



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 36/12-Yung Wah II

Date of award: 22 March 2012

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): **Pen Bunchhea**

DISPUTANT PARTIES

Employer party:

Name: **Yung Wah II Industrial (Cambodia) Co., Ltd. (the employer)**

Address: Thmey Village, Ta Khmao Commune, Ta Khmao District, Kandal Province

Telephone: 067 555 989

Fax: N/A

Representatives:

- | | |
|---------------------|--------------------------|
| 1. Mr Ng Ming Chuan | Office Manager |
| 2. Mr Seurn Huot | Administration assistant |

Worker party:

Name: **Labor Federation Union of Cambodia (LFUC)**

Local Union of LFUC

Address: Thmey Village, Ta Khmao Commune, Ta Khmao District, Kandal Province

Telephone: 017 515 595

Fax: N/A

Representatives:

- | | |
|--------------------|---|
| 1. Mr Sem Samroeun | Vice-president of LFUC |
| 2. Mr Sim Phally | General secretary of LFUC |
| 3. Mr Phon Ratana | President of the Local Union of LFUC |
| 4. Mr Cheang Sunly | Vice-president of the Local Union of LFUC |
| 5. Mr Lon Sopheak | Secretary of the Local Union of LFUC |

6. Ms Leang Srouymouy Worker in the washing section

ISSUES IN DISPUTE

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

1. The workers demand that the employer maintain their wages and benefits when they take sick leave, if their illness has been certified by a doctor recognised by the state. The employer refuses to accommodate this demand unless their illness is certified by doctors at either Chey Chamnak or Calmette hospital.
2. The workers demand that the employer provide a US\$ 15 attendance bonus to female workers. The employer refuses to accommodate this demand.
3. The workers demand that the employer provide a US\$ 15 accommodation allowance. The employer refuses to accommodate this demand.
4. The workers demand that the employer increases the main wage of female workers to US\$ 80. The employer refuses to accommodate this demand.
5. The workers demand that the employer reinstate Leang Srouymouy, a female worker with ID no. 6078 who works in the washing section. The workers state that the employer dismissed her on 22 December 2011 without a valid reason, and allege that her dismissal was the result of union discrimination. The employer refuses to reinstate her.

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. 136 dated 7 June 2011 (Ninth 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. 164/12 KB/KN dated 17 February 2012 was submitted to the Secretariat of the Arbitration Council on 20 February 2012.

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 Commune, Tuol Kork District, Phnom Penh

Date of hearing: 7 March 2012 (8:30 a.m.)

Procedural issues:

On 27 December 2011, the Department of Labour Disputes of Kandal Province received a complaint from LFUC, outlining the workers' demands for the improvement of working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to resolve the labour dispute. The last conciliation session was held on 3 February 2012, resulting in one of the six issues being resolved. The five non-conciliated issues were referred to the Secretariat of the Arbitration Council on 20 February 2012 via non-conciliation report No. 164/12 KB/KN dated 17 February 2012.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the five non-conciliated issues. The hearing was held on 7 March 2012 at 8:30 a.m with both parties present. The Arbitration Council conducted a further conciliation of the five non-conciliated issues, resulting in the resolution of three issues. Issues 1 and 5 remained unresolved.

Both parties chose non-binding arbitration.

The issuance of this award was due on 14 March 2012, but both parties agreed to extend the due date until 22 March 2012.

The Arbitration Council considers the issues in dispute in this case 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:

- With a certificate of commercial registration No. 494/98 E dated 26 March 1998, Yung Wah Industrial (Cambodia) Co., Ltd. operates a garment factory and employs a total of 4,372 workers.
- There are seven unions in the factory. The Local Union of LFUC is the claimant in this case.

Issue 1: The workers demand that the employer maintain their wages and benefits when they take certified sick leave by a doctor recognised by the state.

- The workers demand that the employer maintain their wages and benefits for sick leave taken, even when their illness has been certified by doctors other than those resident at Chey Chamnak and Calmette hospitals. They make this demand because those hospitals are far away from their homes and the places where they tend to have accidents or fall ill.
- In principle, the employer grants the workers sick leave if their illness is certified by a doctor. However, the employer only maintains their daily wages and attendance bonus if their sick leave is certified by a doctor from either Chey Chamnak or Calmette hospital. Otherwise, the employer will deduct their daily wages and full attendance bonus.
- The employer argues that it has selected only two hospitals because (1) public hospitals, of which these are two, have a proper procedure for issuing a doctor's certificate, contrary to the procedure of private hospitals in which the workers can obtain a fake doctor's certificate; and (2) approximately 100 to 200 workers take sick leave a day. As such, if the employer does not limit its workers to these two hospitals, its production line will be disrupted.

Issue 5: The workers demand that the employer reinstate Leang Srouymuoy, a female worker with ID no. 6078 in the washing section. The workers state that the employer dismissed her on 22 December 2011 without a valid reason, and allege that her dismissal was the result of union discrimination.

- The workers demand that the employer either reinstate Leang Srouymuoy or provide her with a termination payment in accordance with the Labour Law. The workers argue that she was dismissed without a valid reason.
- The employer refuses to reinstate her or provide her with a termination payment because she has committed an act of misconduct by scratching Ven Maly's eyes and pulling her hair during working hours.
- The work hours begin from 6:30 a.m. to 10:30 a.m. and 11:15 p.m. to 3:00 p.m.
- Leang Srouymuoy, ID no. 6078, commenced her work on 14 October 2005 and held an undetermined duration contract. She received a monthly base wage of US\$ 61, a US\$ 7 attendance bonus, and a US\$ 7 seniority bonus. On average, she earned a total of US\$ 140-150 per month, including overtime payments.
- On 21 December 2011, the employer received a complaint from Ven Maly, ID no. 3643, alleging that Leang Srouymuoy physically abused her during working hours. In the complaint dated 21 December 2011, Ven Maly alleged that on 21 December 2011

- at 12:30 p.m. (during working hours), Leang Srouymuoy scratched her eyes because Ven Maly looked at Leang Srouymuoy while she was talking with other workers.
- According to her note dated 21 December 2011, which sought to further clarify the alleged incident and was presented at the hearing, Leang Srouymuoy admitted that the incident occurred, but refuted the allegation that she scratched Ven Maly's eyes with her fingers. Rather, Leang Srouymuoy admitted to covering Ven Maly's eyes with her fingers and pulling her hair. Leane Srouymouy denied the allegations of physical abuse and claimed that she had been joking with Ven Maly, as she had done on prior occasions.
 - According to the evidence submitted by the employer on 7 March 2012, the Arbitration Council finds that there are three written testimonies on this alleged incident. The testimonies are provided by Ty Bona, ID no. 8700, Chorn Sophal, ID no. 2610, and Ngorn Savorn, ID no. 3072. According to the testimonies, only the facts relating to the pulling of Ven Maly's hair and the covering of her eyes are mentioned. In addition, one of the three witnesses considers the incident as evidence of joking between Leang Srouymuoy and Ven Maly.
 - The employer states that on the day of the alleged incident, Ven Maly rushed to make a complaint at the administration office while she was crying and with her hair still askew. However, the administration staff did not check whether or not Ven Maly had any injury to her eyes.
 - The employer states that on the day of the alleged incident, it did not call upon the women to discuss what had occurred, and allowed one day for Leang Srouymuoy to settle the issue with Ven Maly. As settlement could not be reached, the employer decided to dismiss Leang Srouymuoy.
 - Leang Srouymuoy was dismissed on the morning of 22 December 2011 for acts of serious misconduct including scraping the eyes and pulling the hair of Ven Maly during working hours.
 - The employer did not give her prior notice of the dismissal on the basis of serious misconduct.
 - Leang Srouymuoy received her outstanding wages and payment in lieu of unused annual leave together worth US\$ 117.36 on 22 December 2011.
 - Clause 10 point C on serious misconduct of the Internal Work Rules states that, "[s]erious misconduct refers to those stipulated in Article 83 of the Labour Law." The last sentence of point C reads that, "Any workers who have committed serious misconduct will be dismissed immediately."

REASONS FOR DECISION

Issue 1: The workers demand that the employer maintain their wages and benefits when they take sick leave for an illness certified by a doctor recognised by the state.

In this case, the employer grants the workers sick leave and maintains their daily wages and attendance bonus only if their illness is certified by a doctor from either Chey Chamnak or Calmette hospital.

Thus, the Arbitration Council considered whether the employer is obliged to maintain the daily wages and attendance bonus of the workers whose illness is certified by doctors other than those from Chey Chamnak and Calmette hospitals.

Wages

Article 71 paragraph 3 of the Labour Law states that, “The labour contract shall be suspended under the following reasons: “3.The absence of the worker for illness certified by a qualified doctor.”

Article 72 paragraph 1 of the Labour Law states:

[t]he suspension of a labour contract affects only the main obligations of the contract, that are, those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker.

Based on these two articles, the Arbitration Council considers that the workers’ certified sick leave leads to a suspension of employment contracts between the employer and the workers. Given the suspension of their employment contracts, the workers is not required to perform services for the employer and the employer is not required to pay wages to them.

However, in this case, the employer maintains the wages and attendance bonuses of the workers whose illness is certified by a doctor from either Chey Chamnak or Calmette hospital.

Article 13 paragraph 2 of the Labour Law states:

Except for the provisions of this law that cannot be derogated in any way, the nature of public order of this law is not obstructive to the granting of benefits or the rights superior to the benefits and the rights defined in this law, granted workers by a unilateral decision of an employer or a group of employers, by an employment contract, by a collective convention or agreement, or by an arbitral decision.

Based on this article, the Arbitration Council considers that the employer's practice is better than what is provided for in the law.

Therefore, the Arbitration Council rejects the workers' demand that the employer maintain the wages and attendance bonuses of the workers whose illness is certified by doctors other than those from Chey Chamnak and Calmette hospitals.

Attendance bonus

Point 1 of Notification No. 041/11 KB/SCN dated 7 March 2011 states that, "[t]he workers who come to work regularly in accordance with the number of working days of each month shall receive at least a bonus of US\$ 7 per month."

Article 103 of the Labour Law states that, "Wage includes, in particular:

- Gratuities..."

The Arbitration Council finds that the attendance bonus provided for in this notification qualifies as a gratuity. Thus, the attendance bonus is part of the wage.

Based on the above mentioned Articles 71 and 72, the employer is not obliged to provide the attendance bonus for the day of certified sick leave because the contracts between the workers and the employer have been suspended. This means that the employer can deduct the attendance bonus in proportion to the number of days of sick leave.

However, in this case, the employer deducts the full attendance bonus if the workers' illness is certified by doctors other than those from Chey Chamnak and Calmette hospitals.

Hence, the Arbitration Council rules that the employer is not obligated to maintain the full attendance bonus nor deduct the full attendance bonus when the workers take sick leave for illness certified by a qualified doctor.

In conclusion, the Arbitration Council rejects the workers' demand that the employer maintain the full attendance bonus of workers whose illness is certified by other doctors than those of Chey Chamnak and Calmette hospitals, and orders the employer to deduct the attendance bonus in proportion to the number of days of sick leave for illness certified by a qualified doctor of public or private hospitals recognised by the Ministry of Health.

Issue 5: The workers demand that the employer reinstate Leang Srouymuoy, a female worker with ID no. 6078 in the washing section. The workers state that the employer

dismissed her on 22 December 2011 without a valid reason, and allege that her dismissal was the result of union discrimination.

The Arbitration Council considers whether or not Leang Srouymuoy physically abused Ven Maly by scratching her eyes and pulling her hair, and whether or not Leang Srouymuoy has committed serious misconduct.

Leang Srouymuoy was dismissed on the grounds of serious misconduct (scratching Ven Maly's eyes and pulling her hair).

Clause 10 point C of the Internal Work Rules states in relation to serious misconduct, "[s]erious misconduct refers to those acts stipulated in Article 83 of the Labour Law." The last sentence of point C reads that, "Any workers who have committed serious misconduct will be dismissed immediately."

Article 83, Part B, point 4 of the Labour Law states in relation to worker misconduct, "4. Threat, abusive language or assault against the employer or other workers."

In previous arbitral awards, the Arbitration Council has ruled that the claimants bear the burden of proof (*see Arbitral Award 79/05-Ever Green; 101/08-GDM, reasons for decision, issues 1 and 2; 108/08-Hugo, reasons for decision, issue 4; 163/09-Tack Fat, reasons for decision, issue 2; 168/09-Tekthla Plaza, reasons for decision, issue 2; 115/10-G Foremost, reasons for decision, issue 18; 148/11-Dai Young*).

The Arbitration Council applies these rulings in this case. According to the facts, the employer unequivocally accepted the version of events alleged by Ven Maly in her complaint. Moreover, the employer did not call upon the staff to discuss the matter and to determine what actually transpired. The employer did not enquire as to whether the acts by Leang Srouymuoy constituted physical abuse and whether these acts caused any injury to the eyes of Ven Maly. Apart from the written testimonies by the three workers mentioned above, there is no specific evidence to prove that Leang Srouymuoy has caused serious health problems for Ven Maly, which would prevent her from undertaking work. Thus, the Arbitration Council rules that the employer does not have sufficient evidence to prove that Leang Srouymuoy has scratched Ven Maly's eyes and pulled her hair, which is deemed serious misconduct in accordance with Article 83 Part B.

Therefore, the dismissal of Leang Srouymuoy on the basis of serious misconduct is not substantiated by sufficient evidence and the argument is not valid.

The Arbitration Council rules that the employer does not have a valid reason to dismiss Leang Srouymuoy.

According to the facts, the employer maintains its refusal to reinstate her. Leang Srouymuoy demands to be either reinstated or provided with a legal termination payment if the employer refuses to reinstate her.

Given her demand, the Arbitration Council considers whether the employer terminates her contract in accordance with the legal procedure.

Article 74 paragraph 1 of the Labour Law states:

The labour contract of unspecified duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party.

Compensation in lieu of prior notice

Article 75 point 4 of the Labour Law states:

The minimum period of a prior notice is set as follows:

- Two months, if the worker's length of continuous service is longer than five years and up to ten years.

Article 77 of the Labour Law states:

The termination of a labour contract at will on the part of the employer alone, without prior notice or without compliance with the prior notice periods, entails the obligation of the employer to compensate the worker the amount equal to the wages and all kinds of benefits that the worker would have received during the official notice period.

According to the facts, the employer has not provided Leang Srouymuoy with prior notice of dismissal. Given this consequence, the employer has failed to fulfill the obligation of giving prior notice required by Article 75 point 4 of the Labour Law. Based on Article 77, the employer must pay compensation in lieu of prior notice equivalent to two months' wages and benefits because she has six years of service.

Indemnity for dismissal

Article 89 point 2 of the Labour Law states:

If the labour contract is terminated by the employer alone, except in the case of a serious offence by the worker, the employer is required to give the dismissed worker, in addition to the prior notice stipulated in the present Section, the indemnity for dismissal as explained below:

- If the worker has more than twelve months of service, an indemnity for dismissal will be equal to fifteen days of wage and fringe benefits for each year of service. The maximum of indemnity cannot exceed six months of wage and fringe benefits. If the worker's length of service is longer than one year, time fractions of service of six months or more shall be counted as an entire year.

Based on this article, since Leang Sourmouy has been dismissed for reasons other than serious misconduct, the employer must pay an indemnity for dismissal equal to 15 days of wages and benefits for each year of her service. As such, the employer must provide Leang Sourmouy a total indemnity for dismissal equal to 90 days' wages and benefits because she has six years of service.

Damages

Article 91 paragraphs 1 and 3 of the Labour Law states:

The termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages.

The worker, however, can request to be given a lump sum equal to the dismissal indemnity. In this case, he is relieved of the obligation to provide proof of damage incurred.

Based on this article, Leang Srouymuoy is entitled to damages due to her unfair dismissal. She does not present specific evidence relating to any damage caused by the dismissal. Consequently, the employer must provide damages equal to the indemnity for dismissal worth of 90 days' wages and benefits because she has six years of service.

In conclusion, the Arbitration Council rejects the workers' demand that the employer reinstate Leang Srouymuoy, and orders the employer to provide her with compensation in lieu of prior notice, indemnity for dismissal equal to 90 days' wages and benefits, and damages equal to 90 days' wages and benefits.

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 maintain the full attendance bonus for workers' sick leave whose illness is certified by doctors other than those from Chey Chamnak and Calmette hospitals.
- Order the employer to deduct the attendance bonus in proportion to the number of days of sick leave for an illness certified by a qualified doctor of public or private hospitals recognised by the Ministry of Health.

Issue 5:

- Reject the workers' demand that the employer reinstate Leang Srouymuoy.
- Order the employer to provide her with compensation in lieu of prior notice, indemnity for dismissal equal to 90 days' wages and benefits, and damages equal to 90 days' wages and benefits.

Type of award: non-binding award

The award 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: **Mar Samborana**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature:

