Vol 6, No 1, January - June 2021, pp: 45 - 50

Faculty Publications
ISSN: 3008-1017
Title DOI: https://doi.org/10.62458/021024

Change of Employer: Recent Cases on Job Security

Virak Prum*

ABSTRACT

Article 87 of the Labor Law 1997 as amended in 2018 reads: "If a change occurs in the legal status of the employer, such as by succession or inheritance, sale, merger or transference of fund to form a company, all employment contracts in effect on the day of the change remain binding between the new employer and the workers of the enterprise." This short article reveals key conceptual understandings governing the logic of this law by analyzing two recent labor arbitration cases. Job security seems indeed guaranteed as a matter of law but more needs to be done.

Keywords: change of employer, termination, job security.

As in many countries around the world, job security in Cambodia is unstable, especially for garment factory workers many of who are employed on short-term contratcs.[1] When the ownership of the company passes hands, stress increases for everyone. For employees, questions are abundant. Among others, will they still have the job? If so, will the new owner keep things the way it was? Can they ask for some sort of compensation from the old owner? For the employer side, their right to make changes to the way work should be performed is not sacred. Workers will most certainly challenge any changes to the status quo which they perceive as not benefiting them. Whereas the employer rightly wants to make money by introducing new methods in the performance of the work, the employees stand to fight to retain their assured wages and benefits. Thus, here lies the difficulty in striking a good balance between the freedom to undertake and the duty of subordination— two concepts to be taken from the French context since Cambodia's labor law is essentially a translation of the French labor law— to which I now turn.

EMPLOYER'S FREEDOM TO UNDERTAKE

Commonly known in the French legal parlance as la liberté d'entreprendre—which we may call freedom to undertake—this freedom was first implied in the most sacred republican text issued following the French Revolution in 1789. The Law of 2-17 March 1791 came to expressly recognize this freedom.[2] Although the recognition of this freedom to undertake represented one of the most significant politico-economic developments because the economic activities in the seven centuries prior to the Revolution had been strictly delimited, its constitutional status was only confirmed two centuries later in 1982 by the French Constitutional Council.[3] The freedom to undertake effectively empowers a person (employer) to engage in two spheres of actions: freedom in economic activity and freedom in the structural organization of the enterprise.[4]

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

Closely related to the freedom to undertake, actually even inseparable from it, is the freedom to work or la liberté du travail because, as a leading jurist in the French labor law puts it, "there can neither be employee without an entrepreneur, nor a veritable enterprise without employees."[5] The French highest court la Cour de cassation called freedom to work a "fundamental principle of the free exercise of a professional activity."[6] But employees, being such, shall obey the right of the employer to manage and direct them. Subordination is the single most important element in qualifying a relationship as an employment relationship.

EMPLOYEE'S DUTY OF SUBORNATION

Morally, being "subordinate" is being "subject to the authority or control of another."[7] The French jurisprudence[8] has used the term juridical subordination (subordination juridique) since the famous decision Bardou in 1931 which

characterized an employment contract on the basis of the employee's personal submission to orders and directives of the employer. But the law has evolved, and it is now more appropriate to speak of functional subordination (subordination fonctionnelle) as a matter of being integrated in an organization. Over the years, the French jurisprudence has developed an interpretative technique to discern several indicators or signs for the existence of subordination. This technique lists, among others, the following signs, none of which is necessarily self-sufficient: Imposition on the time and place to perform work; Respect for procedures; Obligation to report; Modality of remuneration; Provision of tools to perform work; Exclusivity clause or non-competition clause.

All of these signs reinforce the idea of employees being integrated into an organized service, which was only a sign of subordination and that the actual subordination remained "characterized by the execution of a contract under the authority of an employer who has the power to give orders and directives, to control the execution and to sanction any breaches committed by the subordinate."[9] Put differently, the duty of subordination is derived from three types of power enjoyed by an employer: power to direct, power to regulate, and power to discipline.[10]

RECENT CASES AT THE ARBITRATION COUNCIL

The following two recent cases heard by the Cambodian Arbitration Council could shed some light on how job security may be guaranteed in the event there is a change of employer. They may also drop some hints about the scope of the employer's power to introduce changes, and on how the Arbitration Council would go about proving the existence of consent.

045/18 Quantum Clothing Cambodia, 18 December 2018

Movements of staff within the production process flow

The central question in this Arbitral Award [Quantum Clothing (Cambodia), Co., Ltd][11] was whether the new employer would have to clear certain preexisting obligations to employees. It is understandable that employees would be worried, although the new employer does not intend to terminate any contract, if the new employer refused to honor the preexisitng obligations owed to them by the former employer. Perhaps, mentally speaking, they may want their previous life to be cleared before moving on to a fresh start under the new employer.

In this labor dispute, the new employer Quantum Clothing (Cambodia) had introduced changes to the production methods whereby 75 employees who had previously been earning based on the quantity each of them would produce, got redirected to work in a new production process flow. This change was meant to be a pilot, a trial project to see whether this could help boost the productivity, to help improve the company's underperforming financial outlook. But the concerned employees argued that working in the new process would make them earn less than before and, therefore, they demanded compensation. Additionally, they contended that the change of the employer[12] (transfer of the enterprise) even amounted to terminating their employment relationships; as such, they demanded that Quantum Clothing settle (clear) all termination package, namely, pay in lieu of notice, seniority pay and damages as of 6 January 2017, the day when the employees concluded the Agreement on the Change of Shareholders with the new employer.

In addressing these demands, the Arbitration Council had to interprete (new) Article 87 of the Labor Law 1997 as amended in 2018, which reads: "If a change occurs in the legal status of the employer, such as by succession or inheritance, sale, merger or transference of fund to form a company, all employment contracts in effect on the day of the change remain binding between the new employer and the workers of the enterprise." This Article 87 must be understood as creating a legal assurance by which employees shall not lose their job just because there is a new owner of the company. It is worth noting that this Article 87 is a word for word adaptation from the French Labor Code's Article L.1224-1, which presently reads: "Lorsque survient une modification dans la situation juridique de l'employeur, notamment par succession, vente, fusion, transformation du fonds, mise en société de l'entreprise, tous les contrats de travail en cours au jour de la modification subsistent entre le nouvel employeur et le personnel de l'entreprise." In furthering the idea that this Article is designed to protect jobs, one leading scholar in the French labor law rightly states that "In summary, nothing has occurred. The change of employer is neutral."[13] In line with this understanding, the Arbitration Council explained that the new employer must uphold any existing employment contracts:

> ...the Council is of the opinion that when there is a change in the legal status of the employer, all existing employement contracts as of the day the change occurs must remain valid between

> the new employer and employees of the former entreprise.
>
> In this case...the [new] employer does not intend to terminate any employment contracts. In spite of changes in the shares structure, the employer still honors seniority, employment contracts and benefits owed to the employees...The transfer of employees from quantity-based earning unit to a new production process flow was done as a pilot project and that if any employees so transferred would earn less than when they were earning based on quantity, the employer would still pay up the diffirence...
>
> The Council found that this change in the legal status of employer did not breach the (new) Article 87 because the employer keeps honoring the existing contracts. Therefore, the [new] employer has no obligation to yet clear any seniority payment as of 6 January 2017 and termination package, namely, pay in lieu of notice, seniority pay according to the new Article 89 and damages. (Arbitral Award, 045/18, Quantum Clothing Cambodia, pages 13-14)

Although without alluding to the employer's powers to direct and regulate, the Arbitration Council summarily dismissed all the demands made by the employees on the grounds that the change of employer did not amount to any terminations and that indeed the employer still honors all the existing wages and benefits as if no change had occured. The Council was more content in quickly holding that, by virtue of Article 87, job security is indeed guaranteed.

023/19 Qins Textile Cambodia, 26 March 2019

Can employees who remain claim some sort of termination payment?

In a more recent arbitral award handed on 26 March 2019, in a similar case to the Quantum Clothing case, the Arbitraiton Council reiterates its jurisprudence which holds that employees who agree to go on working under the new employer may not demand the new employer to compensate (to clear) what the old employer was owing. In this labor dispute, former employer [Dongbu Summit (Cambodia), Co., Ltd] had transferred all employees to the new employer [Qins Textile (Cambodia) Co., Ltd]. When the new employer asked employees to sign and replace their old contracts with new ones, the employees contended that the signing of the new contracts should amount to actually ending their previous contracts, thereby, entitling them to a termination package.

In particular, the employees demanded the new employer to settle five types of compensation, namely, pay in lieu of notice, seniority pay, damages, pay for unused annual leave, and last or unpaid salary. The Arbitration Council relied on its precedent expounded in Quantum Clothing case which held that:

> The change in legal status from an old employer to a new employer without affecting the employment contract and benefits which the employees were enjoying previously [means that] the new employer is not obligated to settle any termination packakge. (Award, Qins Textile, p.10)

In other words, there were no terminations at all. Interestingly, though, in this Qins Textile case the arbitrators made reference to Article 667 of the Civil Code which essentially states that employer may not transfer employees to another person without the consent of the employees and that employee may not have another person perform his duty on his behalf without first obtaining the consent of the employer. Furthermore, in case of a breach of this Article (absence of consent), either side has right to terminate the employment contract.[14]

Without digging into the various forms 'consent' can take, the Council chose to quickly conclude that the employees' continuation to work normally must be taken to mean that they had effectively given such consent to the transfer, to the change of employer. The Council wrote:

> ...Furthermore, from the change to the new employer until now, employees have continued to work normally without any changes and no employee has been terminated by the employer either. Therefore, in applying Article 667 of the Civil Code and the new Article 87 of the Labor Law, the Council is of the opinion that employees have consented to work for the new employer who also has maintained and honored all existing employment contracts, benefits, and seniority for all. As such, Qins Textile is not obligated to settle any termination package for the employees. (Award, Qins Textile, p.10)

There were no terminations, and thus, the Council dismissed all such claims normally arising out of termination cases.

CONCLUSION

Granted, the Arbitration Council has, on the one hand, followed its own precendent in quickly holding that the change of employer has indeed no effect on existing employment contracts. The old employer may disappear without a trace but the company goes on with staffers. Cambodian labor law intends to create a guarantee for job security for employees, and has been intepreted in that spirit. However, as long as the new employer keeps the status quo and goes on with it, the employees would be unable to demand any imaginary termination payments. In this sense, the employee also seems obligated to honor his employment contract. Article 87 appears to embody a reciprocal obligation on the part of both sides.

On the other hand, more cases are required to help bring in clarity to many remaining pertinent questions. What might happen in case terminations happen just before the change takes place, what if the employer decided to recruit the terminated employee right after the transfer, what if the employee refused to work for the new employer (as per Civil Code Art. 667, not providing 'consent'), may the employee require the emplyer to continue his contract even if the employer does not so wish, and so on. Equally important, determining the true meaning of the phrase "change in the legal status of the employer" can present yet another difficult theoretical question. Article 87 contemplates a few situations (such as by succession...) but these are not the only situations. Until all the above questions get answered, I must say that the current jurisprudence on change-of-employer job security will remain an unfinished affair.

ENDNOTES

1 See Pech Sotheary (2018, August 31). Industrial Relations Up, Job Security Down. Khmer Times, Retrieved from https://www.khmertimeskh.com/528740/industrial-relations-up-job-security-down/

2 This law, known as le décret d'Allarde, reads "… Il sera libre à toute personne de faire tel négoce ou d'exercer telle profession, art ou métier qu'elle trouvera bon…" (any individual will be free to do such trading or exercise such profession, art or craft that he deems good). In the past, the usual legal parlance was la liberté du commerce et de l'industrie (freedom of commerce and industry). It should be noted that the European Union of which France is a member embraces this concept in the Charter of Fundamental Rights of the European Union (article 15 on Freedom to choose an occupation and right to engage in work) which became effective in 2009. The text of the Charter is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT(last accessed in September 2016).

3 Jean-Bernard Blaise and Richard Desgorces (2015). Droit Des Affaires: Commerçants, Concurrence, Distribution. Issy-Les-Moulineaux: LGDJ, p. 308, 310.

4 Alain Supiot (2011). Le Droit du Travail. Paris: Press Universitaire de France, p. 48-50.

5 Alain Supiot, op. cit, at 47.

6 Cour de cassation, chambre sociale, 10 juillet 2002, N° de pourvoi: 00-45135. Text of the decision is available in French at https://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007046365&dateTexte (last accessed in September 2016).

7 http://www.thefreedictionary.com/subordination (accessed in June 2016)

8 This section heavily relies on Alain Supiot, ibid.

9 Cour de cassation (Soc., 16 Nov. 1996, Société générale), in Alain Supiot, op.cit at 72.

10 iibid, at 76-78.

11 This and most awards are available on this link: https://www.arbitrationcouncil.org/en/ac-decisions/arbitral-decisions

12 The new employer concluded an agreement with employee representative and union on 6

January 2017, called Agreement on the Change of Shareholders.

13 Antoine Mazeaud (2014, 9e edition). Droit du travail. Issy-les-Moulineaux: LGDJ, p. 539.

14 The Civil Code appears to give a prominent place to consent, by which nobody may be forced to work for a person or organization against his will. With Cambodian Civil Code being a faithful adaptation of the Japanese Civil Code, Japanese legal experts wrote commentary on every article and provided two examples on how consent in this Article 667 might be thought of. First, for instance, when there is no work for two or three days, if the employer wants to send the employee to work for another employer, he must seek consent from the employee. Likewise, without the employer's consent, an employee cannot ask somebody else to work on his behalf so that he can take time off. See Office of Legal and Judicial Development Project (2010). Commentary of the Civil Code, Part 3. Phnom Penh: JICA, p. 109-10. On File With Author.