



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 25/11-MPA

Date of Award: 18 March 2011

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): **Pen Bunchhea**

DISPUTANT PARTIES

Employer party:

Name: **MPA International Ltd (the employer)**

Address: Street 214, Beoung Raing Commune, Daun Penh District, Phnom Penh

Telephone: 012 964 518

Fax: N/A

Representatives:

1. Mr Khiev Van Lawyer
2. Mr Chhem Samnang Head of Human Resources

Worker party:

Name: **Former security guards of MPA International**

Address: Street 214, Beoung Raing Commune, Daun Penh District, Phnom Penh

Telephone: 012 335 060

Fax: N/A

Representatives:

1. Mr Heng Vichet Security guard
2. Mr Macakrong Sokha Security guard
3. Mr Chab Chamroeun Security guard

ISSUES IN DISPUTE

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

1. The workers demand that the employer introduce a reasonable alternating day and night shift rotation at 15 day intervals. Workers who agree to work night shift demand a written agreement that the employer has to pay them in accordance with the Labour Law. The employer refuses to accommodate the workers' demands due to managerial prerogative.
2. The workers demand that the employer refrain from forcing them to work overtime, arguing that it forced Heng Vichet to work overtime in 2009. The employer states that it asks the workers to work overtime on a voluntary basis. It does not provide a separate overtime meal allowance because it has calculated their wages to include the meal allowance required by the Labour Law.
3. The workers demand that the employer provide them with equal wages for the same work. The employer states that it refuses to accommodate the workers' demand because the staff do not all have the same level of professionalism.
4. The workers demand that the employer reinstate Heng Vichet, Macakrong Sokha, and Chab Chamroeun because they have not committed acts of misconduct. The employer refuses to reinstate Heng Vichet because he abandoned his work (he was absent from 15 August 2010 to 31 August 2010); however, the employer will consider reinstating Macakrong Sokha and Chab Chamroeun.
5. The workers demand that the employer return Macakrong Sokha's radio, hammock, bag, Khmer identity card, motorbike license, and other documents contained in his bag to Heng Vichet because But Rithy, ID No. 340, took his belongings from him at the Swedish embassy in 2008. Macakrong Sokha was aware of this. The employer refuses to return Macakrong Sokha's belongings because it did not order its staff to take them from him.

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. 133 dated 9 June 2010 (Eighth 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. 190 KB/RK/VK dated 15 February 2011 was submitted to the Secretariat of the Arbitration Council on 15 February 2011.

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 Quarter, Tuol Kork District, Phnom Penh

Date of hearing: 24 February 2011 at 8:30 a.m.

Procedural issues:

On 13 January 2011, the Department of Labour Disputes received a complaint from the workers, demanding that the employer improve working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the dispute and the last conciliation session was held on 9 February 2011. As a result, three of the eight issues were conciliated. The five non-conciliated issues were referred to the Secretariat of the Arbitration Council on 15 February 2011 via non-conciliation report No. 190 KB/RK/VK dated 15 February 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation on the five non-conciliated issues, held on 24 February 2011 at 8:30 a.m.

Both parties were present at the hearing. The Arbitration Council conducted a further conciliation of the five issues, resulting in issues 2, 3, and 5 being withdrawn by the workers. The Arbitration Council will consider issues 1 and 4 in this case 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. Authorisation letter from the employer for Khiev Van, dated 23 February 2011.
2. Authorisation letter from the employer for Khiev Van, dated 16 November 2010.
3. Brief statement on the labour dispute in case 25/11, dated 23 February 2011.
4. Certificate of commercial registration of the employer, dated 28 October 2008.
5. Internal Work Rules of the employer, dated 11 December 2006.
6. Statute of the employer, dated 24 October 2008.
7. Request by Chea Phanet for security guards, dated 16 August 2010.

8. Report by Chea Phanet on the return of the security guards to MPA International, dated 16 August 2010.
9. Letter from Chea Phanet to Heng Vichet, a security guard, dated 27 July 2010.
10. Report by Chea Phanet on the security guards' absence to the head of operations, dated 27 July 2010.
11. Report by Chea Phanet on the security guards' absence to the head of human resources, dated 28 July 2010.
12. Authorisation letter from the employer for Chhem Samnang, dated 31 January 2011.
13. Certificate of enterprise registration of MPA International Ltd, dated 3 June 2009.
14. Record of collective labour dispute conciliation, dated 9 February 2011.
15. Application for security training by Heng Vichet, dated 19 April 2006.
16. Resume of Heng Vichet, dated 19 April 2006.
17. Reference form completed by Keut Seng for Heng Vichet, dated 19 April 2006.
18. Khmer Identification Card of Keut Seng.
19. Khmer Identification Card of Heng Vichet.
20. Employment contract of Heng Vichet, dated 20 October 2009.
21. Letter from the Minister for Interior to Heng Vichet, President of the Tourism Guide Association, regarding a request to amend the TGA statute and to recognise its new structure, No. 469 SNC dated 23 March 2010.
22. Letter from the Minister for Labour and Vocational Training to the president of Our Health Association requesting the creation of a self-health protection program, No. 508 KB dated 24 March 2010.
23. Letter from But Rithy to the employer's lawyer denying the allegations made by Heng Vichet, dated 25 February 2011.
24. Letter from Ouk Vanthy to the head of human resources regarding Heng Vichet's case, dated 28 March 2011.
25. Letter by Chea Phanet regarding Heng Vichet's case, dated 26 February 2011.

B. Provided by the worker party:

1. Brief statement on the collective labour dispute, dated 26 February 2011.
2. Letter from Heng Vichet to the Minister for Labour and Vocational Training requesting intervention in his case, dated 16 August 2010.

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

1. Report on collective labour dispute resolution at MPA International Ltd, No. 190 KB/RK/VK, dated 15 February 2011.
2. Record of collective labour dispute resolution at MPA International Ltd, dated 9 February 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 133 KB/AK/VK/LKA dated 17 February 2011.
2. Notice to attend the hearing addressed to the workers, No. 134 KB/AK/VK/LKA dated 17 February 2011.

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:

- No local union or federation is involved in the issues in this case, there are only three security guards making a direct demand to the Arbitration Council.
- According to the non-conciliation report, the employer employs 2,050 workers.

Issue 1: The workers demand that the employer introduce an alternating day and night shift rotation at 15 day intervals and pay their wages at the night rate in accordance with the Labour Law.

- The workers state that they make this demand for Heng Vichet and Macakrong Sokha only.
- The workers state that Heng Vichet and Macakrong Sokha commenced work in 2005 under undetermined duration contracts. Their wages were initially US\$ 55 and later US\$ 150 per month.
- According to the employer's evidence, Heng Vichet commenced probationary work on 10 March 2006 and earned US\$ 55 per month. Following the probationary period, he was paid US\$ 150 per month. Heng Vichet worked from 10:00 p.m. to 6:00 a.m. As such, the Arbitration Council finds that his employment commenced in 2006, he received wages of US\$ 150, and he worked the night shift.
- Macakrong Sokha's employment contract was not submitted to the Arbitration Council; however, the employer agrees that he commenced work in 2005, was paid US\$ 150 per month, and worked the night shift.
- The employer's practice is to pay the same wages to both day and night shift workers.

- The workers argue that working night shifts can affect their health. By the time the dawn approaches, they feel exhausted. If they have an alternating day and night shift rotation at an interval of 15 days, they have time to rest.
- The employer refuses to accommodate the demand on the grounds that the shift rotation does not exist in its policy. Moreover, the workers' employment contracts stipulate their working hours; i.e. they are required to work eight hours per day and can choose their preferred shift. The employer explained that shift work is comprised of A shift, from 6:00 a.m. to 2:00 p.m.; B shift, from 2:00 p.m. to 10:00 p.m.; and C shift, from 10:00 p.m. to 6:00 a.m.

Issue 4: The workers demand that the employer reinstate Heng Vichet, Macakrong Sokha, and Chab Chamroeun, and provide them with back pay from the date of dismissal to the date of reinstatement.

- In this case, Heng Vichet, Macakrong Sokha, and Chab Chamroeun demand that the employer reinstate them. At the hearing, the employer agreed to reinstate Macakrong Sokha and Chab Chamroeun, but not Heng Vichet. However, Macakrong Sokha and Chab Chamroeun refused to be reinstated. The Arbitration Council is of the view that Macakrong Sokha and Chab Chamroeun are no longer in dispute with the employer because their demand has been met. Thus, the Arbitration Council will not consider the demand of those two workers.

Case of Heng Vichet:

- The employer argues that Heng Vichet's demand does not give rise to a collective dispute because he did not comply with his employment contract or the Internal Work Rules.
- The workers argue that the demand is a collective dispute because it involves collective benefits and many claimants, but the other workers did not dare bring their complaints to the Council because they feared for their job security. Heng Vichet stated that he was President of the association that represented the workers of MPA International Ltd.
- The Arbitration Council finds that the workers' claim has no basis and that Heng Vichet failed to state how his position as President of the association could jeopardise the effective operation of the employer.
- The employer argues that it dismissed Heng Vichet because he abandoned his work from 15 August 2010 to 31 August 2010. Clause 6, point 3 of the Internal Work Rules states that "absence of six consecutive days shall be construed as abandonment of

work.” In addition, this act constitutes a serious infraction of disciplinary regulations as per Article 83 of the Labour Law. In this instance, Heng Vichet did abandon his work.

- The employer stated that it telephoned him and asked him to return to work on 14 August 2010, transferring him from the embassy [he had been stationed at]. He responded at the time that he would not accede to the employer’s request. The employer noted that he did not attend work on 15 August 2010. On 16 August 2010, the employer telephoned him again but he could not be reached. He remained absent until 31 August 2010. Therefore, on 1 September 2010 the employer assumed that he had abandoned his work.
- Heng Vichet stated that on the night of 15 August [2010] he went to stand guard at the embassy and was informed by another security guard that he had been replaced in that position. On 16 August 2010, he attempted to meet with Operations Manager Khy Phanna, but was unsuccessful. He then telephoned Khy Phanna and was told that he had been dismissed on the grounds of work abandonment. He alleged that on 16 August 2010 he submitted a letter to the Minister for Labour and Vocational Training requesting reinstatement. Based on the evidence, the Arbitration Council finds that the letter was written on 16 August 2010 and was received by the Ministry of Labour and Vocational Training on 1 September 2010 and by the Department of Labour Disputes on 13 September 2010.

REASONS FOR DECISION

The Arbitration Council will consider issue 4 first because it involves the employment relationship between the security guard Heng Vichet and the employer. The decision on this issue may affect the interests involved in issue 1.

Issue 4: The workers demand that the employer reinstate Heng Vichet and provide him with back pay from the date of dismissal to the date of reinstatement.

At the hearing, the employer argued that the dispute between it and Heng Vichet is not collective. The Arbitration Council considers this issue 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.

In previous arbitral awards, the Arbitration Council has assumed that the demands in the non-conciliation report give rise to collective disputes. Furthermore, in the event that the employer objects on the basis that the dispute is not collective, the employer has the burden of proving the allegation (*see AAs 45/07-Wilson, reasons for decision, issue 4 and 13/08-Terratex, reasons for decision, issue 2*).

According to the facts, the employer argues that Heng Vichet's demand relates to his dispute with the employer; it does not involve other workers and does not jeopardise the effective operation of the enterprise.

In Arbitral Award 10/03-Jacqsintex, the Arbitration Council held that:

In order to call a dispute a collective dispute, it must fulfil three conditions in accordance with Article 302 of the Labour Law. The three conditions are:

- a. It is a dispute between some workers and one or more employer;
- b. The subject of the dispute relates to 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
- c. The dispute could jeopardise the effective operation of the enterprise or social peace.

Therefore, the Arbitration Council will consider whether the three conditions are satisfied:

1. The Arbitration Council finds that the first condition is not satisfied because the dispute concerns only one worker. According to the facts, Heng Vichet did not have evidence proving that his demand was endorsed by other workers.
2. The second condition is satisfied because the dispute relates to the dismissal of workers.
3. The third condition is not satisfied because the dispute concerns the termination of an individual contract; it does not affect the benefits of other workers, and it could not jeopardise the effective operation of the employer.

Therefore, the Arbitration Council holds that the dispute is not a collective dispute.

Article 309 of the Labour Law states:

If conciliation fails, the labour dispute shall be referred to settle:

- a) by any arbitration procedure set out in the collective agreement, if there is such a procedure; or

- b) by any other procedure agreed on by all the parties to the dispute; or
- c) by the arbitration procedure provided for in this Section.

Clause 32 of *Prakas* No. 099 on the Arbitration Council, dated 21 April 2004, provides that “[t]he arbitration panel shall decide on any collective labour dispute that is referred to it in accordance with Article 309 of the Labour Law.”

Thus, based on the foregoing, the Arbitration Council does not have jurisdiction over non-collective labour disputes.

In conclusion, the Arbitration Council declines to consider Heng Vichet’s demand that the employer reinstate him.

Issue 1: The workers demand that the employer introduce an alternating day and night shift rotation at 15 day intervals and pay their wages at the night rate in accordance with the Labour Law.

As decided above, Heng Vichet’s demand does not fall within the jurisdiction of the Arbitration Council. Therefore, the Council declines to consider this demand insofar as it relates to Heng Vichet.

In this case, the Arbitration Council will consider this demand only as it relates to Macakrong Sokha because the employer has agreed to reinstate him.

Demand for an alternating day and night shift rotation at an interval of 15 days:

Article 65 of the Labour Law states:

A labour contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties.

According to this article, an employment contract is subject to ordinary law. Therefore, Decree 38 on Contracts and Other Liabilities dated 28 October 1988 is taken into account when considering this issue (*see AAs 131/09-Medcrest Textiles, reasons for decision, issue 3; 54/10-USA, reasons for decision, issue 6; and 107/10-June Textile, reasons for decision, issue 4*).

Article 1 of the decree states: “A contract is an agreement between two or more persons to create, change or terminate one or more obligations which bind them.”

Article 22 of the same decree states: “A contract is a legally binding agreement between the parties.”

Based on these articles, the Arbitration Council considers that a contract is a legally binding agreement between the parties and amendments to the contract can only be made with the consent of both contracting parties.

Article 3 of the aforementioned decree states: “A contract is valid provided that it...arises out of a real and free agreement.”

This means that a contract is not valid unless it is concluded with free consent.

Macakrong Sokha acknowledges that he has worked the night shift since he commenced at MPA International. The Arbitration Council finds that when concluding the employment contract, he knew clearly that he would be required to work the night shift. For this reason, if a worker wishes to change their shifts, the worker must seek agreement from the employer.

In conclusion, the Arbitration Council rejects Macakrong Sokha’s demand that the employer rotate day and night shifts at 15 day intervals.

Demand that the night rate be calculated in accordance with the Labour Law:

(The new) Article 144 of the Labour Law (1997), as amended in 2007, states:

Besides continuous work that is performed by groups of workers with rotating shifts who sometimes work during the day and sometimes at night, the work of the enterprise may have one portion which is performed always at night. Night work shall be paid at a rate of 130% (one hundred thirty percent) of the day time wage.

In light of this article, the Arbitration Council considers that night workers must be paid wages that are 30% higher than the wages paid to day workers (130% of day work wages) (see AA 119/07-Royal Crowntex, issue 16).

The Arbitration Council finds that the employer is paying security guards working at night the same wages that it pays to those working during the day. Macakrong Sokha is paid US\$ 150 per month, the same amount paid to workers on the day shift.

In conclusion, based on the new article [144], the Arbitration Council orders the employer to pay Macakrong Sokha 130% of day shift wages, i.e. 130% of US\$ 150, if he agrees to be reinstated.

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

DECISION AND ORDER

Issue 1:

- Decline to consider Heng Vichet's demand that the employer rotate day and night shifts at 15 day intervals and pay his wages at the night rate in accordance with the Labour Law.
- Reject Macakrong Sokha's demand that the employer rotate day and night shifts at 15 day intervals.
- Order the employer to pay Macakrong Sokha's wages at the rate of 130% of day shift wages if he agrees to be reinstated.

Issue 4:

- Decline to consider Heng Vichet's demand that the employer reinstate him.

Type of award: non-binding award

This 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 time period.

SIGNATURES OF 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: **Pen Bunchhea**

Signature: