



KINGDOM OF CAMBODIA
NATION RELIGION KING

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THE ARBITRATION COUNCIL

Case number and name: 36/09-Citadel

Date of award: 31 March 2009

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Kao Thach**

Arbitrator chosen by the worker party: **Vong Vanna**

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

DISPUTANT PARTIES

Employer party:

Name: **Citadel (Cambodia) Pte., Ltd. (the employer)**

Address: Salang Village, Samrong Krom Commune, Dangkor District, Phnom Penh

Telephone: 012 820 469

Fax: 023 880 015

Representatives:

- | | |
|-------------------------|-------------------------------------|
| 1. Mr Christoph Million | Technical Manager |
| 2. Mr Mak Moniroth | Administration Staff and Accountant |
| 3. Mrs Ou Vouchly | IT and Legal Officer (CAMFEBA) |
| 4. Mr In Sophat | Assistant |

Worker party:

Name: **Khmer Youth Trade Union Federation (KYFTU)**

Address: Prey Sala Village, Kakab Commune, Dangkor District, Phnom Penh

Telephone: 017 370 363 or 017 671 798 Fax: N/A

Representatives:

- | | |
|----------------------|-------------------------------|
| 1. Mr Mai Vathana | Conciliation Officer of KYFTU |
| 2. Mr Poat Kouk | President of KYFTU |
| 3. Mr Chhun Chamreun | Vice-President of KYFTU |
| 4. Mr Horm Kongkea | Worker |

| | |
|---------------------|--------|
| 5. Mr Un Leakena | Worker |
| 6. Mr Chay Sopheak | Worker |
| 7. Mr Mam Chan | Worker |
| 8. Mr Man Safi Y | Worker |
| 9. Mr Mil Rieb | Worker |
| 10. Mr Chhun Vanna | Worker |
| 11. Mr Chun Phalkun | Worker |
| 12. Mr Chea Limhorn | Worker |
| 13. Mr Ngin Pros | Worker |
| 14. Mr Kai El | Worker |
| 15. Mr Sin Mat | Worker |

ISSUES IN DISPUTE

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

1. The workers demand that the employer build a parking lot for their motorbikes and bicycles and that it take responsibility for the loss of their motorbikes and bicycles. The employer states that it will provide a proper place for the workers to park their motorbikes and bicycles, but it will not be responsible for any loss.

2. Twenty workers demand to be reinstated after being dismissed for participating in a strike to demand a parking lot for their motorbikes and bicycles. The employer claims that it cannot reinstate the 20 workers because they committed misconduct as set out in Article 83 of the Labour Law, that is, they parked their motorbikes and bicycles in the production area.

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. 076 dated 10 May 2007 (Fifth 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. 183 KB/AK/VK dated 10 March 2009 was submitted to the Secretariat of the Arbitration Council on 11 March 2009.

HEARING AND SUMMARY OF PROCEDURE

Hearing venue: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Tonle Bassac Commune, Chamkarmorn District, Phnom Penh

Date of hearing: 17 March 2009 at 2:00 p.m.

Procedural issues:

On 03 March 2009, the Department of Labour Disputes received a complaint from KYFTU following the demand that the employer reinstate 20 workers. 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 4 March 2009. Neither of the two issues was resolved. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 11 March 2009.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the two non-conciliated issues, held on 17 March 2009 at 2:00 p.m. Both parties were present as summoned by the Arbitration Council.

At the hearing, the Arbitration Council conducted a further conciliation of the two non-conciliated issues but neither was resolved. However, the workers revised the first demand, only demanding that the employer take responsibility for the loss of motorbikes and bicycles. They no longer demand that the employer build a parking lot as it has already done so.

The Arbitration Council asked the employer's representative Christoph Million, the technical manager (production section manager), whether he had the authority to make decisions on behalf of the employer in relation to the issues in dispute. He responded in the affirmative. At the time, the workers did not object to his attendance or his authority to make decisions. However, at the end of the hearing the workers asked the Arbitration Council whether Christoph Million was entitled to represent the employer. The Arbitration Council asked Christoph Million submit an authorisation letter to it by 20 March 2009. However, he did not submit this letter by the due date.

In previous cases where a party's representative has not submitted an authorisation letter, the Arbitration Council has generally refused to consider the issue. However, in some cases it has considered the issue if the representative has sound reasons.

In this case, the Arbitration Council finds that Christoph Million is the technical manager (production section manager), and furthermore, he claimed at the hearing that he was authorised to make decisions in relation to the issues. Consequently, the Arbitration Council finds that Christoph Million is entitled to represent the employer.

The Arbitration Council will consider the issue in dispute 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:

- Citadel (Cambodia) Pte., Ltd. (Citadel) commenced operation in 2004 and currently employs 75 workers. Of the 75 workers, 30% have motorbikes and approximately 10% have bicycles.
- There is one union at the enterprise, KYFTU, which is the claimant in this case.
- The union confirmed that all 75 workers are its members. Union contribution fees are taken manually and have not yet been reported to the employer. The employer does not object to this claim.

Issue 1: The workers demand that the employer take responsibility for the loss of their motorbikes and bicycles.

- The workers confirmed at the hearing that they no longer demand that the employer build a parking lot for their motorbikes and bicycles, because it has already done so. The workers only demand that the employer take responsibility for the loss of their motorbikes and bicycles.
- The workers stated at the hearing that because the factory is small and is usually flooded during the rainy season, the employer allows them to park their motorbikes and bicycles in a location on the premises which is not flooded. However, in June or July 2008 the employer built a parking lot close to – and within view of – their workstations. Since December 2008, the employer has allowed the workers to keep their motorbikes and bicycles there without any mishaps occurring. The workers do not object to this claim.

- The workers state that no worker has lost their bicycle or motorbike, but they are worried about them being lost in the future because the employer has announced that the workers must take care of their own vehicles. Therefore, the workers demand that the employer take responsibility for the loss of their motorbikes and bicycles.
- The employer states that it has built a parking lot for the workers' motorbikes and bicycles, surrounded by a metal barbed wire fence. Further, the parking lot is close to and visible from the workers' workstations. There is one employee who unlocks the gate so that the workers can safely park their bicycles and motorbikes during working hours.
- Moreover, no worker has yet lost their motorbike or bicycle. Besides which, Clause 8 of the employer's Internal Work Rules states that "[t]he employer is not responsible for the parking of workers' vehicles. The manager can direct them to park in other places at any time without explanation." Therefore, the employer cannot be responsible for the loss of workers' motorbikes or bicycles as they demand.

Issue 2: The workers demand that the employer reinstate 20 workers.

- The workers demand the reinstatement of 20 workers because the employer dismissed them for parking their motorbikes and bicycles in a place which was prohibited by the employer, and this is not a serious offence.
- The employer issued a warning stating: "Do not bring motorbikes into the factory at any cost; if any worker does not follow this practice, s/he will be issued a warning."
- The workers acknowledge that the employer generally asks them to park their motorbikes and bicycles in the designated place. However, on 2 March 2009, the employer announced that "[a]ll workers have to take care of their own vehicles."
- On 3 March 2009, fearing the loss of their motorbikes, the 20 workers who were later dismissed by the employer parked their motorbikes in the prohibited area.
- Christoph Million, the technical manager (production manager), claimed at the hearing that on 3 March 2009 at 7:30 a.m., he arrived at the factory and saw that workers had parked their motorbikes in the prohibited area. He asked those workers to move their motorbikes, but none of them did as he asked. Christoph Million then phoned the company director, who arrived at about 9:00 a.m. without any workers moving their motorbikes. Therefore, at 10:15 a.m. the company director decided to dismiss the workers. He noted that it was not until the lunch break at 12:00 p.m. that the workers moved their motorbikes. When the workers returned in the afternoon, they again parked their motorbikes in the prohibited area. Consequently, at 4:00 or 5:00 p.m., the employer prepared dismissal documents and calculated the dismissal

indemnity for each of the 20 workers. The workers refused to accept these. The workers do not deny this.

- The employer claims that the workers' refusal to comply with the Internal Work Rules is regarded as a serious offence based on Article 11 of Internal Work Rules and Article 83, Part B(3) of the Labour Law. Therefore, the employer will not reinstate the 20 workers as demanded.

REASONS FOR DECISION

Issue 1: The workers demand that the employer take responsibility for the loss of their motorbikes and bicycles.

In this case, the workers no longer demand that the employer build a parking lot as it has already done so. They only demand that the employer take responsibility for any loss of their motorbikes and bicycles. No worker has lost their motorbike or bicycle so far, but they fear that they might be stolen in the future. Therefore, this demand is regarded as a future demand.

The Arbitration Council unanimously decides that it will not consider this issue for the following reasons:

In previous cases containing future demands, the Arbitration Council has explained that "the Arbitration Council was created to resolve existing labour disputes and not to resolve disputes which have not yet occurred" (*see Arbitral Awards 10/03-Jacqsintex, issue 2; 14/06-Zheng Yong, issue 2; 41/07-M & V (Branch 3), issue 1; and 74/07-Global Apparels, issue 2*).

The Arbitration Council applies the above interpretation in this case, because no one can accurately predict what might happen in the future. Therefore, the workers' demand that the employer take responsibility for the loss of their motorbikes and bicycles – which has not yet occurred - cannot be considered because it is not known if the event will ever take place, where it will take place, when it will take place, which workers will suffer a loss, and in particular how the employer might take responsibility.

Furthermore, in Arbitral Award [119/07]-Royal Crowntex, issue 14, the Arbitration Council ruled:

The demand that the employer reimburse the workers for the loss of their motorbikes is not supported by any article of the Labour Law or any regulation imposing a responsibility upon the employer for the loss of workers' motorbikes or bicycles.

The Arbitration Council applies this ruling in this case because there is no article in the Labour Law or any regulation which mentions the employer's responsibility for the loss of workers' motorbikes and bicycles. Moreover, no evidence was presented by the workers proving that employers should be responsible for the loss of workers' motorbikes and bicycles during working hours.

Therefore, the Arbitration Council declines to consider the workers' demand that the employer be responsible for future losses of their motorbikes and bicycles.

Issue 2: The workers demand that the employer reinstate 20 workers.

In this case, 20 workers demand to be reinstated because the offence for which they were dismissed, parking their motorbikes in a prohibited area, does not constitute a serious offence. However, the employer refuses to reinstate the 20 workers, alleging that they did not comply with the Internal Work Rules and that this constitutes a serious offence according to Clause 11 of the Internal Work Rules and Article 83, Part B(3) of the Labour Law.

Therefore, the Arbitration Council will consider whether the 20 workers did in fact commit serious offences as alleged.

Article 83, Part B(3) of the Labour Law provides that "[s]erious infractions of disciplinary, safety, and health regulations" is considered a serious offence.

According to the above article, "serious offenses" can refer to serious infractions of disciplinary regulations, as contained in the Internal Work Rules.

Article 11 of the Internal Work Rules dated 7 November 2005, which relates to disciplinary sanctions, states:

Workers deliberately committing misconduct, proven by concrete evidence, will be punished by the employer in accordance with the severity of the misconduct:

- Minor misconduct: If committing misconduct for the first time, workers will receive a verbal warning and sign a personal document. If workers commit the same misconduct a second time, they will receive a written warning. If it is the third time, they will be dismissed.
- Medium misconduct: If committing misconduct for the first time, workers will receive a written warning and sign a personal document. If it is the second time, workers will be suspended without wages (not exceeding seven days). If it is the third time - if workers do not learn their lessons - they will be dismissed.
- Serious misconduct: As stated in the Labour Law, workers will be dismissed. If necessary, the employer will submit the case to the authorities to be resolved in accordance with the law.

The employer issued a notification (according to the workers, approximately half an hour before the dispute occurred) stating: “Do not bring motorbikes into the factory at any cost; if any worker does not follow this practice, s/he will be issued a warning.”

According to the employer’s Internal Work Rules and the above notification, if any of the workers disobey the notification prohibiting motorbikes from being taken into the factory, the employer will issue that worker a warning.

The facts and the evidence presented by the employer of the written warnings dated 24 February 2009 show that of the 20 workers who were dismissed, only two received warnings; Chhun Vanna and Mam Chan, who disobeyed the employer’s order and parked their motorbikes in the factory. This constitutes misconduct and violates the notification by the employer and its Internal Work Rules. The workers who parked their motorbikes in the factory on 3 March 2009 included Chhun Vanna and Mam Chan, who had already received first warnings, but they were not issued second warnings. Other workers who had never been warned were not later warned by the employer. Therefore, the employer did not warn the workers who parked their motorbikes into the factory as required by the Internal Work Rules, which provide that if workers commit misconduct for the first time, they will be issued a verbal warning and will be required to sign personal documents. If workers commit the same misconduct again, they will receive a written warning. If workers commit the same misconduct a third time, they will be dismissed.

The Arbitration Council finds that the workers’ failure to comply with the prohibition when they parked their motorbikes in a prohibited area is a minor or medium form of misconduct under the Internal Work Rules. Therefore, the Arbitration Council finds that the employer’s dismissal of those 20 workers because it regarded the worker’s failure to comply with the Internal Work Rules or its notification as a serious offence is unsound and inconsistent with the Internal Work Rules.

Article 27 of the Labour Law provides that “[a]ny disciplinary sanction must be proportional to the seriousness of the misconduct. The Labour Inspector is empowered to control this proportionality.”

Based on the facts and the explanation above, the Arbitration Council finds that the failure of the 20 workers to comply with the notification and the Internal Work Rules by taking their motorbikes into the factory is not so serious as to merit the workers’ immediate dismissal. In short, the employer should follow the Internal Work Rules by first giving verbal or written warnings before dismissing workers. Therefore, the employer’s dismissal of the 20 workers is not proportional to the misconduct that they committed.

Arbitral Award 76/05-Global Footwear, issue 1, states that “the Arbitration Council finds that misconduct is serious only when it is repeated, supported by concrete evidence, or clearly specified in the Labour Law or the Internal Work Rules.”

Therefore, based on the legal facts and reasoning in the above explanation, the Arbitration Council finds that the dismissal of the 20 workers because they did not comply with the internal work rules and notification of the employer - which was regarded by the employer as a serious misconduct - is not consistent with the Labour Law.

Clause 34 of *Prakas* No. 099 SKBY dated 21 April 2004 states:

Within the limitations of the Labour Law and this *Prakas*, [the Arbitration Council] has the power and authority to provide any civil remedy or relief which it deems just and fair, including:

A. orders to reinstate dismissed employees to their former or any other appropriate position...

Therefore, in conclusion, the Arbitration Council decides to order the employer to reinstate the 20 workers.

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 the workers’ demand that the employer be responsible for future losses of their motorbikes and bicycles.

Issue 2: Order the employer to reinstate the 20 workers.

Type of award: non-binding award

This award of the Arbitration Council 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: **Kao Thach**

Signature:

Arbitrator chosen by the worker party:

Name: **Vong Vanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: