



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 193/12-Tropicana Resort & Casino**

**Date of award: 21 November 2012**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRAL PANEL**

Arbitrator chosen by the employer party: **Seng Vuoch Hun**

Arbitrator chosen by the worker party: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Tan Try**

#### **DISPUTANT PARTIES**

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

Name: **Tropicana Resort & Casino (the employer)**

Address: National Road 5, Kbal Spean Village, Poipet District, Poipet City, Banteay  
Meanchey Province

Telephone: 012 690 862

Fax: N/A

Representatives in the first hearing:

- |                     |                                |
|---------------------|--------------------------------|
| 1. Mr Ou Bunra      | Lawyer                         |
| 2. Mr Som Samret    | Representative of the employer |
| 3. Mr Lok Bunthoeun | Staff member                   |
| 4. Mr Chea Saron    | Staff member                   |

Representatives in the second hearing:

- |                      |   |
|----------------------|---|
| 1. Mr Iv Poly        | Lawyer from Cambodia International Law Firm |
| 2. Mr Bic Thongsreng | Lawyer from Cambodia International Law Firm |

Representative in the third hearing:

- |               |   |
|---------------|---|
| 1. Mr Iv Poly | Lawyer from Cambodia International Law Firm |
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##### **Worker party:**

Name: **Cambodian Tourism and Service Workers Federation (CTSWF)**

**Local Union of CTSWF**

Address: 16A, St. 360, Boeung Keng Kang 3, Chamkarmorn District, Phnom Penh

Telephone: 012 927 283

Fax: N/A

Representatives in the first hearing:

1. Mr Sat Seb President of the Local Union of CTSWF
2. Mr Lay Boren Activist of the Local Union of CTSWF
3. Mr Vong Nimol Program officer of American Center for International Labor Solidarity (ACIL)
4. Mr Khun Tharo Program officer of American Center for International Labor Solidarity (ACIL)
5. Ms Chea Sivhuong Program officer of American Center for International Labor Solidarity (ACIL)
6. Mr Sok Kruey Lawyer from American Center for International Labor Solidarity (ACIL)
7. Mr Sam Polyngha Project and dispute resolution officer of CTSWF
8. Mr Mom Rithy Acting president of CTSWF

Representatives in the second hearing:

1. Mr Mom Rithy Acting president of CTSWF
2. Mr Sat Seb President of the Local Union of CTSWF
3. Mr Lay Boren Activist of the Local Union of CTSWF
4. Ms Chorm Sopheap Member of the Local Union of CTSWF
5. Ms Rin Vorleak Member of the Local Union of CTSWF
6. Mr Suon Sopheap First deputy secretary of the Local Union of CTSWF
7. Mr Vong Nimol Program officer of American Center for International Labor Solidarity (ACIL)
8. Mr Khun Tharo Program officer of American Center for International Labor Solidarity (ACIL)
9. Mr Sok Kruey Lawyer
10. Mr Erk Sopheakdey Vice-president of Cambodian Labour Confederation (CLC)
11. Mr Tep Vannak Dispute resolution officer of CTSWF

Representatives in the third hearing:

1. Mr Mom Rithy Acting president of CTSWF
2. Mr Sat Seb President of the Local Union of CTSWF



Third hearing: 16 November 2012 at 2:00 p.m.

**Procedural issues:**

On 16 August 2012, the Department of Labour and Vocational Training of Banteay Meanchey province ('the department') was informed that the Local Union of CTSWF had led a strike, demanding that the employer improve working conditions on 18 bases, points reinstate the three workers to their former positions, and provide the three workers with back pay from the date of their dismissal to the date of reinstatement.

After having been notified of the strike, the department issued a letter numbered 0679 and dated 16 August 2012, inviting the workers to attend the information session on 17 August 2012 and the employer on 20 August 2012. The employer sought postponement of the information session to 22 August 2012. On 23 August 2012, the department held a conciliation session for this collective dispute at Poipet City Hall and managed to resolve 13 of 21 issues. The employer and the workers agreed to hold negotiations on the non-conciliated issues, including issues 2, 3, 4, 6, 10, 14, 19, and 21, on 10 September 2012. At the second conciliation session, five further issues were resolved, leaving three non-conciliated issues. The next conciliation session was scheduled for 22 September 2012. On 17 September 2012, the employer informed the Ministry of Labour and Vocational Training via letter that it refused to reinstate Sat Seb, Lay Boren, and Cheun Kimheng.

The three non-conciliated issues were referred to the Arbitration Council on 26 September 2012 via non-conciliation report No. 0798 MKB.KHBC dated 21 September 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 three non-conciliated issues. The hearing was held on 10 October 2012 at 8:30 a.m. with both parties present. The Arbitration Council summoned the employer and the workers to attend the second hearing held on 14 November 2012. However, the employer requested postponement of this hearing, claiming that its witness was engaged in an important task in Thailand and could not attend the hearing. The employer assured the Arbitration Council that if that witness remained unavailable at the rescheduled hearing, the employer would find another credible witness and bring crucial evidence to the rescheduled hearing. The second hearing was adjourned to 16 November 2012 at 2:00 p.m. The workers and the employer were present. However, the employer brought no witness or evidence to the hearing.

The Arbitration Council conducted a further conciliation of the three non-conciliated issues, resulting in issue 3 being resolved through agreement. Issues 1 and 2 remained unresolved.

This award was due to be issued on 23 October 2012. However, the workers and the employer agreed to extend its due date to 21 November 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:**

- Tropicana Resort & Casino operates a hotel and entertainment club. According to the non-conciliation report, the employer hires approximately 893 workers.
- The Local Union of CTSWF is the claimant in this case. This union has been formally registered through certificate No. 2232 dated 23 August 2011.

#### **Issue 1: The workers demand that the employer reinstate the union president Sat Seb to his former position and provide him with back pay from the date of his dismissal to the date of reinstatement.**

- At the hearing, the employer claimed that Sat Seb was one of the security guards responsible for overseeing gambling activities at the casino, and the president of the Local Union of CTSWF.
- Sat Seb commenced his employment on 5 December 2000 and was dismissed on 16 March 2012. The workers claim that he does not have a written employment contract; he merely has a job application form. According to the evidence submitted by the employer, the Arbitration Council finds that Sat Seb's application form is dated 31 January 2001. Thus, the Arbitration Council concludes that Sat Seb commenced his employment after 31 January

2001, and not in December 2000. His initial wages were 3,500 Baht and current wages 7,000 Baht.

- In relation to the demand for back pay, the workers specifically demanded that the employer provide back pay of only base wages.
- At the hearing, the workers claimed that the employer dismissed Sat Seb because of his involvement in the complaint the subject of the dismissal of Lay Boren. The workers claimed that the employer dismissed Lay Boren over allegations that he attempted to gamble with clients.
- The employer acknowledges that it is aware of Sat Seb's union membership.
- The employer claims that it dismissed Sat Seb due to his misconduct. The employer claims that it had issued three letters of warning to him and that he had previously acknowledged receipt of those letters. Those letters are dated 12 April 2011, 17 April 2011, and 1 May 2011 respectively.
- According to the statement of the workers dated 26 October 2012, the workers denied those three letters of warning were given to Sat Seb.
- The workers claim that the incidents in which misconduct is alleged to have occurred have not been documented. The employer argues that Vichai, the head of human resources department, witnessed Sat Seb sign the letters of warning.
- The workers argue that there were not three instances where warnings were issued; they claim that the letters merely contained accusations alongside Sat Seb's signature. The workers claim that Sat Seb was also called into the CCTV room twice due to his complaint over the dismissal of Lay Boren. The Arbitration Council gave him the letters of warning to examine. He acknowledged that it was his signature on the letter of warning dated 12 April 2011, but denied that it was his signature on the other letters of warning dated 17 April 2011 and 1 May 2011.
- At the second hearing, the employer admitted that it did not request authorisation from the Labour Inspector to dismiss Sat Seb.
- On 26 March 2012, CTSWF filed a dismissal complaint of Sat Seb, the president of the Local Union of CTSWF, with the Department of Labour and Vocational Training of Banteay Meanchey province.
- On 20 April 2012, the Department of Labour and Vocational Training of Banteay Meanchey province issued letter No. 0444 directing the employer to reinstate Sat Seb and provide him with back pay.
- On 17 May 2012, the employer appealed against letter No. 0444.

- On 31 July 2012, the said department issued a letter rejecting the employer's appeal on the grounds that the dismissal of Sat Seb violated Article 293 of the Labour Law.

**Issue 2: The workers demand that the employer reinstate the union activist Lay Boren to his former position and provide him with back pay from the date of his dismissal to the date of reinstatement.**

- The workers make this demand because Lay Boren has not committed the misconduct as alleged. The workers claim that there are no internal work rules within the company.
- The workers claim that Lay Boren was a union activist.
- The workers claim that Lay Boren commenced his employment on 16 May 2008 after concluding a verbal contract. He was dismissed on 29 February 2012 over alleged misconduct in dealing and shuffling cards.
- The workers claimed that on 29 February 2012 at 10:30 p.m. the casino manager Tin Tong Joo held a meeting of inquiry with Sat Seb over the alleged misconduct for three to four hours. Tin Tong Joo asked him to write a confession letter and leave the workplace or his wife and relatives would also be dismissed and US\$ 1,000 in compensation would be sought. Lay Boren wrote up a letter. The employer tore up the letter because it was not in accordance with the content preferred by the employer. After that, Lay Boren wrote the second letter, and waited until the end of work hours to leave the premises. His wife obtained his outstanding wages for him.
- The employer claims that it dismissed Lay Boren because he had committed serious misconduct by conspiring with a patron named Nou Bora to help him win at gambling. The employer claims that it has a CCTV tape and witnesses to prove his misconduct. Moreover, the accused patron had written and signed a letter of confession. However, the employer did not submit the CCTV tape and brought no witness to submit its claim made from the first hearing.
- The employer submitted some documents in foreign languages. Under the arbitral process, the Arbitration Council only considers documents in Khmer. Therefore, the Arbitration Council declines to consider those documents.
- The employer submitted the alleged confession letter of Nou Bora in Khmer. The workers objected to this letter because it was undated.
- The employer claims that when any staff member commits misconduct, its practice is to call a meeting with them and forward the matter to the police to

conduct further investigation. Then, the employer would dismiss them. The workers did not object this claim.

- The employer claims that in this case, it did not call in police officers at the request of Lay Boren because his wedding day was approaching. Thus, the employer only dismissed him. The workers objected to this claim. The aforesaid workers' claim reads, "...or his wife and relatives would be dismissed..." However, according to the evidence submitted by the workers, Lay Boren used the word fiancée and not wife. Thus, the Arbitration Council is more convinced of the employer's claim.
- The workers claim that there was a dealing instructor present at his table, but the dealing instructor did not tell Lay Boren of his misconduct. The dealing instructor was later called back by a security guard at the instruction of Tin Tong Joo. Clients won 20,000 Baht on the table for which Lay Boren was responsible.
- The employer claims that it has unregistered internal work rules.
- The workers demand that the employer provide back pay of base wages. His monthly wages are 6,000 Baht.
- Lay Boren has already received outstanding wages from the employer.

**Issue 3: The workers demand that the employer reinstate Cheun Kimheng to her former position and provide her with back pay from the date of her dismissal to the date of reinstatement.**

- The workers and the employer have reached an agreement over this issue. Therefore, the Arbitration Council will not consider this issue.

#### **REASONS FOR DECISION**

**Issue 1: The workers demand that the employer reinstate the union president Sat Seb to his former position and provide him with back pay from the date of his dismissal to the date of reinstatement.**

The Arbitration Council considers whether the employer is obligated to reinstate Sat Seb and provide him with back pay (base wages) from the date of his dismissal to the date of reinstatement.

Article 293 of the Labour Law states, "The dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector."

This article is applicable to union leaders as stipulated in Clause 4 paragraph 2 of *Prakas* No. 305 dated 22 November 2001 issued by the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation which reads,

“...[e]xceeding the period mentioned in the above paragraph, this protection will be granted to 3 union leaders pursuant to the conditions set out in Articles 282 and 293 of the Labour Law...”

Based on Clause 4 paragraph 2 of *Prakas* 305 and Article, 293, the Arbitration Council finds that union leaders enjoy special protection from dismissal, as do worker delegates. This means that dismissal of union leaders can only take place after authorisation from the Labour Inspector.

In Arbitral Award 190/12- Long Lead, the Arbitration Council has ordered the employer to reinstate the union president and provide him with back pay from the date of his dismissal to the date of reinstatement due to a violation of the legal procedure set forth under Article 293 and Clause 4 of *Prakas* No. 305.

The Arbitration Council applies that ruling in this case.

In this case, Sat Seb is the president of the Local Union of CTSWF. This union has been registered through certificate No. 2232 dated 23 August 2011. Sat Seb is entitled to special protection from dismissal. Therefore, the employer must seek authorisation from the Labour Inspector first, before dismissing Sat Seb.

According to the facts, the employer has dismissed Sat Seb, and admitted in the second hearing that it failed to seek authorisation from the Labour Inspector in order to do so. Therefore, the Arbitration Council determines that the employer has violated the legal procedure set forth under Article 293 and Clause 4 of *Prakas* No. 305 to dismiss Sat Seb. The employer claims that it has reasons to dismiss him. However, since the employer has failed to follow the legal procedure to in dismissing Sat Seb, the Arbitration Council does not need to consider the reasons for his dismissal.

The Arbitration Council rules that the employer is obligated to reinstate Sat Seb and provide him with back pay from the date of his dismissal to the date of reinstatement.

In conclusion, the Arbitration Council orders the employer to reinstate Sat Seb and provide him with back pay from the date of his dismissal to the date of reinstatement.

**Issue 2: The workers demand that the employer reinstate the union activist Lay Boren to his former position and provide him with back pay from the date of his dismissal to the date of reinstatement.**

The Arbitration Council considers this issue as follows:

**Is Lay Boren entitled to special protection?**

The workers claim that Lay Boren is a union activist.

Based on the aforesaid article 293 and clause 4, the Arbitration Council rules that the special protection of worker delegates is granted to only union leaders. This means that this protection does not extend to union activists or members. Therefore, the Arbitration Council determines that Lay Boren is not entitled to special protection from dismissal.

**What is the nature of the employment contract between the employer and Lay Boren?**

According to the facts, Lay Boren commenced his employment in 2008 through a verbal contract, and he was dismissed on 29 February 2012.

Article 67 paragraph 1 of the Labour Law states, "...A labour contract signed with consent for a specific duration must contain a precise finishing date."

Article 67 paragraph 7 of the Labour Law states, "A contract of a fixed duration must be in writing. If not, it becomes a labour contract of undetermined duration."

Based on paragraphs 1 and 7 of this article, the Arbitration Council rules that Lay Boren held an undetermined duration contract.

**Is the employer obligated to reinstate Lay Boren to his former position and provide him with back pay from the date of his dismissal to the date of reinstatement?**

Article 74 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.

However, no layoff can be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group.

Based on this article, the Arbitration Council rules that the employer has the right to dismiss the workers at will by informing them of a valid reason relating to their aptitude or behaviour, based on the requirements of the operation of the enterprise or the company (*see Arbitral Award 51/08-ASD, reasons for decision, issue 3*).

In this case, the employer claims that it dismissed Lay Boren because he had committed serious misconduct by conspiring with patron Nou Bora to help him win at gambling. The employer claims that it has a CCTV tape and witnesses to prove his misconduct. Moreover, the accused client wrote and signed a confession letter.

In previous arbitral awards, the claimant has borne the burden of proof (*see Arbitral Awards 79/05-Ever Green, 101/08-GDM, reasons for decision, issues 1 and 2; 168/09-Tekthla Plaza, reasons for decision, issue 2; 115/10-G Foremost, reasons for decision, issues 18; 148/11-Dai Young*).

Since the employer fails to submit evidence to support its claims at the hearing by the deadline, the Arbitration Council does not have sufficient facts to conclude whether or not Lay Boren has committed serious misconduct as alleged by the employer. As the employer has failed to prove its claim, the Arbitration Council cannot accept its claim. The Arbitration Council rules that since the employer has failed to submit sufficient evidence by the deadline, the employer has no legal basis to dismiss Lay Boren.

The Arbitration Council rules that the employer is obligated to reinstate Lay Boren. However, since the employer maintains its refusal to reinstate him, the Arbitration Council will consider a termination payment Lay Boren is entitled to as follows:

- 1. Compensation in lieu of prior notice**

Article 75 of the Labour Law states, “The minimum period of a prior notice is set as follows: One month, if the worker's length of continuous service is longer than two years and up to five 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.

In this case, the employer dismissed Lay Boren without giving notice. Since he commenced his employment on 16 May 2008, his seniority is approximately three years, nine months, and 14 days.

Therefore, Lay Boren is entitled to receive compensation in lieu of prior notice equal to one month's wages in accordance with Articles 75 and 77 of the Labour Law.

## **2. Indemnity for dismissal**

Article 89 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.

The Lay Boren's employment period is from 16 May 2008 to 29 February 2012. Thus, his seniority is approximately three years, nine months, and 14 days.

Based on Article 89 of the Labour Law, Lay Boren is entitled to indemnity for dismissal equal to 60 days wages and benefits.

### **3. Payment in lieu of annual leave**

Article 166 paragraphs 1 and 2 of the Labour Law states:

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 a 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.

The Arbitration Council rules that Lay Boren is entitled to payment in lieu of unused annual leave before the termination of his contract in accordance with Article 166. Therefore, the Arbitration Council determines that the employer must provide him with payment in lieu of unused annual leave before the termination of his contract by calculating as such: daily wages multiplies by remaining days of annual leave.

### **4. Damages**

Article 91 of the Labour Law state:

The termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages. These damages are not the same as the compensation in lieu of prior notice or the dismissal indemnity. 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 the reasoning mentioned above, since the employer fails to submit sufficient evidence by the deadline to support the dismissal of Lay Boren, the employer has no legal basis to dismiss him. Therefore, Lay Boren is entitled to damages equal to indemnity for dismissal in accordance with Article 91 of the Labour Law.

### **5. Outstanding wages**

Article 116 of the Labour Law states, "In the event of termination of a labour contract, wage and indemnity of any kind must be paid within forty-eight hours following the date of termination of work."

In this case, the workers state that Lay Boren has already received outstanding wages.

Thus, the employer has fulfilled its obligation under Article 116 of the Labour Law.

In conclusion, the Arbitration Council orders the employer to provide Lay Boren with compensation in lieu of prior notice equal to one month's wages, indemnity for dismissal equal to wages and benefits of 60 days, payment in lieu of unused annual leave before the termination of his contract, and damages equal to indemnity for dismissal.

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

**DECISION AND ORDER**

**Issue 1:**

Order the employer to reinstate Sat Seb and provide him with back pay from the date of his dismissal to the date of reinstatement.

**Issue 2:**

Order the employer to provide Lay Boren with compensation in lieu of prior notice equal to one month's wages, indemnity for dismissal equal to wages and benefits of 60 days, payment in lieu of unused annual leave prior to the termination of his contract, and damages equal to indemnity for dismissal.

**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: **Seng Vuoch Hun**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Tan Try**

Signature: .....