

ISSUES IN DISPUTE

(in the non-conciliation report)

According to the non-conciliation report, the following issues are the workers' demand in this case:

The workers demand that the company reinstate 23 workers who are union leaders and founding members of the union in Grand Diamond City. The Grand Diamond City Co, Ltd., refuses to reinstate them because among the 23 workers there are 18 workers for whom the company is reviewing evidence of serious misconduct; as for the five others, the company agrees to pay termination compensation in accordance with the Labour Law [] because the company did not know that those people are [union] leaders and founding members of the union. The company has known [their status] since 13 January 2006.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor Law (1997); the Prakas on the Arbitration Council 99/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators 513/05 (Third 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. But the conciliation hearing was unsuccessful, and the non-conciliation report number 129/MoLVT dated 24 January 2006 was submitted to the Secretariat of the Arbitration Council on 26 January 2006.

HEARING AND SUMMARY OF PROCEDURE BEFORE THE ARBITRATION COUNCIL

Place of hearing: The Arbitration Council, Phnom Penh Center Building "A", Sothearos Blvd;
Tonlebasac; Chamkamorn, Phnom Penh.

Date of hearing: First hearing on 8 February 2006 at 2:00 to 5:00 p.m.
Second hearing on 28 February at 8:00 to 12:00 p.m.

Procedural issues:

On 17 January 2006, the Labour and Vocational Training Office called a meeting to conciliate a [collective] labour dispute between Grand Diamond City Co., Ltd. and the workers at Grand Diamond City. The workers demanded that the company reinstate 23 workers who are leaders and founding members of the union at Grand Diamond City Co., Ltd. The conciliators attempted to conciliate the issues, but the parties to the dispute could not reach an agreement. Thus the non-conciliation issue was sent to the Arbitration Council on 26 January 2006.

After receiving the case both parties to the dispute were invited by the Arbitration Council to a first hearing on 8 February 2006 at 2:00 p.m. Both parties were present at the arbitral hearing. The Arbitration Council attempted to conciliate the non-conciliation issue again, but it was unsuccessful. At the conclusion of the first hearing, the Arbitration Council ordered the parties to send additional documents relating to the case and arguments raised at the hearing by 14 February 2006.

The Arbitration Council called the parties in dispute for a second hearing on 28 February 2006 at 8:00 a.m. Both parties were again present at the hearing. In the arbitral hearing the Arbitration Council invited the witnesses to clarify their arguments; only witnesses from the workers side were present at the hearing.

EVIDENCE

Witnesses and experts:

Witnesses of the worker party who appeared at the hearing:

- Mr. Kem Kimly Vice President of Worker Union at Grand Diamond City;
- Mr. Mey Bros Senior Advisor of Worker Union at Grand Diamond City;
- Leng Soknheun Accountant of Worker Union at Grand Diamond City.

Witnesses of the employer party who [were requested to, but] did not appear at the hearing:

- Mr. Ay Khom Roithna Soun
- Mr. Tes Savuth
- Mr. Hy Yon
- Mr. Mom Sarong

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

- Statute of Grand Diamond City Private Limited Company registered on 7 February 2002.
- Business license No. Co-5852/02P dated 7 February 2002 of Grand Diamond City Private Limited Company.
- Internal Work Rules of Grand Diamond City Private Limited Company.
- Letter from Grand Diamond City Private Limited Company addressed to H.E Minister of the Ministry of Labour and Vocational Training on the issue of Mr. Ing Lysreng, Union President of workers at Grand Diamond City.
- Delegating letter of Grand Diamond City Private Limited Company to attorney Hak Seakly and Bun Honn.
- Legal memo from the attorney of Grand Diamond City Private Limited Company dated 6 February 2006.

- Clarification letter of Mr. Ay Khom Roithna Soun
- Clarification letter of Ms. Chy Rapan Khananith
- Additional legal memo of the attorney of Grand Diamond City Private Limited Company.

Provided by the worker party:

- Registration certificate No. 861/MoLVT dated 30 December 2005 of the Worker Union at Grand Diamond City.
- Letter No. 2056/MoLVT dated 30 December 2005 of the Ministry of Labour and Vocational Training on the approval for Worker Union registration at Grand Diamond City.
- Application form for registration of Worker Union at Grand Diamond City dated 16 November 2005 to H.E minister of the Ministry of Labour and Vocational Training.
- Receipt acknowledging the application form issued by Labour Dispute Department of the Ministry of Labour and Vocational Training dated 25 November 2005.
- Minute of inquiry of Grand Diamond City dated 25 November 2005 on the reason why the workers climbed to the 9th floor
- Notice of Worker Union at Grand Diamond City dated 19 November 2005 to the General Manager of the company in respect of the election held on 15 November 2005 and introduction of union/worker leaders at Grand Diamond City (with an attached translation (into English) document)
- Biography of three union leaders
- Job announcement from Grand Diamond City for the position of [card] dealer and dealer inspector held from 2 to 5 January 2006 at 9:00 a.m. to 4:30 p.m.
- Survey form – [regarding necessity of union]
- Minute dated 30 October 2005
- Minute dated 15 November 2005
- Two minutes dated 25 November 2005
- Minute dated 9 December 2005
- Three minutes dated 10 December 2005
- Two minutes dated 11 December 2005
- Minute dated 14 December 2005
- Minute dated 28 December 2005
- Minute dated 29 December 2005
- Minute dated 5 January 2006
- Minute dated 7 January 2006

- Announcement of Grand Diamond City notifying its staff about changing their decisions about joining the union
- List of 12 workers who voluntarily established the Worker Union
- Announcement dated 15 January 2006 of Grand Diamond City providing notification about signing written employment contracts
- Announcement dated 16 January 2006 of Grand Diamond City providing notification about a request for all workers to fulfill their roles in accordance with the Labour Law, Internal Work Rules and instructions of the company.

Provided by the Ministry of Labour and Vocational Training [MoLVT]:

- Report on collective labour dispute resolution at Grand Diamond City No. 129/MoLVT dated 24 January 2006.
- Minute on collective labour conciliation dated 17 January 2006.
- Appointment letter No. 065/MoLVT dated 13 January 2006 nominating Mr. Khiev Savuth, Vice Director of Labour Dispute Department to conciliate the dispute at Grand Diamond City.
- Letter No. 026/MoLVT dated 18 January 2006 of the Ministry of Labour and Vocational Training to the Arbitration Council help resolve the dispute.

Provided by the Secretariat of the Arbitration Council:

- Invitation letter No. 047/SAC dated 2 February 2006 inviting the employees to appear at the hearing.
- Invitation letter No. 046/SAC dated 2 February 2006 inviting the employer to appear at the hearing.
- Invitation letter No. 069/SAC dated 20 February 2006 inviting the employees to appear at the second hearing.
- Invitation letter No. 068/SAC dated 28 February 2006 inviting the employer to appear at the second hearing.

FACTS

Grand Diamond City Co., Ltd. is located at Kbal Spean, Poipet commune, Ou Chhrauv district, Banteay Menchhey province and employs 1300 workers.

- Having examined the report on the collective labour dispute conciliation
- Having listened to arguments by representatives from both the employer and employees

- Having listened to witnesses in the hearing
- Having checked all documents obtained from both employer party and employee party.

The Arbitration Council finds that:

- ♦ The following names of workers are the plaintiff workers in this case (**List No. 1**):
 - 1- Mr. Ing Lysreng
 - 2- Mr. Nhem Rathana
 - 3- Mr. Kong Rithy
 - 4- Mr. Chan Sereyrun
 - 5- Mr. Heng Sith
 - 6- Mr. Paung Sinvannak
 - 7- Mr. Sem Rany
 - 8- Mr. Vong Borey
 - 9- Mr. San Sokhunthea
 - 10- Mr. Seng Bunheng
 - 11- Mr. Tenn Nora
 - 12- Mr. Po Sok
 - 13- Ms. Siem Eang
 - 14- Ms. Ning Thokchhing
 - 15- Ms. Kiem Chhenglon
 - 16- Ms. Lim Pean
 - 17- Ms. Hok Sreyaun
 - 18- Mr. Mech Malone
 - 19- Mr. Chea Pov
 - 20- Mr. Ya Phirum
 - 21- Mr. Hok Chamroeun

- ♦ Mr. Seng Samoul and Mr. Bol Samath who were [members of the original 23 plaintiffs in this case, were later] reinstated, and thus there are only 21 workers who [are parties to] the complaint for reinstatement.

- ♦ Grand Diamond City Co., Ltd. dismissed the following workers:
 - Mr. Ing Lysreng, Union President of the Worker Union at Grand Diamond City dismissed on 18 November 2005.

- Three workers, Mr. Nhem Rathana (Senior Advisor to the union), Mr. Kong Rithy (Advisor to the union) and Mr. Chan Sereyrun (Advisor to the union), dismissed on 11 December 2005.
- Mr. Heng Sith (Activist of the union) dismissed on 14 December 2005.
- Three workers, Mr. Kem Kimly (Union Vice President), Mr. Leng Soknheun (Accountant), Mr. Mey Pros (Senior Advisor), dismissed on 25 Nov 2005.
- Three workers [dismissed] on 11 December 2005 included Mr. Nhem Rathana (Senior Advisor), Mr. Kong Rithy (Advisor), Mr. Chan Sereyrun (Advisor).
- Mr. Heng Sith (Activist) [dismissed] on 14 December 2005.

18 workers on 31 December 2005 as listed below (**List No. 2**):

- 1- Mr. Sem Rany
- 2- Mr. Vong Borey
- 3- Mr. San Sokhunthea
- 4- Mr. Seng Bunheng
- 5- Mr. Tenn Nora
- 6- Mr. Po Sok
- 7- Ms. Siem Eang
- 8- Ms. Ning Thokchhing
- 9- Ms. Kiem Chhenglon
- 10- Ms. Lim Pean
- 11- Ms. Hok Sreyaun
- 12- Mr. Mech Malone
- 13- Mr. Chea Pov
- 14- Mr. Ya Phirum
- 15- Mr. Hok Chamroeun
- 16- Mr. Paung Sinvannak
- 17- Mr. Bon Long
- 18- Ms. Reun Veasna

- However, Mr, Bon Long accepted to have damages provided by the Company; and Ms. Reun Veasna was reinstated on 18 January 2006.
- Two more workers were dismissed on 1 January 2006; Mr. Mech MaLone (union member) and Mr. Chea Pov (union member).
- Mr. Ya Phirum (union member) was [also] dismissed on 1 January 2006.

- ♦ The workers of the Grand Diamond City organized an election for the union at Grand Diamond City, [officially] named “Worker Union at Grand Diamond City” on 15 November 2005 at 8:00 a.m. at a guest house, Hang Means Thmey, in Baleley

village, Poipet commune, Ou chhrauv district, Banteay Menchey province. The following were elected as union leaders:

- Mr. Ing Lysreng Union President;
- Mr. Kem Kimly Union Vice President;
- Mr. Po Ech Secretary General of the union.

- ♦ Among the workers who are the direct parties in dispute in this case, the following workers were candidates standing for union election on 15 Nov 2005 (**List No. 3**):

- 1- Mr. Ing Lysreng
- 2- Mr. Chan Sereyrun
- 3- Mr. Kong Rithy
- 4- Mr. Nhem Rathana.

- ♦ Among the workers who are the direct parties in dispute in this case, the following workers participated the union election (**List No. 4**):

- 1- Mr Ing Lysreng
- 2- Mr. Nhem Rathana
- 3- Mr. Kong Rithy
- 4- Mr. Chan Sereyrun
- 5- Mr. Heng Sith
- 6- Mr. Mech Malone
- 7- Mr. Seng Bunheng
- 8- Mr. Tenn Nora
- 9- Mr. Po Sok
- 10- Ms. Siem Eang
- 11- Ms. Hok Sreyaun (Thok Sreyaun).

- ♦ Among the workers who are direct parties to the dispute in this case, the following are workers for whom the Arbitration Council did not receive any supporting documents certifying their position. Apart from workers' arguments in the hearing that such workers were union members during the period of union registration, [there is no evidence to find] they participated in the election (**List No. 5**):

- 1- Mr. Sem Rany
- 2- Mr. Vong Borey
- 3- Mr. San Sokhunthea
- 4- Ms. Ning Thokchhing

- 5- Ms. Kiem Chhenglon
- 6- Mr. Pau Sinvannak
- 7- Mr. Chea Pov
- 8- Mr. Ya Phirum
- 9- Ms. Lim Pean

- ♦ Mr. Hok Chamreun joined the union after the union had registered according to his testimony in the hearing. Mr. Hok Chamreun argued that he was dismissed by the company because his wife had joined the union that was just established and [she] is union activist. [He also testified that] he had never committed misconduct in the period since starting work.
- ♦ The Worker Union at Grand Diamond City submitted an application form for its union registration at the Ministry of Labour and Vocational Training on 16 November 2005 and received the receipt of registration on 25 November 2005. The Ministry officially recognized the Worker Union at Grand Diamond City through its registered letter No. 861/MoLVT dated 30 December 2005 and the terms of its letter No. 2056/MoLVT dated 30 December 2005 of the Ministry.
- ♦ On 21 November 2005, Worker Union leader at Grand Diamond City, Mr. Kem Kimly brought along with him an envelope to the General Manager of the Grand Diamond City company to notify him about the union election of the Worker Union at Grand Diamond City and to schedule an appointment with him in order to introduce him to the panel of union leaders. The contents of the envelope consist of:
 - Notification letter and introduction letter regarding the panel of union leaders (both in Khmer and in English);
 - List of names of union leaders
 - List of candidates standing in the union election.

The envelope was sent to the administration management team at Grand Diamond City, Mr. Ay Khom Roithna Soun (Administration Manager) and Mr. Nhoun Mouv (Assistant to the Administration Manager) on 21 November 2005, but the administration management team refused to accept the envelope and handed it back over to Mr. Kem Kimly after opening it.

- ♦ On 25 November 2005 about 9:00 a.m. five [union] officials, Mr. Kem Kimly, Mr. Mey Bros, Mr. Leng Soknheun, Mr. Ouch Sambath, and Mr. Nhem Rathana of the Worker Union at Grand Diamond City [sought out] the General Manager again at his office on the second floor of building "RCA" in order to meet and to deliver the envelope to him at his office. They were told by the Chief Security Guard to wait

for the General Manager, and then the Chief [Security Suard] told them that the General Manager was busy and could not meet them.

- ♦ The workers argued that on the second floor, they met the Chief Security Guard, Mr. Hy Yon and told him their intention to meet General Manager. They also met the secretary to the General Manager.
- ♦ On the same day, three members of the Worker Union, Mr. Kem Kimly, Mr. Mey Bros and Mr. Leng Soknheun agreed to continue sending their letter to the employer of the company (Mr. Oy) on the 9th floor, which is his resident office. They did not meet the company's employer, but they did meet Mr. Hy Yon, Chief Security Guard and Ms. Chom ([also] called (Ms. Chy Rapan Khananith,) of senior management.
- ♦ After returning from the 9th floor, union officers met [members of the management team, including] Mr. Ay Khom Rothan Soun, Ms. Chy Raphon (called Ms. Chom) and Mr. Hy Yon in the meeting room on the second floor.
- ♦ At the meeting, the management team accused the three union officials of making a mistake by climbing to the 9th floor which is the resident [office] of Mr. Oy, but [stated that] because this was their first mistake and it was not serious, the company would pardon them. Union officers delivered to Ms. Chom the envelope package intended for the company's [Head] and Ms. Chom received the envelope. The union officials left the meeting room and went back to work.
- ♦ At about 3:00 p.m. on the same day, the three union officials were summoned to the administration office where there were four people from the company, Mr. Mr. Ay Khom Roithna Soun, Mr. Tes Savuth, Mom Sarong and Mr. Hy Yon. The three union officials were told that the company had decided to dismiss them and returned the envelope [and its contents] to the union officers.
- ♦ In late 2005, a survey was conducted on whether a union was needed or not through an inquiry form. [This form] did not include the company's name or any signatures of the management team.
- ♦ The employment contracts between the employer and the employees who were dismissed were made verbally and can be considered undetermined duration contracts.
- ♦ The company made an announcement on 15 January 2006 asking the workers to sign written contracts for a duration of 6 months.
- ♦ The employer is conducting an investigation about whether there is evidence of serious misconduct perpetrated by certain workers, including 15 workers for whom the employer is considering whether to pay indemnities.

- ◆ Two workers, who are not union members and are not involved in this dispute, confessed that [they] committed misconduct as accomplices to other workers in stealing/cheating money from the company and were involved with other accomplice workers in their line and group sections [of the company].

REASONS FOR DECISION

Article 293 of Labour Law states that “The dismissal of a worker delegate or candidate for worker delegate can take place only after authorization from the Labour Inspector.”

Paragraph 3 of Prakas 305 states that *“Any worker belonging to a union who runs for a leadership position in that union shall enjoy the same protection from dismissal as a worker delegate. This protection begins 45 days prior to the election and ending, if she/lie is not elected, 45 days after the election. To this end, the employer must be duly informed of the candidacy by any reliable means.”*

Article 4 of the Prakas 305 provides *“this protection to workers who are founding members of the union and who voluntarily join the union. This protection lasts at least 30 days after registration date of union. To receive this protection, the union must notify the employer about the identities of the protected people through all reliable means and a copy this communication sent to Ministry of Labour and Vocational Training.”*

In 50/05 – Fortune, the Arbitration Council determined that in order to have such worker protection according to the law the following conditions must be fulfilled: (i) workers are those who are set forth in Prakas 305, (ii) the dismissal of the workers is within the period of protection and (iii) the workers must have notified the employer about the identities of protected workers by any reliable means.

According to the facts, workers in List No. 1 are included among those in List No. 4, Mr. Ing Lysreng, Mr. Nhem Rathana, Mr. Kong Rithy, Mr. Chan Sereyun, Mr. Heng Sith, Mr. Mech Malone, Mr. Seng Bunheng, Mr. Tenn Nora, Mr. Po Sok, Ms. Siem Eang, Ms. Hok Sreyaun, and includes those in List No. 5, Mr. Sem Rany, Mr. Vong Borey, Mr. San Sokhunthea, Ms. Nin Thokching, Ms. Kiem Chhenglon, Mr. Pau Sinvannak, Mr. Chea Pov, Mr. Ya Phirum and Ms. Lim Pean is separately from Mr. Hok Chamroeun.

According to the facts, the workers in List No. 4 are those who went to cast a ballot for the union leaders. The Arbitration Council finds that they were [union] members during the period of [union] registration, covered under Prakas 305. The workers in List No. 5 did not provide documents to certify their membership to the union or the time at which they joined the union, only their argument at the hearing. Thus, the Arbitration Council finds that there is not enough evidence to identify those in List No. 5 as union members during the

period of registration. As for Mr. Hok Chamroeun, he argued at the hearing that he joined the union after the union had registered and after the company had dismissed him.

Thus the Arbitration Council finds that only the workers in List No. 4 fulfill the first condition [for the worker protection as set forth above]. Moreover, the workers in List No. 4 include Mr. Ing Lysreng who was dismissed three days after the election; the others were dismissed during the period of [union] registration and within 30 days after the union obtained the certificate of registration dated 30 December 2005. This proves that their dismissal was during the period of special protection.

Therefore the workers in List No. 4 fulfill two of the three conditions [in respect of the worker protection as set forth above].

Did the workers notify the employer about the identity of those who are entitled to special protection through any reliable means?

In the hearing, the employer's lawyer argued that the Company did not receive any notification about the union election, union candidates, founding members or union members. But the workers argued that they attempted many times to provide an envelope with information (both in Khmer and English) related to the union - such as minutes of the election and the workers who participated in the election - to the employer, but the employer refused.

According to Prakas 305 the Arbitration Council finds that this provision does not refer to any specific "reliable means" which the union must follow in order to introduce their leaders to the Company. The purpose of this regulation is only to ensure that the Company has learned about the panel of union leaders to avoid violating the rights of the union leaders who are protected and to ease employment relations between the Company and the union.

According to the facts and evidence, the Arbitration Council finds that the worker party did attempt to notify the employer about their information related to the identities of those in the union who are specially protected (List No. 4). In addition, the worker party had handed over the envelope to the manager at the meeting on 25 November 2005, but later the envelope was returned back to the union officers in the afternoon of the same day; the envelope had not been opened, and meanwhile they were dismissed.

Even though the envelope had been returned back without having been opened, the Arbitration Council finds that the workers did attempt to notify the employer about information related to its union through reliable means. The fact that the employer failed to open the envelope cannot be considered as not notifying the company.

Thus the Arbitration Council finds that the workers in List No. 4 have fulfilled the above three conditions and must be entitled to special protections which require the employer to ask permission from the Labour Inspector in advance before dismissing them regardless whether there is a reason or not. In this instance, the company dismissed the

workers in List No. 4 without providing notification in advance or approval from the Labour Inspector of the Ministry.

Therefore the Arbitration Council finds that the company must reinstate such workers.

Regarding workers in List No. 5 and Mr. Hok Chamreun, the Arbitration Council finds that they are not entitled to special protections because they do not fulfill the three conditions above. The worker party argued that the company dismissed them because they are union members. Does their dismissal constitute discrimination against the union or not?

Article 12 of the Labour Law states that *“Except forno employer shall consider on account of membership of workers’ union or the exercise or union activities to be the invocation in order to make a decision on: hiring ... or ... termination of employment contract..”*.

Article 279 of the Labour Law states that *“Employers are forbidden to take into consideration union affiliation or participation in union activities when making decision s concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal”*.

In the hearing the employer’s representative argued that the company did not know who were union members and also did not receive any notification from the union members.

According to the facts and evidence provided to the Arbitration Council, the Arbitration Council finds that the workers’ argument did not have enough supporting evidence in order to persuade the Arbitration Council to believe that the workers in List No. 5 were union members when they were dismissed. Moreover, the worker party failed to send the identities of their union members to the Arbitration Council or to the employer either. Therefore the Arbitration Council finds that the workers’ argument that the company discriminated against the union cannot be accepted.

Whereas Mr. Hok Chamreun was dismissed by the company on 31 December 2005, one day after the date of union registration, he argued in the hearing that he had never committed any misconduct [in the time] since he was offered his job at the company. However, because his wife, Ms. Siem Am, is a union activist (her name is in List No. 4) and was also dismissed by the company on 31 December 2005, he was dismissed too.

Apart from Mr. Hok Chamreun’s testimony in the hearing, the worker party failed to send additional documents as evidence in order support his argument, thus the Arbitration Council finds that Mr. Hok Chmareun’s argument regarding his dismissal is not taken into account and does not provide sufficient evidence to convince the Arbitration Council to believe that his dismissal was an act of discrimination against the union.

In this case the Arbitration Council notes that the company dismissed the workers without providing any valid reason and did not give prior notice to them, and only told them that [they] were terminated on the day it handed over the letters of termination. According to

the Labour Law if the employer terminates the employment contract without any valid reason in accordance with the Law and fails to provide prior notice, the workers are entitled to damages and other benefits determined in the Labour Law, apart from compensation that is equal to one month of wage.

However in this case the worker party only demanded reinstatement by the company; they did not demand compensation for termination of their employment contracts, thus the Arbitration Council does not consider and decide on this instance.

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

DECISION

1. Order the company reinstate the workers in List No. 4 after this award comes into effect.
2. Reject the workers' demand for reinstatement of Mr. Hok Chamreun and workers in List No. 5.

Type of Award: Non binding award

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition with the Secretariat of the Arbitration Council within this time period.

Signatures of Members of the Arbitration Panel:

Arbitrator chosen by the employer party:

Name: **Ly Tayseng**

Signature:

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature:

Chair of arbitration panel:

Name: **Tang Try**

Signature: