



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 67/11-Huey Chuen

Date of Award: 13 July 2011

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: **Tuon Siphann**

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

DISPUTANT PARTIES

Employer party:

Name: **Huey Chuen (Cambodia) Corp., Ltd (the employer)**

Address: Chroy Ampil Village, Kabal Kos Commune, Meanchey District, Phnom Penh

Telephone: 012 989 717

Fax: N/A

Representatives:

1. Mr Him Phalla Head of Administration
2. Mr Mom Thorn Assistant to the Head of Administration
3. Mr Put Sovann Assistant to the Head of Administration

Worker party:

Name: **National Union Federation Cambodian Workers (NUCW)**

Local Union of NUCW

Address: Chroy Ampil Village, Kabal Kos Commune, Meanchey District, Phnom Penh

Telephone: 017 616 598

Fax: N/A

Representatives at the first hearing:

1. Mr Tol Phanmoeung President of NUCW
2. Ms Mao Chenda President of the Local Union of NUCW
3. Ms Pov Sreymach Vice-President of the Local Union of NUCW

4. Mr Ty Samnang Advisor to the Local Union of NUCW
5. Mr Ream Chetra Officer of NUCW

Representatives at the second hearing:

1. Mr Tol Phanmoeung President of NUCW
2. Ms Mao Chenda President of the Local Union of NUCW
3. Ms Pov Sreymach Vice-President of the Local Union of NUCW
4. Mr Ty Samnang Advisor to the Local Union of NUCW
5. Mr Ben Saveurn Secretary of NUCW

ISSUES IN DISPUTE

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

1. The workers demand that the employer pay outstanding wages and benefits for 28 April 2011 to nine workers who attended a meeting. The employer states that it will pay the outstanding wages of only the three workers whose names are on the certificate of union registration [the union leaders].
2. The workers demand that the employer reinstate Ty Samnang, without conditions, and provide him with back pay. The employer seeks to resolve this dispute within the framework of the individual labour dispute resolution process.

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. 610 KB/RK/VK dated 8 June 2011 was submitted to the Secretariat of the Arbitration Council on 8 June 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: First hearing: 17 June 2011 at 2:00 p.m.
Second hearing: 7 July 2011 at 4:00 p.m.

Procedural issues:

On 4 June 2011, the Department of Labour Disputes received a complaint from NUCW outlining the workers' demands for the improvement of 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 6 June 2011. As a result, 16 of the 18 issues were resolved. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 8 June 2011 via non-conciliation report No. 610 KB/RK/VK dated 8 June 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 two non-conciliated issues. The first hearing was held on 17 June 2011 at 2:00 p.m. and a second hearing was held on 7 July 2011 at 4:00 p.m.

Both parties were present at the hearing, at which they informed the Council that they had only one remaining issue in dispute. The Arbitration Council attempted to conciliate the issue, but it remained unresolved.

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

EVIDENCE**Witnesses and Experts:****A. Witnesses for the employer party:**

1. Mr Suon Sothearith Accountant
2. Ms Sok Navy Administration Officer (in charge of resignation requests)

B. Witnesses for the worker party:

1. Ms Sun Sreylin Worker

Documents, Exhibits, and other evidence considered by the Arbitration Council:**A. Provided by the employer party:**

1. Letter from the employer authorising its representatives Him Phalla, Put Sovann, and Mom Thorn, dated 17 June 2011.
2. Brief statement on the labour dispute.
3. Daily work report of Touch Samnang [supervisor of Ty Samnang], dated 2 June 2011.
4. Letter from the Council for the Development of Cambodia to the employer regarding approval for a new footwear production building, No. 121/08 dated 10 January 2008.
5. Internal Work Rules of the employer, No. 051 dated 18 May 2006.
6. Collective agreement with the NUCW, No. 296 dated 16 June 2011.

7. Certificate of most representative status (MRS) of the Local Union of the Cambodian Union Federation (CUF), No. 023/10 dated 17 June 2010.
8. Letter from the Department of Labour Disputes to the employer regarding its request for a certificate of MRS for the Local Union of CUF, No. 392 dated 25 May 2010.
9. Letter from the president of the Local Union of CUF to the Minister for Labour and Vocational Training requesting a certificate of MRS, dated 13 April 2010.
10. Thumbprints of workers who witnessed Ty Samnang threatening the head of the factory at 9:40 a.m. on 27 May 2011.
11. Resignation form.
12. Leave form.
13. Doctor's certificate from Dr Heng Tengsamnang, dated 21 January 2010, confirming that Ty Samnang has diarrhoea.
14. Doctor's certificate from Dr Heng Tengsamnang, dated 13 April 2011, confirming that Ty Samnang has diarrhoea.

B. Provided by the worker party:

1. Letter from the worker delegates and the Local Union of NUCW to the employer requesting negotiation of 15 issues, dated 2 June 2011.
2. Thumbprints of workers at the factory endorsing Ty Samnang's reinstatement claim.

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

1. Report on collective labour dispute resolution at Huey Chuen (Cambodia) Corp., Ltd, No. 610 MKBV/KP dated 8 June 2011.
2. Record of collective labour dispute resolution at Huey Chuen (Cambodia) Corp., Ltd, dated 6 June 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the first hearing addressed to the employer, No. 383 KB/AK/VK/LKA dated 10 June 2011.
2. Notice to attend the first hearing addressed to the workers, No. 384 KB/AK/VK/LKA dated 10 June 2011.
3. Notice to attend the second hearing addressed to the employer, No. 454 KB/AK/VK/LKA dated 6 July 2011.
4. Notice to attend the second hearing addressed to the workers, No. 454 KB/AK/VK/LKA dated 6 July 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:

- Huey Chuen (Cambodia) Corp., Ltd employs a total of 1,100 workers.
- The Local Union of NUCW is the claimant in this case.

Issue 2: The workers demand that the employer reinstate Ty Samnang without conditions and provide him with back pay.

- The workers revised their demand at the hearing. They demand that the employer either reinstate Ty Samnang or pay him a termination payment.
- Ty Samnang served under a verbal contract as an interpreter and head of sewing lines from 15 January 2008. As head of sewing lines, his task was to manage the work of nine sewing lines, each consisting of 45 workers. He has been an advisor to the Local Union of NUCW since January 2010.
- The workers state that Ty Samnang submitted a leave form on 26 May 2011, requesting permission to take sick leave from 27 May 2011 to 31 May 2011, but the employer refused to grant him the leave. Due to this refusal, he tore up the leave form. He claims that he did this during the afternoon of 26 May 2011 but has also stated that it occurred on the morning of 27 May 2011.
- The employer refutes the workers' claim that Ty Samnang submitted a sick leave form, stating that he actually requested a resignation form from Sok Navy, the member of the administration staff in charge of administering workers' resignation requests. Sok Navy filled in the resignation form in order to submit it to the head of the factory. Upon receipt of the resignation form, the head of the factory consulted with heads of other branch factories and verbally informed Ty Samnang of the approval of his resignation on 27 May 2011.
- The employer states that upon being informed of the approval of his resignation on 27 May 2011, Ty Samnang went to the administration office to take his resignation letter without permission from administration staff. The head of the factory asked Ty Samnang about the resignation letter after being notified of its removal, but Ty Samnang said that he had not taken it and slapped a table after the conversation ended.
- Between the dates of 27 May 2011 and 31 May 2011, the employer called Ty Samnang to the factory and gave him a warning and a final chance to return to work if he agreed to apologise to the head of the factory for his behaviour. Ty Samnang refused to apologise and insisted that he be reinstated.

- There is one member of the administration staff at the factory responsible for requests for sick leave and leave for personal commitments and another responsible for workers' resignations. On 26 May 2011, Ty Samnang met with Sok Navy, who is responsible for the latter. Ty Samnang did not give a reason for his meeting with Sok Navy apart from stating that the staff member responsible for requests for sick leave was absent.
- The employer maintains leave records for when workers take more than one day off. Once their leave record is full, the worker begins a new leave record. The employer states that the workers are not required to fill in many leave forms when they are absent; they are only required to fill in the leave record provided by the employer. The employer contends that if Ty Samnang's claim that he tore up his leave form was true, then his leave record would have been torn up. The workers have not raised an objection to this contention.
- The employer submitted Ty Samnang's leave record, which is not full, to the Arbitration Council.
- The workers demand that the employer either reinstate or provide a termination payment to Ty Samnang in accordance with the Labour Law.
- The employer refuses to reinstate him because, it argues, he has already resigned and he refused to apologise to the head of the factory.
- A number of workers participated in a strike to endorse the claim for Ty Samnang's reinstatement. The Arbitration Council was provided with a list of 167 workers who endorse the claim, including their ID numbers and thumbprints.
- The employer argues that the dispute is not collective because it was unaware that Ty Samnang was an advisor to the Local Union of NUCW.
- The workers argue that the dispute is collective because a large number of workers endorse the claim, as demonstrated by the strike.
- The Arbitration Council summoned Sok Navy, aforementioned member of the administration staff, to the hearing to provide testimony regarding Ty Samnang's resignation request. Sok Navy testified that:

On 26 May 2011 at 5:15 p.m., I was alone in the office of administration when Ty Samnang told me that he wanted to resign. I filled in the resignation form and gave it to him so that he could seek approval from the head of the factory.

On 27 May 2011 at 8:15 a.m., the head of Group 7 asked me whether the head of the factory had approved his resignation. I told him that I did not know yet.

That morning, the head of the factory verbally informed Ty Samnang that his

resignation had been approved. At 8:50 a.m. the head of the factory gave me the approved resignation letter for filing. I put the letter on my table and left the office. At 9:45 a.m. the head of the factory asked me where the resignation letter was. Then I realised that the letter had been taken away. Since I commenced work in 2008, I have been solely charged with administering workers' resignation requests. I was never assigned to handle workers' leave requests in the absence of other administration staff and vice versa.

- The Arbitration Council summoned accountant Suon Sothearith to the hearing to provide testimony regarding the allegation that Ty Samnang removed the approved resignation letter from Sok Navy's table. Suon Sothearith testified:

On 27 May 2011 at 9:10 a.m., I saw Ty Samnang take the resignation letter from Sok Navy's table. I took no notice of his action as it was irrelevant to my work. Upon hearing that the letter had been taken, I told Sok Navy that I had seen Ty Samnang taking it.

- Ty Samnang acknowledges that he went to the office of administration on 27 May 2011, but does not admit to taking the resignation letter.
- The Arbitration Council summoned Sun Sreylin to the hearing to provide testimony regarding Ty Samnang's alleged altercation with the head of the factory. The Arbitration Council is of the view that Sun Sreylin's testimony is not relevant to the merits of this case as he merely confirmed that Ty Samnang had an altercation with the head of the factory.

REASONS FOR DECISION

Issue 2: The workers demand that the employer reinstate Ty Samnang without conditions and provide him with back pay.

Before turning to this issue, the Arbitration Council considers whether it has jurisdiction over the issue.

In principle, it is the duty of the Labour Inspector and the Ministry of Labour and Vocational Training (MoLVT) to decide which disputes are individual and which are collective before sending a case to the Arbitration Council. Therefore, the Arbitration Council will usually follow a decision of the Labour Inspector and the MoLVT unless there is an explicit reason to object to the decision (*see AAs 10/03-Jacqsintex; 02/04-Cambodiana; 41/04-MiCasa; 07/05-Coca Cola; and 64/09-Sinomax II*).

In previous arbitral awards, the Arbitration Council has made the presumption 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” (see AAs 45/07-Wilson and 64/09-Sinomax II).

According to the facts, the employer argues that the dispute is not collective because it was unaware that Ty Samnang was an advisor to the Local Union of NUCW. The workers argue that the dispute is collective because a large number of workers endorsed the claim, as demonstrated by the strike. The Arbitration Council will consider the employer’s argument on the basis of the law and evidence presented by the employer below.

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 Arbitral Award 45/07-Wilson, issue 4, the Arbitration Council identified three conditions that must be fulfilled in order to meet the requirements of Article 302:

- a. It is a dispute between one or more employers and a number of their workers.
- 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.

Based on Article 302 and the Council’s interpretation above, three conditions must be fulfilled for a dispute to be collective. In this case, the Arbitration Council considers that the first condition is met because the disputant party is represented by the Local Union of NUCW and the issue in dispute is endorsed by 167 workers. The second condition is met because the issue concerns working conditions, i.e. the non-renewal of Ty Samnang’s contract. The third condition is also met because there is a strike to demand the reinstatement of Ty Samnang, and this could jeopardise the effective operation of the employer. Therefore, the Arbitration Council has jurisdiction over this dispute.

The Arbitration Council will first consider whether Ty Samnang has resigned.

Article 74, paragraph 1 of the Labour Law (1997) states that “[t]he labour contract of unspecified duration can be terminated at will by one of the contracting parties.”

This means that either the employer or the employee can end an undetermined duration contract at will.

According to Sok Navy's testimony, Ty Samnang requested a resignation form on 26 May 2011. He submitted the form to the head of the factory and obtained the head's approval on 27 May 2011. However, Ty Samnang refutes the claim, arguing that he actually submitted a sick leave form.

The Arbitration Council has found in previous arbitral awards that the claimant bears the burden of proof (*see AAs 79/05-Evergreen; 101/08-GDM, reasons for decision, issues 1 & 2; 108/08-Hugo, reasons for decision, issue 4; 163/09-Tack Fat, reasons for decision, issue 2; 168/09-Teok Tla Plaza II, reasons for decision, issue 2; 115/10-G-Foremost, reasons for decision, issue 18; and 54/11-June Textile*).

The Arbitration Council has been presented with consistent facts and testimonies indicating that Ty Samnang's claim is not credible. Ty Samnang's personal leave record, which is intact, is important evidence that Ty Samnang did not submit a sick leave form.

Another important fact is that Ty Samnang submitted the letter to Sok Navy, the officer in charge of administering workers' resignation requests. Moreover, Sok Navy and Suon Sothearith's testimonies compel the Arbitration Council to believe that Ty Samnang submitted a resignation letter and later took it away.

The Arbitration Council goes on to consider whether the employer is obliged to either reinstate Ty Samnang or pay him a termination payment following his resignation.

According to the facts, the employer gave him a chance to return to work if he agreed to apologise to the head of the factory for his rude behaviour (i.e. slapping the table). However, he refused to apologise and so the employer refused to reinstate him. The Arbitration Council considers that the employment relationship between Ty Samnang and the employer ended on 27 May 2011 after the head of the factory informed Ty Samnang that his resignation had been approved. The Arbitration Council considers that the employer is not obliged to reinstate Ty Samnang or pay him a termination payment following his resignation.

The Arbitration Council rejects the workers' demand that the employer either reinstate or pay a termination payment to Ty Samnang.

Under the law, payments due to resignees include outstanding wages and payment in lieu of annual leave remaining as at the date of termination of the contract.

Article 167, paragraph 2 of the Labour Law provides that "[i]f the contract is terminated or expires before the worker has acquired the right to use his paid-leave, an indemnity calculated on the basis of Article 166 above is granted to the worker."

Based on this provision, the employer must provide payment in lieu of untaken annual leave if a worker's contract is terminated or expires.

The Arbitration Council orders the employer to provide outstanding wages and payment in lieu of untaken annual leave to Ty Samnang.

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

DECISION AND ORDER

Issue 2:

- Reject the workers' demand that the employer either reinstate or pay a termination payment to Ty Samnang.
- Order the employer to provide outstanding wages and payment in lieu of untaken annual leave to Ty Samnang.

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 THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: