



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 51/12-Sabrina

Date of award: 27 March 2012

Dissenting opinion by Arbitrator Ing Sothy

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

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

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

DISPUTANT PARTIES

Employer party:

Name: **Sabrina (Cambodia) Garment MFG Corp. (the employer)**

Address: National Road 4, Reussey Village, Sambo Commune, Samrong Torng District,
Kompong Speu Province

Telephone: 012 263 522

Fax: N/A

Representatives:

1. Ms Hong Luy Head of Administration
2. Mr Sim Chantha Administration staff
3. Ms You Sokchan Administration staff

Worker party:

Name: **Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC)**

Local Union of FTUWKC

Address: No. 16A, Street 360, Boeung Keng Kang III, Chamkamorn District, Phnom Penh

Telephone: 012 935 496

Fax: N/A

Representatives:

1. Mr Thorn Thul Officer of FTUWKC
2. Mr Sol Kimsan Officer of FTUWKC

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3. Mr Ge Sakla Secretary of the Local Union of FTUWKC

ISSUE IN DISPUTE

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

1. The workers demand that the employer reinstate the union leader. The employer refuses to accommodate this demand.

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. 145/12 KB/KS dated 1 March 2012 was submitted to the Secretariat of the Arbitration Council on 2 March 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: 12 March 2012 at 2:00 p.m.

Procedural issues:

On 23 February 2012, the Department of Labour Disputes of Kompong Speu Province received a strike notice from the Local Union of FTUWKC regarding its demand that the employer reinstate the union's leader. Upon receiving the notice on 24 February 2012, the Department of Labour Disputes of Kompong Speu Province notified the two parties [the workers and the employer] to attend an information session held on 27 February 2012, and conducted a conciliation of the labour dispute on 29 February 2012. After the information session and conciliation, the employer maintained its refusal to reinstate Ge Sakla.

The non-conciliated issue was referred to the Secretariat of the Arbitration Council on 2 March 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 non-conciliated issue, held on 12 March 2012 at 2:00 p.m. Both parties were present at the hearing. The Arbitration Council conducted a further conciliation of the issue, resulting in it remaining unresolved.

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

The Arbitration Council will consider the issues in dispute based on the evidence and reasons below.

EVIDENCE

Witnesses and Experts: N/A

Documents, Exhibits, and other evidence considered by the Arbitration Council:

A. Provided by the employer party:

1. Payroll record of payment in lieu of annual leave paid to Ge Sakla.
2. Payroll record of Ge Sakla's 'resignation payment' (indemnity for dismissal, compensation in lieu of prior notice, payment in lieu of annual leave, outstanding wages, and damages) for February 2012.
3. Report on Ge Sakla's resignation.
4. Job application of Ge Sakla.
5. Two month probationary contract of Ge Sakla, effective from 19 December 2006 to 19 February 2007.
6. Casual employment contract of Ge Sakla, effective from 6 September 2006 to 6 October 2006.
7. Endorsement by a referee of Ge Sakla's identity and residence for the electoral roll.
8. Proof of residence No. 14558 dated 15 June 1999.
9. Employment contract of Ge Sakla, effective from 19 February 2007 to 19 August 2007.
10. Employment contract of Ge Sakla, effective from 19 August 2007 to 19 February 2008.
11. Employment contract of Ge Sakla, effective from 19 February 2008 to 19 August 2008.
12. Employment contract of Ge Sakla, effective from 19 August 2008 to 19 February 2009.

13. Minutes of a meeting regarding a new grouping arrangement put in place due to the needs of the factory, held amongst the employer, the workers' representatives, and the union, dated 20 February 2012.
14. Company statute and memorandum.
15. Certificate of commercial registration, No. 4118 dated 1 August 2008.
16. Internal Work Rules of the employer, No. 411 dated 30 May 2011.
17. Letter from the employer notifying the head of the Department of Labour and Vocational Training of the contract termination of Ge Sakla, dated 22 February 2012.
18. Letter from the Department of Labour Disputes to Sun Vanny regarding an application for registration of the Local Union of FTWKC, No. 309 dated 14 March 2012.
19. Letter from the employer to the head of the Department of Labour and Vocational training of Kompong Speu Province seeking permission to dismiss Ge Sakla, dated 13 March 2012.
20. Collective agreement between the employer and the Local Union of the Coalition of Cambodian Apparel Worker Democratic Unions (C.CAWDU), dated 23 May 2011.

B. Provided by the worker party:

1. Letter from the Local Union of FTUWKC notifying the employer of the members of its leadership in the factory, No. 020/12 dated 2 February 2012.
2. Receipt of acknowledgement of an application for registration of the Local Union of FTUWKC, dated 10 February 2012.
3. List of names of the leaders of the Local Union of FTUWKC, dated 28 January 2012.
4. Statute of the Local Union of FTUWKC.
5. Letter from Cambodia Post verifying that it has not received a notification from FTUWKC.
6. Excerpt of Article 12 of the Labour Law.
7. Minutes of a meeting of the Local Union of FTUWKC regarding its election, dated 28 January 2012.
8. Receipt of local Express Mail Service (EMS) used by Sol Kimsan to send a notification to the employer, dated 6 February 2012.
9. Application for registration from the Local Union of FTUWKC to the Minister for Labour and Vocational Training, dated 10 February 2012.

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

1. Report on the collective labour dispute resolution at Sabrina (Cambodia) Garment MFG Corp., No. 145/12 KB/KS dated 1 March 2012.
2. Minutes of the collective labour dispute resolution at Sabrina (Cambodia) Garment MFG Corp., dated 29 February 2012.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 254 KB/AK/VK/LKA dated 6 March 2012.
2. Notice to attend the hearing addressed to the workers, No. 255 KB/AK/VK/LKA dated 6 March 2012.

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:

- Sabrina (Cambodia) Garment MFG Corp. operates a garment factory and employs a total of 5,000 workers.
- The Local Union of FTUWKC is the claimant in this case.

Issue 1: The workers demand that the employer reinstate the union leader.

- The workers demand that the employer reinstate Ge Sakla.
- Having commenced as a permanent worker on 19 December 2012 [2006] on an undetermined duration contract, Ge Sakla is a worker in the ironing section and the secretary of the Local Union of FTUWKC.
- The employer dismissed him on 22 February 2012 as he refused to follow a direction at work.
- On 20 February [2012], the employer held a discussion with the president of the Local Union of C.CAWDU [the union with most representative status], the workers' representatives, and the head of administration about the transfer of workers from the sewing and ironing sections to the sample section, the outcome of which was agreement on the transfer. A total of 32 workers in the ironing section, including Ge Sakla, were transferred to the sample section. However, the employer did not inform them of their new wage nor did it give them a reason for not telling them of the new wage. Of the 32 workers, only Ge Sakla refused to be transferred to the new section.
- On 21 February 2012 at 8:30 a.m., the administration staff informed Ge Sakla that he was transferred to the sample section. Ge Sakla asked the administration staff about his new wage. The administration staff told him that his wage would be increased to

the wage of the head of the sample section. Ge Sakla asked what his exact new wage would be. However, the administration staff still did not tell him and told him to move to the new section first. Consequently, Ge Sakla refused to work in the new section. The employer allowed him to consider the transfer until the following day.

- On 22 February 2012 at about 7:00 a.m., Ge Sakla arrived at the administration office and told the administration staff that he still did not agree to the transfer because the task in the sample section is more difficult even though it utilises ironing skills, and more importantly, he was not informed in advance of his new wage. The employer accepted this version of events and stated that he was dismissed on that same day because of his refusal to follow the employer's direction in organising work sections. Ge Sakla did not accept a termination payment.
- Since the commencement of his work [in 2006], Ge Sakla has not received any disciplinary warnings.

Ge Sakla's union leadership:

- Ge Sakla was elected secretary of the Local Union of FTUWKC on 28 January 2012.
- The Local Union of FTUWKC submitted an application for registration to the Department of Labour Disputes of the Ministry of Labour and Vocational Training, and received an acknowledgement receipt for the application on 10 February 2012.
- This union notified the employer of the election result on 2 February 2012 at about 2:00 p.m. At that time, a security guard contacted the staff members in the administration office and was instructed not to acknowledge the receipt of the notification at that time because the staff members were busy.
- On 6 February 2012, the union sent the election result to the employer by post. However, the employer asserts that it has not received it.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate the union leader.

Before determining this issue, the Arbitration Council considers whether the demand gives rise to a rights dispute.

In previous arbitral awards, the Arbitration Council has ruled that a rights dispute is a dispute which has a basis in the law, an agreement [employment contract], or a collective agreement (*see Arbitral Awards 05/11-M & V (Branch 1), reasons for decision, issue 1; 13/11-Gold Kamvimex, reasons for decision, issues 1 & 2; and 14/11-GHG, reasons for decision, issue 4*).

The Arbitration Council applies the abovementioned ruling in this case.

In this case, the Arbitration Council finds that the issue concerns the termination of a worker's employment contract, which has a basis in the Labour Law thus making this a rights dispute.

The Arbitration Council considers whether the employer had a valid reason to dismiss Ge Sakla.

Article 74 of the Labour Law (1997) states that:

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 behaviour, based on the requirements of the operation of the enterprise, establishment or group.

Based on this article, the Arbitration Council considers that the employer is entitled to dismiss the workers at will; however, the employer must notify the workers of a valid reason relating to their aptitude or behaviour based on the requirements of the operation of the enterprise or of the company (*see Arbitral Awards 51/08-ASD, reasons for decision, issue 3; 60/08-PCCS, reasons for decision, issue 6; and 19/12-MPA, reasons for decision, issue 1*).

In this case, the employer dismissed Ge Sakla with immediate effect after he maintained his refusal to move to the sample section, which was deemed by the employer as refusing to follow its direction.

The Arbitration Council considers whether Ge Sakla's refusal to move to the new section without being informed of the new wage in advance was a refusal to follow the employer's direction and therefore misconduct, leading to dismissal.

Article 2, paragraph two of the Labour Law (1997) states that "[e]very enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in factory, workshop, work site, etc., under the supervision and direction of the employer."

In previous arbitral awards, the Arbitration Council has interpreted this article to mean that the employer has the right to direct and supervise the company as long as it is done lawfully and reasonably (*see Arbitral Awards 62/06-Quicksew, reasons for decision, issue 5; 108/06-Trinunggal Komara, reasons for decision, issue 1; 33/07-Goldfame, reasons for decision, issue 3; 106/07-M & V (Branch 3), reasons for decision, issue 3; 84/08-Trinunggal Komara, reasons for decision, issue 1; and 141/08-Bloomtime, reasons for decision, issue 1*).

The Arbitration Council applies this interpretation in this case.

The Arbitration Council goes on to consider that whether the employer's direction and supervision in this case was lawful and reasonable.

Article 112(a) of the Labour Law states that:

The employer must take measures to inform the workers in a precise and easily comprehensible fashion of:

a) The terms regarding wage that apply to the workers before they are assigned to a job or at any time that these terms change.

In this case, the employer decided to transfer Ge Sakla from the ironing section to the sample section and change his wage as well. However, he was not informed of his exact wage and was required to move to the new section suddenly. The Arbitration Council considers that the employer's action is inconsistent with paragraph (a) of Article 112.

The Arbitration Council considers that the wage is an important element in the employment contract between the worker and the employer. The worker has the right to know their wage for performing specific tasks, so that they can consider whether the work is commensurate with the wage they will be paid. The Arbitration Council considers that the fact that the employer required a worker to move to a new section without informing him of his new wage in advance is unreasonable.

According to the facts, the task in the sample section is more difficult than that in the ironing section. This was one of the reasons for the worker's refusal to move to the new section. The Arbitration Council determines that his refusal to move to the new section without being informed of his wage is not as the same as a refusal to follow the employer's direction amounting to misconduct which can lead to dismissal. The Council decides that the employer had no valid reason to dismiss Ge Sakla.

As the employer dismissed this union leader on 22 February 2012, the Arbitration Council goes on to consider whether the employer dismissed him in accordance with the procedure set forth in the Labour Law.

Article 293 of the Labour Law states that: "[t]he dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector..."

Clause 3, paragraph three of *Prakas* No. 305 dated 22 November 2001, states:

Any worker belonging to a union who runs for a leadership position in that union shall enjoy the same protection from dismissal as a shop steward. This protection begins 45 days prior to the election and ends, if s/he is not elected, 45 days after the election. To this end, the employer must be duly informed of

the candidacy by any reliable means. However, the employer shall only be required to comply with this provision once for each election of union leaders.

In previous arbitral awards, the Arbitration Council has interpreted Clause 3 of *Prakas* No. 305 to mean that

The workers are entitled to special protection as long as (1) they are under the category of workers who are entitled to special protection, (2) the dismissal takes place during the protection period, and (3) the union must notify the employer of the worker candidates entitled to special protection through all reliable means (*see Arbitral Awards 71/09-Hytex, reasons for decision, issue 1 and 09/10-Chung Hao*).

In this case, the Arbitration Council will consider whether the case of Ge Sakla has satisfied the aforesaid three conditions in order to acquire special protection.

First condition: Ge Sakla was a candidate for union leadership under Clause 3 of *Prakas* No. 305 and was elected on 28 January 2012. Thus, he is under the category of workers who are entitled to special protection.

Second condition: the employer dismissed him on 22 February 2012; that is, within 45 days after the election, a period of special protection (*see Arbitral Award 40/10-Meng Yan*). In Arbitral Award 40/10, the Arbitration Council ruled that protection for the elected candidates should last at least 45 days after the election or extend to an appropriate period, which can be until the date of application for registration of the union.

Third condition: the union notified the employer of the elected candidates for its leadership on 2 February 2012 and 6 February 2012. That is, [the Arbitration Council finds that] the union has in fact notified the employer through reliable means [despite the employer's denial of receiving it]. Thus, this condition is met.

In this case, after the hearing on 14 March 2012, the Arbitration Council received evidence from the employer regarding a request for authorisation to dismiss Ge Sakla submitted to the Labour Inspector.

Clause 25 of *Prakas* No. 099 dated 21 April 2004 states that: “[t]he arbitration panel shall be free to determine the admissibility, relevance, materiality and weight of evidence as well as the allocation of the burden of proof.”

At the hearing, the Arbitration Council found that the employer had dismissed Ge Sakla without making a request for authorisation from the Labour Inspector. However, after the hearing the employer submitted to the Arbitration Council evidence in the form of a request made to the Labour Inspector for authorisation to dismiss Ge Sakla. The Council

considers that this evidence is irrelevant to the facts and the employer's argument at the hearing. Therefore, the Council does not consider this evidence in its decision.

Based on the foregoing, the Arbitration Council considers that the employer failed to request authorisation from the Labour Inspector to dismiss this union leader. Therefore, the Council orders the employer to reinstate Ge Sakla to the sample section, maintain his wages and benefits, and retain his work responsibility to be at least at the level of his previous work responsibility in the ironing section.

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

DECISION AND ORDER

Part I. Rights dispute:

Issue 1: Order the employer to reinstate Ge Sakla to the sample section, maintain his wages and benefits, and retain his work responsibility to be at least at the level of his previous work responsibility in the ironing section.

Type of award: binding award

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

Part II. Interests dispute: N/A

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Ang Eng Thong**

Signature:

Annex to Arbitral Award 51/12-Sabrina

Dissenting Opinion to Arbitral Award 51/12-Sabrina By Arbitrator Ing Sothy from the employer list

Clause 37 of *Prakas* No. 099 SKBY, dated 21 April 2004, issued by the Ministry of Labour and Vocational Training states:

The arbitral panel shall record its decisions in an award which shall be signed by all three arbitrators. If one of the arbitrators does not agree with the decision of the majority, the dissenting arbitrator may record his dissent as an annex to the award.

Based on this clause, I, Arbitrator **Ing Sothy**, would like to record my dissent on the ruling of Arbitral Award **51/12-Sabrina** in which the Arbitration Council orders the employer to reinstate Ge Sakla. I would like to explain the reasons for my dissent:

At the hearing, the employer argued that the dismissal of Ge Sakla is due to the fact that he refused to follow its direction, and at the time of dismissal, he was an ordinary worker [not a union leader] (Letter of the employer regarding notification of the worker's contract termination, dated 22 February 2012), and the employer did not receive the notification from the union [regarding its elected representatives].

The workers argued that it notified the employer of the election on 2 February 2012 at 2:00 p.m. via two or three security guards, but could not recall the colour of the security guards' shirts. The workers also argued that it had submitted an application for registration of the union since 10 February 2012 and notified the employer by post on 6 March 2012, but the date on the postal receipt was **5 March 2012**.

The arbitral panel ordered both parties to submit evidence by 14 March 2012 and they did so by the deadline. The employer submitted a letter dated 13 March 2012, requesting the dismissal of Ge Sakla to the Labour Inspector along with the following reasons of dismissal:

1. Ge Sakla has violated clause 3, point 1, of the Internal Work Rules and clause 7, point k, of the collective agreement.
2. Ge Sakla has faked documents in the application for registration of the union, that is to say, his date of birth is 4 June 1980 in the company's documents and 4 June 1985 in the application.

In conclusion, I consider that:

1. At the time of dismissal, the employer was aware that Ge Sakla is an ordinary worker (letter of the employer dated 22 February 2012).
2. At the hearing, the employer learned that Ge Sakla was a union leader. Thus, on 13 March 2012, the employer submitted a request to dismiss Ge Sakla in accordance with Article 293 of the Labour Law.

As outlined above, I consider that the dismissal must be based on Ge Sakla's misconduct, which is under the jurisdiction of the Labour Inspector (Article 293 of the Labour Law); additionally, I note the Arbitration Council has not considered the substance of the employer's requests to dismiss the union leaders based on serious misconduct in the past.

In this dispute, the employer was not aware that Ge Sakla was a union leader during the period between the date of dismissal and the date of the hearing (from 22 February 2012 to 13 March 2012); after the hearing, the employer was aware of his position as secretary of the union and made a request to the Labour Inspector to dismiss him, on 13 March 2012 to the date of authorisation of the dismissal.

Hence, I would like to divide the ruling into two parts.

Part 1:

- From 22 February 2012 to 13 March 2012, Ge Sakla, the union leader, was entitled to special protection in accordance with Article 282 [of the Labour Law] and *Prakas* No. 305, clause 4, paragraph 2, line 1.

Part 2:

- From 14 March 2012 until the date of the decision to dismiss him, the decision whether or not to reinstate him is under the exclusive jurisdiction of the Labour Inspector in accordance with Article 293 of the Labour Law.

Conclusion:

- Part 1: I agree to order the employer to reinstate Ge Sakla from 23 February 2012 until the decision of the Labour Inspector because he is a union leader.
- Part 2: As the dismissal of union leaders is under the exclusive jurisdiction of the public institution stipulated in Article 293 of the Labour Law, the parties must follow it:
 1. If Ge Sakla has not committed misconduct as alleged, the Labour Inspector will not order the employer to dismiss him.
 2. If Ge Sakla has not committed misconduct as alleged, the Labour Inspector will approve the dismissal of Ge Sakla.

Regarding the document that the Arbitration Council ordered the parties to submit, the Council must take it into consideration because Rule 4, point 4.5, of the Arbitration Council Procedural Rules, states that, “[t]he arbitration panel may require a party to provide evidence in the form of witnesses, exhibits or documents” and Rule 4, point 4.8 states that, “[i]n making any decision concerning proceedings, including procedural disputes, the arbitration panel shall be guided by considerations of fairness, the cost-effective resolution of the dispute , and the need to resolve the dispute quickly.”

As this case falls under the jurisdiction of the Arbitration Council for the period prior to the employer’s request to the Labour Inspector, I consider that the arbitral panel can rule on part 1 and not part 2, which is under the exclusive jurisdiction of the Labour Inspector in accordance with Article 293 of the Labour Law.

Furthermore, the Labour Law and the labour-related regulations do not restrict the employer to submit a dismissal request within a certain period of time. Therefore, the employer holds the right to submit the dismissal request at any time when it learns that the dismissed worker is a union leader.

Phnom Penh, 27 March 2012

Signature

Ing Sothy