



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 22/11-Banjamat Construction

Date of Award: 21 March 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

Arbitrator chosen by the employer party: **Chhiv Phyrum**

Arbitrator chosen by the worker party: **An Nan**

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

DISPUTANT PARTIES

Employer party:

Name: **Banjamat Construction Co., Ltd (the employer)**

Address: Prey Korkey Village, Dang Tung Commune, Dang Tung District, Kampot Province

Telephone: 085 242 990 Fax: N/A

Representatives:

1. Mr U Piseth Representative of Banjamat Construction Co., Ltd

Worker party:

Name: **Building and Wood Workers Trade Union Federation of Cambodia (BWTUC)**

Local Union of BWTUC

Address: Prey Korkey Village, Dang Tung Commune, Dang Tung District, Kampot Province

Telephone: 012 752 617 Fax: N/A

Representatives:

1. Mr Sok Sovandeth President of BWTUC
2. Mr Van Thol First Vice-President of BWTUC
3. Mr Sok Kin Second Vice-President of BWTUC
4. Mr Chhun Pov President of the Local Union of BWTUC
5. Mr Tep Mao Treasurer of the Local Union of BWTUC

6. Mr Siv Sothea Representative of the workers

ISSUES IN DISPUTE

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

Points of demand are as follows:

1. The workers demand that the employer reinstate the union leaders to work with their skills.
2. The workers demand that the employer provide back pay to the union leaders from the date of their dismissal to the date of reinstatement.
3. The workers demand that the employer refrain from discriminating against and threatening union members.
4. The workers demand that the employer implement the law on paid public holidays.
5. The workers demand that the employer implement the law on annual leave.
6. The workers demand that the employer calculate wages for night work in accordance with the Labour Law.

Unresolved points of demand

1. The employer says that it will not reinstate two workers of Banjamat Construction Co., Ltd and one worker of Kron 2010 Co., Ltd.
2. The employer says that it will not provide back pay to them.
3. The workers demand that the employer refrain from discriminating against and threatening union members.
4. The workers demand that the employer implement the law on paid public holidays.
5. The workers demand that the employer implement the law on paid annual leave.
6. The workers demand that the employer calculate wages for night work in accordance with the Labour Law.

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 the non-conciliation report No. 024 MKBV/KP 011 dated 24 January 2011 was submitted to the Secretariat of the Arbitration Council on 14 February 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: 1 March 2011 at 2:00 p.m.

Procedural issues:

On 27 December 2010, the provincial Department of Labour Disputes of Kampot Province received a complaint, No. 002/10 dated 24 December 2010, from the BWTUC outlining the workers' demand that the employer improve working conditions. Upon receiving the claim, the provincial Department of Labour Disputes of Kampot Province assigned an expert officer to resolve the dispute and the last conciliation session was held on 11 January 2011. None of the six issues were conciliated. The six non-conciliated issues were referred to the Secretariat of the Arbitration Council on 14 February 2011 via non-conciliation report No. 024 MKBV/KP011 dated 24 January 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 six non-conciliated issues, held on 1 March 2011 at 2:00 p.m.

Both parties were present at the hearing. The Arbitration Council attempted to conciliate the six issues, resulting in Issues 3, 4, 5, and 6 being resolved. Since Issues 1 and 2 are related, the workers agreed to combine these as one issue.

The Arbitration Council will consider the remaining issue 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. Letter of authorisation from the Director of the employer to U Piseth.
2. Patent certificate 2010 of Banjamat Construction Co., Ltd, dated 23 April 2010.
3. Certificate of value added tax of Banjamat Construction Co., Ltd, dated 2 July 2007.
4. Work evaluation sheet of workers by Kin and Comil Company, dated 24 July 2010.

5. Letter from BWTUC to the Manager of a construction site in Kampot Province, seeking to hold a discussion on some issues, No. 0039/10 dated 18 December 2010.
6. Letter requesting to negotiate the transfer of Chhun Pov from the Maintenance Section to the Construction Section, dated 13 December 2010.
7. Application for an order for provisional relief submitted by representatives of Banjamat Construction Co., Ltd to the Court Director of Kampot Province, dated 30 December 2010.
8. Complaint by U Piseth submitted to the Police Commissioner of Kampot Province, dated 19 December 2010.
9. Order for provisional relief No. 376 RV/010, dated 31 December 2010.
10. Dismissal letter issued by Banjamat Construction Co., Ltd to Chhun Pov and Tep Mao, No. B 002 dated 17 December 2010.
11. Record of collective labour dispute resolution at Banjamat Construction Co., Ltd, dated 11 January 2011.
12. Clarification letter regarding the transfer plan from the Maintenance Section to the Construction Section.
13. Letter objecting to documents of BWTUC, dated 3 March 2011.

B. Provided by the worker party:

1. Brief statement on the labour dispute in case 22/11, dated 1 March 2011.
2. Statute of the Local Union of BWTUC at K-Cement Co., Ltd of Kampot Province, dated 7 November 2010.
3. Notification of union election, from BWTUC to the Director of K-Cement Co., Ltd of Kampot Province, No. 0037/10 dated 2 November 2010.
4. Application for union registration by the Local Union of BWTUC to the Minister for Labour and Vocational Training.
5. Receipt of acknowledgement of union registration, dated 12 November 2010.
6. Dismissal letter issued by Banjamat Construction Co., Ltd to Chhun Pov and Tep Mao, dated 17 December 2010.
7. Letter from BWTUC to the Minister for Labour and Vocational Training requesting protection for candidates standing for union leadership, No. 0037/10 dated 2 November 2010.
8. Letter from BWTUC to the Minister for Labour and Vocational Training regarding its request for union registration, No. 0042/10 dated 18 January 2011.

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

1. Report of collective labour dispute resolution at Banjamat Construction Co., Ltd, No. 024 MKBV/KP dated 24 January 2011.

2. Record of collective labour dispute resolution at Banjamat Construction Co., Ltd, dated 11 January 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend to the hearing addressed to the employer, No. 040 KB/AK/VK/LKA dated 21 February 2011.
2. Notice to attend the hearing addressed to the workers, No. 041 KB/AK/VK/LKA dated 21 February 2011.

FACTS

- Having examined the report of collective labour dispute resolution;
- Having listened to the statements of the representatives of the employer and the worker; and
- Having reviewed the additional documents;

The Arbitration Council finds that:

- The employer states that Banjamat Construction Co., Ltd (Banjamat) is a subcontractor for K-Cement Co., Ltd (K-Cement), engaged in the civil construction and maintenance of machines from 2006 to 2011.
- The Local Union of BWTUC, the claimant in this case, has not received a certificate of registration from the Ministry of Labour and Vocational Training.

Issues 1 and 2: The workers demand that the employer reinstate Chhun Pov and Tep Mao to their former position and provide them with back pay from the date of dismissal to the date of reinstatement.

Case of Chhun Pov:

- Chhun Pov commenced work in the Maintenance Section of Banjamat on 1 January 2010, under a verbal undetermined duration contract. His daily wage was 21,100 riels. The employer increased his wage by 2.5% after six months of employment. As a result, his daily wage was 21,500 riels.
- Chhun Pov worked eight hours per day. Each week, he had one day off after having worked for five days, irrespective of which day the day off fell on. His working hours were from 2:00 p.m. to 10:00 p.m.

Case of Tep Mao:

- Tep Mao commenced work in the Maintenance Section of Banjamat on 1 January 2010 under a verbal undetermined duration contract. His daily wage was 15,800 riels.

The employer increased his wage by of 2.5% after six months of employment. As a result, his daily wage was 16,300 riels.

- Tep Mao worked eight hours per day. Each week, he had one day off after having worked for five days, irrespective of which day the day off fell on. His working hours were from 2:00 p.m. to 10:00 p.m.
- The employer dismissed him on 17 December 2010, the same day it dismissed Chhun Pov.

Grounds for dismissing Chhun Pov and Tep Mao

- The employer states that it dismissed them because they refused to follow its direction. The employer claims that the two workers committed serious misconduct in the following two instances:
 - o On 14 December 2010, they wrote a letter requesting to hold negotiations with the employer about their transfer from the Maintenance Section, which has long term work for the workers, to the Construction Section, which does not.
 - o On 16 December 2010, from 7:40 p.m. to 8:10 p.m., 20 workers of two companies at a construction site of K-Cement in Kampot Province protested against the transfer of Chhun Pov and Tep Mao. Eight of the protesters were workers of Banjamat.
- The workers accept the claim above and state that they protested because Sambath, the Head of the section in which Chhun Pov worked, told him that Banjamat would transfer him from the Maintenance Section to the Construction Section.
- The workers and the employer agree that during the dismissal the employer did not observe the obligation of giving prior notice, and Chhun Pov and Tep Mao have not received their last wages.
- The workers and the employer agree that Chhun Pov and Tep Mao were workers of Banjamat.
- Chhun Pov and Tep Mao state that they are leaders of the Local Union of BWTUC at K-Cement.

Case of the union:

- The workers state that they established the Local Union of BWTUC at K-Cement because Banjamat and other sub-contractors are part of K-Cement. The workers notified only K-Cement of the election date and candidates as follows:
 - o On 3 November 2010, the union notified K-Cement of an election for leaders and the candidates via a letter dated 2 November 2010.

- On 7 November 2010, the union held an election in which 119 workers were in attendance. These workers were employed by Banjamat and other sub-contractor companies at the construction site of K-Cement.
 - Workers elected as union leaders were: (1) Chhun Pov; (2) Tep Mao; (3) Mao Ngor; (4) Pov Sreymom; and (5) Pon Trop.
 - On 12 November 2010, the union submitted an application for union registration to the Ministry of Labour and Vocational Training. However, it was not registered because K-Cement refused to recognise the union leaders since they were not its workers.
- Banjamat acknowledges the establishment of the union at the K-Cement construction site. It further states that it is the union of K-Cement and not of Banjamat.
 - In this case, the workers demand that the employer reinstate Chhun Pov and Tep Mao to their former position and provide them with back pay from the date of dismissal to the date of reinstatement, on the grounds of unjust dismissal. The employer does not agree to this demand because the dismissed workers refused to follow its direction.
 - The employer failed to submit its Internal Work Rules to the Arbitration Council for consideration.

REASONS FOR DECISION

In this case, the workers demand that the employer reinstate Chhun Pov and Tep Mao to their former position and provide them with back pay from the date of dismissal to the date of reinstatement, on the grounds of unjust dismissal. The employer does not agree to this demand because the dismissed workers refused to follow its direction. Before turning to this issue, the Arbitration Council considers whether the dispute is collective or individual, whether Chhun Pov and Tep Mao belong to a class of workers entitled to special protection, and whether the dismissal of Chhun Pov and Tep Mao was carried out in compliance with the law.

1. Whether the dispute is collective or individual.

In previous Arbitral Awards, the Arbitration Council has held that, in principle, the Arbitration Council will resolve the issues in the non-conciliation report forwarded by the Ministry of Labour and Vocational Training if there is not an explicit reason to object on the basis that the issues are not collective (*see AA 10/03-Jacqsintex, Reasons for Decision, Issue 4; 02/04-Cambodiana Hotel; 41/04-MiCasa; 07/05-Coca Cola; 61/09-Cintri*).

The Arbitration Council agrees with the interpretation above. In this case, the employer has not objected on the basis that the dispute is not collective. Therefore, the Arbitration Council is able to consider this case.

2. Whether or not Chhun Pov and Tep Mao belong to a class of workers entitled to special protection.

Article 293, Paragraph 1 of the Labour Law provides that “[t]he dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector.”

Clause 3, Paragraph 3 of *Prakas* No. 305 dated 22 November 2001 states:

Any worker belonging to a union who runs for a leadership position in that union shall enjoy the same protection from dismissal as a worker delegate. This protection begins 45 days prior to the election and ends, if s/he is not elected, 45 days after the election. To this end, the employer must be duly informed of the candidacy by any reliable means. However, the employer shall only be required to comply with this provision once for each election of union leaders.

Based on this clause, the Arbitration Council finds that candidates for union leadership are entitled to special protection.

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

the workers could not receive special protection unless (1) the workers are those who receive special protection, (2) the dismissal should be made during the special protection, and (3) the union must inform the employer of the workers who receive special protection by all reliable means (*see 122/09-YVP, Reasons for Decision, Issue 3*).

The Arbitration Council agrees with the interpretation above. According to the facts, Chhun Pov and Tep Mao were elected union leaders of K-Cement Co., Ltd and not of Banjamat Construction Co., Ltd [because they notified K-Cement]. Therefore, Chhun Pov and Tep Mao are not entitled to the special protection provided for in Article 293 and Clause 3 above.

In conclusion, the Arbitration Council considers that Chhun Pov and Tep Mao are not entitled to special protection.

3. Whether or not the dismissal of Chhun Pov and Tep Mao was carried out in compliance with the law.

According to the facts, Chhun Pov and Tep Mao hold undetermined duration contracts.

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 is entitled to dismiss the workers at will by giving notice, accompanied by reasonable grounds regarding the workers' aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group (*see AA 51/08-ASD, Reasons for Decision, Issue 3*).

In this case, the employer dismissed the workers with no prior notice because they refused to follow its direction and protested against the transfer. The Arbitration Council considers whether or not the dismissal of Chhun Pov and Tep Mao was based on reasonable grounds regarding their aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group.

Article 318 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.

In previous Arbitral Awards, the Arbitration Council has interpreted Article 318 to mean that a strike is comprised of three fundamental elements: (1) a group of workers; (2) work stoppage; and (3) the purpose of obtaining satisfaction of a demand (*see AA 36/06-Mondotex, Reasons for Decision, Issue 6 and 125/09-Wincam Corporation, Reasons for Decision, Issue 1*).

According to the facts 20 workers, including Chhun Pov and Tep Mao, protested against the transfer of Chhun Pov and Tep Mao on 16 December 2010 from 7:40 p.m. to 8:10 p.m. The Arbitration Council considers the protest to be a strike because it involved a work stoppage by a group of workers during working hours, with the aim of obtaining satisfaction of a demand.

Article 332, paragraph 2 of the Labour Law provides that '[t]he worker shall be reinstated in his job at the end of the strike'.

Article 333 of the Labour Law states:

The employer is prohibited from imposing any sanction on a worker because of his participation in a strike. Such sanction shall be nullified and the employer shall be punishable by a fine in the amount set in Article 369 of Chapter XVI.

In previous Arbitral Awards, the Arbitration Council has found that the dismissal of workers on the basis of participation in a strike is illegal (see AA 01/06-Goldtex Hing Shing, Reasons for Decision, Issue 7; 125/09-Wincam Corporation, Reasons for Decision, Issue 1; 148/09-Focus Footwear, Reasons for Decision, issue 7).

In this case, the Arbitration Council agrees with the interpretation above. The dismissal was contrary to Articles 332 and 333 of the Labour Law and jurisprudence of the Council. Furthermore, the dismissal was also without reasonable grounds regarding the workers' aptitude or behaviour based on the requirements of the operation of the enterprise, establishment or group.

In conclusion, the Arbitration Council orders Banjamat to reinstate Chhun Pov and Tep Mao and provide them with back pay from the date of dismissal to the date of reinstatement.

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

DECISION AND ORDER

Issues 1 and 2:

- Order Banjamat Construction Co., Ltd to reinstate Chhun Pov and Tep Mao and provide them with back pay from the date of dismissal to the date of reinstatement.

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: **Chhiv Phyum**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: