



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាគណ្តារ

THE ARBITRATION COUNCIL

Case number and name: 201/13-Sabrina (Cambodia)

Date of award: 28 October 2013

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Mar Samborana**

Arbitrator chosen by the worker party: **Ann Vireak**

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

DISPUTANT PARTIES

Employer party:

Name: - **Sabrina (Cambodia) Garment Manufacturing Corp.**

Address: National Road 4, Russey Village, Sambo Commune, Samrong Toung District,
Kompong Speu Province

Telephone: 017 33 80 33

Fax: N/A

Representatives:

1. Mr Kim Soheat

Attorney at Law

2. Ms Sann Lychou

Administrative staff

Worker party:

Name: - **Free Trade Union of Workers of Kingdom of Cambodia (FTUWKC)**

- **Local Union of FTUWKC (the union)**

Address: #16A, Street 360, Sangkat Boeung Keng Kong 3, Khan Chamkarmon, Phnom
Penh

Telephone: 017552 452

Fax: N/A

Representatives:

1. Mr Thorn Thol

Secretary-General of FTUWKC

2. Mr Khut Thet

FTUWKC Officer

3. Mr Rin Thol

Worker in Ironing Section of Sabrina Cambodia

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4. Ms Ry Oeung	Worker in Quality Control Section of Sabrina Cambodia
5. Mr Chea Sarith	Worker in Ironing Section of Sabrina Cambodia
6. Mr Keo Thouk	Worker in Sewing Section of Sabrina Cambodia
7. Ms Mak Phallun	Worker in Cleaning Section of Sabrina Cambodia
8. Mr Vun Vuth	Worker in Ironing Section of Sabrina Cambodia
9. Ms Cheav Soy	Worker in Sewing Section of Sabrina Cambodia
10. Ms Heng Roeun	Worker in Sewing Section of Sabrina Cambodia
11. Ms Bun Sovanny	Worker in Cutting Section of Sabrina Cambodia
12. Ms Por Neang	Worker in Sewing Section of Sabrina Cambodia
13. Mr Meas Sokly	Worker in Ironing Section of Sabrina Cambodia
14. Mr Soy Ear	Worker in Ironing Section of Sabrina Cambodia
15. Mr Phon Savatha	Worker in Sewing Section of Sabrina Cambodia
16. Mr Chy Sakla	Secretary of the union
17. Mr Seir Puth	Worker in Ironing Section of Sabrina Cambodia
18. Ms Sao Nath	Worker in Sewing Section of Sabrina Cambodia
19. Ms Chy Sreytoch	Worker in Quality Control Section of Sabrina Cambodia

ISSUES IN DISPUTE

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

- The workers do not agree to the termination of their contracts of employment even though the employer paid them termination compensation in accordance with the law. They demand reinstatement. The employer claims it will maintain its stance regarding the dismissal because the workers committed serious misconduct.

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. 155 dated 17 June 2013 (Eleventh 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. 1029 dated 14 August 2013 was submitted to the Secretariat of the Arbitration Council on 16 September 2013.

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: 2 October 2013 (at 8:30 a.m.)

Procedural issues:

On 22 July 2013, the Department of Labour Disputes (the department) received a complaint from FTUWKC concerning dismissal of 22 workers at Sabrina (Cambodia). Upon receiving the claim, the department assigned an expert officer to resolve the labour dispute and the last conciliation session was held on 12 August 2013 at 2 p.m. and none of the issues were resolved. The non-conciliated issue was referred to the Secretariat of the Arbitration Council on 14 August 2013.

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 2 October 2013. Both parties were present.

The Arbitration Council divided the issues into two types: rights disputes and interests disputes. In this case, the parties are signatories to the Memorandum of Understanding on Improving Industrial Relations in the Garment Industry (MoU), dated 3 October 2012. According to the MoU, both parties have agreed to binding arbitration for rights disputes. However, the MoU does not create binding obligations regarding interest disputes. The parties are able to choose non-binding arbitration for interest disputes, and can object to an arbitral award issued in relation to such disputes. Such an objection will not affect the parties' obligation to implement an award on rights issues in accordance with the MoU.

In this case, the parties chose non-binding Arbitral Award for interests disputes.

Both parties agreed to defer the date of award issue from 14 October 2013 to 28 October 2013.

Therefore, the Arbitration Council will consider the issues in dispute 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

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- 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:

- Sabrina (Cambodia) Garment Manufacturing Corp (“Sabrina”) is a garment manufacturer, which employs 5020 workers (*according to collective dispute resolution report of Sabrina (Cambodia) 1029/13 dated 14 August 2012*).
- The union received a certificate of union registration from the Ministry of Labour and Vocational Training dated 21 November 2012.
- Coalition of Cambodian Apparel Workers Democratic Unions (C.CAWDU) at Sabrina holds the Most Representative Status (MRS) at Sabrina (*according to collective agreement between Sabrina and Democratic Union of Garment Workers of Sabrina dated 2 January 2013*).
- 22 workers at Sabrina requested help from the President of FTUWKC via a request letter dated 15 July 2013. The 22 workers are listed in Table (A):

Table (A)

N	Name	ID	N	Name	ID	N	Name	ID
1	Chy Sreytouch	01040	9	Oeun Theary	16228	17	Oun Kvan	V 20022
2	Soy Ear	01151	10	Rin Thol	23188	18	Chea Poeun	V 40019
3	Ry Oeung	03296	11	Sek Vichet	25145	19	John Sreynoth	V 40055
4	Cheav Soy	05100	12	Por Neang	27146	20	Vun Vuth	Yd 064
5	Khoeu Sok Khem	05128	13	Dos Sareun	27178	21	Eim Savy	V 20028
6	Heng Roeun	07229	14	Chea Sarith	28119	22	Bun Sovanny	V 20040
7	Saov Nath	08268	15	Yin Saory	29177			
8	Pom Sokchan	12248	16	Chin Srey Orn	V 10067			

- 17 workers attended the hearing at the Arbitration Council on 2 October 2013. The 17 workers are listed in Table (B):

Table (B)

N	Name	Sex	N	Name	ID	N	Name	Sex
1	Chy Sreytouch	F	7	Rin Thol	M	13	Mak Phallyn	F
2	Soy Ear	M	8	Por Neang	F	14	Meas Sokly	M

3	Ry Oeung	F	9	Chea Sarith	M	15	Phon Savata	M
4	Cheav Soy	F	10	Vun Vuth	M	16	Chy Sakla	M
5	Heng Roeun	F	11	Bun Sovanny	F	17	Seir Puth	M
6	Saov Nath	F	12	Keo Thouk	M			

- According to Table (A) and Table (B), the Arbitration Council noted the spelling of some workers' names is different. In such case, the Arbitration Council decided to recognise and use the written names of the workers attending the hearing listed in the attendance list on the hearing day. For the workers who did not attend the hearing, the Arbitration Council used their names as listed in Table (A).
- Among the 17 workers in Table (B) who attended the hearing of this case, only 11 of those names appear in Table A. Those 11 workers are: Chy Sreytouch, Soy Ear, Ry Oeung, Cheav Soy, Heng Roeun, Sao Nath, Rin Thol, Por Neang, Chea Sarith, Vun Vuth, and Buth Sovanny. The other 11 workers whose names appear in Table B are absent from the hearing.
- Among the 11 workers who attended the hearing, 8 are members of the C.CAWDU: Ry Oeung, Chea Sarith, Vun Vuth, Cheav Soy, Por Neang, Soy Ear, Sao Nath, and Chy Sretouch. The other 3 workers: Heng Roeun, Rin Thol, and Bun Sovanny are members of the union.
- Therefore, the Arbitration Council considered this case only in relation to the 11 workers who attend the hearing.

Issue: The workers demand that the employer reinstate 11 workers.

- The workers demand that the employer reinstate 11 workers. If the employer does not reinstate them, the workers demand that the employer pay termination compensation pursuant to the Labour Law.

Information in relation to the 11 workers:

- The parties agree to the following:

N	Name	Sex	Date of Work Commencement (According to their ID Cards)	Date of Dismissal (The employer's report)
1	Chy Sreytouch	F	5 May 2004	10 June 2013
2	Ry Oeung	F	9 June 2010	7 June 2013
3	Soy Ear	M	6 May 2008	6 June 2013
4	Cheav Soy	F	7 February 2003	7 June 2013
5	Heng Roeun	F	9 March 2007	7 June 2013
6	Saov Nath	F	10 October 2008	7 June 2013

7	Rin Thol	M	1 November 2011	The employer claims: 10 June 2013 The workers claim: 15 June 2013
8	Por Neang	F	23 December 2010	7 June 2013
9	Chea Sarith	M	1 September 2010	10 June 2013
10	Vun Vuth	M	15 October 2009	10 June 2013
11	Bun Sovanny	F	11 May 2007	20 June 2013

- Where the employer's documents are different from the workers' ID cards, the employer agreed to the date of work commencement being based on the workers' ID cards. Therefore, the dates of work commencement listed in the table above are based on the workers' ID cards.
- Mr Rin Thol claims the employer notified him of his dismissal on 15 June 2013, which was the day that the employer permitted workers to return to work. The employer did not permit him to return to work and instead notified him of his dismissal. However, the employer claims to have notified Mr Rin Thold of his dismissal on 10 June 2013. The employer was not able to directly notify Mr Rin Thol of his dismissal because Mr Rin Thol did not return to work after the strike. The employer adds that it displayed the notification letter at the company and sent the copies to the department and Garment Manufacturing Association of Cambodia (GMAC).
- The Arbitration Council ordered the employer to submit copies of the dismissal notification letter to the Arbitration Council by the deadline for evidence.
- The employer subsequently submitted a letter on the seventeen sheet long notification letter on termination of contract of employment dated 10 June 2013 sent to the department with signature of receipt dated 11 June 2013 and to the GMAC with the signature of receipt dated 12 June 2013. However, the seventeen sheet long notification letter on termination of contract of employer dated 10 June 2013 was not attached to the letter [sent to the department and GMAC].
- Having considered the notification letter regarding the termination of Mr Rin Thol's contract of employment dated 10 June 2013 submitted by the employer on 1 October 2013, the Arbitration Council found there was notification dated 10 June 2013 bearing the phrase *"Copy to: Department of Labour and Vocational Training of Kompong Speu Province and GMAC"*.
- According to the documents provided and the employers' claim, the Arbitration Council finds that the employer's claim is reasonable and consistent with the evidence; therefore, the claim is made out. The Arbitration Council decides to take

the employer's claim that the employer did notify Mr Rin Thol of his termination on 10 June 2013, and although the employer did not directly notify Mr Rin Thol, the employer did take action in relation to Mr Rin Thol's dismissal on 10 June 2013.

1) First case: Ms Bun Sovanny

A. The parties' claim with respect to individual dispute:

- The employer claims the Arbitration Council should not consider the issue relating to the dismissal of Ms Bun Sovanny because this issue is an individual dispute:
 - The dispute is between the employer and Ms Bun Sovanny.
 - This dispute arose from her non-compliance with the employer's managerial direction after the employer decided to transfer her.
 - The employer claims it dismissed her on the grounds that she failed to comply with the terms of her employment contract.
 - This dismissal did not affect the production line.
- The workers claim the dispute between the employer and Ms Bun Sovanny is a collective dispute on the bases that this dispute arose from her transfer based on her involvement in the strike action and that the transfer was undertaken immediately following the strike.

B. The parties' claim with respect to Ms Bun Sovanny's dismissal

- The workers claim:
 - The employer groundlessly dismissed Ms Bun Sovanny.
 - Ms Bun Sovanny did not comply with the employer's direction because the newly assigned tasks were difficult and she was not aware of having committed misconduct. She claims the employer transferred her from punch in worker to fabric distributor.
- The employer claims:
 - Ms Bun Sovanny failed to comply with Point 2 of the terms stipulated in the contract of employment that, if conditions of production changed and did not improve, the employer reserved its right to change her position and job.
 - Ms Bun Sovanny was dismissed on the grounds of serious misconduct being her non-compliance with terms stipulated in her contract. 'Refusal to comply with the terms of the employment contract' is considered serious misconduct pursuant to Point 2 (B), Article 83 of the *Labour Law*.
- The employer contends that:
 - On 14 June 2013, the employer notified Ms Bun Sovanny of her transfer from 'punch in' to 'fabric organizing' within the same cutting section.
 - The reasons for the transfer were: 1) the employer intends for every worker to know how to punch in. This is a precautionary measure for when punch in

workers are absent and other workers can replace them; punch in being essential, the disruption of which may cause disruption to other work flow, and; 2) based on past experience, the five 'punch in' workers always staged strike action which caused disruption to work flow because other workers could not replace them.

- Fabric organising is simple task, which does not require particular skills; any worker can perform this job without additional training. Punch in workers check fabric organising reports from the cutting section, and key the data into a computer, then print out the data, which is called a 'punch in report'. Next, the supervisor of the cutting section picks up the punch in report and sends it to the fabric organisers. Sometimes punch in workers also make corrections to the purchase order (P.O.) and mark or stamp (P.O.) on an unmarked punch in paper if there is allocation of P.O.
- Fabric organisers are assigned to 1) bind fabric into number of bundles specified in the punch in paper, and 2) put those pieces into plastic bags, each of which weight 5 or 6 kilograms and move them to storage; the fabric organisers are assisted by other workers in the cutting section. The fabric organising does not require any particular skill; the workers can do it as long as they can count numbers, check the shirt sizes, and bind fabric into bundles.
- Following her transfer, Ms Bun Sovanny was still working in cutting section and the employer maintained her wages, seniority bonus, time and work shift, and benefits.
- Following notification of her transfer, Ms Bun Sovanny did not follow the direction and spent her time socializing for a week.
- Therefore, the employer dismissed her on 20 June 2013 on the grounds of misconduct as stipulated in Point B (2), Article 83 of the Labour Law, for failing to comply with Point 2 of her employment contract.

1) Second Case: The Other 10 Workers

The parties' claim in relation to the dismissal of 10 workers:

- The workers claim they had not committed serious misconduct because; 1) some workers did not carry sticks or stones as alleged by the employer, and; 2) although some workers carried sticks or stones, the employer has no evidence to prove that workers committed violence with those tools as alleged by the employer.
- The employer claims it dismissed the 10 workers on the grounds of serious misconduct committed on 27 May 2013 and 3 June 2013:

- Intimidation against security guards of the company: this is within the definition of 'serious misconduct' pursuant to Point B (4), Article 83 of the Labour Law. On the day of the strike, the workers were involved in activities, such as carrying sticks or stones which affected order and security in the company.
- Violence during strike: pursuant to Article 330 of the *Labour Law*, violence during a strike is regarded as serious misconduct. The workers were involved in violence (as described above) during strike on 27 May and 3 June 2013. (This claim was raised at the hearing, and stated in the employer's evidence dated 1 October 2013).

- The parties agree as follows:

N	Names	Sex	Actions in Factory Premises during Strike	Date of Recognition of Actions (Video Clips Review)	Date of Taking Actions (Notifications of Dismissal)
1	Rin Thol	M	Carried stick and stone	6 June 2013	10 June 2013
2	Soy Ear	M	Carried stick	6 June 2013	7 June 2013
3	Cheav Soy	F	Carried stone	6 June 2013	7 June 2013
4	Heng Roeun	F	Carried stone	6 June 2013	10 June 2013
5	Por Neang	F	Carried stone	6 June 2013	10 June 2013
6	Chea Sarith	M	Carried stone	6 June 2013	7 June 2013
7	Vun Vuth	M	Carried stick	6 June 2013	7 June 2013
8	Ry Oeung	M	Carried stick	6 June 2013	7 June 2013

- The workers claim the 8 workers whose names are listed in the table above were involved in such actions as alleged; however, they did not commit any violence or damage the employer's property.
- The workers claim the employer has no evidence substantiating the allegation that the workers committed violence or damaged the company's property.
- In the case of Ms Chy Sreytouch and Sao Nath, the parties agree:

N	Name	The Parties' claim in relation to both workers' actions during strike		Date of Recognition of Actions (Photos and Video Clips Review)	Date of Taking Actions (Notifications of Dismissal)
		The employer (based on video clips and photos)	The workers		
1	Sao Nath	Carried stick	Striked outside the factory and did not carry stick	6 June 2013	7 June 2013
2	Chy Sreytouch	Carried stick	Striked but did not made entry to the factory and did not hold stick	6 June 2013	7 June 2013

- In Ms Chy Sreytouch's instance, the employer claims that according to photos and video clips, Ms Chy Sreytouch carried a stick in the factory premises during the strike.
- Ms Chy Sreytouch objects to the employer's allegation and claims she did join the strike but did not enter the factory and she did not carry stick either.
- According to the photos submitted by the employer, the Arbitration Council finds that the photos do not clearly identify this particular worker as carrying a stick. Ms Chy Sreytouch objects to the allegation that the striker who appears in the photos and video clips was her.
- The Arbitration Council notes that the photos are not clear enough to identify that this particular worker was holding a stick. The Arbitration Council also notes that the video clip presented by the employer at the hearing is not clear and too short to identify that the striker in the video clip was Ms Chy Sreytouch.
- Similarly, the employer alleged that according to the photos and video clips, Ms Sao Nath was holding a stick in the factory premises during the strike actions.
- Ms Sao Nath objects to the employer's allegation and claims that she joined the strike outside the factory premises and she did not hold a stick as alleged by the employer. She objects to the allegation that the striker holding a stick in the photo and video clip is her.

- The Arbitration Council notes that the photo is not clear enough to identify that the striker is holding a stick. The Arbitration Council also notes that the video clip presented by the employer is not clear enough to identify the striker as Ms Sao Nath.
- The employer claims that team supervisors carried out the identification of the two workers holding sticks during the strike actions in the photo and video clip; however, it has no other supporting evidence to substantiate that both workers were holding sticks during the strike.
- The employer confirms its position that the aforementioned 11 workers will not be reinstated by the employer. The employer reserves its right to pay termination compensation in accordance with the Labour Law if the Arbitration Council finds that the employer dismissed the workers without complying with the Labour Law.

REASONS FOR DECISION

Issue: The workers demand that the employer reinstate 11 workers, or pay them termination compensation in accordance with the Labour Law if the employer does not reinstate them.

Before considering the demand, the Arbitration Council will interpret rights and interests disputes:

Paragraph 2, Article 312 of the Labour Law states:

The Arbitration Council 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.

Clause 43 of the Prakas 099 on the Arbitration Council dated 21 April 2004 states:

An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award.

Paragraph 2, Article 312 of the Labour Law and Clause 43 of the Prakas no.099 on the Arbitration Council dated 21 April 2004 states that the Arbitration Council 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. The Arbitration Council concludes that disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement are rights disputes and the Arbitration Council legally settles rights disputes (*see the Arbitration Award 05/11-M & V (Branch 1), Reasons for Decision, Issue 1&5, 13/11-Gold Kamvimex, Issue 1&2, 14/11-GXG, Issue 4*).

Any kinds of disputes that are not stipulated in the agreement or collective agreement are interests disputes and the Arbitration Council settles interests disputes based on equity.

The demand in this issue is related to termination compensation stipulated in the Labour Law; therefore, the Arbitration Council finds that the dispute is a rights dispute.

The Arbitration Council will consider:

1) In the Case of Ms Bun Sovanny:

The Arbitration Council will consider whether or not this dispute is a collective dispute in the jurisdiction of the Arbitration Council.

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 previous awards, the Arbitration Council presumes 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 Arbitral Award no. 45/07-Wilson, Reasons for Decision, Issue 4 and 13/08-Teratex, Issue 2*).

Article 302 states that to be a collective labour dispute the following three conditions must be fulfilled:

- a. It is a dispute between some workers and one or more employers.
- 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.

In this case, the first condition is fulfilled because the dispute is between Ms Bun Sovanny and the employer.

The Arbitration Council finds that the second condition is fulfilled because the dispute between the workers and the employer is about working conditions which is Ms Bun Sovanny's dismissal.

The employer claims the dismissal does not affect production line, which means the production line is still the same, and there is no disruption or any difficulty. The workers do not object to the employer's claim and the former do not contend that the dispute causes any inconvenience to the enterprise or affects social security based on any reasons. The workers just claim that the dispute is collective dispute on the grounds that the dispute was caused by job transfer based on strike because it immediately took place after strike. In this case, the Arbitration Council finds that there is no fact or any claim by the parties that leads to the presumption that the dispute caused any inconvenience to the enterprise's operation or jeopardises social peace. Therefore, the Arbitration Council finds that the third condition is not fulfilled.

In conclusion, the Arbitration Council finds that this dispute is not a collective dispute, but individual dispute. As a result, the Arbitration Council has no jurisdiction to consider this dispute.

Therefore, the Arbitration Council decides to decline to consider the workers' demand that the employer reinstate Ms Bun Sovanny or pay termination compensation in accordance with the Labour Law.

2) In the Case of the 10 Workers:

According to the findings of the fact, the 10 workers have been working in the company for the period of:

N	Name	Sex	Date of Work Commencement (According to their ID Cards)	Date of Dismissal (The employer's documents)	Total Period of Service (start from 2 years)
1	Chy Sreytouch	F	5 May 2004	10 June 2013	over 2 years
2	Ry Oeung	F	9 June 2010	7 June 2013	over 2 years
3	Soy Ear	M	6 May 2008	6 June 2013	over 2 years
4	Cheav Soy	F	7 February 2003	7 June 2013	over 2 years
5	Heng Roeun	F	9 March 2007	7 June 2013	over 2 years
6	Saov Nath	F	10 October 2008	7 June 2013	over 2 years
7	Rin Thol	M	1 November 2011	10 June 2013	over 2 years
8	Por Neang	F	23 December 2010	7 June 2013	over 2 years
9	Chea Sarith	M	1 September 2010	10 June 2013	over 2 years
10	Vun Vuth	M	15 October 2009	10 June 2013	over 2 years

The Arbitration Council considers whether the employer dismissed the 10 workers in accordance with the Labour Law.

According to the findings of fact, the employer dismissed the 10 workers on the grounds that they had committed serious misconduct, being violence during strike action (committed 27 May 2013 and 3 June 2013) as defined by Article 330 of the *Labour Law* and for threats against the company's security guards stipulated in Point B (3), Article 83 of the *Labour Law*. The employer alleged that during strike, the workers were involved in such activities as holding sticks or stones, which were regarded as violence and upset the security of and order in the company.

Before considering the dismissal of the 10 workers, the Arbitration Council notes as follows:

Article 318, paragraph one of the Labour Law states:

[A] strike is a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work.

Article 3 of *Law on Public Assembly for Peaceful Demonstration* dated 5 December 2009 states:

The scope of this law covers every public assembly or procession of peaceful demonstration in the Kingdom of Cambodia. However, it does not cover:...2) any assembly inside or outside along the fence of factory or enterprise or institutions in relation to labour disputes, which are covered by Labour Law...

According to Paragraph 1, Article 318 of the *Labour Law* and Article 3 of the *Law on Public Assembly for Peaceful Demonstration*, the Arbitration Council finds that any assembly inside or outside, along the fence of a factory or enterprise or institutions in relation to labour disputes is not regarded as demonstration under the scope of Law on Public Assembly for Peaceful Demonstration; however, it is regarded as strike under the scope of application of the Labour Law (1997).

Next, the Arbitration Council will consider the strike according to the Labour Law.

Therefore, the Arbitration Council will consider the dismissal of the 10 workers as follows:

A) Case of the 8 workers who held sticks and/or stones during the strike actions

In this case, the employer dismissed the 8 workers on the grounds that the workers committed serious misconduct.

Thus, the Arbitration Council will consider whether or not the 8 workers really committed serious misconduct.

Article 330 of the Labour Law states that “[a] strike must be peaceful. Committing violent acts during a strike is considered to be serious misconduct that could be punished, including work suspension or disciplinary layoff.”

According to Article 330, the Arbitration Council finds that a ‘peaceful’ strike refers to a strike staged in peaceful form or way. Violence during a strike refers to any act committed in the form of violence including using sticks or other tools during the strike.

According to the facts, during the strikes on 27 May 2013 and 3 June 2013, the employer and workers agree that the 8 workers were involved in such activities as:

N	Names	Sex	Actions in Factory Premise during Strike
1	Rin Thol	M	Carried a stick and stones
2	Soy Ear	M	Carried a stick
3	Cheav Soy	F	Carried stones
4	Heng Roeun	F	Carried stones
5	Por Neang	F	Carried stones
6	Chea Sarith	M	Carried stones
7	Vun Vuth	M	Carried a stick
8	Ry Oeung	M	Carried a stick

Based on the facts agreed by the parties, the Arbitration Council finds that the workers' actions including holding sticks or stones during the strike cannot be regarded as peaceful strike action. Using such tools during a strike is sufficient to be regarded as causing or being involved in violent acts during a strike. Therefore, the Arbitration Council decides that the workers' actions come within the meaning of 'violent acts' during strike action as stipulated by Article 330. There is, however, no evidence substantiating actual violence or damage to the company's property or victims of such acts or actions because a strike is defined by the Labour Law as:

[A] strike is a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining the satisfaction for their demand from the employer as a condition of their return to work.

This means the demand shall be made by peaceful means, not by such aforementioned actions.

Therefore, the Arbitration Council finds that the 8 workers were involved in actions that caused violence during strike action regarded as serious misconduct based on Article 330 of the Labour Law.

Furthermore, Article 83 of the Labour Law states: *"The following are considered to be serious offences:...On the part of the worker*

...

3. Serious infractions of disciplinary, safety, and health regulations.

..."

The Arbitration Council finds that each worker has a duty to work for the employer in accordance with terms of the contract and in principle; they are under an obligation to avoid

causing insecurity in the workplace. In any form of dispute or demand, the workers shall not use threat against the company's security and safety as the tool to resolve their dispute. The workers are under an obligation to peacefully resolve all issues with the employer.

As mentioned above, the Arbitration Council finds that the 8 workers' actions were taken in a form with the potential to cause violence, which threatens the company's security and safety.

Therefore, the Arbitration Council considers that the 8 workers above seriously violated rules of company's security and safety, which is considered serious misconduct based on Article 83 (B3) of the Labour Law.

In conclusion, the Arbitration Council finds that the employer has right to dismiss the 8 workers on the grounds of serious misconduct in accordance with the Labour Law.

The Arbitration Council finds that among the 8 workers, Mr Rin Thol was on a fixed duration contract (less than 2 years of continuous service) and the other 7 workers were on undetermined duration contracts (more than 2 years of continuous service). The Arbitration Council finds that:

According to Article 82 (2), 75, 77, 89, and 91 of the Labour Law, the employer is not under an obligation to provide prior notice, indemnity for dismissal or damages to the 7 workers (other than Rin Thol) who were on undetermined duration contracts.

Pursuant to Paragraph 2 and 3, Article 73 of the Labour Law, the employer is not under an obligation to provide damages to Mr Rin Thol, who was on a fixed duration contract. Concerning the five per cent severance payment stipulated in Paragraph 6, of Article 73, the Arbitration Council will consider whether Mr Rin Thol is entitled to severance pay when he committed serious misconduct.

According to Paragraph 2 and 3, Article 73 of the Labour Law, without the parties' agreement, fixed duration contracts can be terminated before expiration only in the case of serious misconduct or acts of god. The worker is entitled to receive damages equal to wages that the worker would have received at the conclusion of the contract when termination is made by the employer alone.

The employer can terminate fixed duration contract on the grounds of serious misconduct with no obligation to pay damages.

Further, according to Paragraph 6, Article 73 of the Labour Law, upon termination of a contract, the employer shall provide severance pay proportionate to both wages and period of the contract and this severance pay shall be stated in a collective agreement. If it is not stated in a collective agreement, the severance pay shall be at least equivalent to five per cent of total wages earned by the worker over the period of the contract.

Severance pay is therefore proportional to the period of the contract (the period stated in the contract, not the period of workers' service before the conclusion of the fixed

duration contract). The calculated outcome should be at least equal to five per cent of the wages the worker received during the period of their contract (the period in which the workers earned wages and such period as stated in the contract or the formal conclusion of the contract according to its expiration date). Therefore, if the worker is dismissed on the grounds of serious misconduct before the expiration date of the contract, the basis for calculating severance pay will not be the full period stated in the contract.

Furthermore, according to Article 89 of the *Labour Law*, in relation to termination compensation for undetermined duration contracts, it is clearly specified that the employer is not under an obligation to provide termination compensation if the contract of employment is terminated at the discretion of the employer on the grounds of serious misconduct.

Therefore, the employer is not under an obligation to provide termination compensation and damages when termination of a fixed duration contract is made on the grounds of serious misconduct. This conclusion is also pursuant to 'termination of undetermined duration contract' on the grounds of serious misconduct as stated in Article 89 and 91 of the *Labour Law*.

In this case, Mr Rin Thol committed serious misconduct; therefore, the Arbitration Council finds that Mr Rin Thol is not entitled to severance pay equal to five per cent of wages earned during the period of his contract. Thus, the employer is not obliged to provide Mr Rin Thol severance pay equal to five per cent of wages earned over the period of his contract.

However, according to Article 166, 167, and 116 of the Labour Law, the employer is obliged to calculate payment in lieu of the remaining annual leave and outstanding wages of all 8 workers.

B) Case of Ms Chy Sreytouch and Ms Sao Nath

In this case, the employer dismissed Ms Chy Sreytouch and Ms Sao Nath on the grounds of serious misconduct.

The Arbitration Council will review and consider whether or not Ms Chy Sreytouch and Ms Sao Nath really committed serious misconduct.

According to previous awards, the parties who make a claim or allegation hold the burden of proof (*see Arbitral Award no. 79/05-Evergreen, 101/08-GDM, Reasons for Decision, Issue 1 and 2, 108/08-Hugo, Issue 4, 163/09-Tack Fat, Issue 2, 168/09-Teoktla Plaza, Issue 2, 115/10-G-Foremost, Issue 18, and 148/11-Dai Young*).

The Arbitration Panel in this case also agrees with the interpretation in the previous cases.

The employer alleges Ms Chy Sreytouch and Ms Sao Nath held sticks and stones during the strike based on photos and video clips. The two workers were identified by team supervisors, who reviewed the video clips produced by the company. Ms Chy Sreytouch and

Ms Sao Nath object to the allegation and claim they participated in the strike outside factory premise and they did not hold sticks or stones as alleged by the employer.

Based the photo submitted by the employer, the Arbitration Council cannot identify whether or not Ms Chy Sreytouch and/or Ms Sao Nath are in the photo because the photo is small and unclear.

At the hearing, the employer played a video clip to prove that the two workers were holding sticks and stones during the strikes in the factory's premises. Based on the video clip, the Arbitration Council cannot identify whether or not the persons in the video clip are the two workers because it's not clear and too short and quick.

The employer claims there is no other evidence proving that the two workers were holding sticks and stones during the strikes in the factory premises.

In this case, the Arbitration Council finds that the employer does not have solid evidence to prove that the two workers were really holding sticks and stones. Therefore, the employer fails to provide evidence proving that the two workers were involved or attempted to commit violent acts by holding sticks or stones as alleged by the employer.

Therefore, the dismissal of the two workers on the grounds of serious misconduct without providing sufficient evidence to support their claim is not right.

The Arbitration Council finds that the employer dismissed the two workers without complying with the Labour Law.

At the hearing, the employer claims it will not reinstate the two workers. The workers demand that the employer either reinstate them or pay termination compensation in accordance with the Labour Law. Therefore, the Arbitration Council will consider the termination compensation to which the two workers are entitled in accordance with the Labour Law in the case that the employer dismissed the two workers without complying with the Labour Law:

1) Compensation in lieu of prior notice

According to the facts, the employer failed to comply with the minimum period of prior notification stipulated in Article 75 of the *Labour Law*. Therefore, according to Article 75 and 77 of the *Labour Law*, the Arbitration Council finds that the two workers are entitled to compensation in lieu of prior notice:

- Ms Chy Sreytouch having seniority of nine years, one month, and five days is entitled to compensation in lieu of prior notice equal to two months of wages and all kinds of benefits.
- Ms Sao Nath having seniority of four years, seven months, and twenty-seven days is entitled to compensation in lieu of prior notice equal to one month of wages and all kinds of benefits.

2) Indemnity for dismissal

According to Article 89 of the *Labour Law*, the two workers are entitled to indemnity for dismissal:

- Ms Chy Sreytouch having seniority of nine months, one month, and five days is entitled to indemnity for dismissal equal to 135 days of wages and perquisites.
- Ms Sao Nath having seniority of four years, seven months, and twenty-seven days is entitled to indemnity for dismissal equal to seventy-five days of wages and perquisites.

3) Damages

According to the interpretation above, the Arbitration Council finds that the employer fails to fulfil the burden of proof proving appropriate reasons for the dismissal of the two workers. Therefore, the employer does not have appropriate reasons for dismissing the two workers in accordance with the *Labour Law*.

Therefore, according to Article 91 of the *Labour Law*, the two workers are entitled to damages equal to indemnity for dismissal (*see Indemnity for Dismissal above*).

4) Outstanding wages

According to Article 166 of the *Labour Law*, the two workers are entitled to receive any outstanding wages that they have not yet received. Therefore, the employer shall pay the two workers any outstanding wages.

5) Payment in lieu of remaining annual leave

According to Article 166 and 167 of the *Labour Law*, the two workers are entitled to payment in lieu of their annual leave that has not been exhausted prior to the conclusion of the contract. Therefore, the employer shall make payment in lieu of annual leave that have not been exhausted before the conclusion of the contract according to the number of days of the two workers' remaining annual leave.

In conclusion, the Arbitration Council decides to reject the workers' demand that the employer reinstate the two workers and order the employer to pay the two workers termination compensation:

Ms Chy Sreytouch

1. Compensation in lieu of prior notice equal to two months of wages and all kinds of benefits
2. Indemnity for dismissal equal to 135 days of wages and perquisites
3. Damages equal to 135 days of wages and perquisites
4. Payment in lieu of the remaining annual leave
5. Outstanding wages

Ms Sao Nath

1. Compensation in lieu of prior notice equal to one month of wages and all kinds of benefits
2. Indemnity for dismissal equal to 75 days of wages and perquisites
3. Damages equal to indemnity for dismissal or 75 days of wages and perquisites
4. Payment in lieu of remaining annual leave
5. Outstanding wages

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:

- Decline to consider the workers' demand that the employer either reinstate Ms Bun Suvanny or provide termination compensation in accordance with the Labour Law.
- Reject the workers' demand that the employer reinstate the 10 workers.
- Order the employer to provide the 10 workers termination compensation:

The 8 Workers (Rin Thol, Soy Ear, Cheav Soy, Heng Roeun, Por Neang, Chea Sarith, Vun Vuth, and Ry Eang)

1. Payment in lieu of remaining annual leave
2. Outstanding wages

Ms Chy Sreytouch and Ms Sao Nath

Ms Chy Sreytouch

1. Compensation in lieu of prior notice equal to two months of wages and all perquisites
2. Indemnity for dismissal equal to 135 days of wages and perquisites.
3. Damages equal to indemnity for dismissal or 135 days of wages and perquisites.
4. Payment in lieu of remaining annual leave
5. Outstanding wages

Ms Sao Nath

1. Compensation in lieu of prior notice equal to one month of wages and all kind of benefits
2. Indemnity for dismissal equal to 75 days of wages and perquisites.
3. Damages equal to indemnity for dismissal or 75 days of wages and perquisites
4. Payment in lieu of the remaining annual leave
5. Outstanding wages

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 3 October 2012.

Part II. Interests dispute: N/A

SIGNATURES OF THE MEMBERS OF THE ARBITRAL PANEL

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature:

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: