



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល**

**THE ARBITRATION COUNCIL**

**Case number and name: 100/07- Hoyear Cambodia**

**Date of Award: 24 October 2007**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATION PANEL**

Arbitrator chosen by the employer party: **Seng Vuochhun**

Arbitrator chosen by the worker party: **Ven Pov**

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

#### **DISPUTING PARTIES**

##### **Employer party:**

Name: **Hoyear (Cambodia) Garment Limited**

Address: National Road 2, Sangkat Chak Angre Leu, Khan Mean Chey, Phnom Penh

Telephone: 016 577 789 Fax: N/A

Representative:

- |                       |                             |
|-----------------------|-----------------------------|
| 1. Mr. Huot Chamnan   | Chief of Administration     |
| 2. Mr. Im Pich Sangva | Assistant to Administration |

##### **Worker party:**

Name: **Khmer Youth Federation Trade Union (KYFTU) and local Khmer Youth Trade Union (KYTU) at Hoyear Company**

Address: National Road 2, Sangkat Chak Angre Leu, Khan Mean Chey, Phnom Penh

Telephone: 012 990 227 Fax: N/A

Representative:

- |                |   |
|----------------|---|
| 1. Tith Vannak | Officer of KYFTU                            |
| 2. Sorn Piseth | Officer of KYFTU                            |
| 3. Hin Borey   | President of local KYTU at the factory      |
| 4. Kong Sinuon | Vice-president of local KYTU at the factory |

## **ISSUES IN DISPUTE**

(In the Non-Conciliation Report)

1. The workers demand that the Company reimburse medical check fees for all workers who had medical check because this is stated in the Labour Law. The Company does not respond to this demand immediately and requests one more month to get approval from the owner.
2. The workers demand that the Company reinstate the two leaders of KYTU (Hin Borey and Kong Sinuon). The Company party cannot reinstate Hin Borey and Kong Sinuon because the company has already terminated their contracts.
3. The workers demand that the company cancel fixed duration contract for workers who have been working for more than two years. The Company does not agree because it follows the Labour Law.
4. The workers demand that on the occasions when the Company has no work for the workers (for a short period of time) and when the workers arrive at the Company and the Company tells them to go back home, it has to provide full wages; and backpay wages for the previous suspensions. The Company does not agree to the demand.
5. The workers demand that the Company not use probationary employment contracts which means that it has to make full rights contracts right away and provide a copy of the contract to the workers. The Company does not agree to the demand because it follows the Labour Law (Article 68).
6. The workers demand that the Company pay the 5% [severance pay] owed to workers over the last two years and [when calculating the severance pay, this should] include the probationary employment period. The Company party cannot provide an answer now but requests one more month to consider and get approval from the owner.

## **JURISDICTION OF THE ARBITRATION COUNCIL**

The 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 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. 076 dated 10 May 2007 (Fifth 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 hearing was unsuccessful, and the non-conciliation report No. 1024 K.B/AK/VK dated 19 September 2007 was submitted to the Secretariat of the Arbitration Council on 19 September 2007.

## **HEARING AND SUMMARY OF PROCEDURE**

**Place of hearing:** The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khann Chamkarmorn, Phnom Penh.

**Date of hearing:** 2 October 2007 (From 2:00 p.m. to 5:30 p.m.)

### **Procedural issues:**

On 7 August 2007, the Department of Labour Disputes received complaint No. 724 SSYK, dated 4 August 2007 from the Khmer Youth Trade Union demanding that the Company improve working conditions. After receiving the complaint, the Department of Labour Disputes assigned an officer to conciliate this dispute and the last conciliation was held on 31 August 2007 with 10 out of 16 issues being conciliated. The remaining six non-conciliation points were referred to the Secretariat of the Arbitration Council on 19 September 2007.

After receipt of the case, the Secretariat of the Arbitration Council invited the employer party and the worker party at the factory to a hearing and conciliation on the six non-conciliation points on 2 October 2007 at 2:00 p.m. Both parties were present as invited by the Arbitration Council.

On the hearing day, the Arbitration Council attempted to conciliate the non-conciliation points mentioned in the non-conciliation report by the Department of Labour Disputes and received a conciliation result on Issues 3, 5 and 6. Thus, in this case, the Arbitration Council will consider only Issues 1, 2 and 4 based on the evidence and clarification by the parties in the hearing as follows:

## **EVIDENCE**

**Witnesses and experts:** *names*

### **Documents, Exhibits and other evidence considered by the Arbitration Council**

Provided by the employer party:

- Objection letter of the Company to the arbitral award of the Arbitration Council in case 91/06, dated 14 November 2006;
- Employment application letter of Hin Borei;
- Certificate of medical check of Hin Borei, dated 6 June 2006;
- Probationary employment contract of Hin Borei, dated 7 June 2006;
- Employment contract of Hin Borei, dated 7 August 2006;
- Notification No. 006/07 HY regarding termination of the employment contract of Hin Borei, a worker, dated 18 July 2007;
- Notification No. 007/07 HY regarding termination of the employment contract of Kong Sinuon, a worker, dated 18 July 2007;

- Minute on notification of termination of employment contract, dated 18 July 2007
- Clarification dated 20 July 2007;
- Employment application letter of Kong Sinuon;
- Certificate of medical check of Kong Sinuon, dated 09 June 2006;
- Employment contract of Kong Sinuon, dated 09 August 2006;
- Letter to request visa on Internal Work Rules of Hoyear Company, dated 29 August 2005;
- Internal Work Rules of Hoyear Company, dated 12 September 2005;
- Minutes of individual labour dispute conciliation of Hoyear Company, dated 15 August 2007;
- Minutes of collective labour dispute conciliation of Hoyear Company, dated 3 August 2007
- Statue of Hoyear Cambodia Company, dated 25 July 2005;
- Patent of Hoyear Cambodia Company, dated 14 March 2007;
- Letter No. 2043/05 KVK by Council for the Development of Cambodia regarding the request to establish an investment company called Hoyear Cambodia, dated 23 June 2005;
- Certificate to certify membership of the Garment Manufacturers' Association in Cambodia of Hoyear Cambodia, dated 23 June 2005;
- Certificate of membership of the Garment Manufacturers' Association in Cambodia of Hoyear Company;
- Certificate of registration in commercial preferential system of Hoyear Company, dated 23 August 2007;
- Certificate of commercial registration of Hoyear Cambodia Company, dated 28 June 2005;
- Letter No. 1470 PN.NTK from the Ministry of Commerce regarding the confirmation of commercial registration of Hoyear Company, dated 28 June 2005;
- Letter No. 892 S.N.P.St. from the Ministry of Environment regarding request for establishment of Garment Factory of Hoyear Company, dated 06 July 2005;
- Sample employment contract;
- Sample probationary employment contract.

Provided by the worker party:

- List of names and thumbprints of workers employed in the Hoyear Company who had a medical check and paid the fee themselves;

- Notification No. 005/07 HY by Hoyer Company regarding preparation of election for full-right worker delegate and assistant to worker delegate, dated 27 June 2007;
- Minutes of inquiry asked to Ms. Kong Sinuon by the Department of Labour Dispute, dated 09 August 2007;
- Letter No. 569 S.S.Y.K regarding request for help to resolve labour dispute at Hoyer Company, dated 27 June 2007;
- Letter No. 515 S.S.Y.K regarding request to meet to discuss and reconcile labour dispute case of workers in Hoyer Company, dated 15 June 2007;
- Letter of workers at Hoyer Company to request the head of Khmer Youth Trade Union Federation to intervene and resolve employment conditions, dated 14 June 2007;
- Letter No. 524 S.S.Y.K regarding request to help to resolve labour dispute case at Hoyer Company, dated 04 August 2007;
- Letter No. 708 S.S.Y.K regarding request to meet to discuss and reconcile labour dispute case of workers in Hoyer Company, dated 30 July 2007;
- Letter of workers at Hoyer Company to request the head of Khmer Youth Trade Union Federation to intervene and resolve employment conditions, dated 28 July 2007;
- Letter 613 KB/AK/VK regarding request to recognize union leadership, dated 02 July 2007;
- Letter to notify termination of employment contract of Ms. Hin Borei, dated 18 July 2007;
- Employment contract of Hin Borei, dated 07 August 2006;
- Letter to notify termination of employment contract of Mrs Kong Sinuon, dated 18 July 2007;
- Employment contract of Ms. Kong Sinuon, dated 09 August 2006;
- Minutes of collective labour dispute conciliation of Hoyer Company, dated 03 August 2007

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

- Minutes of collective labour dispute conciliation, dated 03 August 2007.
- Report of collective labour dispute resolution at Hoyer Company, No. 1024 KB/AK/VK, dated 19 September 2007;

Provided by the Secretariat of the Arbitration Council:

- Invitation letter No. 433 K.B/AK/VK/LKA dated 25 September 2007 to invite the worker party to attend the hearings.
- Invitation letter No. 434 K.B/AK/VK/LKA dated 25 September 2007 to invite the employer party to attend the hearings.

#### **FACTS**

- Having reviewed documents the parties submitted to the Arbitration Council
- Having reviewed the report of the collective labour dispute conciliation
- Having listened to the statements by the representatives of the worker party and the employer party

#### **The Arbitration Council finds that:**

- Hoyer Cambodia Company employs approximately 914 workers.
- Khmer Youth Trade Union, the complainant in this case, mentions that there are approximately 222 workers involved in this case but it does not know how many of them are the union members.
- Based on the employer's claim, there are two unions in this factory: the Khmer Youth Trade Union and Cambodia Independent Trade Union but neither of them have most representative status.

#### **Issue 1: The workers demand that the Company reimburse the medical check fee to all workers.**

- The workers mention that the demand in this issue is the same as the one in Arbitral Award 91/06-Hoyear, dated 08 November 2006 (issue 1); the reason for this is that the Company did not implement the award of the Arbitration Council. The union says that they filed a complaint to the court but there was no action taken by the court. Thus, they decided to put this forward to the Arbitration Council again.
- The union mentions that there are 222 workers who are demanding that the company reimburse the medical check fee but the union does not indicate which workers are in the old complaint in Arbitral Award 91/06-Hoyear, dated 08 November 2006 (issue 1) and which workers are new claimants who had a medical check from the beginning of 2007.
- The representative of the employer party in the hearing mentions that the Company agreed to pay the medical check fee for all workers who commenced work after 01 June 2007 provided they passed their two month probationary period and became regular workers.

- The workers do not agree and request that the company pay the medical check fee to all workers.

## **Issue 2: The workers demand that the Company reinstate two leaders of KYTU: Hin Borei and Kong Sinuon**

### **1. Ms. Hin Borei**

- Ms. Hin Borei is a worker with a one year fixed duration contract which started from 07 August 2006 to 06 August 2007. Ms. Hin Borei received a base wage of US\$50 per month. The Company gave notification to terminate her contract on 18 July 2007. The Company paid a 5% severance payment to Ms. Hin Borei in an amount of US\$111.468. The Company party acknowledges that Ms. Hin Borei is the President of the union. The Company already notified the Department of Labour Disputes about the termination of her employment contract as it understands that she is the President of the union. The Company adds that the Company told Ms. Hin Borei that she can continue her union work in the Company even though she has ended her contract with the Company. The Company [states] that it does not discriminate [against] union [members].
- Ms. Hin Borei accepts the above mentioned fact but still insists that the Company reinstate her stating that she has a two year mandate as the President of the union. She claims that the Company continues the contracts of the other union leaders but for her the union does not. She thinks that the Company has discriminated [against her]. Ms. Hin Borei does not provide any evidence to prove that the Company has discriminated [against her].

### **2. Ms. Kong Sinuon**

- Ms. Kong Sinuon is a worker with a one year fixed duration contract which started from 9 August 2006 to 8 August 2007. Ms. Hin Borei received a base wage of US\$50 per month. The Company gave notification to terminate her contract on 18 July 2007. The Company paid a 5% [severance] payment to Ms. Kong Sinuon in an amount of US\$98.575. The Company party acknowledges that Ms. Kong Sinuon is the Vice-President of the union. The Company already notified the Department of Labour Dispute about the termination of [Mrs Sinuon's] employment contract. The Company allows Ms. Kong Sinuon [to continue] to do union work.
- Ms. Kong Sinuon accepts the above mentioned fact but still insists that the Company reinstate her stating that she has a two year mandate as the Vice-President of the union. She [states] that the Company continues the contracts of the other union leaders but for her the union does not. She thinks that the

Company has discriminated [against her but]. Ms. Kong Sinuon does not provide any evidence to prove that the Company has discriminated [against her].

**Issue 4: The Workers demand that the Company pay 100% [of wages when it suspends the labour contract] and backpay wages for the previous times when the Company, for short periods, had no work for workers to do.**

- The workers demand that the company provide full wages and [compensate them] for the times when there was no work in the group during July 2007 [which happened] three times; the first time for two days, the second time for six days and the third time for three days and the Company asked workers to use their annual leave. For those workers who did not have annual leave, the Company allowed them to take the leave in advance of accrual. The workers mention that they do not want to use their annual leave during [periods when there is] no work.
- The workers want to keep this annual leave to use at other times and not when there is no work. In addition, the workers request that the Company provide their full wage [for the period] when there was no work during July 2007 and demand that the Company provide full wages when workers arrive at the factory and the Company asks them to go back home because there is no work. In cases where the Company informs them in advance that there is no work, the workers agree to accept 50 percent of wages during [the period of] no work.
- The Company accepts this fact and [says that] the reason that the Company cannot inform [workers] in advance is because the transport of goods from the port to the company does not come on time. The Company mentions that to some workers the Company pays them 50% when there is no work and some workers use annual leave. The Company mentions that it does not inform the Labour Inspector about the suspension of work when the Company has no work for workers to do.
- The Company also mentions that it does not [specify what days workers must] take annual leave but when any workers have important personal commitments to attend they can use their annual leave.

**REASONS FOR DECISION**

**Issue 1: The workers demand that the Company reimburse the medical check fee to all workers**

In this case the workers demand that the Company reimburse the 10100 riel medical check fee to 222 workers but the union does not show which workers were the subject of the old complaint in case 91/06-Hoyear, dated 08 November 2006 (issue 1) and which workers

are the new claimants; and had the medical check from the beginning of 2007; and are seeking that the Company payback their medical check fee after the award was issued. However, in the hearing the workers mention that the demand in this issue is the same as the one in Arbitral Award 91/06-Hoyear, dated 08 November 2006 (issue 1); the reason for this is that the Company did not implement the Award of the Arbitration Council. The Arbitration Council considers that because the workers do not provide any evidence regarding the new workers who are involved in this issue in dispute, the Arbitration Council will consider this issue as follows:

In previous Awards [it was held] that “based on the principle of *res judicata* of the Arbitration Council that in the same issue which the Arbitration Council has already decided, the Arbitration Council cannot re-consider it.” (See Arbitral Awards 10/06-North Gaiety, Issue 1; 24/06, Issue 4 and 106/06-Quick Sew, Issue 5).

In conclusion, the Arbitration Council decides to decline to consider the demand of the workers that the employer reimburse the medical check fee.

## **Issue 2: The workers demand that the Company reinstate the two leaders of KYTU: Hin Borey and Kong Sinuon**

Article 73, paragraph 1 of the Labour States, “*A labor contract of specific duration normally terminates at the specified ending date...*”

Based on the contents of this Article 73, paragraph 1, the Arbitration Council considers that a fixed duration employment contract should expire automatically at the [specified end date]. This means that the obligations of the employer and the workers end. Thus, a party cannot force the other party to continue the contract if there is no agreement.

In this case, the Ms. Hin Borei's contract expired on 06 August 2007 and Ms. Kong Sinuon's on 08 August 2007. Thus, it means that the obligations between the employer and workers Hin Borei and Kong Sinuon also ended. Therefore, neither party can force the other party to continue the contract if there is no agreement.

Article 73, paragraph 5, of the Labour Law state, “*If the contract has a duration of more than six months, the worker must be informed of the expiration of the contract or of its non-renewal ten days in advance. This notice period is extended to fifteen days for contracts that have a duration of more than one year. If there is no prior notice, the contract shall be extended for a length of time equal to its initial duration or deemed as a contract of unspecified duration if its total length exceeds the time limit specified in Article 67.*”

Based on the content of Article 73, paragraph 5, the Arbitration Council considers that the Company has an obligation to notify workers according to the duration of the worker's employment contract which means that if the workers have been working for more than one year the Company has provide 15 days notice.

In this case, Ms. Hin Borei's and Ms. Kong Sinuon's contracts have a fixed duration of one year and the Company notified [them] about the termination of [their] contract on 18 July 2007. Hence, the Arbitration Council considers that the company has [met its obligations] under Article 73, paragraph 5, of the Labour Law. In addition, Article 73, paragraph 7, of the Labour Law states, *"At the expiration of the contract, the employer shall provide the worker with the severance pay proportional to both the wages and the length of the contract. The exact amount of the severance pay is set by a collective agreement. If nothing is set in such agreement, the severance pay is at least equal to five percent of the wages paid during the length of the contract."*

Based on the content of Article 73, paragraph 7, the Arbitration Council considers that the Company has an obligation to provide a [severance] payment equal to five percent of the wages [paid] for the duration that the workers have been working for the company.

In this case, the Company also mentions that it has already provided a [severance] payment equal to five percent of wages and the workers state that they have already received that amount. Thus, the Arbitration Council considers that the Company has met its obligations under Article 73, paragraph 7, of the Labour Law which provides for the provision of five percent of wages at the termination of a contract.

However, in this case, the workers allege that the Company continues the employment contract of the other union leaders but does not continue [the contracts of] Ms. Hin Borei and Ms. Kong Sinuon. The workers allege that the company has discriminated [on the grounds of union membership.]

Article 12 of the Labour Law states, *"Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children, as well as provisions relating to the entry and stay of foreigners, no employer shall consider on account of: ...membership of workers' union or the exercise of union activities; to be the invocation in order to make a decision on: ...discipline or termination of employment contract."*

Based on the content of Article 12 of the Labour Law as mentioned above, the Arbitration Council considers that the Labour Law prohibits an employer from using a workers' membership in a union as a reason to make decisions about discipline or termination of the employment contract. In this case, however, the workers do not provide any evidence to show that the Company has discriminated on the grounds of union membership. In addition, the Company allows Ms. Hin Borei and Ms. Kong Sinuon to continue to do union work. In the hearing Ms. Hin Borei and Ms. Kong Sinuon also accept this fact. Thus, the Arbitration Council considers that there is no union discrimination.

In conclusion, the Arbitration Council rejects the demand for the Company to reinstate the two union leaders of the Khmer Youth Trade Union: Hin Borei and Kong Sinuon.

**Issue 4: The Workers demand that the Company pay full wages and compensate them for the time the Company suspended their contracts (for short periods of time).**

Article 71, paragraph 11, of the Labour Law states, *“The labor contract shall be suspended under the following reasons: ... 11. When the enterprise faces a serious economic or material difficulty or any particularly unusual difficulty, which leads to a suspension of the enterprise operation. This suspension shall not exceed two months and be under the control of the Labor Inspector.”*

Based on the content of Article 71, paragraph 11, as mentioned above, the Arbitration Council considers that for an employment contract to be legally suspended it has to fulfill two conditions: (1) *the company faces a serious economic or material difficulty which leads to the suspension of the enterprises for not longer than two months and (2) the suspension must be put under [the control of the] labour inspector.*

In this case, the Arbitration Council finds that the company does not fulfill the first and second conditions because it does not provide evidence to show that there is a serious economic or material difficulty or any special difficulty which leads to the suspension of the enterprise for not more than two months and it also mentions that it has not put the suspension of activities under [the control of] the labour inspector.

In previous Arbitral Awards the Arbitration Council determined that where an employment contract is suspended in accordance with the Labour Law as stated in Article 71, paragraph 11, the workers do not receive wages during the time their employment is suspended. The Arbitration Council also determines that where the company has no work for workers to do and the company does not suspend the worker's employment contracts in accordance with Article 71 paragraph 11 of the Labour Law, the company has an obligation to pay full wages (See Arbitral Awards 21/03-Loyal Cambodia, Issue 8; 46/04-M&A Cambodia, Issue 1; 01/04-New Point 2, Issue 1 and 60/04-United Art, Issue 1).

In this case, the Arbitration Council also agrees with the previous awards of the Arbitration Council as mentioned above, i.e., when the company suspends employment illegally, the Company has to provide full wages. In this case, some workers were paid 50% of wages when the company had no work for the workers to do in July 2007. Thus, the Company has to provide the remaining 50% of wage to workers.

However, in this case, the workers demand that the Company not use their annual leave when there is no work.

Article 170 of the Labour Law states, *“In principle, annual leave is normally given for the Khmer New Year unless there is a different agreement between the employer and the worker. In this case, the employer must inform the Labor Inspector of this arrangement.*

*In every case of the paid annual leave exceeding fifteen days, employers have the right to grant the remaining days off at another time of the year, except for the leave for children and apprentices less than eighteen years of age.”*

The Arbitration Council considers that the content of Article 170 raises two points about annual leave: (1) the principle of [taking] annual leave during Khmer New Year and (2) the principle of [taking] annual leave based on agreement between an employer and workers. In this second principle, it requires the employer to inform the Labour Inspector in advance about the agreement.

In this case the employer party acknowledged in the hearing that it never arranged for the workers to take annual leave or made any agreement with the workers that it would deduct their annual leave when there is no work. Thus, the Arbitration Council considers that the employer cannot require workers to use their annual leave when the company has no work for the workers to do. The employer has to clearly determine the time annual leave [will be taken] for each worker. If the leave is not [taken] during Khmer New Year, the employer has to discuss [the matter with each worker] and reach agreement from each worker in advance and has to report it to the Labour Inspector before implementing it. Therefore, the Company has to immediately stop the practice of using workers' annual leave without agreement of the workers.

Therefore, the Arbitration Council decides that the Company party has to pay 50% of wages to [those] workers who received 50% [of wages] from the Company in July 2007 and the Company has immediately stop the practice of deducting workers' annual leave without the agreement of the workers.

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

**DECISION**

**Issue 1:** Decline to consider the workers' demand for the employer to reimburse the medical check fee.

**Issue 2:** Reject the demand of the workers for the Company to reinstate Ms. Hin Borei and Ms. Kong Sinuon.

**Issue 4:**

- a. Order the employer to pay 50% of wages to workers for the period the Company had no work for them during July 2007.
- b. Order the employer to immediately stop the practice of deducting workers' annual leave without the agreement of the workers.

**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 to the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:**

Arbitrator chosen by the employer party:

Name: **Seng Vuochhun**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: .....