

Reinforcing Labor Caselaw: Recent Decisions Concerning Union, Strike, FDC

Virak Prum*

ABSTRACT

This review on recent decisions reveals the will of the Arbitration Council in defending its precedents in three key areas of labor law, namely, the so-called most representative status of a trade union, the arbitrators' order to strikers to return to work, and the issue concerning the length of fixed duration contracts. The Council never hesitates to refuse to consider interest-based claims if the union lacks that particular status; it is also quick to discontinue its proceedings should employees disobey its order to stop the strike. Concerning the fixed duration contracts, the well-known "two years and that's it!" position has not changed. The quickest conclusion is that the Arbitration Council will not change its positions any time soon.

Key words: Interest, most representative, strike, caselaw, FDC.

Introduction

Cambodian labor law has since 1997 evolved into a body of regulations most of which deeply affect the garment and footwear industry thanks to extensive interpretations laid by the Arbitration Council. Since its door opened in May 2003,² the Arbitration Council has entertained almost two thousand labor disputes and, in the process, has established a reliable jurisprudence. With the 1997 Labor Law being originally drafted in a foreign language, the influence of foreign experts was expected, at least in the inception phase of the Council. Indeed, the second and third cases heard by the Council had foreign lawyers taking part in issuing those arbitral awards.³ The Council even directed that in case of doubts as regards the meaning of a provision in the 1997 law, the arbitrators could refer to the original draft in French.⁴ Leaving those early days behind, and apart from some hypothetical cases such as those surrounding the same work same wage principle or post employment non-competition clauses which the Council has not yet tried,⁵ other areas of industrial relations now stand on a firm jurisprudential base to which I now turn.

Most Representative Status of a Union

[Award No. 36/18 Evergreen Apparel (Cambodia), dated 02 October 2018]⁶

Ideally, in a collective labor dispute⁷ brought before the Arbitration Council, the employee side usually has a union representing them. In this Evergreen Apparel (Cambodia) case,

* Virak Prum, PhD
CamEd Business School
Email: prvirak@cam-ed.com

the employees requested a double increase to the annual pay from \$100 to 200\$ to be paid to employees who would resign. According to the case file, employees had begun leaving the factory. The employer, despite having made incremental increases in the past, refused this request for doubling. The arbitrators did not give a win to either party. They simply dismissed the case. Their argument, though, wasn't about the substantive merit of the claim but specifically on the procedural aspect of it: the lack of the so-called "most representative status" of the union representing the employees. This most representative status (2016 Trade Union Law, Art. 54) gives its holder an exclusive right for the purpose of negotiating a collective agreement and resolving collective disputes. It is a statutory requirement for any union when bringing a case concerning "interest", in other words, concerning new entitlements that are not already created "by law, collective agreements, internal policy, employment contracts, mutual agreements or any established practice" (Award 36/18, p. 10).

As was already pronounced in other cases cited by the Council (Award 36/18, p.9), the current system provides some flexibility by allowing appointed employees (when there is not yet a most representative union) to act as staff representatives in bringing a collective labor dispute (not involving interest) before the Council as long as the appointed employees are so recognized by the Ministry of Labor via a written letter.⁸ However, this 36/18 case is typically an interest-based dispute because the Council could not find in any written document the obligation of the employer to pay such amount of \$200. In refusing to consider the claim, the Council reasoned as follows:

[...] the Arbitration Council notes that the arbitral award concerning an interest-based dispute will become a part of the collective agreement applicable to all the employees in a company, thereby, making employees lose their right to negotiate a collective agreement as well as the right to go on strike related to a claim for interest in the future. Therefore, in order for the Council to hear an interest-based dispute, the union bringing up the dispute shall be the most representative union [...]. In previous cases, the Council also refused to consider interest-based dispute if the union was not the most representative union in the company. (Award 36/18, p.12, citing six previous awards)

Thus, the arbitrators dismissed the case as they have done so repeatedly in the past. This caselaw is a stern reminder that the procedural aspect is just as important as the substantive merit of a claim. Loyal to its previous interpretations and being mindful of the impact such awards would have on the right to collective bargaining, the Council has been reserving the exclusive privilege in bringing interest-based disputes to most representative unions only, either representing at least 30% of all employees (where there is only one union) or more than 30% of all employees (where there are more than one union).

No Arbitral Proceedings If the Strike Goes On

[Award No. 035/18 Ghim Ly (Cambodia), PTE., LTD, dated 14 September 2018] ⁹

This case tested the power of the arbitrators in issuing orders to strikers to stop the strike and return to work while the arbitral proceedings are underway. The case file shows that despite having received such order to return to work, some of the striking employees ignored it and continued on with their strike activities. The action of those employees put the authority of the arbitrators to the test. Such authority finds its basis in Prakas 099 (Art.20) dated 21 April 2004 on the Arbitration Council which stipulates that “during the arbitral proceedings, all parties to the dispute must halt any measures including strike or lockout or any other measures which could further aggravate the conflict situation. All parties must attend all meetings the arbitrators have convened them to attend.” Given the non-compliance, the arbitrators refused to hear the case. In explaining the reason for the award, they stated that:

According to Article 20 of the 099 Prakas, the Arbitration Council notes that the parties to the dispute must halt any measures such as strike or lockout or any other measures which could further aggravate the conflict situation during the arbitral proceedings. In previous cases, the Arbitration Council interpreted this Article to mean that the arbitrators will discontinue the proceedings if the employees go on with the strike or if the employer goes on with the lock out. (Award 035/18, p. 4-5, citing eight previous awards.)

The arbitrators are actually very much used to making awards to drop cases in this way. Indeed, they began building such caselaw as early as in 2004 when it all began. As cited in an old case named Sang Woo (Cambodia) Co., Ltd (Award 59/06 dated 08 August 2006), the arbitrators made reference to their 2004 order in case 04/04 MSI which compelled strikers to return to work, and to other similar orders in other cases in 2004 and 2005, all reiterating the authority of the Arbitration Council to refuse to hear the case unless the employees stop the strike and return to work (Award 59/06, p.6).

In following this well established caselaw, the arbitrators in this 035/18 decided to end the proceedings. What remains unsettled in the current caselaw is a jurisprudential definition of what constitutes a strike. Article 318 of 1997 Labor Law defines a strike as “a concerted work stoppage by a group of workers that takes place within an enterprise or establishment for the purpose of obtaining a very just resolution for their demand from the employer as a condition for their return to work.” But how many employees should there be to qualify as a “group”? What if the company has only one employee? What makes a resolution “very just”? Finally, what justifies a claim as a “demand”? These questions remain unanswered and should interest arbitrators in the future.¹⁰

FDC: Two Years and That's It!

[Award No. 022/18 Lean Global Textile (Cambodia), Co., Ltd, dated 16 July 2018] ¹¹

Fixed Duration Contract (FDC) has been subject to a lot of debates ever since the 1997 Labor Law created it in its famous Article 67(2) which states that:

...[FDC] cannot have a period longer than two years. This contract may be renewed once or multiple times so long as the renewal(s) has (have) a maximum period not exceeding two years.

Any practice contrary to the initial rule will make the contract become a unfixed duration contract.

There are three ways to read this controversial provision.

The first way: apart from the initial FDC which cannot last longer than two years, subsequent renewals could each be of a maximum two years period. If we accept this reading, there will be people who may never be able to benefit from the Unfixed Duration Contract (UDC) because their employer may forever give them multiple renewed FDCs as long as each renewal does not exceed two years period. Many garment factory employers have followed this practice by giving multiple, say, 3-month long contracts to their workers, some of who have been with them for more than ten years. This reading is the least popular one among the learned as it would essentially render UDC useless, whereas UDC is generally thought to protect workers better. It also defeats the purpose of the last sentence “any practice contrary to the initial rule will make the contract become a UDC.” The very existence of this last sentence is to rectify a bad practice (“contrary”) in favor of a more secure UDC.¹² Clearly, we can therefore deduce the intention of the lawmaker as not wishing for anyone to work under FDC for a long period.

The second way: apart from the initial FDC which cannot last longer than two years, subsequent renewals are allowed as long as the total sum of all the renewals altogether do not exceed the maximum period of two years. This means that the allowable length for combined renewals is two years only. If we accept this reading, the maximum period of FDC—initial contract plus any renewal(s)—is four years maximum. This reading seems less controversial than the one mentioned above but still won't hold its ground when viewed against the argument expounded by the arbitrators below.

The third way: the total length of FDC—the initial contract and any renewal(s) thereof combined—cannot be longer than two years. This has been the reading adopted by the Arbitration Council since the begininig. In this Lean Global Textile case, the arbitrators continue to apply their interpretation by which the total length of FDC (initial plus renewals) cannot exceed two years. Their well-known argument was first produced in one of their very early cases in 2003 under Award No.10/03 Jacqsintex Garment Co., Ltd, dated 23 July 2003, which reads as follows:

[...] However, because the law on this point is not clear it is proper for the Arbitration Council to consider the context of this Article in order to understand its intended meaning. The Cambodian labor law has a bias toward contracts of undetermined duration as expressed in Art. 67(7) & (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 Art. 73(5) provides that contracts of specified duration [shall] be converted to contracts of undetermined duration where there is no notice of termination and [when] their “total length exceeds the time limit specified in Article 67.” Because Art. 73(5) refers to the total length of time specified in Art. 67(2) the Arbitration Council understands that the period of two years specified in Art. 67(2) is also a maximum total duration and not the duration of an individual renewal. This interpretation is also supported by international labor standards; namely paragraph 3 of ILO Recommendation 166 of 1982 regarding Termination of Employment which provides that contracts of fixed duration should not be used for long term employment. This Recommendation of the ILO also 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. Finally, looking at the history of the 1997 Labor Law we see that it was drafted in French and then translated into Khmer. Although the Khmer version of the law was adopted by the National Assembly Art. 67(2) is not clear. For this reason we can look at the original French in order to gain a better understanding of the Khmer version. Art. 67(2) in French reads: *Le contrat de travail conclu pour une durée déterminée ne peut être conclu pour une durée supérieure à deux ans. Il peut être renouvelé une ou plusieurs fois pour autant que le renouvellement n’entraîne pas un dépassement de la durée maximale de deux ans [...].* (Award 10/03, Reasons for Decisions, Issue 1).¹³

When translated into English, this original version shall read: “The employment contract made for a specified period cannot be concluded for a period longer than two years. This contract may be renewed once or multiple times as long as the renewal does not cause an exceeding of the maximum period of two years.” As such, renewals are permitted so long as such action won’t affect the maximum period of two years. Thus, it is crystal clear that the original intention is to ensure that the maximum period of two years will not be exceeded in any way in spite of any renewal. It is worth noting that the current labor law in France, in principle, limits FDC to a maximum period of 18 months.¹⁴

Conclusion

This review has demonstrated the will of the Arbitration Council to reinforce its jurisprudence in three important areas of industrial relations: the most representative status of a trade union, the order to return to work for strikers, and the controversial understanding of fixed duration contracts. In each of the three areas, the Council did not hesitate to apply its caselaw and has shown no sign of wanting to reverse its opinions.

As regards the most representative status, litigants would do well to understand what constitutes an interest-based claim, for this would require this particular status or the case will be dropped. Likewise, employees must obey the arbitrators' order to return to work if they want the Council to continue with the proceedings. Lastly, the FDC controversy should be laid down to rest. Unless the 1997 Law is amended to say otherwise, the interpretation of the Arbitration Council concerning the length of FDC remains the most logical one and should be upheld.

Viewed altogether, the caselaw of the Arbitration Council will likely continue to stand the test of time and provide a sense of juridical stability for many years to come.

ENDNOTES AND REFERENCES

¹ Dr. Virak Prum is an Adjunct Professor of Law and teaches courses in *Cambodian Business Law* program at CamEd Business School. Professor Virak holds LLB, LLM (Japan), PhD (Japan). Article submitted in October 2018.

² The Arbitration Council effectively began functioning with *Prakas* No. 338 dated 11 December 2002 on Arbitration Council, with an Annex on procedural rules. This *Prakas* was later replaced by another *Prakas* No. 099 dated 21 April 2004 with a revised Annex on procedural rules which remain effective until this day.

³ The award 02/03 dated 21 May 2003 (involving Chou Sing Garment C/L) had an arbitrator named Kim Leong Lee chosen by the employer sitting on the arbitration panel, whereas the award 03/03 dated 11 June 2003 (involving Tonga Garment Co., Ltd) had an Australian lawyer chairing the 3-member arbitration panel.

⁴ See The Arbitration Council Digest. #1 of 2003, dated 10 August 2003, p.4. Available at http://www.arbitrationcouncil.org/kh/ac_decisions/decisions-digest (accessed on 05 April 2016).

⁵ For these two concepts in a comparative view, See Virak Prum (2016). *A Note on Constitutional Principle: Same Work, Same Wage?* (Available on <https://drive.google.com/file/d/0BzHgXFrA8q7lUnlrTFI5RFFkaG8/view>) and Virak Prum (2016). *Non-Competition Clause in the French Labor Law* (Available on <https://drive.google.com/file/d/0BxOaYhs9pC6QMGY3MHVhVzNka3c/view>)

⁶ This Award is available at <http://www.arbitrationcouncil.org/kh/ac-decisions/arbitral-decisions> (Award No. 36/18 Evergreen Apparel (Cambodia), dated 02 October 2018)

⁷ 1997 Labor Law (Article 302): A collective labor dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations

within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peacefulness.

⁸ In Phnom Penh, the written recognition would be issued by the Director of the Labor Dispute Resolution Department. In the provinces, by the Director of the Provincial Labor and Vocational Training Department.

⁹ This Award No. 035/18 is available at <http://www.arbitrationcouncil.org/en/ac-decisions/arbitral-decisions> (accessed on 09 October 2018).

¹⁰ While there are plenty of cases in which the Arbitration Council ended the proceedings due to ongoing strikes, the Council has not yet interpreted the meaning of a strike. If we follow the French jurisprudence, however, a strike happens only when a few elements are met: first, the work stoppage must be real, complete (not partial) and, secondly, the work cessation comes from a collective agreement (though it doesn't matter if the strike only affects a section of the staff). Then, there is also the issue of what may qualify as "professional demands" (revendications professionnelles). See Françoise Favennec-Héry & Pierre-Yves Verkindt (2016, 5e edition). *DROIT DU TRAVAIL*. Issy-les-Moulineaux: LGDJ, p. 185-189.

¹¹ This Award No. 022/18 is available at <http://www.arbitrationcouncil.org/en/ac-decisions/arbitral-decisions> (accessed on 09 October 2018).

¹² Unfixed Duration Contract generally gives more benefits to workers as it provides a sense of job security in that the employer may not terminate UDC easily. Except for serious misconduct and Act of God, UDC may only be terminated by the employer if there is a proven issue of aptitude or behavior inconsistent with the operations of the company. Even then, the employer must still serve a prior notice (ranging from 7 days to 3 months prior) during which the employee gets two days off (paid) to look for another job. See Articles 75, 79, 82 of the 1997 Labor Law. A recent amendment to the 1997 Law (amendment dated 26 June 2018) has made UDC even more appealing by creating "seniority pay" effective from 1st January 2019. Moreover, this amendment together with Prakas 443 (dated 21 September 2018) have gone further in so far as to require employers to back-pay some seniority pay to their current staff for the years of service before 2019 as well; such back-pay amount is equal to 15 days of pay (30 days for garment workers) per each year of service, although it is capped at a maximum 6-month worth of basic salary. See Presentation slides of the Ministry of Labor and Vocational Training, dated 23 September 2018. On file with author.

¹³ This Award No. 10/03 is available at <http://www.arbitrationcouncil.org/en/ac-decisions/arbitral-decisions> (accessed on 09 October 2018).

¹⁴ See Antoine Mazeaud (2014, 9e edition). *Droit du travail*. Issy-les-Moulineaux: LGDJ, p. 366. The French *Code du Travail* regulates the maximum period of FDC in its Art. 1242-8-1. See *Code du Travail* 2017-2018 (80e edition). Dalloz: Paris.

