



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 65/11-Sae Han

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: **Sae Han International (Cambodia) Co., Ltd (the employer)**

Address: Trapang Thloeng Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 494 569

Fax: N/A

Representatives:

1. Mr Kim Jae Dong Director of Sae Han International (Cambodia) Co., Ltd
2. Mr Chheav Raotha Head of Administration
3. Mr Pen Sothea Legal Officer

Worker party:

Name: **Voice Khmer Youth Union Federation (VKYUF)**

The first Local Union of VKYUF

Address: Trapang Thloeng Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 713 065

Fax: N/A

Representatives:

1. Mr An Sakhan General Secretary of VKYUF
2. Mr Ol Samarth Officer of VKYUF
3. Mr Khok Sokhea President of the first Local Union of VKYUF

Name: **Voice Khmer Youth Union Federation (VKYUF)**

The second Local Union of VKYUF

Address: Trapang Thloeng Village, Chom Chao Commune, Dangkor District, Phnom Penh

Telephone: 012 713 065

Fax: N/A

Representative:

1. Mr Sorn Chamroeun President of the second Local Union of VKYUF

ISSUES IN DISPUTE

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

1. The workers demand that the employer refrain from deducting the incentive bonus due to the production target not being achieved. The employer states that it will pay the bonus if the target is achieved.
2. The workers demand that the employer reinstate Neang Sotheara, the Secretary of the second Local Union of VKYUF. The employer refuses to do so, asserting that it was unaware that he was the Secretary of the second Local Union of VKYUF.

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. 133 dated 9 June 2010 (Eighth 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. 582 KB/RK/VK dated 6 June 2011 was submitted to the Secretariat of the Arbitration Council on 7 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: 23 June 2011 at 2:00 p.m.

Procedural issues:

On 27 April 2011, the Department of Labour Disputes received a complaint from the VKYUF, No. 641/11 dated 26 April 2011, outlining the workers' demands for the employer to improve working conditions. Upon receiving the claim, the Department of Labour Disputes

assigned an expert officer to resolve the dispute and the last conciliation session was held on 25 May 2011. Seven of the nine issues were conciliated. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 7 June 2011 via non-conciliation report No. 582 KB/RK/VK dated 6 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, held on 23 June 2011 at 2:00 p.m. Both parties were present at the hearing. The Arbitration Council attempted to conciliate the two issues, resulting in neither of the issues being resolved.

The Arbitration Council will consider the remaining issues in dispute based on evidence and reasoning as follows.

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 on the labour dispute, dated 14 June 2011.
2. Company Statute of the employer, No. 5453 dated 8 September 2008.
3. Internal Work Rules of the employer, No. 77 dated 8 November 2010.
4. Certificate of commercial registration, No. 0729 dated 11 February 2008.
5. Registration certificate of the second Local Union of VKYUF, dated 9 February 2011.
6. Dismissal notice, employment application form, probationary contract, Khmer ID card, birth certificate, and fixed duration contract of Neang Sotheara.
7. Payroll information of resignees, dated 11 April 2011.
8. Payroll information of group leader 38 from 1 March to 31 March 2011.

B. Provided by the worker party:

1. Letter from VKYUF to the Head of the Department of Labour Disputes requesting intervention to resolve the dispute, No. 641/11 SSSYX dated 26 April 2011.
2. Letter from the workers to the President of VKYUF requesting intervention to resolve the dispute, dated 20 April 2011.
3. Registration certificate of the first Local Union of VKYUF, dated 23 December 2010.
4. Registration certificate of the second Local Union of VKYUF, dated 9 February 2011.

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

1. Report on collective labour dispute resolution at Sae Han International (Cambodia) Co., Ltd, No. 582 MKBV/KP dated 6 June 2011.
2. Record of collective labour dispute resolution at Sae Han International (Cambodia) Co., Ltd, dated 25 May 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend the hearing addressed to the employer, No. 374 KB/AK/VK/LKA dated 8 June 2011.
2. Notice to attend the hearing addressed to the workers, No. 375 KB/AK/VK/LKA dated 8 June 2011.
3. Notice to attend the hearing addressed to the employer, No. 395 KB/AK/VK/LKA dated 15 June 2011.
4. Notice to attend the hearing addressed to the workers, No. 396 KB/AK/VK/LKA dated 15 June 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:

- Sae Han International (Cambodia) Co., Ltd operates a garment factory. The employer commenced the operation in 2008 and employs a total of 1,100 workers.
- The first and second Local Unions of VKYUF are the claimants in this case.
- The first Local Union of VKYUF, representing 300 workers, was registered on 23 December 2010 and the second, representing 40 workers, on 9 February 2011.

Issue 1: The workers demand that the employer refrain from deducting the incentive bonus due to the production target not being achieved.

- In 2010, the employer set a monthly incentive bonus of US\$ 30 for all group leaders. To be eligible to obtain the incentive bonus, all group leaders must direct their members to achieve the targets set by the employer. The group leaders are aware of the employer's incentive bonus policy.
- Three group leaders failed to lead their members to achieve the production target in March 2011. Therefore, the employer has not provided them with the incentive bonus.
- According to the employer's brief statement, these three group leaders are Num Navy, ID No. 1929, leader of group 12; Seng Sreyneang, ID No. 6381, leader of group 11; and Out Chandara, ID No. 3446, leader of group 11. The three group leaders receive main wages of US\$ 80 per month.

- There are 18 sewing groups at the factory. Each group consists of 38-44 workers. The workers generally sew in accordance with the mode set by the employer.
- The employer states that in March 2011 it set a target of 2,000 to 3,000 pieces of cloth per day for the workers in groups 11 and 12. The three group leaders achieved only 900 to 1200 pieces per day. The other groups achieved their targets. The employer asserts that the incentive bonus encourages group leaders to work harder. It is not part of their wages. Each group leader is aware of the incentive bonus policy.
- The three group leaders were absent from the hearing and their representatives were not well informed as to the details of why they were not paid the incentive bonus. The workers attribute their not being paid the incentive bonus to the lack of workers in their groups and the slow work of new workers.
- The employer refutes the workers' claim, arguing that if any worker in either group resigns, they are replaced with a skilled worker.
- The workers base their demand on Article 102 of the Labour Law, stating that the incentive bonus is part of wages, and Article 28 of the same law, stipulating that the employer is prohibited from deducting the workers' wages and, therefore, the employer is not entitled to deduct the US\$ 30 incentive bonus.

Issue 2: The workers demand that the employer reinstate Neang Sotheara, the Secretary of the second Local Union of VKYUF.

- Neang Sotheara commenced work on 12 October 2010 on a three month fixed duration contract. Upon its expiration, the employer renewed his contract for another three months, effective from 12 January to 11 April 2011.
- Upon his contract expiring on 11 April 2011, the employer notified him that it would not be renewed due to the fact that he was lazy and often absent from his workstation. Moreover, the employer had less work for him.
- On 30 May 2011, the employer paid his outstanding wages and severance pay.
- The workers say in their brief statement that they make this demand because Neang Sotheara was the Secretary of the second Local Union of VKYUF. The local union received a certificate of registration on 9 February 2011.
- The employer argues that it was unaware of his secretaryship and that the election notice did not specify his name. The employer further contends that it was notified of his position as secretary on 19 April 2011, after the election.

- At the hearing, the workers demanded that the employer reinstate Neang Sotheara and provide him with back pay from the date of his dismissal to the date of reinstatement on the basis of Articles 292, 293, and 294 of the Labour Law.
- At the hearing, the workers argued that the employer was notified of the election date. However, the second Local Union of VKYUF did not know the election date, how many workers attended the election, how many votes Neang Sotheara received, nor where the election took place. The Arbitration Council ordered the second Local Union of VKYUF to submit documentation regarding the election, but the union failed to do so.
- The employer showed evidence that Neang Sotheara has accepted severance pay and agreed to withdraw the demand. The workers were unaware of this information. At the hearing, the Arbitration Council ordered the workers to confirm whether or not Neang Sotheara has agreed to withdraw the demand. The workers tried to contact him by telephone but he could not be reached up until the date of award issuance.

REASONS FOR DECISION

Issue 1: The workers demand that the employer refrain from deducting the incentive bonus due to the production target not being achieved.

The Arbitration Council considers this issue as follows:

Article 2 of the Labour Law states:

All natural persons or legal entities, public or private, are considered to be employers who constitute an enterprise, within the meaning of this law, provided that they employ one or more workers, even discontinuously.

Every enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in [a] factory, workshop, work site, etc., under the supervision and direction of the employer.

In previous Arbitral Awards, the Arbitration Council has ruled that “the employer party had the right to manage and direct the company so long as the management and the direction are reasonable and in compliance with the law” (see AA 116/07-Grace Sun, *Reasons for Decision, Issue 2*).

In Arbitral Award 81/08-Global Apparel, issue 4, the Arbitration Council ruled that the employer’s right to manage and direct includes the right to set an incentive bonus.

The Arbitration Council agrees with the abovementioned interpretation.

In this case, the employer refuses to provide the US\$ 30 incentive bonus for March 2011 to the three group leaders because their groups did not achieve the production target. The workers raise Articles 28 and 102 of the Labour Law as the basis for their demand.

Article 28 of the Labour Law states:

The employer shall not impose fines or double sanctions for the same misconduct. These fines mean any measure that leads to a reduction of the remuneration being normally due for the performance of work provided.

The Arbitration Council finds that the three group leaders earn main wages of US\$ 80 per month. The Arbitration Council considers that the withholding of the incentive bonus is not a fine leading to a reduction of the remuneration normally due for the performance of work because the incentive bonus is not remuneration normally due to the workers. The incentive bonus is for any group leader who leads his/her members to achieve the production target set by the employer. If a group leader cannot achieve the target, he/she is not entitled to the bonus. The Arbitration Council considers that Article 28 of the Labour Law is not applicable in this case.

Articles 102 and 103 of the Labour Law define 'wage' and list the components of wage. The Arbitration Council considers that although bonuses are a component of wages, eligibility for bonuses is not the same as that for wages. Wages are paid to workers for the performance of services specified in a contract. Bonuses are conditional extra wages aimed at motivating the workers to work harder. The employer has the right to set conditions and targets to be achieved in an employment contract, provided that the conditions are reasonable and lawful. It is up to the worker to try to fulfil the condition in order to obtain the bonus. Normally, workers must fulfil certain conditions or requirements set the employer to be entitled to a bonus. In principle, if the workers are unable to do so, they are not entitled to the bonus. Therefore, the Arbitration Council considers that because the three group leaders failed to lead their members to achieve the production target, they are not entitled to the incentive bonus of US\$ 30 for March 2011.

In conclusion, the Arbitration Council rejects the workers' demand that the employer pay the outstanding US\$ 30 incentive bonus for March to Num Navy, ID No. 1929, leader of group 12; Seng Sreyneang, ID No. 6381, leader of group 11; and Out Chandara, ID No. 3446, leader of group 11.

Issue 2: The workers demand that the employer reinstate Neang Sotheara, the Secretary of the second Local Union of VKYUF.

The workers demand that the employer reinstate Neang Sotheara and provide him with back pay from the date of his dismissal to the date of reinstatement on the basis of Articles 292, 293, and 294.

In this case, upon completion of his probationary contract, the employer renewed Neang Sotheara's contract for another three months, effective from 12 January to 11 April 2011.

Article 73, paragraph 5 of the Labour Law states:

If the contract has a duration of more than six months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67.

According to this provision, prior notice of non-renewal is required for employment contracts of over six months. According to the facts, Neang Sotheara held a three month contract. Thus, prior notice of the non-renewal of his contract is above what is provided in the Labour Law.

In this case, the workers argue that Neang Sotheara was the Secretary of the second Local Union of VKYUF and base their demand on Articles 292, 293, and 294 of the Labour Law.

Article 292 of the Labour Law states that: "It is the duty of the employer to organise elections. In case that there are no shop stewards, the employer shall set a date for the elections..."

The Arbitration Council considers that the issue in dispute does not concern the election of worker delegates. Thus, Article 292 is not applicable in this case.

Article 293 of the Labour Law states that: "The dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector."

In previous Arbitral Awards, the Arbitration Council has ruled that:

Article 293 of the Labour Law cannot apply in the case of contract expiration because this Article states clearly that the protection is with respect to the dismissal of shop stewards and union leaders and does not include situations where a contract

has expired (see AAs 34/05-Jacqsintex, Reasons for Decision, Issue 1; 10/09-New Wide, Reasons for Decision, Issue 2; 05/11-M&V I, Reasons for Decision, Issue 5).

The Arbitration Council agrees with the abovementioned interpretation. The Arbitration Council considers that the issue concerns contract expiration and non-renewal and not dismissal from employment, because dismissal involves terminating an unexpired contract.

The Arbitration Council considers that Article 293 of the Labour Law is not applicable in this case and the employer was not obliged to seek approval before declining to renew Neang Sotheara's contract. The Arbitration Council considers that the non-renewal of his contract does not violate the law.

At the hearing, the employer showed evidence that Neang Sotheara has accepted severance pay and agreed to withdraw the demand, but the workers were unaware of this information. At the hearing, the Arbitration Council ordered the workers to confirm with Neang Sotheara whether or not he has agreed to withdraw the demand. The workers tried to contact him by telephone but he could not be reached up until the date of award issuance. The Arbitration Council considers that Neang Sotheara may have withdrawn the demand, because he was absent at the hearing and has accepted severance pay.

In conclusion, the Arbitration Council rejects the workers' demand that the employer reinstate Neang Sotheara.

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 pay the outstanding US\$ 30 incentive bonus for March to Num Navy, ID No. 1929, leader of group 12; Seng Sreyneang, ID No. 6381, leader of group 11; and Out Chandara, ID No. 3446, leader of group 11.

Issue 2: Reject the workers' demand that the employer reinstate Neang Sotheara.

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: