



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 04/11-Zhen Yun

Date of award: 7 February 2011

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: **Ann Vireak**

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

DISPUTANT PARTIES

Employer party:

Name: **Zhen Yun Cambodia Co., Ltd. (the employer)**

Address: Tuol Sangke Village, Tuol Sangke Commune, Russei Keo District, Phnom Penh

Telephone: 012 990 892 Fax: N/A

Representative:

1. Mr Ly Chansovan Head of Administration

Worker party:

Name: **Free Trade Union of Workers of the Kingdom of Cambodia (FTUWKC)**

Local Union of FTUWKC

Address: Tuol Sangke Village, Tuol Sangke Commune, Russei Keo District, Phnom Penh

Telephone: 012 880 039 Fax: N/A

Representatives:

1. Mr Yun Roathkeopisey Officer of FTUWKC
2. Mr Seng Bora President of the Local Union of FTUWKC
3. Mr Kim Kimsuy Vice-President of the Local Union of FTUWKC
4. Ms Moeung Sina Secretary of the Local Union of FTUWKC

ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate Seng Bora and Kim Kimsuy because their termination resulted from union discrimination. The employer maintains that it cannot reinstate them.
2. The workers demand that the employer place a physician on standby during working hours. The employer's representative says it will discuss the issue with the company director.

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. 20 KB/RK/VK dated 4 January 2011 was submitted to the Secretariat of the Arbitration Council on 6 January 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 Commune, Tuol Kork District, Phnom Penh

Date of hearing: 19 January 2011 at 8:00 a.m.

Procedural issues:

On 13 December 2010, the Department of Labour Disputes received a complaint from the workers outlining their demands for the improvement of working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert officer to conciliate the labour dispute and the last conciliation session was held on 28 December 2010. As a result, two of the four issues were conciliated. The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 6 January 2011 via non-conciliation report No. 20 KB/RK/VK dated 4 January 2011.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the workers to a hearing and conciliation of the two non-conciliated issues, held on 19 January 2011 at 8:00 a.m. Both parties were present at the hearing.

At the hearing, the Arbitration Council conducted a further conciliation of the two issues. As a result, issue 1 was partly resolved in that the employer agreed to reinstate Seng Bora, but it did not agree to reinstate Kim Kimsuy.

The Arbitration Council will consider the issues in dispute 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. Authorisation letter from the company director for Ly Chansovan, dated 1 December 2010.

B. Provided by the worker party:

1. Letter from FTUWKC to the company director notifying the employer of the leaders of the Local Union in the first term, No. 095/10 dated 11 November 2010.
2. Minutes of collective labour dispute conciliation at Zhen Yun Cambodia Co., Ltd., dated 15 November 2010.
3. Minutes of an information session with the workers' representatives, dated 16 December 2010.
4. Agreement dated 17 November 2010.
5. Minutes of collective labour dispute conciliation at Zhen Yun Cambodia Co., Ltd., dated 28 December 2010.
6. Complaint submitted by the workers to the head of the Department of Labour Disputes regarding the company director's non-compliance with an agreement.
7. Receipt of acknowledgement of the case, dated 8 December 2010.

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

1. Report on collective labour dispute resolution at Zhen Yun Cambodia Co., Ltd., No. 20 KB/RK/VK dated 4 January 2011.
2. Minutes of collective labour dispute resolution at Zhen Yun Cambodia Co., Ltd., dated 28 December 2010.

D. Provided by the Secretariat of the Arbitration Council:

1. Letter from the Secretariat of the Arbitration Council to the company director regarding arbitrator selection, No. 022 KB/RK/VK/LKR dated 10 January 2011.
2. Notice to attend the hearing addressed to the employer, No. 031 KB/AK/VK/LKA dated 12 January 2011.
3. Notice to attend the hearing addressed to the workers, No. 032 KB/AK/VK/LKA dated 12 January 2011.

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:

- According to the non-conciliation report, Zhen Yun Cambodia Co., Ltd. employs 250 workers. However, the employer stated at the hearing that it employs a total of 162 workers.
- The Local Union of FTUWKC, the claimant in this case, is not yet formally registered.
- According to the workers' statement, a union election was held on 3 November 2010 in which Seng Bora was elected President, Kim Kimsuy was elected Vice-President, and Moeung Sina was elected Secretary. FTUWKC notified the employer of the election result on 11 November 2010.
- The employer argues that it did not receive the union's notification.
- The workers did not submit to the Arbitration Council minutes of the election or a copy of the notification with the employer's acceptance signature. At the hearing, the Arbitration Council asked the three workers (the union leaders) for information about the election venue and how many votes they received, but they did not know.

Issue 1: The workers demand that the employer reinstate Kim Kimsuy.

- The workers initially demanded the reinstatement of Seng Bora and Kim Kimsuy. However, the employer agreed at the hearing to reinstate Seng Bora because he admitted to making mistakes when discovered by the employer. The employer did not agree to reinstate Kim Kimsuy. Consequently, the demand is only for Kim Kimsuy's reinstatement.
- Kim Kimsuy commenced work in the sewing section on 8 February 2010 on a verbal employment contract. The last wages he received amounted to US\$ 66.
- On 25 November 2010, the employer transferred Kim Kimsuy from the sewing section to the cutting section, exercising its managerial prerogative.
- On 13 December 2010, Kim Kimsuy received a warning because he took two days of unauthorised leave to visit his sick brother, on 9 and 10 December 2010. The leave was required to be authorised by a group leader and supervisor, but had not yet been authorised by the supervisor.

- The employer suspended his contract for one week, from 15 to 22 December 2010.
- The workers assert that when he returned to work on 22 December 2010, the security guards at the factory asked him to leave the factory and he was dismissed without a warning letter or a termination notice.
- The employer objects to this assertion, arguing that Kim Kimsuy did not attend work on 22 December 2010 as scheduled. The employer did not dismiss him, rather he abandoned his work after being transferred from the sewing section to the cutting section because there were too many workers in the sewing section. He was a lazy worker after the transfer, leading the employer to suspend him for one week, from 15 to 22 December 2010, so that he could reconsider working in the cutting section. When the suspension was over, he did not return to work. Thus, the employer assumed that Kim Kimsuy had abandoned his work in accordance with the Internal Work Rules.
- Kim Kimsuy states that he was dissatisfied with the work in the cutting section. The employer required him to lift and arrange heavy fabrics to be measured and cut by other workers. He has sewing skills and applied for a sewing position when interviewed by the employer. He preferred working in the sewing section to the cutting section.
- At the hearing, Kim Kimsuy asked a witness via telephone to confirm that he had returned to work after the suspension. The witness testified that Kim Kimsuy did return to work. Later, Kim Kimsuy stated that he attended the workplace on Friday 27 December 2010 and not on 22 December 2010.
- The workers argue that he should be reinstated because his home is close to the factory, he has many friends and relatives working at the factory, and his misconduct was not serious enough to justify termination.
- The employer did not submit its Internal Work Rules or a certificate of commercial registration as requested by the Arbitration Council.

Issue 2: The workers demand that the employer place a physician on standby during working hours.

- The factory does not have an infirmary or a physician during working hours.
- The employer states that it will set up an infirmary at the factory. However, it did not set a timeframe. The employer has a sufficient amount of medicine for the workers.
- The employer states that in practice, if workers feel sick (and the sickness isn't serious) there is a member of the administration staff who provides them with

medicine. The staff member has taken a medical course and has earned a certificate of nursing.

- The workers argue that the member of the administration staff is usually very busy and sometimes has outside assignments. Therefore, the workers need a physician on standby who can provide first aid in a timely manner.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate Kim Kimsuy.

According to the facts, Kim Kimsuy was elected Vice-President of the Local Union of FTUWKC in the election on 3 November 2010.

The Arbitration Council will consider whether or not Kim Kimsuy is entitled to special protection. Article 293, paragraph 1 of the Labour Law provides that “[t]he dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector.”

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

All workers who are candidates for union leadership positions shall receive the same protection from work dismissal as worker delegates [i.e. shop stewards]. This protection begins 45 days prior to the election and ends 45 days after the election if the candidate is not elected. The union shall notify the employer of the worker’s candidacy through all reliable means. However, the employer shall only be required to comply with this provision once for each election of union leaders.

In previous arbitral awards, the Arbitration Council has interpreted this clause as meaning that

workers are entitled to special protection as long as: (1) they are candidates for union leadership; (2) the termination takes place during the protection period; and (3) the union notified the employer of the worker’s candidacy through all reliable means (*see Arbitral Awards 71/09-Hytex, reasons for decision, issue 1 and 09/10-Jung Hao*).

The Arbitration Council will consider in this case whether the three conditions are satisfied in relation to Kim Kimsuy, elected Vice-President of the union.

First condition: Kim Kimsuy stood as a candidate in the election for union leadership on 3 November 2010. Thus, in accordance with Clause 3 above he held a position subject to special protection.

Second condition: the termination must have occurred within the period of protection. For candidates who are not elected, this is the period beginning 45 days before

the election and ending 45 days after the election. The length of the protection period for elected candidates is less clear. In Arbitral Award 40/10-Meng Yan, the Arbitration Council held that the protection period for elected candidates should extend until at least 45 days after the election or for a reasonable time until they submit an application for union registration.

In this case, the Arbitration Council agrees with the above interpretation. The employer dismissed Kim Kimsuy on 27 December 2010, more than 45 days after the election. However, because the union was in the process of applying for registration, the termination took place during the protection period.

Third condition: At the hearing, the workers asserted that the union notified the employer of the candidates for union leadership on 11 November 2010, but the employer argued that it did not receive the notification.

In previous arbitral awards, the Arbitration Council has determined that special protection does not apply if the union fails to notify the employer of the candidates before they are dismissed (*see Arbitral Awards 64/05-Chian Hwey; 66/07-Jia Fung; and 131/10-Leader's Industrial, reasons for decision, issue 1*).

Therefore, the Arbitration Council determines that Kim Kimsuy is not entitled to special protection.

The Arbitration Council will consider whether or not his dismissal was lawful.

Based on the facts, the Arbitration Council finds that Kim Kimsuy was suspended for one week on the grounds of laziness after the employer transferred him from the sewing section to the cutting section. The suspension was effective from 15 to 22 December 2010, intended to give him some time to reconsider working in the cutting section. However, he failed to appear at the workplace or to inform the employer of his absence on the scheduled return date of 22 December 2010. The employer determined that Kim Kimsuy had abandoned his work, in accordance with the Internal Work Rules.

Accordingly, the Arbitration Council will consider whether or not his dismissal, based on his absence on 22 December 2010, was consistent with the Labour Law.

Article 27 of the Labour Law provides that “[a]ny disciplinary sanction must be proportional to the seriousness of the misconduct”.

In previous arbitral awards, the Arbitration Council has ruled that any disciplinary sanction imposed on the workers by the employer must be proportional to the seriousness of the misconduct committed by the workers (*see Arbitral Awards 54/04-Cambodia Sportswear, reasons for decision, issue 2; 08/05-Winner Knitting, reasons for decision, issue 2; 90/07-*

GDM; 109/07-Kingsland, reasons for decision, issue 38; and 134/08-Chevron, reasons for decision, issue 5).

In this case, Kim Kimsuy failed to appear at the workplace; he was away from work for four consecutive days and did not notify the employer of his absence.

However, the employer did not give him notice of termination even though he was absent beyond the date he was scheduled to return and the employer assumed that he had abandoned his work.

Article 82 of the Labour Law states:

The contracting parties are released from the obligation of giving prior notice under the following cases:

1. For a probation or an internship specified in the contract.
2. For a serious offense on the part of one of the parties.
3. For acts of God that one of the parties is unable to meet his obligations.

Based on this article, the Arbitration Council considers that the employer is not obliged to give workers prior notice if they are on probation or in cases of serious misconduct or acts of God. In this case, Kim Kimsuy was not employed on probation and his dismissal was not due to an act of God. The Arbitration Council finds that the employer assumed Kim Kimsuy had committed serious misconduct by taking a leave of absence for a number of days. For this reason, it decided not to give him prior notice.

Article 83 of the Labour Law provides:

The following are considered to be serious offenses:

- ...B. On the part of the worker
- ...3. Serious infractions of disciplinary, safety and health regulations.

The employer asserted at the hearing that a continued leave of absence is deemed as work abandonment under the Internal Work Rules; however, the employer did not submit the Internal Work Rules to the Arbitration Council. The Arbitration Council is of the view that the employer does not have an internal work rule stipulating that Kim Kimsuy's actions constitute serious misconduct. Further, the Arbitration Council finds that the Labour Law does not define a continued leave of absence as serious misconduct.

Article 84 of the Labour Law provides that “[p]ending the creation of the Labour Court, the ordinary court has the jurisdiction to determine the magnitude of offences other than those included in the preceding article.”

In this case, the Arbitration Council considers that if the employer does not have an internal work rule defining serious misconduct it must file a complaint in the competent court to determine the magnitude of the worker's misconduct. If it is determined to be serious misconduct, the employer is not obliged to give the worker prior notice.

According to the facts, the employer did not submit evidence of a court decision affirming that Kim Kimsuy's misconduct was serious. Thus, the Arbitration Council finds that the disciplinary sanction imposed on the worker was not reasonable or proportional.

Based on the foregoing, the Arbitration Council is of the view that the termination was unreasonable.

Clause 34 of *Prakas* No. 099 SKBY, dated 21 April 2004, states:

In matters referred to the arbitration panel, the panel shall have the power and authority to fully remedy any violation of provisions provided in the Labour Law, implementing regulations under the Labour Law, collective bargaining agreements or other obligations arising from the professional relationship between employer and employee. Within the limitations of the Labour Law and this *Prakas*, it has the power and authority to provide any civil remedy or relief which it deems just and fair, including:

A. orders to reinstate dismissed employees to their former or any other appropriate position;...

In conclusion, the Arbitration Council orders the employer to reinstate Kim Kimsuy once this award takes effect. The employer is able to impose a disciplinary sanction for Kim Kimsuy's misconduct in taking unauthorised leave [for four days from 22 December 2010].

Issue 2: The workers demand that the employer place a physician on standby during working hours.

The Arbitration Council will consider whether the employer is obliged to place a physician on standby during working hours.

Clause 1 of *Prakas* No. 330 SKBY on enterprise infirmary, dated 6 December 2000 provides that "[e]mployers of enterprises and establishments stipulated in Article 1 of the Labour Law employing at least 50 employees must establish a permanent infirmary at the workplace."

Clause 3 of the same *Prakas* states:

The number and quality of medical personnel shall be determined according to the number of employees at the enterprise or establishment as prescribed in the table below:

Number of employees at the enterprise	Number of nurses (male or female)	Number of physicians	Minimum number of hours in each eight hour shift that medical personnel must be present.
50 - 300	One on standby	One physician or junior physician	Two hours
301-600	One on standby	One physician	Two hours
601 - 900	Two on standby	One physician	Three hours
901 - 1400	Two on standby	One physician	Four hours
1401-2000	Two on standby	One physician	Six hours
Over 2000	Three on standby	One physician	Eight hours

When overtime work takes place at an enterprise or establishment, the infirmary shall have nurses and physicians on standby during that time.

Based on the two clauses above, in previous arbitral awards the Arbitration Council has ordered employers who have not fulfilled their obligations to establish a medical infirmary, provide nurses and doctors in proportion to the number of workers, and to provide a sufficient amount of medicine for first aid (see *Arbitral Awards 62/08-Pav Da, reasons for decision, issue 2 and 118/07-Ja Ding, reasons for decision, issue 3*).

According to the facts, the employer does not have an infirmary or a physician on standby. The employer has a sufficient amount of medicine for minor illnesses. In this case, the workers demand that the employer place a physician on standby at the factory because the physician could provide first aid in a timely manner. The Arbitration Council considers that it is essential that the employer place a physician on standby to deal with situations where workers have work-related accidents or fall ill due to their fragile health. When these situations arise, the factory physician can treat the workers instantly or give them medicine to improve their health. According to the facts, the employer employs 162 workers. Consequently, the employer is required to place a nurse and physician on standby for a minimum of two hours during each shift.

In conclusion, the Arbitration Council orders the employer to place a nurse and physician on standby for a minimum of two hours during each shift.

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

DECISION AND ORDER

Issue 1: Order the employer to reinstate Kim Kimsuy once this award takes effect. The employer is able to impose a disciplinary sanction for Kim Kimsuy's misconduct in taking unauthorised leave.

Issue 2: Order the employer to place a nurse and physician on standby for a minimum of two hours during each shift.

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: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: