



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 64/09-Sinomax (Branch 2)

Date of award: 17 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: **An Nan**

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

DISPUTANT PARTIES

Employer party:

Name: **Sinomax International (Cambodia) Garment Limited (Branch 2) (the employer)**

Address: Village 2, Svay Rolum Commune, S'ang District, Kandal Province

Telephone: 012 626 868

Fax: N/A

Representatives:

1. Mr Hom Phea

Lawyer

2. Mr Rim Vireak

Assistant to the Lawyer

Worker party:

Name: **Coalition of Cambodian Apparel Workers Democratic Union (C.CAWDU)**

Local Union of C.CAWDU

Address: No. 6C, Street 476, Tuol Tompoung Commune, Chamkarmorn District, Phnom Penh

Telephone: 012 988 623

Fax: N/A

Representatives:

1. Mr Ek Sopheak

General Secretary of C.CAWDU

2. Ms Meas Vanny

Officer of C.CAWDU

3. Mr Em Sopheak

Officer of C.CAWDU

4. Mr Ney Bunthoeun

Vice-President of the Local Union of C.CAWDU

ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate Ney Bunthoeun, vice-president of the local union, and back pay his wages and benefits from the date his contract was suspended until the date of reinstatement. The employer does not agree to the demand, claiming that this is an individual dispute and that the contract between Ney Bunthoeun and the employer has expired.
2. The workers demand that when they resign from work the employer allow them to do so and pay them in accordance with the Labour Law. The employer claims that it will provide severance pay if the company approves the termination of a fixed duration contract.

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. 171/09 dated 18 May 2009 was submitted to the Secretariat of the Arbitration Council on 20 May 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: 1 June 2009 at 2:00 p.m.

Procedural issues:

The Department of Labour and Vocational Training of Kandal Province received a complaint from the Local Union of C.CAWDU outlining the workers' demands for the improvement of working conditions by the employer. Upon receiving the claim, the Department of Labour and Vocational Training of Kandal Province assigned an expert officer to resolve the labour dispute and the last conciliation session was held on 23 December 2008, resulting in three of the five issues being resolved. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 20 May 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 1 June 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, and the workers agreed to withdraw issue 2. Therefore, the Arbitration Council will consider issue 1 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:

- Sinomax International (Cambodia) Garment Limited (Branch 2) is located in Village 2, Svay Rolum Commune, S'ang District, Kandal Province.
- The claimant union in this case is the Local Union of C.CAWDU, representing 750 workers.

Issue 1: The workers demand that the employer reinstate Ney Bunthoeun, union vice-president, and back pay all benefits from the date of his suspension until the date of reinstatement.

- The workers demand that the employer reinstate Ney Bunthoeun to his former position.
- The employer argues that it cannot reinstate him as his contract has been terminated.
- The employer adds that:
 - The Arbitration Council has previously issued an arbitral award to resolve this dispute; Arbitral Award 55-57/08 on 20 May 2008.
 - The dispute is not collective but individual, and the employer generally holds the right not to extend a worker's contract.

- The employer received a letter issued by the head of the General Department of Labour, saying that the issue is an individual dispute.
- The workers argue that the employer's reason for not extending the fixed duration contract of Ney Bunthoeun, an incumbent union leader, was based on discrimination against the union. When it learned that Ney Bunthoeun had been elected union vice-president, it issued a letter notifying him of the non-renewal of his contract.
- The employer and workers agree that the facts in this dispute are the same as those in case 55-57/08. However, the following new facts were presented:
 - The employer sent a letter to the head of the Department of Labour and Vocational Training of Kandal Province seeking approval for the non-renewal of Ney Bunthoeun's contract, but so far no response has been given.
 - As the employer has not received a response from the Department of Labour, it has not filed an appeal with the Ministry.
 - The employer received a letter issued by the head of the General Department of Labour stating that the dispute is individual.
- A warrant issued by the Kandal Provincial Court orders all workers to resume their work at the factory apart from Ney Bunthoeun, who has been dismissed by the employer pending a final ruling by the Kandal Provincial Court.
- The Arbitration Council ordered the employer to submit relevant documents by 5 June 2009 and gave the workers until 9 June 2009 to dispute those documents. However, the employer did not submit any documents by the deadline set by the Council.
- The employer states that Ney Bunthoeun's contract has been terminated since the Arbitration Council issued Arbitral Award 55-57/08 until now.
- The facts in Arbitral Award 55-57/08 are that Ney Bunthoeun commenced work at the factory on 12 April 2007 on a fixed duration contract. He worked in the table cutting section and received a main wage of US\$ 65 per month and an average wage of US\$ 90 per month. He signed four subsequent employment contracts as follows:
 - A first three month contract valid from 12 April 2007 to 12 July 2007.
 - A second three month contract valid from 12 July 2007 to 12 October 2007.
 - A third three month contract valid from 12 October 2007 to 12 January 2008.
 - A fourth three month contract valid from 12 January 2008 to 12 April 2008.
- On 18 January 2008, he was elected vice-president of the Local Union of C.CAWDU.

- On 28 March 2008, the employer notified Ney Bunthoeun of the non-renewal of his contract due to expire on 12 April 2008.
- On 12 April 2008, the employer notified Ney Bunthoeun of the suspension of his contract pending a ruling from the Labour Inspector. As at 1 June 2009, the employer had not received a response from the Labour Inspector.
- The workers called a strike on 18 April 2008 demanding the reinstatement of Ney Bunthoeun.
- On 24 April 2008, the Arbitration Council issued an order calling for an end to the strike. On the same day, the employer reinstated Ney Bunthoeun in compliance with the order issued by the Arbitration Council.
- The employer argued that it is within its right to decide whether or not to renew a contract when it expires. Moreover, Ney Bunthoeun committed misconduct three times and received two warnings. The other instance was noted but no warning was given.
- Ney Bunthoeun only acknowledged two instances of misconduct, arguing that he did not make a third mistake and had not affixed his thumbprint to a third warning.
- The union suggested that the Arbitration Council should order the reinstatement of Ney Bunthoeun with backpay, because following his election as union vice-president he had a high profile in dealing with workplace disputes.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate Ney Bunthoeun, union vice-president, and back pay all benefits from the date of his suspension until the date of reinstatement.

Before considering this issue, the Arbitration Council will consider whether or not it has jurisdiction over the issue.

In principle, the Labour Inspector and the Ministry of Labour and Vocational Training are authorised to determine which disputes are individual and which are collective before submitting a dispute to the Arbitration Council. Therefore, the Arbitration Council will follow the decision of the Labour Inspector and the Ministry of Labour and Vocational Training unless there is a clear reason not to (*see Arbitral Awards 10/03-Jacqsintex, reasons for decision, issue 4; 02/04-Cambodiana Hotel; 41/04-MiCasa; and 07/05-Coca Cola*).

Further, in previous cases the Arbitration Council has assumed that each demand in the non-conciliation report of the Ministry of Labour is a collective labour dispute. Where the

employer challenges this assumption, the employer bears the burden of proof in relation to its claim (*see Arbitral Award 45/07-Wilson, reasons for decision, issue 4*).

According to the facts, the employer argues that this is an individual dispute. As evidence, they provided a letter issued by the head of the General Department of Labour stating that it is an individual dispute, and instructing the Department of Labour and Vocational Training of Kandal Province to follow the individual dispute procedure. The Arbitration Council will consider the employer's argument 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, reasons for decision, issue 4, the Arbitration Council set out three conditions that must be met in order to be a collective dispute:

- A. the dispute arises between one or more employers and a number of staff;
- B. the disputed issue relates to working conditions, the exercise of the recognised rights of professional organisations, the recognition of professional organisations, or issues regarding relations between employers and workers; and
- C. the dispute could jeopardise the effective operation of the enterprise or social peace.

Based on Article 302 of the Labour Law and the Arbitration Council's interpretation, to be categorised as collective a dispute must fulfil the three criteria. In this case, the Arbitration Council finds that the worker party is represented by C.CAWDU and supported by the majority of workers (so condition A is fulfilled). The issue relates to working conditions, i.e. the non-renewal of Ney Bunthoeun's contract (so condition B is fulfilled). According to the facts in Arbitral Award 55-57/08, when the workers learned that the employer had not extended Ney Bunthoeun's contract, they staged a strike demanding that his contract be extended. Therefore, the dispute has disrupted the effective operation of the enterprise (so condition C is fulfilled).

The employer provided a letter issued by the head of the General Department of Labour and Vocational Training calling the issue an individual dispute. The Arbitration Council finds that this letter was genuinely issued by the head of the General Department of Labour and Vocational Training to the head of the Department of Labour and Vocational

Training of Kandal Province ordering that the dispute be settled in accordance with the procedure for individual disputes.

Article 11 of *Prakas* No. 099 on the Arbitration Council dated 21 April 2004 states:

The members of the Arbitration Council shall function in complete independence and within the scope of their authority as established in Article 312 of the Labour Law. No one shall give any instructions to the Arbitration Council or its members with regard to the settlement of disputes.

Article 312, paragraph two 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 Clause 11 of *Prakas* No. 099 and Article 312 of the Labour Law, the Arbitration Council finds that the letter issued by the Department of Labour is only part of the evidence provided by the employer. Notably, it is not of a legally binding character that would urge the Arbitration Council to abide by it. Moreover, the Arbitration Council finds that the letter was issued for the purpose of being sent to the Department of Labour and Vocational Training of Kandal Province for resolution of the labour dispute. It was not a letter to provide clarification for or to instruct the Arbitration Council that the issue relating to Ney Bunthoeun was not a collective labour dispute. On the contrary, the Ministry of Labour and Vocational Training sent the non-conciliation report, No. 171/09 dated 18 May 2009, to the Secretariat of the Arbitration Council on 20 May 2009. Thus, the Arbitration Council finds that the employer's evidence is insufficient to displace the Council's assumption, based on the non-conciliation report, that this is a collective labour dispute. Based on the interpretation above, the Arbitration Council finds that this is collective labour dispute.

Furthermore, the employer argues that the issue in dispute was previously before the Arbitration Council in issue 1 of Arbitral Award 55-57/08–Sinomax. In the award, the Council declined to consider the workers' demand that the employer reinstate Ney Bunthoeun, the vice-president of the Local Union of C.CAWDU, on the basis that his dismissal had not yet taken place, thus the dispute concerned future rights. Thus, the Arbitration Council will consider the issue below.

Res Judicata is a legal principle meaning that if an arbitral award has been issued by the Arbitration Council, the same parties cannot then bring the same subject matter before the same jurisdiction for resolution.

Based on this principle, the Arbitration Council has generally found that when it has already decided on an issue, it has the discretion to consider whether or not that issue should be decided again (*see Arbitral Awards 10/06-North Gaiety; 24/06-Fortune Garment,*

reasons for decision, issue 4; 106/06-Quicksew, reasons for decision, issue 5; 45/07- Wilson, reasons for decision, issue 2; and 14/08-Quicksew, reasons for decision, issue 1).

With regard to the principle of *Res Judicata*, in Arbitral Award 153/08-Hytex Garment, the Arbitration Council explained that it will reject the workers' demand if three conditions are fulfilled: (1) the same party/parties; (2) the same issue(s); and (3) the Arbitration Council has issued a final ruling. This is to avoid inconsistent resolutions of the same issue and to ensure that once issued, a decision is final.

In this case, the Arbitration Council agrees with its interpretation in previous awards with regard to *Res Judicata*. The Arbitration Council finds that only the first and second conditions are met, i.e., the parties and issue are the same. The third condition is not fulfilled because in Arbitral Award 55-57/08–Sinomax, the Arbitration Council did not make a decision based on the facts since the dismissal of Ney Bunthoeun had not yet taken place. Rather, the dispute related to future rights.

In conclusion, the Arbitration Council finds that *Res Judicata* does not apply in this case. Thus the Council will consider the issue below.

In this case, the Arbitration Council agrees with above interpretation of *Res Judicata*. In Arbitral Award 55-57/08–Sinomax, the Arbitration Council did not consider the facts of the issue since at that time the worker had not yet been dismissed. Moreover, the Arbitration Council finds that further issues arose resulting in the dismissal of Ney Bunthoeun. Thus, the Arbitration Council has the right to examine and decide on the issue once again.

At the hearing, the parties agreed that the facts relating to non-renewal of the employment contract are the same as those set out in Arbitral Award 55-57/08–Sinomax. Certain additional issues were discussed at the hearing. Therefore, the Arbitration Council will consider that fact agreed upon.

Therefore, the Arbitration Council will consider whether the employer has the right to decide whether or not to extend a worker's fixed duration contract.

Article 73, paragraph one of the Labour Law states:

A labour contract of specific duration normally terminates at the specified ending date. It can, however, be terminated before the ending date if both parties are in agreement on the condition that this agreement is made in [the] form of writing in the presence of a Labour Inspector and signed by the two parties to the contract.

In Arbitral Award 100/07–Hoyear Cambodia, the Arbitration Council interpreted Article 73 as follows: "The Arbitration Council finds that a fixed duration contract shall expire

automatically. This means that the obligations between the employer and worker come to an end. Thus, neither party can force the other to renew a contract without agreement.”

In this case, the Arbitration Council agrees with its decision in previous awards, that the expiry of a fixed duration contract automatically puts an end to the employment relationship; the decision as to whether or not to renew a contract depends on the parties to that contract, and neither party can force the other to extend a contract without mutual agreement. Therefore, the employer has the right to decide whether to renew an expired fixed duration contract, as long as union discrimination is not the basis of the decision.

In this case, the workers argue that Ney Bunthoeun’s contract was terminated by the employer after he was elected vice-president of the local union.

In previous awards, the Arbitration Council has consistently held that “[t]he Arbitration Council generally determines that the claimant party bears the burden of providing evidence to substantiate its allegation” (see *Arbitral Awards 112/06-River Rich, reasons for decision, issue 1; 01/07-Supreme; and 123/07-E Garment, reasons for decision, issue 1*).

With regard to evidence of union discrimination, the Arbitration Council considers the statements made at the hearing as well as the evidence presented to determine whether or not union discrimination exists in a particular case (see *Arbitral Awards 17/07-Charm Textile, reasons for decision, issue 1 and 141/08-Bloomtime, reasons for decision, issue 4*).

The Arbitration Council agrees with the above interpretation in this case. According to the facts, the workers did not provide evidence of union discrimination, such as evidence of the employer’s dissatisfaction with union activities. The Arbitration Council finds that the employer raised Ney Bunthoeun’s misconduct as the basis for the non-renewal of his contract. However, it is unclear what misconduct he committed, and whether this misconduct affected the quality of his work. Furthermore, the employer did not argue that it needed to reduce its workforce due to economic difficulties. However, the lack of evidence presented by the employer does not provide a sufficient basis to conclude that it discriminated against the union, since the worker acknowledged that he had committed misconduct.

The Arbitration Council generally refuses to consider demands by workers in the absence of sufficient evidence (see *Arbitral Awards 74/07-Global Apparels, reasons for decision, issue 2; 94/07-Fortune Garment, reasons for decision, issues 6 and 8; 108/08-Hugo, reasons for decision, issue 4*). Thus, the Arbitration Council found that there is an insufficient basis to consider the workers’ allegation.

In conclusion, the Arbitration Council decides to reject the workers’ demand that the employer reinstate Ney Bunthoeun, union vice-president, to his former position and back pay his wages from the date of his dismissal until the date of reinstatement.

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

DECISION AND ORDER

Issue 1: Reject the workers' demand that the employer reinstate Ney Bunthoeun, union vice-president, to his former position and back pay his wages from the date of his dismissal until the date of reinstatement.

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: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: