



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 14/11-GHG

Date of award: 16 February 2011

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: **Sin Kim Sean**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

DISPUTANT PARTIES

Employer party:

Name: **GHG (Cambodia) Ltd.**

Address: Roeusey Village, Stung Meanchey Commune, Meanchey District, Phnom Penh

Telephone: 012 522 266

Fax: N/A

Representatives:

1. Mr Long Heang Official from the Garment Manufacturers Association in Cambodia (GMAC)
2. Ms Chea Lychou Administrator

Worker party:

Name: **Coalition of Cambodian Apparel Worker Democratic Unions (C.CAWDU)**

Local Union of C.CAWDU

Address: No. 2-3G, Street 26BT, Boeung Tompun Commune, Meanchey District,

Phnom Penh

Telephone: 089 960 860

Fax: N/A

Representatives:

1. Mr Muoy Chheang Dispute Resolution Official of C.CAWDU
2. Ms Lach Sochun Worker
3. Ms Nun Socheat Worker

THIS IS AN UNOFFICIAL ENGLISH TRANSLATION OF THE AUTHORITATIVE KHMER ORIGINAL.

Date of hearing: 27 January 2011 at 8:00 a.m.

Procedural issues:

On 20 December 2010, the Department of Labour Disputes received a complaint from C.CAWDU, No. 081/10 SBY dated 16 December 2010, outlining their demands for the improvement of working conditions by the employer. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the labour dispute and the last conciliation session was held on 10 January 2011, resulting in none of the four issues being resolved. The four non-conciliated issues were referred to the Secretariat of the Arbitration Council on 20 January 2011 via non-conciliation report No. 084 KB/RK/VK dated 20 January 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the four non-conciliated issues, held on 27 January 2011 at 8:00 a.m. Both parties were present at the hearing as summoned by the Arbitration Council. The Arbitration Council conducted a further conciliation of the four non-conciliated issues, resulting in issues 1 and 3 being resolved.

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, the parties are unable to object 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.

Any objection by the parties to an award on interests disputes will not affect their obligation to implement an award on rights disputes in accordance with the spirit of the MoU.

The Arbitration Council will consider the issues 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. Brief statement by the employer, dated 31 January 2011.
2. Warning letter for Lach Sochun, dated 4 December 2010.
3. Warning letter for Lach Sochun, dated 6 July 2010.
4. Warning letter for Lach Sochun, dated 3 December 2010.
5. List of workers who were late to work.

6. Internal Work Rules of the employer, dated 25 March 2004.
7. Letter of objection to issue 2, in which Lach Sochun states that she was sick, dated 1 February 2011.

B. Provided by the worker party:

1. Brief statement by the workers, dated 27 January 2011.
2. Authorisation letter from the leaders of the Local Union of C.CAWDU and the workers for the President of C.CAWDU, dated 6 December 2010.
3. Internal Work Rules of the employer, dated 25 March 2004.
4. Thumbprints of witnesses attesting to Lach Sochun's innocence.
5. Thumbprints of witnesses attesting that there was a traffic jam on 18 November 2010, causing Kong Thun to be late for work.
6. Letter of objection to the statement and documents submitted by the employer, dated 2 February 2011.
7. Certificate of union registration of the Local Union of C.CAWDU, dated 5 October 2009.

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

1. Report on collective labour dispute resolution at GHG (Cambodia) Ltd., No. 084 KB/RK/VK, dated 20 January 2011.
2. Record of collective labour dispute resolution at GHG (Cambodia) Ltd., dated 10 January 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 067 KB/AK/VK/LKA dated 21 January 2011.
2. Notice to attend the hearing addressed to the workers, No. 068 KB/AK/VK/LKA dated 21 January 2011.
3. Notice to attend the hearing addressed to workers Nun Socheat and Kong Thun, No. 070 KB/AK/VK/LKA dated 24 January 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:

- GHG (Cambodia) Ltd. (GHG) commenced operation in 2004 and currently employs 1,100 workers.

- The Local Union of C.CAWDU, registered on 5 October 2009, is the claimant in this case.
- The leaders of the Local Union of C.CAWDU, Lach Sochun and Kong Thun, have authorised the president of C.CAWDU to represent them in all stages of dispute resolution, as well as before the Arbitration Council.

Issue 2: The workers demand that the employer reinstate Lach Sochun and back pay her wages from the date of termination to the date of reinstatement.

- Lach Sochun, a cleaning worker, commenced work on 1 June 2006 and the employer dismissed her on 3 December 2010 for serious misconduct.
- Lach Sochun objects to her dismissal, arguing that she did not commit serious misconduct.
- The employer does not agree to the workers' demand for reinstatement and asserts that the issue is an individual dispute which is not under the jurisdiction of the Arbitration Council.
- The workers claim that the issue is a collective dispute because: (1) Lach Sochun is a member of the union and (2) The issue was referred by the Labour Inspector to the Arbitration Council and was contained in the non-conciliation report of the Ministry of Labour and Vocational Training, thus making this a collective labour dispute.
- The employer claims that the issue is an individual dispute because it involves only the employer and Lach Sochun and does not involve collective benefits or working conditions; rather, it involves the infraction of disciplinary regulations.
- At the hearing, the workers and the employer agreed that the dispute does not jeopardise the effective operation of the employer or social peace.

Issue 4: The workers demand that the employer provide to Kong Thun the US\$ 5 attendance bonus for November 2010.

- Kong Thun stated at the hearing that in accordance with the Internal Work Rules the workers work in the morning from 7:00 a.m. to 11:00 a.m., and in the afternoon they work from 12:00 p.m. to 4:00 p.m. However, in November 2010 she was late to work twice, as follows:

First incidence: on 15 November 2010, Kong Thun was 12 minutes late due to a traffic jam. The employer maintained her attendance bonus.

Second incidence: on 18 November 2010, Kong Thun was 10 minutes late due to a traffic jam. The employer deducted the full monthly attendance bonus.

- Kong Thun demands that the employer back pay the attendance bonus because the incidences of lateness were due to traffic jams and were not intentional.
- The employer states that it is unable to maintain her attendance bonus because the incidences of lateness were recurrent. When she was late to work on 15 November 2010 the employer did not deduct her attendance bonus.

REASONS FOR DECISION

Issue 2: The workers demand that the employer reinstate Lach Sochun and back pay her wages from the date of termination to the date of reinstatement.

Before turning to this issue, the Arbitration Council will consider whether it has jurisdiction over the dispute.

In principle, the Labour Inspector and the Minister for Labour and Vocational Training have a duty to decide whether or not a dispute is collective before referring it to the Arbitration Council. Therefore, the Arbitration Council will comply with the decision of the Labour Inspector and the Minister if there is no clear objection by the parties (*see Arbitral Awards 10/03-Jacqsintex, issue 4; 41/04-MiCasa; 07/05-Coca Cola, issues 1 & 2; 45/07-Wilson, issue 4; and 13/09-Terratex Knitting, issue 2*).

However, in this case the Labour Inspector has not determined whether this dispute is an individual or collective dispute; it is merely stated in the non-conciliation report that the employer asserts that the dispute is an individual dispute.

In Arbitral Award 45/07-Wilson, issue 4, the Arbitration Council explained that it “[p]resumes that all claims contained in the MoLVT non-conciliation report are collective. As the employer has made an objection against this presumption, it has the burden of proving its claim.”

At the hearing, the employer claimed that this dispute involves only Lach Sochun and the employer and not collective benefits and working conditions. Moreover, after she was dismissed the employer’s operation continued smoothly; there was no threat to the enterprise’s effective operation or social peace.

Article 302 of the Labour Law states:

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

Based on this article, to be a collective labour dispute the following three conditions must be fulfilled:

- a. It is a dispute between some workers and one or more employers.
- 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, or issues regarding relations between employers and workers.
- c. The dispute could jeopardise the effective operation of the enterprise or social peace.

In this case, the first condition is fulfilled because the complaint was initiated by a union representing a group of workers. The second condition is fulfilled because the dispute involves the employment relationship between the employer and its workers. The third condition is not fulfilled because the dispute has not jeopardised the effective operation of the employer or social peace. Thus, the three conditions defining a collective labour dispute are not fulfilled. Therefore, the Arbitration Council holds that this dispute is not a collective labour dispute.

Therefore, the Arbitration Council declines to consider this issue.

Issue 4: The workers demand that the employer provide to Kong Thun the US\$ 5 attendance bonus for November 2010.

Before turning to this issue, the Arbitration Council will consider whether the demand gives rise to a rights dispute or an interests dispute.

Article 312, paragraph 2 of the Labour Law states that “[t]he Council of Arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes.”

Based on this article, the Arbitration Council will resolve rights disputes based on the law and interests disputes based on equity.

Clause 43 of *Prakas* No. 099 SKBY on the Arbitration Council, dated 21 April 2004 states:

An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award.

In previous arbitral awards, the Arbitration Council has determined a dispute to be an interests dispute where the demand does not relate to an entitlement in the law, an agreement, or a collective agreement (*see Arbitral Awards 119/09-SL, issue 1; 86/10-New Mingda, issue 2; and 02/11-Pou Yuen, issue 2*).

Based on the foregoing, the Arbitration Council considers that an interests dispute does not relate to existing rights in the law, an agreement, or a collective agreement. A rights dispute, on other hand, relates to existing rights in the law, an agreement, or a collective agreement.

According to the findings of fact, Kong Thun was late to work twice due to traffic jams and the employer deducted her attendance bonus. The parties' dispute involves the attendance bonus stipulated in Notification No. 017 dated 18 July 2000. Thus, the Arbitration Council considers this dispute to be a rights dispute.

The Arbitration Council will consider whether Kong Thun is entitled to receive the attendance bonus.

Point 4 of Notification No. 049/10 KB/SCN from the Ministry of Labour and Vocational Training, dated 9 July 2010, states that “[o]ther benefits to which workers are entitled in accordance with points 3, 4, 5, and 6 of Notification No. 017 SKBY dated 18 July 2000 must be retained and enforceable.”

Point 3 of Notification No. 017 SKBY dated 18 July 2000 provides that “workers who attend work regularly in accordance with the number of working days in each month will receive a bonus of at least US\$ 5 per month.”

In Arbitral Award 44/07-Winner Knitting, issue 2, the Arbitration Council found that the phrase “work regularly” has two meanings, as below:

- (a) work 26 days per month if there is no national festival or leave set by the state.
- (b) work less than 26 days per month if there are national festivals or leave set by the state, which is legal leave, or leave taken with the employer's permission.

In previous arbitral awards, the Arbitration Council has interpreted “working regularly” to mean that the workers attend work according to the number of days determined (*see Arbitral Awards 94/04-Eternity, issue 9; 08/07-Siu Quinh, issue 4; and 51/07-Goldfame, issue 10*).

Furthermore, in previous arbitral awards the Arbitration Council has held that workers who do not attend work in accordance with the time determined by the employer are not entitled to receive the attendance bonus (*see Arbitral Awards 94/04-Eternity, issue 9; 08/07-*

Siu Quinh, issue 4; 74/09-Fortune, issue 9; 55/10-Tack Fat, issue 4; and 143/10-GHG, issue 3).

Based on the foregoing, the Arbitration Council considers that the attendance bonus will be provided to those workers who attend work regularly in accordance with the number of days determined per month and if they fail to do so, they are not entitled the attendance bonus.

In this case, the Arbitration Council finds that on 18 November 2010, Kong Thun was 10 minutes late to work due to a traffic jam and the employer deducted her attendance bonus. However, on 15 November 2010 the employer did not deduct Kong Thun's attendance bonus when she was 12 minutes late to work.

Based on the foregoing, the Arbitration Council finds that the employer is obliged to provide the attendance bonus to Kong Thun and she is required to attend work regularly in accordance with the time determined by the employer. In this case, the Arbitration Council considers that her reason [for coming late], a traffic jam, lacks an evidentiary base and does not legally excuse Kong Thun from her obligation to come to work regularly as determined by the employer's Internal Work Rules. Thus, Kong Thun is not entitled to the attendance bonus for November 2010 in accordance with Notification No. 017 SKBY dated 18 July 2000.

Therefore, the Arbitration Council rejects the workers' demand that the employer provide to Kong Thun the US\$ 5 attendance bonus for November 2010 when she was late to work.

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

DECISION AND ORDER

Issue 2: Decline to consider issue 2.

Part I. Rights dispute:

Issue 4: Reject the workers' demand that the employer provide to Kong Thun the US\$ 5 attendance bonus for November 2010 when she was late to work.

Part II. Interests dispute: N/A

Type of award:

I. Rights dispute:

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.

II. Interests dispute:

The award of the Arbitration Council in Part II 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 MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature:

Arbitrator chosen by the worker party:

Name: **Sin Kim Sean**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: