 April 2009. However, the issue was not resolved and the non-conciliated issue was referred to the Secretariat of the Arbitration Council on 19 May 2009.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the non-conciliated issue, held on 1 June 2009 at 8:00 a.m. Both parties were present as summoned by the Arbitration Council.

At the hearing, the Arbitration Council conducted a further conciliation of the non-conciliated issue but it was not resolved. Therefore, the Arbitration Council will consider the issue in dispute based on the evidence and reasons below.

#### **EVIDENCE**

*This section has been omitted in the English version of this arbitral award. For further information regarding evidence, please refer to the Khmer version.*

#### **FACTS**

- Having examined the report on 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:**

- Cintri (Cambodia) Ltd., located at No. 442D Monivong Blvd, Tonle Bassac Commune, Chamkarmorn District, Phnom Penh, employs approximately 1,050 workers in total.
- The claimant in this case is the Local Union of TUFIKEL, which received a registration certificate on 25 February 2008.

#### **Issue 1: The workers demand that the employer maintain the positions of Chea Sitha and Meak Reoun.**

- Chea Sitha and Meak Reoun were both employed as drivers. Chea Sitha commenced work on 14 December 2005 and Meak Reoun commenced on 20 April 2004.
- On 4 April 2009, the employer decided to transfer Chea Sitha and Meak Reoun to Sihanouk Province, effective from 23 April 2009. The employer notified Chea Sitha and Meak Reoun of the transfer on 23 April 2009. Chea Sitha received and signed to indicate his acceptance of the notification, but Meak Reoun did not receive his notification in person; Chea Sitha collected it on his behalf and gave it to him.
- On 23 April 2009, TUFIKEL notified the employer that it would conduct a non-violent strike to demand that Chea Sitha and Meak Reoun's positions be maintained. It

distributed copies of the notification to concerned institutions including the Phnom Penh City Hall.

- On 28 April 2009, a meeting was held at the Phnom Penh City Hall, led by Kert Chhe, to discuss suspending the strike on 29 April 2009. TUFIKEL agreed to cancel the strike.
- On 2 May 2009, the employer decided to terminate the employment of Chea Sitha and Meak Reoun owing to their refusal to work in Sihanouk Province. However, on 21 May 2009 another meeting was held at the Phnom Penh City Hall, led by Kert Chhe. The employer proposed the following:
  - o To reinstate Chea Sitha and Meak Reoun, rather than dismiss them.
  - o Because of Chea Sitha and Meak Reoun's good performance, the employer transferred them to work as model workers in the branch at Sihanouk Province for six months, with an increase in salary.
- The union did not agree to the transfer, so both parties agreed to wait for a decision from the Arbitration Council, which they would then implement.
- At the hearing, the workers demanded that the employer maintain Chea Sitha and Meak Reoun's jobs in Phnom Penh as a transfer may affect their families' living conditions. Chea Sitha stated that he has three children, two of whom are in the sixth and seventh grades and the third is only one year old. Therefore, he cannot leave his family. Furthermore, he is the president of the local union. Meak Reoun was absent from the hearing but the union representative stated that he was also unable to go to Sihanouk Province for family reasons. He has two children, neither of whom go to school.
- The employer stated at the hearing that it has to transfer Chea Sitha and Meak Reoun to Sihanouk Province because the vice-president of the branch at Sihanouk Province made a request for three more drivers on 26 March 2009. The employer decided to transfer Chea Sitha and Meak Reoun to Sihanouk Province because they are good workers and a model for other staff at that branch. The employer wants to transfer them for six months, but they can try working for there for two weeks and if they find it unsatisfactory or have any problems, they can discuss this with the employer.
- The employer confirmed that it would provide transportation, accommodation and salary bonuses if the workers are transferred to Sihanouk Province.

- Chea Sitha and the workers' representatives at the hearing maintain that they cannot work in Sihanouk Province and insist on working in Phnom Penh as before. The union accuses the employer of discriminating against the union.
- The employer stated that it is within its managerial right to affect changes or transfers in employment. There is no discrimination against the union because the employer was not initially aware that the workers were union leaders and activists. It only became aware of this after it received the strike notification from TUFIKEL. The workers stated that they informed the employer of the union's formation when it was registered. The Arbitration Council sought evidence of this from the workers, but no relevant documents were received by the Council.
- In its statement in defence submitted to the Arbitration Council on 3 June 2009, the employer argues that this is an individual dispute.

### **REASONS FOR DECISION**

#### **Issue 1: The workers demand that the employer maintain the positions of Chea Sitha and Meak Reoun.**

Before considering the issue in dispute, the Arbitration Council will consider whether or not it has jurisdiction over the issue.

In principle, the Labour Inspector and the Ministry of Labour and Vocational Training are authorised to determine which disputes are individual and which are collective before submitting a dispute to the Arbitration Council. Therefore, the Arbitration Council will follow the decision of the Labour Inspector and the Ministry of Labour and Vocational Training unless there is a clear reason not to (*see Arbitral Awards 10/03-Jacqsintex, reasons for decision, issue 4; 02/04-Cambodiana Hotel; 41/04-MiCasa; and 07/05-Coca Cola*).

The employer argues that this issue is an individual dispute, therefore, the Arbitration Council will consider as follows:

Article 302 of the Labour Law states:

A collective labour dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognised rights of professional organisations, the recognition of professional organisations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardise the effective operation of the enterprise or social peace.

Based on Article 302 of the Labour Law, in order to be a collective dispute, three conditions must be met:

- A. the dispute arises between one or more employers and a number of staff;
- B. the disputed issue relates to working conditions, the exercise of the recognised rights of professional organisations, the recognition of professional organisations, or issues regarding relations between employers and workers; and
- C. the dispute could jeopardise the effective operation of the enterprise or social peace.

In this case, condition A is satisfied because the claim has been made by the union. Condition B is satisfied because this dispute relates to working conditions and the relationship between the employer and workers. Condition C is also satisfied because this dispute could jeopardise the effective operation of the enterprise or social peace owing to the workers' threat to stage a strike, which the workers agreed to suspend at the meeting at Phnom Penh City Hall on 28 April 2009.

Based on the above interpretation, the Arbitration Council considers that this dispute is a collective dispute. Under Chapter 12, Section 2 of the Labour Law, the Arbitration Council has jurisdiction to decide on collective labour disputes.

Further, in previous cases the Arbitration Council has assumed that each demand in the non-conciliation report of the Ministry of Labour is a collective labour dispute. Where the employer challenges this assumption, the employer bears the burden of proof in relation to its claim (*see Arbitral Award 45/07-Wilson, reasons for decision, issue 4*).

In this case, the employer did not provide proof or reasons to reject the Arbitration Council's assumption based on the Ministry of Labour's decision that the dispute is collective. The employer merely mentioned in its statement to the Arbitration Council that the workers' demand in this case is an individual dispute only. Therefore, the Arbitration Council finds that the employer has not discharged its burden of proof in relation to its claim that the dispute is individual.

Based on the facts and reasons above, the Arbitration Council has jurisdiction over this dispute. Thus, the Arbitration Council decides as follows:

Article 2 of the Labour Law states:

All natural persons or legal entities...are considered to be employers who constitute an enterprise, within the meaning of this law, provided that they employ one or more workers, even discontinuously.

Every enterprise...each employing a group of people working together in a defined place such as in [a] factory, workshop, work site, etc., under the supervision and direction of the employer.

In previous cases, the Arbitration Council has considered that paragraph two of Article 2 of the Labour Law means that an employer has the right to supervise and direct the enterprise as long as that right is exercised lawfully and reasonably (*see Arbitral Awards 108/06-Trinunggal Komara, reasons for decision, issue 1 and 08/09-Global Apparels*).

Furthermore, in Arbitral Awards 17/03 and 18/03-Ho Hing, reasons for decision, issue 1, the Arbitration Council held that this right to supervise and direct includes the right to transfer workers from one place to another, subject to conditions including: (1) no salary deduction; (2) no transfer from a nearby place to a remote place; (3) no change in shifts from a day-time to a night-time shift or vice versa; and (4) no transfer to a position requiring significantly different skills.

Based on Article 2 of the Labour Law and the Arbitration Council's findings in previous cases, the Arbitration Council considers that the employer has the right to relocate the site of the enterprise from one place to another and to transfer workers from one place to another provided that the change is effected in accordance with the four conditions above, in a lawful and reasonable manner.

In this case, the Arbitration Council finds that the transfer of Chea Sitha and Meak Reoun is subject to the second condition above, which limits the employer's power to transfer workers from a nearby place to a distant place, because Sihanouk Province is 200 km away from Phnom Penh. However, regardless of how far it is, the Arbitration Council will consider whether or not the employer has taken appropriate measures to effect the six month temporary change of worksite.

The workers state that the reason for their unwillingness to work in Sihanouk Province is that it could affect their living conditions, because they each have a wife and children living in Phnom Penh, and that the change is act of discrimination against the union. On the other hand, the employer assured them that in transferring them to Sihanouk Province, it would provide a means of transportation both to and from Phnom Penh, a salary increase, and that the transfer would only be for six months, to allow the staff in Sihanouk Province to learn from them as model employees. The employer states that they can try working there for two weeks, and if after two weeks they find it unsatisfactory they can negotiate with the employer. The employer states that the transfer is not an act of discrimination against the union because it was not aware that they were union leaders and activists.

Concerning the above, the Arbitration Council considers that in this case the exercise of the employer's right to reassign workers does not violate the conditions in Article 2 of the Labour Law or in previous awards. The employer is directing good staff to be a model for other staff, and it has guaranteed that it will provide a means of transportation to allow them

to travel to and from Phnom Penh so that they can visit their families. This resolves the problem of maintaining their family relationships, which is their main concern about the transfer to Sihanouk Province.

The Arbitration Council will now consider whether or not the transfer is an act of union discrimination.

Article 12 of the Labour Law states that "...no employer shall consider on account of...membership of workers' union or the exercise of union activities, to be the invocation in order to make a decision on: ...defining and assigning of work". Article 12 prohibits the employer from discriminating against workers based on union membership in relation to the definition and assignment of work.

In previous cases where workers have alleged union discrimination, the Arbitration Council has held that the workers bear the burden of providing evidence to support the accusation (*see Arbitral Awards 93/06-Evergreen, reasons for decision, issue 1; 112/06-River Rich, reasons for decision, issue 1; and 01/07-Supreme, reasons for decision, issue 1*).

The Arbitration Council applies the above interpretation in this case. Based on the facts, the workers have not provided enough evidence to prove that the transfer of Chea Sitha and Meak Reoun to Sihanouk Province for six months was an act of discrimination. Therefore, the Arbitration Council is of the view that union discrimination was not the reason for the transfer.

In conclusion, the Arbitration Council finds that the transfer of Chea Sitha and Meak Reoun to Sihanouk Province was carried out lawfully and reasonably, and was not an act of discrimination against the 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 employer allow Chea Sitha and Meak Reoun to work in Phnom Penh as usual.
- Order the employer to change the worksite of Chea Sitha and Meak Reoun from Phnom Penh to Sihanouk Province for a maximum period of six months, starting from the day this award take effect, and to provide the two workers with a means of transportation both to and from Phnom Penh, accommodation, and a wage increase, so that they can work as model staff. The workers will first work a two week trial

period, and if they find the transfer unsatisfactory, they can negotiate with the employer.

**Type of award: non-binding award**

This award of the Arbitration Council 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 period.

**SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL**

Arbitrator chosen by the employer party:

Name: **Kol Vathana**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....