



KINGDOM OF CAMBODIA

NATION RELIGION KING

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THE ARBITRATION COUNCIL

Case number and name: 78/11-Mfone

Date of Award: 21 July 2011

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRAL PANEL

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

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

Chair Arbitrator (chosen by the two Arbitrators): **Ang Eng Thong**

DISPUTANT PARTIES

Employer party:

Name: **Mfone Co., Ltd (the employer)**

Address: No. 721, Monivong Blvd, Boeung Keng Kang 3 Commune, Chamkarmorn District,
Phnom Penh

Telephone: 085 310 008

Fax: N/A

Representatives:

- | | |
|----------------------------|--|
| 1. Ms Orasa Mecham | Head of Human Resources Development |
| 2. Ms Lim Sochetra | Head of Human Resources |
| 3. Ms Meoung Romna | Staff member of the Human Resources Section |
| 4. Mr Yi Ratha | Staff member of the Human Resources Section |
| 5. Mr Huon
Sokpheaneath | Legal and Information Officer of the Cambodian
Federation of Employers and Business Associations
(CAMFEBA) |

Worker party:

Name: **Cambodian Labour Confederation (CLC)**

Local Union of CLC

Address: No. 721, Monivong Blvd, Boeung Keng Kang 3 Commune, Chamkarmorn District,
Phnom Penh

Telephone: 012 868 309

Fax: N/A

Representatives:

1. Mr Earn Kimhun Dispute resolution officer of CLC
2. Ms Art Bunlyda Dispute resolution officer of CLC
3. Mr Mao Sam Former staff of the employer
4. Mr Kim Rim Former staff of the employer

ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate four workers, namely Deng Samnang, Kim Rim, Pov Kosal, and Mao Sam, and provide them with back pay from the date of their dismissal to the date of reinstatement. The workers assert that the employer dismissed them all at the same time without informing either them or the Ministry of Labour and Vocational Training. The employer refuses to reinstate them because the Ministry has resolved the issue through the individual labour dispute resolution process.

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. 686 KB/RK/VK dated 28 June 2011 was submitted to the Secretariat of the Arbitration Council on 29 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: 7 July 2011 at 2:00 p.m.

Procedural issues:

On 11 April 2011, the Department of Labour Disputes received a complaint, No. 038/11 SKK dated 11 April 2011 from CLC outlining the workers' demand that the employer 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 8 June 2011. Eight of the nine issues were conciliated at the session. The single non-conciliated issue was referred to the Secretariat of the Arbitration Council on 29 June 2011, via non-conciliation report No. 686 KB/RK/VK dated 28 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 non-conciliated issue, held on 7 July 2011 at 2:00 p.m. Both parties were present at the hearing. The Arbitration Council attempted to conciliate the issue, but it remained unresolved.

The Arbitration Council will consider the 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. Authorisation letter from the employer to Orasa Mecham, Lim Sochetra, Meoung Romna, Yi Ratha, Huon Sokpheaneath, dated 7 July 2011.
2. Brief statement on the labour dispute.
3. Certificate of commercial registration, No. 3092 PN/CBP dated 7 June 2011.
4. Internal Work Rules of the employer, No. 108 dated 30 November 2009.
5. Employment contract of Kim Rim, dated 17 March 2008.
6. Employment contract of Mao Sam, dated 1 August 2007.
7. Minutes of an inquiry for information from the employer's staff, dated 8 February 2011.
8. Record of individual dispute conciliation between the employer and Kim Rim, dated 23 February 2011.
9. Disciplinary letter addressed to Kim Rim.
10. Record of individual dispute conciliation between the employer and Mao Sam, dated 23 February 2011.
11. Disciplinary letter addressed to Mao Sam.
12. Minutes of an inquiry for information from the employer's staff, dated 25 May 2011.
13. Record of collective labour dispute conciliation at Mfone Co., Ltd, dated 8 June 2011.
14. Report of individual labour dispute resolution at Mfone Co., Ltd, dated 28 March 2011.

B. Provided by the worker party:

1. Letter from CLC to the Secretariat of the Arbitration Council regarding its submission of a brief statement about the labour disputes, dated 3 February 2011.

2. Request from workers and the local union leaders to the President of CLC to help resolve the collective labour dispute, dated 1 April 2011.
3. Receipt of acknowledgement of the application for registration of the local union, dated 16 March 2011.
4. Notification of the results of the election to establish the Local Union of CLC, from CLC to the employer, No. 016/11 SKK dated 1 March 2011.

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

1. Report of collective labour dispute resolution at Mfone Co., Ltd, No. 686 KB/RK/VK, dated 28 June 2011.
2. Record of collective labour dispute resolution at Mfone Co., Ltd, dated 8 June 2011.

D. Provided by the Secretariat of the Arbitration Council:

1. Notice to attend to the hearing addressed to the employer, No. 444 KB/AK/VK/LKA, dated 1 July 2011.
2. Notice to attend the hearing addressed to the workers, No. 445 KB/AK/VK/LKA, dated 1 July 2011.

FACTS

- Having examined the report of 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:

- Mfone Co., Ltd is a phone service provider. It has been operating since 1995. It presently employs 585 workers.
- There is no union at the enterprise. CLC is the claimant in this case.
- According to the brief statement submitted by the workers, 18 workers participated in an election on 27 February 2011 to establish a local union of CLC at the enterprise.
- The Local Union of CLC received a receipt of acknowledgement of registration from the Ministry of Labour and Vocational Training on 16 March 2011. At present, it has not been formally registered.

Issue 1: The workers demand that the employer reinstate Kim Rim and Mao Sam and provide them with back pay from the date of their dismissal to the date of reinstatement.

- The workers state that they have withdrawn the demand in relation to Deng Samnang and Pov Kosal because they have accepted the employer's settlement packages, leaving Kim Rim and Mao Sam in this case.
- Kim Rim commenced work as a technician on 17 March 2008 and held an undetermined duration contract.
- Mao Sam commenced work as an electricity mechanic on 1 August 2007 and held an undetermined duration contract.
- On 8 December 2010, Deng Samnang, Pov Kosal, Kim Rim, and Mao Sam took 30 litres of gasoline to power generators at the workstation located in Kean Svay district, as the electricity supplied by Electricite Du Cambodge (EDC) was disconnected. 15 litres of gasoline was consumed and five litres remained in the generator. The four workers each poured 2.5 litres of the remaining 10 litres into their motorbikes. They did not inform the employer of their personal use of the remaining 10 litres.
- The workers state that on 17 December 2010, the four workers requested their supervisor to withdraw another amount of gasoline, and the supervisor enquired about the gasoline acquired on 8 December 2010. They responded that they had used the remaining litres of gasoline. The supervisor punished them by instructing them to return 20 litres of gasoline. The employer states that it was not aware of the issue.
- On 18 December 2010, the Head of Administration asked the four workers to identify the instigator of the acts outlined above.
- On 19 December 2010, the four workers apologised to the Head of Administration, but he/she declined to accept the apology.
- On 27 December 2010, the Head of Administration informed the Head of Human Resources of the events above.
- On 28 December 2010, the Head of Human Resources informed the four workers that their supervisor refused to allow them to return to work because they had committed serious misconduct under Article 83 of the Labour Law.
- On 29 December 2010, the employer dismissed the four workers and paid their outstanding wages and payment in lieu of annual leave.

- The employer argues that the dispute is an individual dispute because the three conditions set out in Article 302 of the Labour Law have not been satisfied. The employer contends that although the first condition is satisfied, the rest are not. For instance, the second condition relates to working conditions (i.e. wages and issues relating to professional organisations), which are irrelevant to the demand. The third condition is not fulfilled because the dispute does not affect the employer's operation, which continues as usual, or social peace.
- The workers argue that the dispute is collective on the basis that it has been subject to conciliation at the Ministry of Labour and Vocational Training, 23 workers endorse the union in this case, and Kim Rim and Mao Sam are founders of the Local Union of CLC.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate Kim Rim and Mao Sam and provide them with back pay from the date of their dismissal to the date of reinstatement.

In this dispute, the employer refuses to provide termination payments to Kim Rim and Mao Sam on the grounds of their serious misconduct in the form of unauthorised use of gasoline. The workers acknowledge having been at fault; however, they returned double the amount of gasoline used to their supervisor, and he/she agreed to settle the issue. Thus, [they argue] the employer should not have dismissed them. The Arbitration Council notes that Kim Rim and Mao Sam did not commit other misconduct apart from taking the employer's gasoline for personal use, and that this issue has already been settled between the two workers and their supervisor. For this reason, the employer is not entitled to dismiss them on the basis of the aforementioned grounds.

Article 28 of the Labour Law states: "The employer shall not impose fines or double sanctions for the same misconduct."

Article 27 of the Labour Law states: "Any disciplinary sanction must be proportional to the seriousness of the misconduct."

On the basis of these provisions, the act of taking 2.5 litres each of the employer's gasoline does not amount to conduct justifying dismissal. Moreover, the workers have returned double the amount of gasoline used without authorisation.

The Arbitration Council considers that there is no valid reason for the dismissal. Therefore, the employer must pay a legal termination payment to Kim Rim and Mao Sam.

However, the employer argues that the dispute is not collective and therefore the Council does not have jurisdiction over it. The workers refute this claim, arguing that the dispute has gone through conciliation at the Ministry of Labour and Vocational Training, therefore it is collective. The Arbitration Council considers whether or not the dispute is collective and whether the Council has jurisdiction over it.

In principle, the Labour Inspector and the Ministry of Labour and Vocational Training have the duty to decide which disputes are individual and which are collective before sending a case to the Arbitration Council. Thus, the Arbitration Council will usually follow the decision of the Labour Inspector and the Ministry of Labour and Vocational Training unless there is an explicit reason to object to the decision (*See Arbitral Awards 10/03-Jacqsintex; 07/05-Coca Cola; 45/07-Wilson; and 13/08-Terratex Knitting*).

In Arbitral Award 45/07-Wilson, Issue 4, the Arbitration Council made the presumption that “all claims contained in the MoLVT non-conciliation report are collective. **As the employer has made an objection against this presumption, they have the burden of proving their claim.**”

In the employer’s brief statement, it argues that the dispute is an individual dispute because it does not involve working conditions (i.e. working hours and wages) or issues concerning professional organisations. Furthermore, the dispute has not affected the employer’s operation, which continues to run as usual.

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.

Based on Article 302 of the Labour Law, in order for a dispute to be collective, it must fulfil three conditions. The three conditions are:

- a. It is a dispute between one or more employers and a number of their workers.
- 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.

The Arbitration Council will consider the three conditions as follows:

First condition: It is a dispute between one or more employers and a number of their workers

The Arbitration Council finds that, according to the facts, Kim Rim and Mao Sam demand that the employer reinstate them or pay termination payments if it refuses to do so. Thus, this dispute involves one employer and its workers. The first condition is met.

Second condition: 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

The Arbitration Council considers that this condition is also met because the dismissal of Kim Rim and Mao Sam is an issue regarding relations between the employer and workers.

Third condition: The dispute could jeopardise the effective operation of the enterprise or social peace

According to the facts, the employer dismissed Kim Rim and Mao Sam on 29 December 2010 and paid their outstanding wages and payment in lieu of annual leave. The employer states that it has been more than six months since the dismissal and the workers have not done anything to disturb its operation, nor is there any sign the dispute could jeopardise its operation in the future, although the Local Union of CLC and some other workers support Kim Rim and Mao Sam in relation to this issue. Further, the Arbitration Council finds that the dismissal of the two workers was not the result of union discrimination because they were dismissed before the local union was established. Hence this condition is not met, as the dismissal does not affect the effective operation of the employer and social peace.

In conclusion, the Arbitration Council considers this dispute to be an individual dispute, and therefore declines to consider the workers' demand.

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

DECISION AND ORDER

Issue 3: Decline to consider the workers' demand that the employer reinstate Kim Rim and Mao Sam and provide them with back pay from the date of their 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 Phyrum**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Ang Eng Thong**

Signature: