



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 22/12-Win Shingtex**

**Date of award: 5 March 2012**

**Dissenting opinion by Arbitrator Ing Sothy**

## **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: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Run Saray**

### **DISPUTANT PARTIES**

#### **Employer party:**

Name: **Win Shingtex (Cambodia) Co., Ltd. (the employer)**

Address: Champu Won Village, Chom Chao Commune, Pursenchey District, Phnom Penh

Telephone: 089 699 958

Fax: N/A

Representatives:

- |                 |                          |
|-----------------|--------------------------|
| 1. Mr Chhen Sao | Head of administration   |
| 2. Mr Yong Kong | Administration assistant |

#### **Worker party:**

Name: **Coalition of Cambodia Apparel Worker Democratic Unions (C.CAWDU)**

#### **Local Union of C.CAWDU**

Address: Champu Won Village, Chom Chao Commune, Pursenchey District, Phnom Penh

Telephone: 012 988 623

Fax: N/A

Representatives:

- |                   |  |
|-------------------|--|
| 1. Ms Meas Vanny  | Legal officer of C.CAWDU                     |
| 2. Mr Muo Chheang | Legal officer of C.CAWDU                     |
| 3. Mr Pal Makara  | President of the Local Union of C.CAWDU      |
| 4. Mr Men Vanna   | 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 the cleaner Huon Phalla. The employer refuses to reinstate her. The employer has terminated her fixed duration contract due to her frequent absences from the workplace.
2. The workers demand that the employer dismiss Chhen Sao and Yong Kong, the head of Administration and the administration assistant. The workers allege that they did not have a good working relationship with Chhen Sao and Yong Kong. The employer refuses to dismiss them, but has claimed it will educate them.

**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. 160 KB/RK/VK dated 13 February 2012 was submitted to the Secretariat of the Arbitration Council on 13 February 2012.

**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:** 20 February 2012 at 2:00 p.m.

**Procedural issues:**

On 9 February 2012, the Department of Labour Disputes received a complaint from the Local Union of C.CAWDU, outlining the workers' demands that the employer dismiss two staff members employed in the administration office and reinstate Huon Phalla. Upon receiving the claim, the Department of Labour Disputes assigned an expert labour officer to resolve the labour dispute. None of two issues were resolved. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 13 February 2012 via non-conciliation report No. 160 KB/RK/VK dated 13 February 2012.

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 hearing was held on 20 February 2012 at 2:00 p.m. with both parties present. The Arbitration Council conducted a further conciliation of the two non-conciliated issues, but they remained unresolved.

As the parties are signatories to the Memorandum of Understanding On Improving Industrial Relations in the Garment Industry (MoU), dated 28 September 2010, the Arbitration Council will divide the issues into two types: rights disputes and interests disputes. In accordance with the MoU, both parties have agreed to choose binding arbitration for rights disputes. However, this does not apply to interests disputes. The parties are able to choose non-binding arbitration for interests disputes, and can object to an arbitral award issues in relation to such disputes.

Such an objection will not affect the parties' obligation to implement an award regarding rights issues in accordance with the MoU.

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

The Arbitration Council considers 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**

- 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:**

- Win Shingtex (Cambodia) Co., Ltd. operates a garment factory and employs a total of 1,134 workers.
- The Local Union of C.CAWDU, the claimant in this case and representing 757 workers, possesses a certificate of most representative status (MRS).

#### **Issue 1: the workers demand that the employer reinstate the cleaner Huon Phalla.**

- Employed under a two-month probationary contract, Huon Phalla commenced work as cleaner on 3 September 2009. At the expiration of Huon Phalla's probationary

contract, the employer offered her consecutive three-month fixed duration contracts. At the expiration of each contract, the employer has paid out a severance payment (5% of the wages that Huon Phalla has earned during each three-month employment period) and a payment in lieu of unused annual leave. The employer then offered Huon Phalla another three-month contract which took effect immediately. Huon Phalla receives an average wage of US\$ 80.

- Huon Phalla's final contract expired on 31 January 2012. On this date, the employer informed Huon Phalla of the non-renewal of her contract. The total length of her contracts was 2 years and 4 months.
- The employer claims that it did not renew her contract due to the following instances:
  - In November 2011, Huon Phalla took 12 days' unauthorised leave and three days' authorised leave. At that time, the employer decided not to renew her contract, but changed its mind later when it learned that she had problems with her family.
  - In December 2011, Huon Phalla took five days' unauthorised leave, including on the 1<sup>st</sup>, 9<sup>th</sup>, 16<sup>th</sup>, 20<sup>th</sup> (only a half day), and the 26<sup>th</sup>.
  - In January 2012, Huon Phalla took another three days' unauthorised leave, that is on the 3<sup>rd</sup>, 4<sup>th</sup> (only a half day), and the 27<sup>th</sup> (only a half day).  
The workers did not refute the employer's claims.
- Clause 6 of the Internal Work Rules states in relation to authorised and unauthorised leaves of absence:

Unauthorised leaves of absence is considered misconduct and its seriousness is categorised as follows:

- Unauthorized leave of absence of two days is considered minor misconduct.
  - Unauthorized leave of absence of more than two days to less than six days is considered medium level of misconduct.
  - Unauthorized leave of absence of more than six days or six consecutive days is considered abandonment of work...
- The employer claims that Huon Phalla performed poorly at work; for instance, she often spent too long in the toilet. As a result, she did not finish her cleaning work on each line. Having taken her family problems into account, the employer chose to provide a verbal warning in relation to her poor performance instead of warning her in writing.

- The workers claim that Huon Phalla's employment contract qualified as undetermined duration contract as the total length of her contracts exceed two years. The workers further claim that the non-renewal of her contract was motivated by union discrimination. The workers allege that on the morning of 31 January 2012, the administrative assistant [Yong Kong] held a meeting with Huon Phalla and insisted that she sign a different union's membership card, but Huon Phalla refused. The workers claim that the contract of another female worker, with ID no. 15 had been renewed by the employer because she agreed to join another union.
- The employer disputes the claim that the administrative assistant held a meeting with Huon Phalla and insisted that she join a different union.
- The workers maintain their demand that the employer reinstate Huon Phalla. Otherwise, the employer must provide her with a termination payment for an undetermined duration contract.
- The employer refuses to reinstate Huon Phalla due to her frequent absences, which are tantamount to misconduct. The employer denies the allegations of union discrimination.

**Issue 2: the workers demand that the employer dismiss Chhen Sao and Yong Kong, as the head of administration and the administrative assistant respectively. The workers allege that they did not have a good relationship with them.**

- The workers make this demand because they neither Chhen Sao nor Yong Kong are competent in their work. The workers present the following reasons to support their demand:
  - Before Chhen Sao and Yong Kong commenced employment, there was a physician on standby for two work shifts per day. However, presently, a physician is on standby only twice a week.
  - Yong Kong is the secretary of a different union. Sometimes, he uses the administration office as his union office.
  - The staff members employed in the administration office [Chhen Sao and Yong Kong] are unhelpful when the Local Union of C.CAWDU seeks negotiations with the employer.
  - 85% of all workers have endorsed the demand for the dismissal of Chhen Sao and Yong Kong.
- The employer refutes the above-mentioned claims, arguing that Chhen Sao and Yong Kong have ensured smooth work in the administration office; for instance, after they began working at the factory they arranged for a physician to be on standby. The employer claims that Yong Kong, who is also the union secretary, has the right to establish a union. It also claims that Chen Sao, the head of administration, will hold

an inquiry into the allegation that Yong Kong uses the administration office as his union office, and if the allegation is found to be true Chen Sao will educate Yong Kong. The employer claims that they also have helped to improve working conditions, particularly in relation to the attendance bonus. The employer provides a US\$ 8 attendance bonus per month.

### **REASONS FOR DECISION**

Before considering this issue, the Arbitration Council considers whether it gives rise to a rights dispute.

In previous arbitral awards, the Arbitration Council has held that “a rights dispute is a dispute concerning entitlements in the law, an agreement or a collective agreement” (see AA 05/11-M&V 1, reasons for decision, issue 1 and 5; 13/11-Gold Kamvimex, reasons for decision, issue 1 and 2).

The Arbitration Council applies these ruling in this case.

The Arbitration Council considers issue 1 to be a rights dispute as it has a basis in the Labour Law. Issue 2 qualifies as a rights dispute since it has a basis in terms of the Labour Law and the Civil Code 2007.

In this case the Arbitration Council agrees with the above interpretation; a rights dispute is a dispute concerning entitlements in the law.

### **Issue 1: the workers demand that the employer reinstate the cleaner Huon Phalla.**

At the hearing, the workers demanded that the employer reinstate Huon Phalla. Otherwise, the workers demanded that the employer provided Huon Phalla with a termination payment of undetermined duration contract. The employer maintained its refusal to reinstate her and claimed that it did not renew her contract because she took too many days off without permission and performed her role poorly.

The Arbitration Council considers whether the contract of Huon Phalla is a fixed or undetermined duration contract.

Article 67 paragraph 2 of the Labour Law states:

The labour contract signed with consent for a specific duration cannot be for a period longer than two years. It can be renewed one or more times, as long as the renewal does not surpass the maximum duration of two years. Any

violation of this rule leads the contract to become a labour contract of undetermined duration.

In Arbitral Award 10/03-Jacqsintex, reasons for decision, issue 1, the Arbitration Council ruled that a fixed duration contract would become undetermined duration contract when the renewal of the contract leads the total the total length of the contract to exceed two years. Regarding this point, the Arbitration Council noted:

The Cambodian labor law has a bias toward contracts of undetermined duration as expressed in Art. 67(7) & (8). The reason for this bias comes from the fact that undetermined duration contracts lead to increased employment security which is important for workers and which is in the interests of the employer as well because long term employment leads to increased commitment to their work from employees. Further Art. 73(5) provides that contracts of specified duration be converted to contracts of undetermined duration where there is no notice of termination and their "total length exceeds the time limit specified in Article 67." Because Art. 73(5) refers to the total length of time specified in Art. 67(2) the Arbitration Council understands that the period of two years specified in Art. 67(2) is also a maximum total duration and not the duration of an individual renewal.

This interpretation is also supported by international labor standards; namely paragraph 3 of ILO Recommendation 166 of 1982 regarding Termination of Employment which provides that contracts of fixed duration should not be used for long term employment. This Recommendation of the ILO also states that fixed duration contracts should be converted to contracts of undetermined duration contracts if they are renewed one or more times. Though this Recommendation is not binding it is a useful instrument to assist in the interpretation of Article 67...

The ruling means that a fixed duration contract will become an undetermined duration contract if the renewal of the contract leads the length of the initial contract together with the length of the consecutive contracts to exceed two years.

In this case, Huon Phalla commenced her work on 3 September 2009 under a consecutive fixed duration contract of three months. It was not until 31 January 2012 that the employer notified her of the contract non-renewal. The total length of her contract was two years and four months. Based on the said ruling, Huon Phalla's contract qualifies as an undetermined duration contract.

The Arbitration Council goes on to consider what benefits of an undetermined duration contract Huon Phalla is entitled to.

Article 74 of the Labour Law states:

The labour contract of unspecified duration can be terminated at will by one of the contracting parties. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party.

However, no layoff can be taken without a valid reason relating to the worker's aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group.

Based on this article, the Arbitration Council considers that the employer has the right to dismiss the workers at will. However, the employer is required to notify the workers in writing along with a valid reason relating to their aptitude or behaviour, based on the requirements of the operation of the enterprise or company (*see Arbitral Award 60/08-PCCS, reasons for decision, issue 6; 131/10-Leader Industrial, reasons for decision, issue 1*).

According to the facts, the employer did not renew Huon Phalla's contract due to her consecutive leaves of absence. Since Huon Phalla's contract qualifies as an undetermined duration contract, the employer must pay her the following termination payment:

### **1. Indemnity for dismissal**

Article 89 of the Labour Law states:

If the labour contract is terminated by the employer alone, except in the case of a serious offence by the worker, the employer is required to give the dismissed worker...the indemnity for dismissal as explained below:

- Seven days of wage and fringe benefits if the worker's length of continuous service at the enterprise is between six and twelve months.

Based on this article, the employer is required to provide an indemnity for dismissal when the employer terminates the workers' contract with no connection to serious misconduct. In this case, the employer has terminated her contract. Therefore, the employer must pay an indemnity for dismissal equal to 30 days' wages.

### **2. Damages**

Article 91 of the Labour Law states:

The termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages.

These damages are not the same as the compensation in lieu of prior notice or the dismissal indemnity.

The worker, however, can request to be given a lump sum equal to the dismissal indemnity. In this case, he is relieved of the obligation to provide proof of damage incurred.

This article means that one party is entitled to damages when the other party terminates an employment contract with no valid reason. In this case, the employer has terminated Huon Phalla's contract due to her consecutive unauthorised leaves of absence and poor performance. Therefore, the Arbitration Council determines that Huon Phalla is not entitled to damages.

### **3. Compensation in lieu of prior notice**

Article 75 of the Labour Law states:

The minimum period of a prior notice is set as follows:...One month, if the worker's length of continuous service is longer than two years and up to five years.

Article 77 of the Labour Law states:

The termination of a labour contract at will on the part of the employer alone, without prior notice or without compliance with the prior notice periods, entails the obligation of the employer to compensate the worker the amount equal to the wages...

According to the facts, Huon Phalla has two years and four months of service. Before dismissing her, the employer must give her notice one month in advance. In this case, the employer has failed to comply with the notice requirement. Therefore, the employer must pay Huon Phalla compensation in lieu of prior notice equal to one month's wages.

### **4. Payment in lieu of annual leave**

Article 166 of the Labour Law states:

...all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half work days of paid leave per month of continuous service.

The length of paid leave as stated above is increased according to the seniority of workers at the rate of one day per three years of service.

Article 167 of the Labour Law states:

If 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 these articles, the Arbitration Council rules that workers are entitled to payment in lieu of annual leave if their contract is terminated or expires. In this case, the employer must provide Huon Phalla with payment in lieu of unused annual leave.

## **5. Outstanding wages**

Article 116 of the Labour Law states:

In the event of termination of a labour contract, wage and indemnity of any kind must be paid within forty-eight hours following the date of termination of work.

At the hearing, the workers did not mention whether or not Huon Phalla had received her outstanding wages. If she had not received her outstanding wages, the employer must pay them to her.

According to the facts, the employer's practice is to make a severance payment to Huon Phalla at the expiration of each of her contracts. Based on the said ruling, her contract qualifies as an undetermined duration contract. Thus, Huon Phalla must repay the employer the severance payment she has received during her employment period of two years and four months.

**Issue 2: the workers demand that the employer dismiss Chhen Sao and Yong Kong, the head of administration and the administrative assistant. The workers allege that they did not have a good relationship with them.**

The Arbitration Council considers whether the employer must dismiss Chhen Sao, the head of administration, and Yong Kong, the administrative assistant.

Article 65 of the Labour Law states:

A labour contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties.

Article 664 of the Civil Code which was adopted in 2007, states, “A contract of employment is formed by the promises of one party to perform services under employment, and another party to pay wages for it.”

Articles 65 of the Labour Law and 664 of the Civil Code, which define an employment contract, are complementary. For instance, Article 65 of the Labour Law stipulates that an employment contract is subject to ordinary law, which references the current civil code.

Article 311 of the Civil Code states, “A contract is the matching of intentions held by two or more parties to create, change or extinguish an obligation.”

Based on Article 65 of the Labour Law and Articles 664 and 311 of the Civil Codes, the Arbitration Council determines that an employment contract is created by the intentions of two parties or more, that is, the employer and the workers and that only the parties to a contract can terminate or modify the obligations under the contract. Third parties do not have the right to do so.

In previous arbitral awards, the Arbitration Council has ruled:

employees do not have the right to demand the employer dismiss any employees unless the employees can prove that the employee is a dangerous person who cannot be allowed in the company or factory, and that keeping the person can cause harm to the workplace (*see Arbitral Awards 54/08-Zhong Yov, reasons for decision, issue 5; 124/10-June Textile*).

According to the facts, the workers demand that the employer dismiss Chhen Sao and Yong Kong. The Arbitration Council finds that Chhen Sao, Yong Kong and the employer have separate employment contracts. As such, the claimant workers are the third parties to their contracts. The Arbitration Council rules that the workers are not entitled to terminate or modify the contract between them and the employer unless the workers can prove that Chhen Sao and Yong Kong are dangerous persons who cannot be kept in the factory or any workstations.

In this case, the Arbitration Council goes on to consider whether Chhen Sao and Yong Kong are dangerous persons and whether retaining them could cause disunity in the workplace.

According to the facts, the workers claim that Chhen Sao and Yong Kong were not competent in their work; for instance, a physician had been on standby for a short period of time rather than regularly available; they were not helpful to the workers; Yong Kong had

established a union in the factory and used the administration office as his union office. In this case, the employer has responded to the workers' claim. The employer was planning to educate Yong Kong and would not allow anyone to use the administration office to serve a particular union's interest. The Arbitration Council finds that no evidence was provided proving that Chhen Sao and Yong Kong are dangerous persons or that retaining them could cause specific disunity in the workplace.

In conclusion, the Arbitration Council rejects the workers' demand that the employer dismiss Chhen Sao and Yong Kong.

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 1:**

- The employer must pay Huon Phalla a termination payment for the termination of her undetermined duration contract, including outstanding wages (if she has not received them), indemnity for dismissal (30 days' wages), and payment in lieu of unused annual leave.
- Huon Phalla must repay the employer the severance payment she received during her employment period of two years and four months.

##### **Issue 2:**

Reject the workers' demand that the employer dismiss Chhen Sao and Yong Kong.

#### **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 28 September 2010.

#### **Part II. Interests dispute: N/A**

#### **Type of award: non-binding award**

The award in Part II 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: **Ing Sothy**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Run Saray**

Signature: .....