



KINGDOM OF CAMBODIA
NATION RELIGION KING

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THE ARBITRATION COUNCIL

Case number and name: 190/13-S.H. International

Date of award: 2 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: **Liv Sovanna**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

DISPUTANT PARTIES

Employer party:

Name: **S.H. International Co., Ltd**

Address: Angkeo Village, Sangkat Chom Chao, Khan Por Senchey, Phnom Penh

Telephone: 012 923 539

Fax: N/A

Representatives:

1. Ms Se Kutkola Attorney representing the company
2. Mr Hour Thearen Administrator

Worker party:

Name: - **Cambodian Labour Union Federation (CLUF)**

- **Cambodian Labour Power Union at S.H. International (CLPU)**

Address: (Borey Sola) House no. 30 C, Street 371, Tropaing Chhouk Village, Sangkat Teok
Tla, Khan Sen Sok, Phnom Penh

Telephone: 012 837 768

Fax: N/A

Representatives:

1. Mr Khin Sokhon Secretary-General of CLUF
2. Mr Khom Khon President of CLPU

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ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate their union leaders: Mr Khom Khon-ID: C-0012, President of CLPU and Mr Lon Phallin-ID: C-0017, Assistant to CLPU and provide them back pay from the date of dismissal to the date of reinstatement.
2. The workers demand that the employer pay wages for May 2013 which has not been paid to Mr Khom Khon and Lon Phallin.
3. The workers demand that the employer provide a 4,000 riel payment in lieu of lunch per day to each worker.

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 2012 (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. 1090 dated 30 August 2013 was submitted to the Secretariat of the Arbitration Council on 2 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: 17 September 2013 at 8:30 a.m.

Procedural issues:

On 9 August 2013, the Department of Labour Disputes (the department) received a complaint from CLUF, outlining the workers' demands for the improvement of working conditions. Upon receiving the claim, the department assigned an expert officer to resolve the labour dispute and the last conciliation session was held on 28 August 2013, but three issues remained unresolved. These three non-conciliated issues were referred to the Secretariat of the Arbitration Council (SAC) on 2 September 2013.

Upon receipt of the case, an Arbitration Panel was formed on 4 September 2013. The SAC summoned the parties to a hearing and conciliation of the three non-conciliated issues,

held on 13 September 2013 at 8:30 a.m. The employer requested to defer the hearing with the workers' agreement. The date of the hearing was deferred to 17 September 2013 at 8:30 a.m.

Both parties were present.

At the hearing, the Arbitration Council conducted a further conciliation of the three non-conciliated issues, resulting in Issue 2 being resolved and the workers decided to withdraw Issue 3. Therefore, the Arbitration Council will consider the remaining issue which is Issue 1.

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 choose non-binding arbitration for their interests disputes.

The parties agreed to defer the date of award issuance from 25 September 2013 to 2 October 2013.

Arbitration Council will consider the issue 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:

- S.H. International Co., Ltd (S.H.) is a garment manufacturer registration no. 358 E/1997 dated 24 June 1997. The company employs a total of 700 workers (*according to the non-conciliation report no. 1090 dated 30 August 2013*).
- The union is the claimant in this case. The union received the certificate of union registration dated 5 August 2013 from the Ministry of Labour and Vocational Training.

Issue 1: The workers demand that the employer reinstate their union leaders: Mr Khom Khon-ID:C-0012, President of CLPU and Mr Lon Phallin-ID: C-0017, Assistant to CLPU and provide them back pay from the date of dismissal to the date of reinstatement.

- At the hearing, the workers demand that the employer reinstate Mr Khom Khon and Mr Lon Phallin and provide them back pay from the date of their dismissal to the date of reinstatement.

The parties' claim in relation to res judicata:

- The workers claimed:
 - o The Arbitration Council considered this demand in a previous case. In the previous case, the workers did not submit sufficient evidence to the Arbitration Council (Express Mail Service (EMS) receipt was not clear) because they received the original receipt from the Ministry of Labour and Vocational Training late.
 - o In the previous case, the Arbitration Council confirmed that the EMS receipt was heavily stained and unreadable, which could not be accepted by the Arbitration Council for consideration.
 - o The workers re-filed their claim on the grounds that: although a court has ruled an accused guilty, the court may later reopen the case if there is evidence proving that the accused is not guilty to find justice for the accused.
 - o In the previous case, the workers recognised their failure to provide sufficient documents to the Arbitration Council; but in this case, the workers provided sufficient evidence including the clear and readable EMS receipt to the Arbitration Council for reconsideration.
- The employer requests the Arbitration Council not to reconsider this case on the following grounds:
 - o Issue 1 in this case (the demand that the employer reinstate Mr Khom Khon and Lon Phallin and provide back pay from the date of dismissal to the date of reinstatement) had already been resolved by the Arbitration Council via issuance of the Arbitral Award no. 122/13-SH International Co., Ltd. (AA 122/13) in which the Arbitration Council rejected the workers' demand that the employer reinstate Mr Khom Khon, Mr Lon Phallin, and Mr Mr Chym Sihak and provide back pay from the date of dismissal to the date of reinstatement.
 - o AA No. 122/13 also stated that arbitral award on rights disputes would be final and enforceable by the parties in accordance with the MoU dated 3 October 2012. Therefore, the parties are obligated to immediately implement the arbitral award and cannot object to the award.

- Correspondence issued by the SAC inviting the parties to the hearing, also stated that the parties shall submit evidence to the Arbitration Council by the deadline: where a party fails to submit evidence by the deadline, the Arbitration Council will not consider the evidence.
- In the court of law as well other chambers, the chambers cannot retry the same case with the same issues and parties that have already been tried. It is against the law that the chambers retry the same case and it is not fair for the parties.
- According to AA 122/13, the Arbitration Council finds that:
 - The Arbitration Council, in the aforementioned case, already heard the claim in Issue 1.
 - On 8 July 2013, the workers submitted a dark and unreadable copy of EMS receipt to the Arbitration Council. On 18 July 2013, the Arbitration Council ordered the workers to submit the original EMS receipt to the Arbitration Council to verify with the copy version, but the workers were unable to submit the evidence to the Arbitration Council. Therefore, the Arbitration Council was unable to accept the EMS receipt for consideration.
 - On Issue 1, the Arbitration Council rejected the workers' claim that the employer reinstate the leaders of CLPU namely, Mr Khom Khon-President, Mr Lon Phallin, and Mr Chim Sihak-Assistant and provide back pay from the date of dismissal to the date of reinstatement.
 - Issue 1 is a rights dispute and the parties in Case no. 122/13-SH International Co., Ltd. are signatories to the MoU dated 3 October 2013 on Improving Industrial Relations in the Garment Industry.

Information in relation to the two workers:

A) Mr Khom Khon:

- Mr Khom Khon commenced employment with the employer on and from 25 May 2010 as a tailor head in the cutting section as well as the President of CLPU.
- The workers claimed that like other workers, previously, he was on an undetermined duration contract. Since the workers wanted to receive the five per cent severance pay, they agreed to such contract termination then switched to fixed duration contract.
- Mr Khom Khon accepted a three-month fixed duration contract commencing from 1 March 2013 to 31 May 2013.
- The employer decided not to renew his contract on 31 May 2013.

B) Mr Lon Phallin:

- At the hearing, Mr Lon Phallin claims he could not recall his commencement date with the employer. He was a tailor head as well as Assistant to the President of CLPU.
- Similar to Mr Khom Khon, he was on a three-month fixed duration contract commencing 1 March 2013 to 31 May 2013.
- The employer decided not to renew his contract on 31 May 2013.

The parties' claim in relation to the non-renewal of Mr Khom Khon's and Mr Lon

Phallin's fixed duration contracts

- The workers claim:
 - o On 31 May 2013 at 3:30 p.m., the employer invited three workers including Mr Khom Khon, Mr Lon Phallin, and Mr Chim Sihak to thumbprint accepting termination compensation without notifying them in advance, and they did not agree to the termination.
- The workers claim:
 - o The employer decided not to renew Mr Khom Khon's and Mr Lon Phallin's contracts of employment based on union discrimination.
 - o The employer decided not to renew Mr Khom Khon's contract of employment after the employer became aware that Mr Khom Khon left Free Trade Union of Workers of Kingdom of Cambodia (FTUWK) and formed a new union, "Cambodian Labour Power Union (CLPU)". The employer invited Mr Khom Khon to meet and asked him why he had formed another union while he was doing well with FTUWK.
 - o The employer decided not to renew Mr Lon Phallin's contract of employment because Mr Lon Phallin was an assistant to Mr Khom Khon, President of the union.
- The employer does not respond to the worker's claim in relation to the non-renewal of Mr Khom Khon's and Mr Lon Phallin's contracts of employment and requested the Arbitration Council decide on *res judicata* and consequently, whether or not another hearing shall be called.

Information in relation to union formation

- On 9 May 2013 at 11:15 a.m., 12 workers at S.H. formed the "Cambodian Labour Power Union" and elected Mr Khom Khon, President of the union, Ms Theang Kimroth, Vice-President of the union, and Ms Mai Sunnary, Secretary of the union. *(The minutes on the election of Cambodian Labour Power Union at S.H. International Co., Ltd. dated 9 May 2013)*
- At the hearing, the workers claim:

- On 10 May 2013 at 1 p.m., Mr Khom Khon submitted a notification letter regarding the elected leaders of the union to a staff member of the employer's administration department.
 - On 31 May 2013 at 6 p.m., Mr Khom Khon made a phone call to the aforementioned staff member of the employer's administration department and the latter told him that the employer wanted to see him.
 - On the same date at 7 p.m., Mr Khom Khon, Mr Lon Phallin, and Mr Chim Sihak met with the employer and the staff member of the administration department. The employer asked the staff member of the administration department for the notification letter provided by Mr Khom Khon to see all together.
- During the hearing, the staff member of the administration denies he received the notification letter from Mr Khom Khon as claimed by the workers.
 - The copy of the notification letter regarding the elected leaders of CLPU at S.H. International Co., Ltd. dated 10 May 2013, provided to the Arbitration Council found no signature of the employer confirming its receipt. In this case, there is no evidence proving that the staff member of the administration had received the notification letter.
 - According to EMS receipt, the Arbitration Council finds that there was a letter sent from the union to the employer on 4 June 2013. The receipt was marked distribution on 6 June 2013 and the staff member of post office stamped and marked "Refused".

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate Mr Khom Khon and Mr Lon Phallin and provide back pay from the date of dismissal to the date of reinstatement. Before considering the demands, the Arbitration Council distinguishes rights and interests disputes.

Paragraph 2 of 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 of Article 312 of the Labour Law and Clause 43 of the Prakas no.099 on the Arbitration Council 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 bargaining agreement are rights disputes and the Arbitration Council has jurisdiction to settle rights disputes (see *the Arbitration Award 05/11-M & V (Branch 1), 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 bargaining agreement are interests disputes and the Arbitration Council settles interests disputes based on equity (see *the Arbitral Award 31/11-Quint Major Industrial, Issue 4 and 62/11-Ocean Garment, Issue 1*).

In this case, as the demand is about reinstatement stipulated in the Labour Law, the Arbitration Council finds that the dispute is a rights dispute.

According to the findings of the facts, the Arbitration Council finds that the Arbitration Panel in Case no. 122/13-S.H. International Co. Ltd., had already decided on the issue between the same parties. Therefore, the Arbitration Council considers whether or not it has the jurisdiction to decide the issue once again.

Res Judicata is a legal principle meaning that if an arbitral award has been issued by the Arbitration Council, the same parties cannot then bring the same subject matter before the same jurisdiction for resolution.

According to the principle of *Res Judicata*, if the same issues are brought by the same parties to a chamber and the chamber has already issued a decision those issues, the chamber has the discretion to consider whether or not that issue should be decided again except there is a contradictory legal provision.

In the arbitration process, there is no legal provision stipulating such issues. Therefore, based on the principle of *Res Judicata*, the Arbitration Council finds that it has the discretion to consider whether or not it should rehear the same issue (see *Arbitral Award no. 45/07- Wilson, Reasons for Decision, Issue 2, 14/08-Quicksew, issue 1, 64/09-Sinomax II, 95/09-Tack Fat, Issue 3, and 81/11-GHG, Issue 1*).

With regard to the principle of Res Judicata, in Arbitral Award 153/08-Hytex Garment, the Arbitration Council explained that it will reject the workers' demand if three conditions are fulfilled:

- (1) The same party/parties;
- (2) The same issue(s); and
- (3) The Arbitration Council has issued a final ruling

Generally, the Arbitration Panel in previous cases held that the purpose of declining to reconsider the same issue brought by the same parties was to prevent inconsistent results and to promote finality by bringing an end to a dispute. (see *Arbitral Award no. 42/07-South Bay, Reasons for Decision, Issue 1, 114/12-Fortune Garment, Issue 3, and 116/11-Fortune Garment, Issue 1 & 2*)

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

In previous cases, the Arbitration Council look into the three conditions of *Res Judicata*:

(1) The same party/parties

In Case 122/13-S. H. International Co., Ltd., Mr Khom Khon and Mr Lon Phallin were claimants and the employer S. H. International was defendant, which means they are the same parties to this case. Therefore, the first condition is fulfilled.

(2) The same issue(s)

In Case 122/13-S. H. International Co., Ltd., the workers demand that the employer reinstate Mr Khom Khon, Mr Lon Phallin, and Mr Cheum Sihak and provide back pay from the date of dismissal to the date of reinstatement. In this case, the same workers demand that the employer reinstate Mr Khom Khon and Lon Phallin and provide back pay from the date of dismissal to the date of reinstatement. In this case, the Arbitration Council finds that the dispute is the same as in Case 122/13-S. H. International Co., Ltd. Therefore, the second condition is fulfilled.

(3) The Arbitration Council has issued a final ruling

In Case 122/13-S H International Co., Ltd., the Arbitration Council, in relation to Issue 1, decided to:

Reject the workers' demand that the employer reinstate leaders of Cambodian Labour Power Union including Mr Khom Khon-President, Mr Lon Phallin, and Mr Chim Sihak-Assistant and provide back pay from the date of dismissal to the date of reinstatement. Therefore, the third condition is fulfilled.

In reference to the above, the Arbitration Council finds that the three conditions of *res judicata* are fulfilled.

Nevertheless, the Arbitration Council finds there should be an exception to the principle of *res judicata*. The principle is not applied in cases where there is irregularity of the application process required by the Arbitration Council (previous decision is made by the Arbitration Council which does not have jurisdiction or authority or other irregularity of process) or the decision is made on various false bases, which seriously affects the parties' right to receive justice if they are not given opportunity to demand for retrial.

The workers claimed they made the same demand again because in the previous case, they submitted a dark and unclear EMS receipt and the Arbitration Council could not consider the EMS receipt as evidence on that basis. The reason for such problem was because the workers received the clear version of EMS receipt from the Ministry late. However, in this case, the workers submitted the clear version of the EMS receipt to the Arbitration Council for reconsideration.

Therefore, the Arbitration Council considers whether or not the failure to provide a clear EMS receipt to the Arbitration Council in the previous case is an exception in the implementation of the principle of *res judicata* in this case.

The Arbitration Council finds that the Arbitration Council, generally, provides full opportunity to the parties to prepare and defend their case before the Arbitration Council. Therefore, the parties should make all-effort to prepare and defend their case to achieve best results.

The Arbitration Council noted that on 8 July 2013, the workers submitted a dark and unreadable EMS receipt to the Arbitration Council. On 18 July 2013, the Arbitration Council ordered the workers to submit the original EMS receipt for the purpose of verifying the copy version, yet the workers failed to submit it to the Arbitration Council. The workers claim this failure was because they received the original receipt from the Ministry of Labour and Vocational Training late.

In this case, the Arbitration Council finds that the Arbitration Panel in Case 122/13 provided full opportunity to the workers to submit a clear version of EMS receipt to the Arbitration Council, but the workers failed to do so by the deadline.

The failure to provide a clear version of EMS receipt amounted to a failure to provide sufficient evidence to support the claim. The Arbitration Council finds that such failure and its reasons cannot be accepted as a special case or exception for the application of the principle of *res judicata*.

Therefore, the workers cannot rely on the above reason as the basis for requesting the Arbitration Council to reconsider their claim, in which the same issue and the same parties are involved and the Arbitration Panel had fully decided on the merits.

In reference to the aforementioned interpretation of the principle of *res judicata*, the Arbitration Council decides to decline to consider the workers' demand that the employer reinstate Khom Khon and Mr Lon Phallin and provide 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

Part I. Rights dispute:

Issue 1: Decline to consider the workers' demand that the employer reinstate Mr Khom Khon and Mr Lon Phallin and provide back pay from the date of dismissal to the date of reinstatement.

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.

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: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: