



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអង្គជំនុំជម្រះ

THE ARBITRATION COUNCIL

Case number and name: 234/13-Ever Glory

Date of award: 2 December 2013

Dissented 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): **Men Nimmith**

DISPUTANT PARTIES

Employer party:

Name: **Ever Glory (Cambodia) Garment Manufacturing Co., Ltd.**

Address: Sangker Village, Sangkat Toul Sangker, Khan Russey Keo, Phnom Penh

Telephone: 012 389 989

Fax: N/A

Representatives:

- | | |
|---------------------|----------------------------|
| 1. Ms Hour Nana | Administrator |
| 2. Ms Hour Channavy | Assistant to Administrator |
| 3. Ms Matt Hfary | Team Supervisor |
| 4. Ms So Vanna | Team Supervisor |

Worker party:

Name: - **Cambodia Asian Confederation (CAC)**

- **Local Union of CAC (the union)**

Address: Sangker Village, Sangkat Toul Sangker, Khan Russey Keo, Phnom Penh

Telephone: 012 941 662

Fax: N/A

Representatives:

- | | |
|-------------------------|------------------------|
| 1. Mr Noun Chantha | President of CAC |
| 2. Ms Oung Sokchamroeun | President of the union |

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3. Mr Veum Linna

Secretary of the union

4. Ms Ton Sorpheap

Vice-President of the union

ISSUES IN DISPUTE

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

- The workers demand that the employer reinstate Ms Ton Sorpheap, Vice-President of the union on the grounds that the employer acted discriminately against the union. The employer claims it will not reinstate Ms Ton Sorpheap because it had already terminated her fixed duration contract of employment and paid her compensation 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. 155 dated 17 June 2013 (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. 1332 dated 28 October 2013 was submitted to the Secretariat of the Arbitration Council on 30 October 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: 5 November 2013 (at 8:30 a.m.)

Procedural issues:

On 1 October 2013, the Department of Labour Disputes (the department) received a complaint from the leaders of the union, 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 22 October 2013, resulting in three of four issues being resolved. The one non-conciliated issue was referred to the Secretariat of the Arbitration Council on 30 October 2013.

Upon receipt of the case, the Arbitration Panel was formed on 31 October 2013. The Secretariat of the Arbitration Council summoned the employer and the workers to a hearing

and conciliation of the one non-conciliated issue, held on 5 November 2013 at 8:30 a.m. Both parties were present.

At the hearing, the Arbitration Council conducted further conciliation of the one non-conciliated issue, but it remained unresolved.

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 interests disputes. The parties are able to choose non-binding arbitration for interests 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.

There is no interest dispute in this case.

At the hearing, the Arbitration Council set 7 November 2013 as the deadline for submission of evidence and 12 November 2013 as the deadline for objections to evidence. The parties submitted their evidence to the Arbitration Council by 7 November 2013. On 22 November 2013, the Arbitration Council requested agreement from the parties to defer award issuance from 25 November 2013 to 2 December 2013. Therefore, the Arbitration Council also decided to extend the period for objection to evidence for the parties until 26 November 2013. However, no objection to evidence submitted by the other party was received from the parties by the extended deadline.

Therefore, the Arbitration Council will consider 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 and evidence;

The Arbitration Council finds that:

- Ever Glory (Cambodia) Garment Manufacturing (hereafter referred to as “Ever Glory”) is a garment manufacturer registered as no. Inv933 E/2005 dated 8 April 2005. The company employs approximately 512 workers (*according to the non-conciliation report-Ever Glory no. 1332 dated 28 October 2013*).
- The union received their certificate of registration dated 25 September 2013 from the Ministry of Labour and Vocational Training. The union leaders are: 1) Ms Ung Chamroeun-President, 2) Ms Ton Sorpheap-Vice-President, and 3) Ms La Vandy-Secretary (*according to a Letter no. 298 on confirmation of union registration of the Ministry of Labour and Vocational Training dated 25 September 2013*).
- The union is the claimant in this case.

Issue 1: The workers demand that the employer reinstate Ms Ton Sorpheap - Vice-President of the union.

Information in relation to Ms Ton Sorpheap:

The parties agree that:

- Ms Ton Sorpheap commenced her job on 28 December 2010 as overlocking and sewing worker. Since commencement, she had been on a three-month probation contract and then continuously on six-month contracts. Her final six-month contract expired on 28 September 2013. Therefore, her contracts of employment were as follows:
 - o A contract with three-month probation commenced 28 December 2010 to 28 March 2011;
 - o The first six-month contract commenced 28 March to 29 September 2011;
 - o The second six-month contract commenced 29 September 2011 to 29 March 2012;
 - o The third six-month contract commenced 29 March 2012 to 29 March 2013;
 - o The fourth six-month contract commenced 29 September 2012 to 29 March 2013; and
 - o The fifth six-month contract commenced 28 March 2013 to 28 September 2013.

The parties’ claim in relation to the dismissal/non-renewal of Ms Ton Sorpheap’s contract of employment.

- The workers claim that the non-renewal of Ms Ton Sorpheap’s contract is based on union discrimination because:
 - o The employer renewed other workers’ contracts; however, it did not renew Ms Ton Sorpheap’s, Vice-President of the union and the employer was aware of her status.

- The employer neither renewed the contract of Ms Ton Sorpheap nor Ms La Vandy-Secretary of the union; however, the latter did not make any demand.
- Within the past 2 to 3 years, Ms Ton Sorpheap had received similar wages as she had received recently; however, the employer never complained about anything and kept renewing her contracts as usual. However, when she became a union leader on and from 3 September 2013, the employer started to find her mistakes and instructed her to work faster and earn more wages.
- The employer claims the non-renewal was not related to union discrimination because:
 - The employer kept renewing contracts of union leaders who performed their work well.
 - The employer did not renew Ms Ton Sorpheap's contract because she had not performed her job well such as:
 - Much lower productivity: the workers earned piece rate and they worked in pairs in their team in which two workers had sewn the front part of shirts and the other two had sewn the back part of the shirts. Ms Ton Sorpheap sewed the back part with another worker. Ms Ton Sorpheap always produced less than the other worker did in the same team and she always earned below the minimum wage and produced less than her partner and the other workers in the same team. The employer presented her wages over three months: 1) in June 2013, she received wages of US\$62.31, 2) in July 2013, she received US\$60.71, and 3) in August 2013, she received US\$60.72. These wages were lower than the minimum wage of US\$80 per month. Moreover, the employer compared the wage earned by Ms Ton Sorpheap to wages earned by the other workers in the same position and team: 1) Kim Saret earned US\$108.45 in July 2013, and 2) Men Serey who replaced Kim Saret earned US\$89.45 in July 2013.
 - The employer had considered dismissing Ms Ton Sorpheap for a long time based on the foregoing. Convinced by the team supervisor, the employer had re-employed her because she had served in the company for a long time. Further, prior to the non-renewal, the team supervisor and section head had previously called her to let her know about her low productivity and instructed her that if there was no change, the employer would not renew her contract; however, her performance did not improve; therefore, the employer decided not to renew her contract.

- Her poor performance, as well as low earnings below the minimum wage of US\$80 affected the company in the following ways: 1) late delivery of product to the buyers, and 2) her wages needed to be added up by the employer to reach the minimum wage of US\$80 even though she earned less than the minimum wage.
- The employer signed the contracts with Ms Ton Sorpheap; therefore, the employer had the right not to renew her contract at its expiration. On 20 September 2013, the employer notified Ms Ton Sorpheap of the non-renewal of her contract which was seven days prior to the expiration of her six-month contract; however, she did not receive the notification letter.
- Ms Ton Sorpheap responded to the employer's claim that:
 - Her poor performance and low earning was caused by the employer who transferred her to sewing section as the company demanded, even though her skill was overlocking. Therefore, she could not work as fast as she could when she was in the overlocking section. The employer also transferred other workers as the company demanded.
 - Within the past two to three years, she had never been absent until the last two to three months when she had often taken leave because she had problems with her nose her to have it checked at the hospital. She had taken leave twice per month and each leave of absence was for two days.
- According to the documents submitted by the employer to the Arbitration Council on 7 November 2013, the Arbitration Council found that there was a notification letter about the non-renewal of Ms Ton Sorpheap's contract dated 20 September 2013 stating that:

...the company stop renewing contract of Ms Ton Sorpheap whose ID: A066; therefore, the company would like to notify her within the period of 8 days starting from 20 September 2013 to 29 September 2013 in accordance with Article 73 of the Labour Law.

There was a note on the documents stating that *"...however, the person does not receive the notification letter; therefore, the company takes team supervisor as witness to this notification."*
- The parties agreed that the employer had made payment in lieu of the remaining annual leave and the five per cent severance pay at the conclusion of each six-month contract. The employer made such payment to workers prior to Khmer New Year every year.
- The employer claims it notified the Labour Inspector of the non-renewal of her contract; however, it did not request authorisation from the Labour Inspector because the employer understood this case was about non-renewal of a fixed duration contract according to Article 73 of the *Labour Law*.

Information in relation to formation of the union

The parties agree that:

- CAC and a number of workers at Ever Glory held an election for leaders of the union on 3 September 2013.
- The employer received a letter notifying elected leaders of the union.
- Leaders of the union comprised: 1) Ms Ung Sokchamroeun - President, 2) Ms Ton Sorpheap - Vice-President, and 3) Ms La Vandy - Secretary.

REASONS FOR DECISION

Before considering the demands, the Arbitration Council interprets rights disputes and interests disputes:

Paragraph 2, 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* no.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, Article 312 of the *Labour Law* and Clause 43 of the *Prakas* no.099 states that the Arbitration Council has jurisdiction to decide 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 agreement are rights disputes and the Arbitration Council legally settles rights disputes.

Issue: The workers demand that the employer reinstate Ms Ton Sorpheap-Vice-President of the union.

Before considering the demand, the Arbitration Council will consider whether it gives rise to a rights dispute or an interests dispute.

The demand is about termination of employment relations between the employer and the worker stipulated in the *Labour Law*. Therefore, according to the interpretation on rights dispute above, the Arbitration Council finds that the issue is a rights dispute.

To decide whether or not the employer is under obligation to reinstate Ms Ton Sorpheap - Vice-President of the union, the Arbitration Council will consider as follows:

1) What type of contracts of employment did Ms Ton Sorpheap have and was the termination of employment relations a 'non-renewal of contract of employment' or 'dismissal'?

Paragraph 2, Article 67 of the *Labour Law* (1997) 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.

Paragraph 5, Article 73 of the *Labour Law* (1997) states that:

... If the contract has a duration of more than six months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67...

In the Arbitral Award no. 10/03-Jacqsintex, Issue 1, the Arbitration Council interpreted Paragraph 2 of Article 67 to mean that a fixed duration contract becomes an undetermined duration contract when a total length of the combined fixed duration contracts renewed surpasses two years. In AA No. 10/03, the Arbitration Council found that:

The Cambodian labor law has a bias toward contracts of undetermined duration as expressed in Article 67, paragraph 7 and 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 Article 73, paragraph 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, paragraph 2." Article 67, paragraph 2 is a maximum total duration and not the duration of an individual renewal.

The recommendation no. 166, paragraph 3, 1982, of the International Labour Organization regarding Termination of Employment provides that contracts of fixed duration should not be used for long term employment. This recommendation 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...

In this case, the Arbitration Panel finds that the interpretation of Paragraph 2, Article 67 of the *Labour Law* above means that a fixed duration contract becomes an undetermined contract as long as a total length of the first contract and any subsequent renewals surpass two years.

According to the findings of the facts, the six-month contracts of employment had been continuously renewed five times: the first renewal was made from 28 March 2011 to 29 September 2011, the second renewal was made from 29 September 2011 to 29 March 2012,

the third renewal was made from 29 September 2012 to 29 March 2013, and the final one was made from 28 March 2013 to 28 September 2013. In this case, the total duration of the continuous renewal of Ms Ton Sorpheap's contract of employment was over two years. Therefore, the contract of employment between the employer and Ms Ton Sorpheap is an undetermined duration contract of employment.

In this case, the employer claims Ms Ton Sorpheap was on a six-month contract starting from 28 March 2013 to 28 September 2013; therefore, it was non-renewal of her final six-month contract. Based on the above interpretation, the Arbitration Council finds that Ms Ton Sorpheap was on an undetermined duration contract; therefore, the Arbitration Council finds it is a dismissal, not a non-renewal because the non-renewal of Ms Ton Sorpheap's six-month contract was made while the total duration of her contracts was over two years. Therefore, the employer dismissed her while she was on an undetermined duration contract.

2) Is Ms Ton Sorpheap entitled to special protection from dismissal?

Article 293 of the *Labour Law* states that *"The dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector..."*

This article is applicable to union leaders as well. As stated in Paragraph 2, Clause 4 of *Prakas* no. 305 dated 22 November 2001 of the Ministry of Labour, Vocational Training, and Youth Rehabilitation on Representativeness of Workers' Professional Organisations at the Enterprise and Establishment and Rights to Collective Negotiation for Collective Agreement at the Enterprise and Establishment states that: *"...exceeding the period mentioned in above paragraph, the protection will be granted to 3 union leaders in conditions set out in articles 282 and 293 of Labor Law..."*

According to the foregoing, the Arbitration Council finds that union leaders are entitled to the same special protection from dismissal as shop stewards. In short, authorisation from Labour Inspectors is required for dismissal of any union leaders.

In this case, Ms Ton Sorpheap is Vice-President of the union receiving certificate of registration dated 25 September 2013 and recognition of union leaders via a Letter no. 298 dated 25 September 2013 from the Ministry of Labour and Vocational Training. Therefore, Ms Ton Sorpheap is entitled to special protection from dismissal. In this case, the employer needs authorisation from the Labour Inspectors prior to the dismissal of Ms Ton Sorpheap.

According to the findings of the facts, the employer claims it had notified Ms Ton Sorpheap of the non-renewal of her contract; however, it had not sought authorisation from the Labour Inspectors because the employer thought that Ms Ton Sorpheap was on a six-month contract, so the termination was a non-renewal according to Article 73 of the *Labour Law*. In this case, the employer had not received authorisation from the Labour Inspector prior to the dismissal of Ms Ton Sorpheap.

Therefore, the Arbitration Council finds that the employer failed to comply with legal procedures set out in Article 293 of the *Labour Law* (1997) and Clause 4 of *Prakas* no. 305 in dismissing Ms Ton Sorpheap who was entitled to special protection from dismissal.

In previous arbitral awards, the Arbitration Council ordered the employer to reinstate workers who were entitled to special protection from dismissal when they were dismissed not in accordance with legal procedure, without authorisation from Labour Inspectors (see *Arbitral Award no. 71/09-Hytex Apparel, Reasons for Decision, Issue 1, 09/10-Chung Hao, 91/11-Quicksew Cambodia, Issue 1, 191/12-Alim (Cambodia), 190/13-Long Lead (Cambodia), 48/13-Sumi (Cambodia) , Issue 11, and 156/13-Pou Yuen, Issue 2*).

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

Further, Paragraph 4, Clause 4 of *Prakas* no. 305 dated 22 November 2001 states that:

Any employer who dismisses workers or employees receiving protection in accordance with above provisions without prior permission from the work inspector... The employer's measures abusing the above provisions shall be deemed null and void and worthless.

According to the foregoing, the dismissal of Ms Ton Sorpheap is deemed null and void.

Therefore, the Arbitration Council orders the employer to reinstate Ms Ton Sorpheap.

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: Order the employer to reinstate Ms Ton Sorpheap.

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..

Part II. Interests dispute: N/A

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: **Men Nimmith**

Signature:

Dissenting Opinion

Clause 37 of *Prakas* No. 099 SKBY, dated 21 April 2004, issued by the Ministry of Labour and Vocational Training states:

The arbitral panel shall record its decisions in an award which shall be signed by all three arbitrators. If one of the arbitrators does not agree with the decision of the majority, the dissenting arbitrator may record his dissent as an annex to the award.

Based on this clause, I, Arbitrator **Ing Sothy**, would like to record my dissent on Issue 1 of the Arbitral Award **234/13 – Ever Glory**. I would like to explain the reasons for my dissent:

Issue: Order the employer to reinstate Ms Ton Sorpheap

By legal right, the employer has the right to offer fixed duration contracts or undetermined duration contracts to workers.

In this case, the employer offered fixed duration contracts and the employer provided severance pay equal to 5 per cent of wages at the conclusion of each and every contract in accordance with Paragraph 6, Article 73 of the *Labour Law*.

Renewal of each fixed duration contract did not exceed 2 years.

Therefore, I find that the renewed contracts were **fixed duration contracts**.

In this case, the employer is ordered to reinstate Ms Ton Sorpheap on the ground that the renewed contract was converted to an undetermined duration contract because the renewed duration exceeded 2 years.

Therefore, when the employer dismisses workers, the employer must pay indemnity for dismissal which means the payment includes:

1. Severance pay equal to 5 per cent of wages; and
2. Indemnity for dismissal.

When the workers are ordered to return severance pay, which has already been provided to the workers, to the employer and the former cannot afford to implement the order, what amount of indemnity for dismissal should the employer pay the workers?

I find that the employer is under an obligation to provide severance pay at the conclusion of each and every fixed duration contract in accordance with the law. Even though the fixed duration contracts are renewed many times, and the total duration of the renewals exceeds 2 years, the contracts are still fixed duration contracts.

However, if the employer does not provide severance pay to workers at the conclusion of each and every fixed duration contract and total duration of the renewals

exceeds 2 years, the fixed duration contracts are converted into undetermined duration contracts.

In conclusion, I find that the employer should not be ordered to convert **fixed duration contracts** into **undetermined duration contracts** because, in this case, the employer had already fulfilled its obligation to provide compensation in accordance with Article 73 of the *Labour Law*.

Fixed Duration Contract (Paragraph 2 of Article 67 of the Labour Law)

- The Labour Contract signed with one consent for a specific duration cannot be for a period longer than two years.

Therefore, at the conclusion of such a contract, the employer shall pay in accordance with Article 73 of the *Labour Law*.

- It can be renewed **once, as long as the renewal does not surpass the maximum duration of two years**. At the conclusion of such a contract, the employer shall pay in accordance with Article 73 of the *Labour Law*.
- It can be renewed **once again, as long as the renewal does not surpass the maximum duration of two years**.

Therefore, each contract renewal did not exceed 2 years and at the conclusion of each and every contract, irrespective of the number of concluding contracts, the employer shall pay in accordance with Article 73 of the *Labour Law*.

There should be no confusion between *renewed one or more times* and **as long as the renewal does not surpass the maximum duration of two years**. The two phrases have different meanings.

Phnom Penh, 2 December 2013

Signature

Arbitrator Ing Sothy