



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

**ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 175/09-APSARA Authority**

**Date of award: 5 February 2010**

## **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

### **ARBITRAL PANEL**

Arbitrator chosen by the employer party: **Seng Vuoch Hun**

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

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

### **DISPUTANT PARTIES**

#### **Employer party:**

Name: **APSARA Authority (the employer)**

Address: Trang Village, Slorgram Commune, Siem Reap City, Siem Reap Province

Telephone: 012 761 717

Fax: 023 969 797

Representatives:

- |                        |                             |
|------------------------|-----------------------------|
| 1. Mr Chhith Bora Vuth | Lawyer for APSARA Authority |
| 2. Mr Pich Soriya      | Lawyer for APSARA Authority |

#### **Worker party:**

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

**Water and Forest Conservation Union of APSARA Authority (WFCUA)**

Address: Veal Village, Kork Chork Commune, Siem Reap City, Siem Reap Province

Telephone: 012 752 617

Fax: N/A

Representatives:

- |                    |                         |
|--------------------|-------------------------|
| 1. Mr Sok Sovandet | President of BWTUC      |
| 2. Mr Vann Thol    | Vice-President of BWTUC |
| 3. Mr Breng Barn   | President of WFCUA      |

**ISSUES IN DISPUTE**

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

1. The workers demand that the employer grant them paid leave on holidays.
2. The workers demand that the employer reinstate 14 workers.
3. The workers demand that the employer grant pregnant workers three months of maternity leave with fifty percent of their wages.
4. The workers demand financial support when they become ill.

**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. 190 KB/BRK dated 2 September 2009 (Seventh 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. 1556 KB dated 22 December 2009 was submitted to the Secretariat of the Arbitration Council on 24 December 2009.

**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:** 19 January 2010 at 8:00 a.m.

**Procedural issues:**

On 27 December 2006, the Department of Labour and Vocational Training of Siem Reap received a claim from the workers following their demand that Sakhonn Borin reinstate 29 workers and improve working conditions. Upon receiving the claim, the Department of Labour and Vocational Training of Siem Reap assigned an expert officer to conciliate the labour dispute and the last conciliation session was held on 14 September 2007. None of the four issues were resolved. The four non-conciliated issues were referred to the Secretariat of the Arbitration Council on 24 December 2009 via non-conciliation report No. 1556 KB dated 22 December 2009.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and worker parties to a hearing and conciliation of the four non-conciliated issues, to be held on 4 January 2009 at 2:00 p.m. However, on 30 December 2009 the authorised representative for APSARA Authority submitted a letter requesting suspension of the hearing in order to give them enough time to scrutinise the case. With agreement from the worker party, the Arbitration Council set 19 January 2009 at 8:00 a.m. as the new date.

Both parties were present at the hearing. The Arbitration Council sought further information relevant to the case and conducted a further conciliation of the four non-conciliated issues. As a result, the worker party decided to withdraw issues 3 and 4. Therefore, the Arbitration Council will consider the remaining issues in dispute, issues 1 and 2, based on the evidence and reasons below.

## **EVIDENCE**

**Witnesses and experts:** N/A

**Documents, Exhibits, and other evidence considered by the Arbitration Council:**

### **A. Provided by the employer party:**

1. Request for hearing suspension in cases 175/09 and 176/09 from Chhith Bora Vuth, the authorised representative of APSARA, dated 30 December 2009.
2. Authorisation letter from the general department of APSARA Authority for its lawyer, Chhith Bora Vuth, No. 610/09 RB.LBRS dated 29 December 2009.
3. Authorisation letter from the general department of APSARA Authority for its lawyer, Pich Soriya, No 037/10 RB.LBRS dated 18 January 2010.
4. Decision from the Council of Ministers regarding the appointment of a team of lawyers to assist APSARA Authority, No. 68 SSR dated 16 July 2009.

### **B. Provided by the worker party:**

1. Statement on the labour dispute between APSARA Authority and its workers in case 175/09, dated 18 January 2010.
2. Registration certificate of WFCUA, No. 1073 KKBV/VK dated 14 December 2006.
3. Registration certificate of BWTUC, dated 11 January 2010.
4. List of union leaders and members who were dismissed from employment.
5. Miscellaneous photographs.

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

1. Letter from the Ministry of Labour and Vocational Training regarding a request for collective labour dispute resolution at APSARA Authority [report on collective labour dispute resolution], No. 1556 KB dated 22 December 2009.

2. Letter regarding the record of the collective labour dispute resolution at APSARA Authority, No. 1162 MKB dated 9 December 2009.
3. Record of the collective labour dispute resolution at APSARA Authority, dated 22 March 2007.

D. Provided by the Secretariat of the Arbitration Council:

1. Letter inviting the employer party to select an arbitrator, No. 619 KB/AK/VK/LKA dated 24 December 2009.
2. Record of selection of an arbitrator by lot from the employer list, dated 28 December 2009.
3. Notice to attend the first [scheduled] hearing addressed to the employer party, No. 923 KB/AK/VK/LKA dated 29 December 2009.
4. Notice to attend the first [scheduled] hearing addressed to the worker party, No. 924 KB/AK/VK/LKA dated 29 December 2009.
5. Notice to attend the second [scheduled] hearing addressed to the employer party, No. 018 KB/AK/VK/LKA dated 8 January 2010.
6. Notice to attend the second [scheduled] hearing addressed to the worker party, No. 019 KB/AK/VK/LKA dated 8 January 2010.

**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:**

- APSARA Authority, which was established by Royal Decree NS/RKT/0295/12 dated 19 February 1995, employs two types of worker: civil servants and contractual workers. The 14 workers [involved in this case] were the latter, and were daily paid workers [workers paid a daily rate]. The Building and Wood Workers Trade Union Federation of Cambodia (BWTUC), of which the Water and Forest Conservation Union of APSARA Authority (WFCUA) is a member, is the claimant in this case.
- The WFCUA states that the 14 workers are union leaders and union members. The WFCUA holds a registration certificate, No. 1073 KKBV/VK dated 14 December 2006, which names Breng Barn as President, Yarn Mol as Vice-President and Mean Chea as Secretary. APSARA Authority has already reinstated Mean Chea because he has resigned from his position as Secretary. Therefore, on the hearing date only 13

workers were involved in the demand for reinstatement in this case. The Arbitration Council ordered the worker party to prepare a list of names of workers involved in the demand and submit it to the Council by 22 January 2010. However, on the scheduled date the worker party had submitted the names and thumb prints of only three workers: Breng Barn, Yarn Mol, and Nhib Sokum.

**Issue 1: The workers demand that APSARA Authority back pay wages for paid holidays.**

- The worker party states that the employer has never paid wages to the workers for paid holidays [public holidays]. Therefore, the workers demand backpay for paid holidays.
- Chhith Bora Vuth, the lawyer representing the employer, asserts that APSARA Authority employs both regular workers and daily paid workers, such as cleaners and shrub-clearing workers (earning 6,000 riel, or 7,000 riel to 8,000 riel per day), in accordance with the requirements of each project. Regular workers work from Monday to Friday and receive wages on holidays. Conversely, daily paid workers do not perform their duties regularly, sometimes working only 3 or 4 days per week based on the requirements of the project. APSARA Authority has a number of different projects. If any worker cannot attend work, they may ask a relative or spouse to work as a substitute for them. APSARA Authority does not pay wages to these workers for paid holidays because it considers that they are casual workers, not regular workers.
- The worker party did not raise an objection to the representative's assertion, but argues that the employer should pay wages for paid holidays to daily paid workers as well as to regular workers.
- Both parties acknowledge that daily paid workers hold verbal labour contracts.
- The worker party further states that although daily paid workers earn 6,000 riel or 7,000 to 8,000 riel per day, they receive their wages on the 5<sup>th</sup> or 6<sup>th</sup> of each month. The employer's representative did not raise an objection to the workers' statement, but maintained the assertion that the workers are casual workers, not permanent workers.

**Issue 2: The workers demand that APSARA Authority reinstate Breng Barn, Yarn Mol, and Nhib Sokum.**

- Breng Barn commenced employment at the end of 2005, but the worker party did not know the [commencement] dates of Yarn Mol and Nhib Sokum, only that they were all dismissed on the same day and held verbal employment contracts.
- The worker party stated at the hearing that APSARA Authority terminated the workers' employment based on union discrimination. It alleges that Sakhonn Borin, a manager, asked the workers into his office and told them to withdraw themselves from the union, saying that if the workers wanted to continue their jobs they must resign from the union. Subsequently, on 22 December 2006 APSARA Authority dismissed the workers.
- The worker party added that APSARA Authority has dismissed workers who are union leaders and union members, but has reinstated them after they have withdrawn from the union. For instance, Mean Chea, former Secretary of WFCUA, was reinstated by APSARA Authority after resigning from WFCUA. The worker party maintained its accusation of union discrimination against APSARA Authority.
- The employer's representative stated that Sakhonn Borin has now resigned from his position and that APSARA Authority did not discriminate against the workers. If it did, it would not have granted permission for union registration. The representative did not provide facts or arguments in response to the workers' statements, he merely responded that APSARA Authority did not discriminate against the union.
- The Arbitration Council allowed the employer's lawyer until 26 January 2010 to make a written objection to the documents, brief statement on the labour dispute, and evidence submitted to the Council by the workers. However, the Arbitration Council did not receive a letter of opposition from the representative by the due date.
- The worker party stated that on 22 December 2006, the union leaders were dismissed from work and APSARA Authority did not seek permission from the Labour Inspector prior to the dismissal.

**REASONS FOR DECISION**

According to the non-conciliation report, the worker party said that there were 13 workers, all union leaders and union members, making the demands in this case. At the hearing, the workers stated that only three individuals are actually making the demands in this case – Breng Barn, Yarn Mol, and Nhib Sokum.

Therefore, the Arbitration Council will consider the demands in this case only for those three individuals.

**Issue 1: The workers demand that APSARA Authority back pay wages for paid holidays.**

In this case, APSARA Authority provides wages during paid holidays to regular workers. Daily paid workers are treated as casual workers by APSARA Authority and do not receive wages during paid holidays. The workers stated at the hearing that they had worked for APSARA Authority since 2005. Specifically, Breng Barn commenced in late 2005 and was dismissed on 22 December 2006, the same date that Yarn Mol and Nhib Sokum were dismissed. Thus, the Arbitration Council will consider below:

1. Whether the workers' demand is within the statute of limitation.
2. Whether daily paid workers can demand backpay for wages on paid holidays, which were not provided in the past.

**1. Whether the workers' demand is within the statute of limitation:**

Article 120 of the Labour Law states:

The statute of limitation for a lawsuit for the payment of wages is three years from the date the wage was due.

Claims subject to the statute of limitation of a lawsuit include the actual wage, perquisites and all other claims of the worker resulting from the labour contract, as well as the indemnity in the event of dismissal.

Based on Article 120 of the Labour Law, the Arbitration Council considers that the right to claim wages shall lapse three years from the date the wage was due. The Arbitration Council has found in this case that the Department of Labour and Vocational Training of Siem Reap received the workers' claim on 27 December 2006. The statute of limitation for the claim for Breng Barn's wages during paid holidays has not lapsed, as he started work in 2005, the workers exercised their rights [by making the initial claim] within three years from his commencement date, and APSARA Authority never provided him with wages during paid holidays. The Arbitration Council has obtained only the date of dismissal of Yarn Mol and Nhib Sokum, 22 December 2006, but considers that the statute of limitation has not yet lapsed because the workers' claim was made five days after that date. Therefore, the Arbitration Council determines that the workers exercised their rights within the time stipulated in Article 120 of the Labour Law.

**2. Whether daily paid workers can demand backpay for wages on paid holidays, which were not provided in the past:**

Article 10 of the Labour Law provides that “[c]asual workers are subject to the same rules and obligations and enjoy the same rights as regular workers, except for the clauses stipulated separately.”

In prior cases, the Arbitration Council has interpreted Article 10 of the Labour Law as follows:

Casual workers and regular workers are entitled to the same rights and obligations. This means that, in terms of the benefits they are entitled to, it is not an issue whether the workers are called casual workers or regular workers because Article 10 of the Labour Law clearly provides guidance concerning this matter (*see Arbitral Awards 97/08-Eternity Apparel, issue 10 and 108/09-Ying Jang, issue 6*).

The Arbitration Council agrees in this case with the above interpretation. Therefore, the Arbitration Council considers that APSARA Authority must provide the same rights and benefits to casual workers as are provided to regular workers.

Article 161, paragraph 1 of the Labour Law states that “[e]ach year, the Ministry in charge of Labour issues a *Prakas* [ministerial order] determining the paid holidays for workers of all enterprises.”

Article 1 of *Prakas* No. 10 SKBY, dated 4 February 1999, states that

Owners or managers of establishments or enterprises set forth in Article 1 of the Labour Law shall authorise their workers and employees to have paid holidays on the days determined each year by declaration of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation.

Based on Article 161 of the Labour Law and *Prakas* No. 10, cited above, the Arbitration Council considers that APSARA Authority is required to grant paid holidays to its workers. In this case, both parties accept that in the past APSARA Authority has not provided wages to certain workers who took paid holidays on the basis that they were casual workers. The Arbitration Council considers that APSARA Authority’s practice of granting paid holidays to regular workers and not casual workers is incorrect because Article 10 of the Labour Law provides that the same rights, benefits and obligations apply to regular and casual workers. Therefore, the Arbitration Council determines that APSARA Authority has an obligation to provide wages during paid holidays to casual workers as well as regular workers.



Thus, the Arbitration Council orders APSARA Authority to back pay wages for paid holidays, which it did not provide in the past, to Breng Barn, Yarn Mol, and Nhib Sokum, from the date of their commencement until the date of their dismissal.

**Issue 2: The workers demand that APSARA Authority reinstate Breng Barn, Yarn Mol, and Nhib Sokum.**

In this case, the workers argue that their dismissal by APSARA Authority was based on union discrimination because Sakhonn Borin, a manager, asked the workers into his office and told them to withdraw themselves from the union, saying that if they wanted to continue working they had to resign from the union. The employer's representative denied the allegation and stated that APSARA Authority did not discriminate against the union. Thus, the Arbitration Council will consider this case as follows.

**Breng Barn and Yarn Mol:**

On the certificate of union registration, No. 1073 KKBV/VK dated 14 December 2006, the Arbitration Council finds Breng Barn listed as President and Yarn Mol listed as Vice-President. Therefore, the Arbitration Council will consider whether APSARA Authority dismissed them in accordance with the Labour Law.

Article 293 of the Labour Law provides that

The dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector...

The Labour Inspector, who has been referred a request to authorise the dismissal of a worker covered by the present article, shall give his decision...within one month at the latest upon receipt of the case”.

Based on the above Article 293 of the Labour Law, the Arbitration Council considers that before dismissing workers with special protection, the employer must have authorisation from the Labour Inspector and the Minister for Labour. This means that the Labour Inspector has an obligation to consider, investigate, and authorise or reject the employer's request to dismiss union leaders within one month at the latest upon receipt of the case (*see Arbitral Award 149/08-Cambo Handsome, issue 1*).

The above article also applies to union leaders, as provided in Clause 4 of *Prakas* No. 305 SKBY of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, dated 22 November 2001, which states that “this protection will be granted to the three union leaders pursuant to the conditions set out in Articles 282 and 293 of the Labour Law.”

In this case, APSARA Authority dismissed Breng Barn and Yarn Mol on 22 December 2006. However, APSARA Authority did not request authorisation from the Labour Inspector. Therefore, the Arbitration Council finds that APSARA Authority did not comply with Article 293 and *Prakas* No. 305 when dismissing the two union leaders. Therefore, the termination was not in compliance with the procedure stipulated by the Labour Law.

In conclusion, the Arbitration Council orders that APSARA Authority reinstate Breng Barn and Yarn Mol.

**Nhib Sokum:**

The Arbitration Council has found that union leaders and members, including Nhib Sokum, were dismissed by APSARA Authority on 22 December 2006. Thus, the Arbitration Council will consider whether the dismissal of Nhib Sokum involved union discrimination.

Article 12 of the Labour Law states:

...no employer shall consider on account of:...

- membership of workers' union or the exercise of union activities
- to be the invocation in order to make a decision on
- hiring,...
  - discipline or termination of employment contract.

Article 279 of the Labour Law states that “[e]mployers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment...and dismissal”.

The Arbitration Council has determined in prior cases that workers have the burden of proof when alleging that the employer has discriminated against the union (*see Arbitral Awards 112/06-River Rich, issue 1; 01/07-Supreme, issue 1; 148/07-Pay Her, issue 1; 158/08-M & V (Branch 4); and 40/09-Goldfame, issue 1*).

In principal, the Arbitration Council will examine the evidence relevant to the case and the arguments of the parties at the hearing in order to determine whether there is union discrimination involved in the dismissal of workers (*see Arbitral Awards 123/07-E-Garment, issue 1; 148/07-Pay Her, issue 1; 30/08-E-Garment, issue 1; 71/09-Hytex, issue 1; and 122/09-YVP, issue 3*).

According to the brief summary submitted by the workers as well as their clarification at the hearing, the workers argue that on 21 December 2006, Sakhonn Borin, a manager, invited the workers to a meeting and informed them that there was no longer work for them since they had joined the union. He continued that if they wanted to keep their work, they

must quit the union. On 22 December 2006, workers who were union leaders and members, including Nhib Sokum, were dismissed by APSARA Authority. Further, Mean Chea was reinstated once he resigned from his position as secretary of the union.

The employer's representative did not provide evidence or facts disproving the workers' allegation of union discrimination. Rather, APSARA Authority merely responded that it does not discriminate against the union. The representative did not raise any objection to the documentary evidence submitted by the workers to the Arbitration Council, such as the brief summary of the dispute. Therefore, the Arbitration Council considers that the employer's argument that it did not discriminate against the union is not credible, nor is it credible that Nhib Sokum's termination did not involve union discrimination.

Thus, based on the workers' arguments, the Arbitration Council determines that Nhib Sokum's dismissal involved union discrimination, in contravention of Articles 12 and 293 of the Labour Law.

In prior cases, the Arbitration Council has ordered employers to reinstate workers whose dismissal involved union discrimination in contravention of Articles 12 and 293 of the Labour Law, which prohibit employers from using union membership or the exercise of union activities as a basis for terminating workers' employment contracts (*see Arbitral Awards 28/07-Dae Kwang, issue 3; 123/07-E-Garment, issue 1; 06/08-Kingsland, issue 2; and 85/09-Nan Kuang, issue 1*).

The Arbitration Council will apply these prior decisions in this case, as Articles 12 and 293 of the Labour Law prohibit APSARA Authority from terminating workers' employment on the basis of union membership or the exercise of union activities.

Therefore, the Arbitration Council orders APSARA Authority to reinstate Nhib Sokum.

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

#### **DECISION AND ORDER**

**Issue 1:** Order APSARA Authority to back pay wages for paid holidays, which it did not provide in the past, to Breng Barn, Yarn Mol, and Nhib Sokum, from the date of their commencement until the date of their dismissal.

**Issue 2:** Order APSARA Authority to reinstate Breng Barn, Yarn Mol, and Nhib Sokum.

**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 MEMBERS OF THE ARBITRAL PANEL**

Arbitrator chosen by the employer party:

Name: **Seng Vuoch Hun**

Signature: .....

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....