



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 16/12-Vision Glory Knitting

Date of award: 24 February 2012

Dissenting opinion 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: **Liv Sovanna**

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

DISPUTANT PARTIES

Employer party:

Name: **Vision Glory Knitting (Cambodia) Co., Ltd. (the employer)**

Address: Tomnopthey Street, Dangkor Commune, Dangkor District, Phnom Penh

Telephone: 012 388 916

Fax: N/A

Representatives:

- | | |
|-------------------------|------------------------|
| 1. Mr Liu Ting Hong | Head of the factory |
| 2. Mr Hor Chhunhuot | Head of administration |
| 3. Mr Chuo Limcheng | Interpreter |
| 4. Ms Chhean Chengleang | Group leader |

Worker party:

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

Local Union of CLUF

Address: Tomnopthey Street, Dangkor Commune, Dangkor District, Phnom Penh

Telephone: 077 776 181

Fax: N/A

Representatives:

- | | |
|---------------------|-----------------|
| 1. Mr Seng Menghong | Officer of CLUF |
| 2. Mr Vong Boret | Officer of CLUF |

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|-------------------|---|
| 3. Mr Pin Sokna | President of the Local Union of CLUF |
| 4. Mr Yan Chan | Vice-president of the Local Union of CLUF |
| 5. Mr Koy An | Secretary of the Local Union of CLUF |
| 6. Mr Sen Se | Advisor to the Local Union of CLUF |
| 7. Mr Preab Thyda | Advisor to the Local Union of CLUF |

ISSUES IN DISPUTE

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

1. The workers demand that the employer reinstate Pin Sokna, the president of the Local Union of CLUF, and Koy An, the vice-president. The employer refuses to reinstate them as it has terminated their fixed duration contracts of three months.
2. The workers demand that the employer specify the date on which it will repay the fee associated with a medical checkup. The employer states that it will repay the fee but will not specify the exact date of repayment.

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. 136 dated 7 June 2011 (Ninth 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. 077 KB/RK/VK dated 27 January 2012 was submitted to the Secretariat of the Arbitration Council on 30 January 2012.

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: 3 February 2012 at 2:00 p.m.

Procedural issues:

On 30 December 2011, the Department of Labour Disputes received complaint No. 3436/11 dated 30 December 2011 from CLUF, outlining the workers' demands that the employer improve their working conditions. Upon receiving the claim, the Department of Labour Disputes assigned an expert labour officer to resolve the labour dispute. The last conciliation session was held on 18 January 2012, resulting in the resolution of two issues.

The two non-conciliated issues were referred to the Secretariat of the Arbitration Council on 30 May 2012 via non-conciliation report No. 077 KB/RK/VK dated 27 January 2012.

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. The hearing was held on 3 February 2012 at 2:00 p.m. with both parties present. The Arbitration Council conducted a further conciliation of the two non-conciliated issues, resulting in issue 2 being resolved. Issue 1 remained unresolved.

As the parties are signatories to the Memorandum of Understanding On Improving Industrial Relations in the Garment Industry (MoU), dated 28 September 2010, the Arbitration Council will divide the issues into two types: rights disputes and interests disputes. In accordance with the MoU, both parties have agreed to choose binding arbitration in relation to rights disputes. However, this does not apply to interests disputes. The parties are able to choose non-binding arbitration for interests disputes, and can object to an arbitral award being issued in relation to such disputes. Such an objection will not affect the parties' obligation to implement an award regarding a rights dispute in accordance with the MoU.

In this case, the parties chose non-binding arbitration for their interests dispute.

The Arbitration Council considers 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:

The Arbitration Council finds that:

- Vision Glory Knitting (Cambodia) Co., Ltd. operates a garment factory and employs a total of 560 workers.
- There are two unions in the factory: the Local Union of CLUF ('the Union') and Workers' Benefits Union. The Union is the claimant in this case. The Union has not been formally registered. It received a receipt of union registration from the

Department of Labour Disputes in the Ministry of Labour and Vocational Training on 11 January 2012.

Issue 1: The workers demand that the employer reinstate Pin Sokna, the president of the Union, and Koy An, the vice-president.

- The workers claim that Pin Sokna and Koy An commenced their probationary work in the washing section on 21 April 2011. The employer offered them a permanent contract effective from 21 June 2011 until 21 September 2011. Their final contracts were effective from 21 September 2011 until 21 December 2011. Pin Sokna is the president of the Union, and Koy An is the secretary.
- The employer disputed the workers' claim regarding the date of Pin Sokna and Koy An's final contracts. The employer claimed that the real date was from 23 September 2011 to 23 December 2011 rather than 21 September 2011 to 21 December 2011. The employer claimed that it did not renew their contracts immediately after their first fixed duration contract expired on 21 September 2011, and that he had instead required them to attend work on 22 September 2011 without a contract, paying them 200% of normal pay rate before renewing their contracts on 23 September 2011. According to the pay slips of Pin Sokna and Koy An submitted by the employer to the Arbitration Council, the workers admitted having worked on 22 September 2011 and received 200% of normal pay rate. The, the employer offered a new contract effective from 23 September 2011 to 23 December 2011. The employer submitted copies of the final contracts of Pin Sokna and Koy An at the hearing. The employer and the workers agreed that the employer modified the date in the final contracts of Pin Sokna and Koy An to 23 December 2011 by a correction pen. The Arbitration Council orders the employer to submit the original copies of the contracts of Pin Sokna and Koy An by 8 February 2012 as it is the holder. However, the employer did not abide by the order.
- The employer decided not to renew the contracts of Pin Sokna and Koy An on 23 December 2011 and provided them with a notice of contract non-renewal on 21 December 2011. Pin Sokna and Koy An accepted the notice.
- The employer argued that it did not renew the contracts of Pin Sokna and Koy An because they refused to follow the employer's directions in some tasks since they had been elected as union leaders, such as the installation of sewing machines, construction work etc. The employer further argued that it had only asked Pin Sokna and Koy An for their assistance in the aforesaid tasks on a temporary basis subsequent to their employment in the washing section. The employer claimed that they were diligent in the performance of their assignments. However, once appointed union leaders, they kept refusing to follow the directions of the employer. Since the

commencement of their employment, neither Pin Sokna nor Koy An has received a warning from the employer.

- The workers did not reject the employer's claims, but rather argued that prior to becoming union leaders Pin Sokna and Koy An followed the directions of the employer when the employer occasionally assigned them tasks outside of their core responsibilities. However, after becoming union leaders, Pin Sokna and Koy An understood that it was unreasonable for the employer to request that they perform such tasks. The workers claimed that the non-renewal of Pin Sokna and Koy An's contracts was evidence of union discrimination.
- On 23 October 2011, the union's first election was held, and Pin Sokna and Koy Na were elected as leaders of the union. The workers claimed that the employer was aware of their leadership as they notified the employer of the election results on 25 October 2011. The elected secretary resigned from their role on 15 November 2011, and the union's second election was held on 22 December 2011. Pin Sokna and Koy An were again elected as leaders of the union. On 11 January 2012, the union received a receipt of union registration from the Department of Labour Disputes in the Ministry of Labour and Vocational Training.
- The workers alleged that the employer discriminated against Pin Sokna and Koy An by dismissing them on 23 October 2011, the same day that the workers notified the employer of the second election results.
- The employer denied the allegations of union discrimination, arguing that Pin Sokna and Koy An's contracts had expired, and the employer did not renew their contracts because they had performed poorly at work since being elected as leaders of the union. The employer further argued that if it wished to discriminate, it would have terminated the contracts of Pin Sokna and Koy An immediately after the first union election. The employer claimed that it did not renew the contracts of other workers during December 2011, as shown in the evidence submitted to the Arbitration Council at the hearing.
- Upon the expiration of a worker's contract, the employer's practice is to provide payment in lieu of annual leave and a severance payment equal to 5% of the wages the worker has earned during his or her contract.
- Neither Pin Sokna nor Koy An has received a severance payment, any payment in lieu of annual leave, or outstanding wages for December 2011 from the employer.
- The employer dismissed Pin Sokna and Koy An without authorisation from the Labour Inspector.

REASONS FOR DECISION

Issue 1: The workers demand that the employer reinstate Pin Sokna, the president of the union, and Koy An, the vice-president of the union.

Before turning to this issue, the Arbitration Council considers whether the issue gives rise to a rights dispute.

In previous arbitral awards, the Arbitration Council has ruled that “a rights dispute is a dispute concerning entitlements in the law, an agreement or a collective agreement” (see AA 05/11-M&V 1, *reasons for decision, issue 1 and 5*; 13/11-Gold Kamvimex, *reasons for decision, issue 1 and 2*).

The Arbitration Council applies this ruling in this case.

The Arbitration Council considers this issue to be a rights dispute as the demand for reinstatement has a basis in the Labour Law.

Before considering whether the employer is obligated to reinstate Pin Sokna and Koy An, the Arbitration Council considers which the types of contracts they are employed under.

Article 67 paragraph 7 of the Labour Law 1997 states that, “A contract of fixed duration must be in writing. If not, it becomes a labour contract of undetermined duration.”

According to the facts, the workers claimed that Pin Sokna and Koy An commenced their probationary work in the washing section on 21 April 2011. The employer offered them a permanent contract effective from 21 June 2011 to 21 September 2011, and their final contracts were effective from 21 September 2011 to 21 December 2011.

The employer claimed that it required Pin Sokna and Koy An to attend work on 22 September 2011 before it could renew their contracts for 23 September 2011 to 23 December 2011. The employer paid Pin Sokna and Koy An 200% of their normal wages.

The employer decided not to renew the contracts of Pin Sokna and Koy An beyond 23 December 2011, and provided them with a notice of contract non-renewal on 21 December 2011. Pin Sokna and Koy An accepted the notice. The employer and the workers agreed that the employer modified the date in the final contracts of Pin Sokna and Koy An to 23 December 2011 by a correction pen (the copies of their final contracts). The workers maintained their claim that the dates of their final contracts were 21 September 2011 to 21 December 2011 rather than 23 September 2011 to 23 December 2011.

The Arbitration Council ordered the employer to submit the original copies of Pin Sokna and Koy An's final contracts by 8 February 2012. The employer did not comply with the order.

In previous arbitral awards, the Arbitration Council has ruled that the claimants have the burden of proof (see Arbitral Awards 79/05-Ever Green; 101/08-GDM, reasons for decision, issues 1 and 2; 108/08-Hugo, reasons for decision, issue 4; 163/09-Tack Fat, reasons for decision, issue 2; 168/09-Tekthla Plaza, reasons for decision, issue 2; 115/10-G-Foremost, reasons for decision, issue 18; 148/11-Dai Young).

The Arbitration Council applies these rulings in this case. The employer and the workers agreed that Pin Sokna and Koy An held fixed duration contracts but disputed the dates of the contracts. The employer holds the original copies of Pin Sokna and Koy An's contracts. At the hearing the employer claim that the effective dates of Pin Sokna and Koy An's contracts were from 23 September 2011 to 23 December 2011, and it promised to provide evidence to support this claim. Since the employer failed to fulfill this obligation, the Arbitration Council determines that the employer does not have sufficient evidence to support its claim. The Arbitration Council accepts the workers' claim that the effective dates of Pin Sokna and Koy An's final contracts were 21 September 2011 to 21 December 2011. Based on Article 67 paragraph 7 of the Labour Law, Pin Sokna and Koy An were working on 22 and 23 December 2011 under undetermined duration contracts.

The employer dismissed Pin Sokna and Koy An on 23 December 2011. The Arbitration Council considered whether the employer dismissed them in accordance with the legal procedure set forth in the Labour Law.

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..."

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

Any worker belonging to a union who runs for a leadership position in that union shall enjoy the same protection from dismissal as a shop steward. This protection begins 45 days prior to the election and ends, if s/he is not elected, 45 days after the election. To this end, the employer must be duly informed of the candidacy by any reliable means. However, the employer shall only be required to comply with this provision once for each election of a union leader.

In previous arbitral awards, the Arbitration Council has interpreted this clause to mean:

workers are protected as long as: (1) they are entitled to receive special protection; (2) the dismissal is made during the period of special protection; and (3) the union used all reliable means to inform the employer of the candidacy of the workers entitled to protection (see Arbitral Awards 71/09-Hytex, reasons for decision, issue 1 and 09/10-Chung Hao)

In this case, the Arbitration Council will consider whether Pin Sokna and Koy An fulfill the aforementioned three conditions.

First condition: Pin Sokna and Koy An were candidates in the union elections in accordance with Clause 3 of *Prakas* No. 305 and they were elected on 22 December 2011. Therefore, they are under the category of protected workers.

Second condition: the employer dismissed Pin Sokna and Koy An on 23 December 2011, which was within the 45 day period after the election, and which was therefore within the period of protection (see Arbitral Awards 40/10-Meng Yan). In Arbitral Award 40/10-Meng Yan, the Arbitration Council ruled that the protection for elected candidates should last at least 45 days after an election, or otherwise continue for a reasonable period of time, i.e. until the date the elected candidates submit an application for union registration.

Third condition: that the union notify the employer of the election of Pin Sokna and Koy An. This condition was fulfilled on 23 December 2011.

In this case, the employer has failed to seek authorisation from the Labour Inspector to dismiss Pin Sokna and Koy An. The employer has therefore failed to comply with the procedure to dismiss the union leaders, who are entitled to special protection from dismissal.

In conclusion, the Arbitration Council orders the employer to reinstate Pin Sokna and Koy An.

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: Order the employer to reinstate Pin Sokna and Koy An.

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 28 September 2010.

Part II. Interests dispute: N/A

Type of award: non-binding award

The award in Part II 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 period.

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: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature:

Annex to Arbitral Award 16/12-Vision Glory

Dissenting opinion by Arbitrator Ing Sothy

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

The arbitration panel shall record its decisions in an award which shall be signed by all 3 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, Ing Sothy, would like to record my dissenting opinion to Arbitral Award 16/12-Vision Glory, in which the Arbitration Council ordered the employer to reinstate Pin Sokna and Koy An. I would like to explain my reasons as follows:

At the hearing, the workers and the employer acknowledged the following facts:

1. At the expiration of the workers' contracts, the employer provides a payment equivalent to 5% of the severance payment, in accordance with the Labour Law.
2. The employer leaves a day between the expiration of the workers' contracts and contract renewal, and provides double pay for their work on the day in between.
3. The workers admit the facts in relation to following or refusing to follow the directions of the employer prior to and following the union's election results.
4. The employer received notification of the union's election results.
5. The employer allows the union's leaders to enter and leave the factory to perform their duties in spite of the fact they are no longer hired by the employer.

As outlined above, I find that the non-renewal of the contracts of Pin Sokna and Koy An is legal as it is in compliance with Article 73 of the Labour Law. The employer, however, must seek authorisation from the Labour Inspector in order to comply with Article 293 of the Labour Law.

Phnom Penh, 24 February 2012

Ing Sothy