



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 83/12-Top World

Date of award: 29 May 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: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Kong Phallack**

DISPUTANT PARTIES

Employer party:

Name: **Top World Garment (Cambodia) Ltd. (the employer)**

Address: Chroy Ampil Village, Kbal Kaoh Commune, Kean Svay District, Kandal Province

Telephone: 012 833 145

Fax: N/A

Representatives:

- | | |
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| 1. Mr Kuch Osaphea | Head of Administration |
| 2. Mr Long Heang | Officer of the Garment Manufacturers Association in Cambodia (GMAC) |
| 3. Ms Ly Hour | Assistant to the Head of Administration |

Worker party:

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

Local Union of C.CAWDU

Address: Chroy Ampil Village, Kbal Kaoh Commune, Kean Svay District, Kandal Province

Telephone: 012 504 154

Fax: N/A

Representatives:

- | | |
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| 1. Mr Sang Yout | Officer of C.CAWDU |
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| 2. Ms Meas Vanny | Officer of C.CAWDU |
| 3. Ms Seang Yon | President of the Local Union of C.CAWDU |
| 4. Ms Keo Chenda | Vice-President of the Local Union of C.CAWDU |
| 5. Ms Srey Sophea | Secretary of the Local Union of C.CAWDU |
| 6. Ms Samrith Sothea | Worker |

ISSUES IN DISPUTE

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

The workers demand that the employer dismiss the Chinese supervisor Van Liza, who used a skirt to hit the head of Samrith Sothea in front of other workers. If the employer refuses to dismiss the supervisor, the workers demand that the employer pay Samrith Sothea US\$ 500 compensation and maintain the workers' daily wages and attendance bonuses for the day they went on strike. The employer refuses to accommodate this demand and states that if the striking workers return to work on the afternoon of the conciliation date, the Chinese supervisor will pay her US\$ 300 compensation and the employer will maintain 50% of the striking workers' wages.

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. 453 KB/RK/VK dated 27 April 2012 was submitted to the Secretariat of the Arbitration Council on 27 April 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: 4 May 2012 at 2:00 p.m.

Procedural issues:

On 26 April 2012, the Department of Labour Disputes received a phone call from the employer regarding a strike by the workers. Upon receiving this complaint, the Department of Labour Disputes arranged a conciliation session for 26 April 2012, at which the issue was not

resolved. The non-conciliated issue was referred to the Secretariat of the Arbitration Council on 27 April 2012 via non-conciliation report No. 453 KB/RK/VK dated 27 April 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 4 May 2012 at 2:00 p.m. Both parties were present at the hearing. The Arbitration Council conducted a further conciliation of the non-conciliated issue, but it remained 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 the MoU, both parties have agreed to choose 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. In this case, the two parties chose non-binding arbitration of interests disputes.

The Arbitration Council will consider the issues 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:

- Top World Garment (Cambodia) Ltd., holding commercial registration certificate No. Inv. 670/99E dated 30 December 1999, operates a garment factory employing a total of 830 workers, 792 of whom are female.
- The Local Union of C.CAWDU, holding certificate of registration No. 1685 KB/VK dated 23 July 2009 is the claimant in this case and represents 412 workers.

Issue: The workers demand that the employer dismiss the Chinese supervisor Van Liza, who used a skirt to hit the head of Samrith Sothea in front of other workers. If the employer refuses to dismiss the supervisor, the workers demand that the employer

pay Samrith Sothea US\$ 500 compensation and maintain the workers' daily wages and attendance bonuses for the day they went on strike.

- At the hearing, the workers demanded that the employer dismiss Van Liza (her Chinese name is Wang Ming Xia) because she committed an act of violence against Samrith Sothea, hitting her on the head three times with a child's denim skirt with attached underwear. The workers demand that the employer implement clause 10 of the Internal Work Rules, regarding serious misconduct.
- At the hearing, the workers stated that on 24 April 2012 at 5:50 p.m. the sewing group leader told Samrith Sothea to re-sew a child's denim skirt with sewn-in underwear because it had been incorrectly sewn. Samrith Sothea refused and asked the group leader to take the skirt to the sewing supervisor first. The group leader did as she asked. The sewing supervisor approached Samrith Sothea with the skirt in her hand. Upon reaching Samrith Sothea's workstation, the sewing supervisor hit her on the head with the skirt three times. Samrith Sothea did not suffer pain or an injury on her head. The sewing supervisor had not previously hit Samrith Sothea or any other worker; she had only scolded them. This incident took place in front of up to 300 workers in groups G, F, and E.
- Samrith Sothea states that the act committed by the supervisor caused her to feel small and embarrassed in front of the other workers.
- The sewing supervisor is in charge of groups G and E.
- At the hearing, the employer acknowledged that Van Liza did in fact hit Samrith Sothea's head at the time and place alleged by the workers. However, the employer was not sure whether the child's denim skirt had sewn-in underwear but acknowledges the factory had produced this type of skirt before. The employer argued that it would not dismiss the sewing supervisor as Samrith Sothea had not sustained any injury or fallen unconscious and had not needed to be hospitalised. Furthermore, the sewing supervisor did it unintentionally; she was a kind and friendly person. The employer recognises that the act was inappropriate but refuses to categorise it as serious misconduct stipulated in the Internal Work Rules. The employer submits that it will not warn the supervisor or sign an agreement with her in order to prevent her from repeating this action. Rather, it has warned her verbally because she holds a managerial position and it wanted to deal with the matter internally.
- The employer's first statement on the labour dispute submitted on 4 May 2012 states that "[o]n 24 April 2012 at 5:50 p.m. the Chinese supervisor mistakenly hit the head of a female worker with a child's skirt..." In contrast, the employer's second statement

dated 8 May 2012 [submitted after the hearing] says that “[t]he Chinese supervisor Wang Ming Xia took an incorrectly made skirt to Samrith Sothea for educational purposes and waved it on her head as a joke.” The Arbitration Council considers that the latter statement contradicts the employer’s acknowledgement at the hearing and its first statement submitted on 4 May 2012. At the hearing and in its brief statement dated 4 May 2012, the employer acknowledged that the Chinese supervisor did in fact hit Samrith Sothea’s head with a skirt. Consequently, the Arbitration Council decides to not take the employer’s second statement into consideration. The Arbitration Council accepts the statement made at the hearing as fact because any explanation, acknowledgement, or statement made at the hearing allows both parties the opportunity to respond and the Arbitration Council to conduct direct oral arguments by the parties.

- The Arbitration Council concludes that the denim skirt used by the sewing supervisor to hit the head of Samrith Sothea had underwear sewn inside it because the employer failed to refute the workers’ assertion; rather, it argues that it is not sure whether or not there was underwear attached to the skirt. If the employer wished to object to this point, it should have submitted specific evidence to the Council. The Arbitration Council believes that the employer is fully able to provide such evidence as the denim skirt is a product of the factory and was made by Samrith Sothea and other workers on the date of the incident.
- Regarding the thumbprints of the witnesses, the Arbitration Council decides not to take them into consideration because the fact that the Chinese supervisor took the denim skirt to hit the head of Samrith Sothea was acknowledged by both parties at the hearing.
- According to the workers’ brief statement dated 8 May 2012, the Chinese supervisor angrily hit Samrith Sothea’s head with the skirt three times, causing her to feel dizzy.
- The employer objects to the workers’ statement in its brief statement dated 11 May 2012, which reads that “Samrith Sothea clearly mentions that she was not dizzy after being hit by the supervisor ...”
- In this case, causing dizziness is an additional claim made by the workers in their brief statement and it is objected to by the employer. Thus, the Arbitration Council decides not to accept the new statement as fact because the workers failed to submit specific evidence to prove their claim.
- Clause 10 of the Internal Work Rules states:

Any worker who has intentionally committed misconduct which is proved by evidence must be disciplined in accordance with the seriousness of the misconduct as follows:

Serious misconduct: He/she will be dismissed immediately. Serious misconduct refers to any misconduct stipulated in Article 83 of the Labour Law. The following act is also considered as serious misconduct:

...

5. An act of violence or abusive language against supervisors and other workers.

REASONS FOR DECISION

Issue: The workers demand that the employer dismiss the sewing supervisor Van Liza (Wang Ming Xia).

First, the Arbitration Council considers whether this issue gives rise to a rights or an interests dispute.

In previous arbitral awards, the Arbitration Council has ruled that a rights dispute concerns entitlements in the law, an agreement [employment contract], or a collective agreement (see Arbitral Awards 05/11-M & V (Branch 1), reasons for decision, issues 1 & 5 and 13/11-Gold Kamvimex, reasons for decision, issues 1 & 2). The Arbitration Council applies this ruling in this case.

The Arbitration Council considers this issue to be a rights dispute as it concerns the workers' employment contract, which has a basis in the Labour Law and the Civil Code.

The workers make this demand because the supervisor Van Liza (Wang Ming Xia) committed an act of violence by hitting the head of Samrith Sothea with a denim skirt with sewn-in underwear three times. The employer refuses to dismiss her as it does not agree this as an act of violence.

In this case, the Arbitration Council considers as follows:

Article 83 of the Labour Law states:

The following are considered to be serious offences:

...

B. On the part of the worker

...

4. Threat[s], abusive language or assault against the employer or other workers.

Clause 10 of the Internal Work Rules states:

Any worker who has intentionally committed misconduct which is proved by evidence must be disciplined in accordance with the seriousness of the misconduct as follows:

Serious misconduct: He/she will be dismissed immediately. Serious misconduct refers to any misconduct stipulated in Article 83 of the Labour Law. The following act is also considered as serious misconduct:

5. An act of violence and abusive language against supervisors and other workers.

According to the facts, on 24 April 2012 Samrith Sothea incorrectly sewed a denim skirt with attached underwear and the group leader told her to do it again. She refused and asked the group leader to take it to the sewing supervisor first. The group leader did as she asked, and the supervisor approached Samrith Sothea with the skirt in her hand. Upon reaching Samrith Sothea's workstation, the supervisor hit her head three times. Samrith Sothea did not suffer any pain or injury on her head. This act left her feeling small and embarrassed in front of the other workers who witnessed the incident.

The Arbitration Council considers the supervisor's act as the commission of violence against the body of Samrith Sothea, and that it was done on purpose because she held the skirt whilst approaching her and hit her head without asking any questions. Thus, the act was a form of assault over her body even though it did not cause any injury.

Based on the abovementioned interpretation, point 4 of part B of Article 83 of the Labour Law, and point 5 of Clause 10 of the Internal Work Rules, the Arbitration Council considers that the sewing supervisor has committed serious misconduct that could result in immediate dismissal. However, in this case the employer refuses to dismiss her.

The Arbitration Council considers whether the workers are entitled to demand that the employer dismiss the sewing supervisor.

Article 65, paragraph one of the Labour Law states that "[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."

Article 311 of the Civil Code states that "[a] contract is the matching of intentions held by two or more parties to create, change or extinguish an obligation."

Based on the above two articles, the Arbitration Council considers that only the contracting parties are entitled to terminate a contract, that is, the employer and the workers. Third parties do not have the right to terminate the contract between the employer and a worker (see Arbitral Award 116/10-Whitex, reasons for decision, issue 1). In this case, only

the employer has the right to terminate the contract of the supervisor, not the claimant workers.

However, in previous cases the Arbitration Council has ruled:

employees do not have the right to demand that the employer dismiss any employee unless the employees can prove that the employee is a dangerous person who should not be allowed in the establishment or factory, and that keeping the person could cause harm to the workplace

(see Arbitral Awards 14/03-Chu Hsing, reasons for decision, issue 1; 17/03 & 18/03-Ho Hing, reasons for decision, issue 4; 87/04-Noble Apparel, reasons for decision, issue 2; 116/07-Grace Sun, reasons for decision, issue 3; 54/08-Zhong Yov, reasons for decision, issue 5; 129/09-Whitex Garment, reasons for decision, issue 1; and 123/10-June Textile).

The Arbitration Council considers whether the sewing supervisor's act against Samrith Sothea qualifies her as a dangerous person and whether keeping her could cause harm to the workplace.

The Arbitration Council considers that the violence and assault against Samrith Sothea by the sewing supervisor is a dangerous act; and such acts should not be committed by a supervisor who directs workers because hitting the workers' heads can cause them harm. As the sewing supervisor, she should not have used a denim skirt to hit the head of Samrith Sothea without asking any questions, even if she had wrongly sewn the denim skirt and refused to sew it again. This proves that as a supervisor she does not take calm and reasoned disciplinary measures and is aggressive in solving problems. Moreover, the head is an important part of the human body which needs special protection against hitting or beating. For example, in a measure aimed at reducing the number of traffic injuries in some countries including Cambodia, motorcycle drivers are legally required to wear helmets. Those who fail to observe this requirement receive fines under the law.

Solving a problem by committing violence in the form of hitting is a dangerous act towards other workers. The Arbitration Council accepts that workers commit minor or serious misconduct. In such cases, the disciplinary action stipulated in the Internal Work Rules must be implemented. Thus, if the sewing supervisor uses violence to solve a problem, she will hit other workers when they commit misconduct. It should be noted that the employer confirmed in this case that it would not warn or make an agreement with the supervisor to prevent the incident being repeated and that it would give her a warning. Based on this evidence, the Arbitration Council decides that the employer has failed to take appropriate disciplinary action to prevent this kind of incident from being repeated in the future.

Furthermore, the supervisor's action undermined the worker's dignity and this damaged the employment relationship between the worker and the employer. Thus, such acts must be avoided in order to strengthen the relationship between the two parties. In fact, Samrith Sothea stated that she felt small and embarrassed when the sewing supervisor committed the act against her in front of other workers.

In conclusion, the Arbitration Council determines that the supervisor's action not only undermined the worker's dignity, but also shows that she is a dangerous person and keeping her at the factory could cause harm to other workers.

Based on the above jurisprudence and reasons, the Arbitration Council orders the employer to dismiss the sewing supervisor Van Liza (Wang Ming Xia).

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: Order the employer to dismiss the sewing supervisor Van Liza (Wang Ming Xia)

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.

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: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: