



KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាសវនកម្មជាតិ

THE ARBITRATION COUNCIL

Case number and name: 101/08-GDM

Date of Award: 16 September 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Kol Vathana**

Arbitrator chosen by the worker party: **Ann Vireak**

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

DISPUTING PARTIES

Employer party:

Name: **GDM Cambodia Branch**

Address: National Road No. 5, Sankat Ruessei Keo, Khan Ruessei Keo, Phnom Penh

Telephone: 012 570 976

Fax: N/A

Representative:

- | | |
|---------------------|--------------------------|
| 1. Mr. Taing Meng | Administration President |
| 2. Mr. Seong Sithon | Administrator |

Worker party:

Name: **Cambodian Workers Labour Federation Union (CWLFU) - Local Union**

Address: Mittakpheap Village, Sankat Ruessei Keo, Khan Ruessei Keo, Phnom Penh

Telephone: 012 258 006

Fax: N/A

Representative:

- | | |
|--------------------|--|
| 1. Mr. Ek Sokchea | General Secretary of CWLFU |
| 2. Mr. Nget Vannei | Official of CWLFU |
| 3. Mr. Tha Yorn | President of Cambodian Workers Labour Union at GDM factory |
| 4. Mr. Sao Dyna | Vice President of Cambodian Workers Labour Union at |

	GDM factory
5. Mr. Mao Sophy	Advisor of Cambodian Workers Labour Union at GDM factory
6. Yun Yat	General Secretary of Cambodian Workers Labour Union at GDM factory
7. Mr. Sorn Kosal	Worker
8. Mr. Chhum Dara	Worker

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The local union of CWLFU in the factory demands that the Company pays damages to workers who were victims of a recent beating. The security guards of Garuda Company in GDM Company called an intervention force to come and beat innocent workers on June 23, 2008. The company states that it is responsible for medical fee, but not for the damage.
- 2- The local union of CWLFU in the factory demands that the Company eliminate the security guards of Garuda Security Company from GDM Company, because the workers are frightened by the incident on June 23, 2008. The Company says that it wants to provide Garuda Security Company some time to resolve this dispute with the affected workers.
- 3- The workers demand that the Company provide triple payment for work on Sundays and public holidays. The Company states it will follow the Labour Law.
- 4- The workers demand that the Company pay half of their wage and perquisites during three months for women workers who take maternity leave. The Company does not agree, but will pay one month of wage before leave starts and the other two months of wages will be paid when the workers are back to work.
- 5- The workers demand that the Company pay US\$ 20 per month for milk allowance to women workers after they gave birth to their babies. The Company does not agree to the demand.

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. 841, dated 5 August 2008, was submitted to the Secretariat of the Arbitration Council on 5 August 2008.

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: 19 August 2008 at 2:00 p.m. to 4:30 p.m.

Procedural issues:

On 1 August 2008 the Department of Labour Dispute received a complaint from the CWLFU demanding that the Company improve working conditions. After receiving the complaint, the Department of Labour Dispute assigned its official to conciliate this dispute, and was able to conciliate seven issues among the 12. The five non-conciliation points were sent to the Secretariat of the Arbitration Council on 5 August 2008.

After receiving this Case, the Secretariat of the Arbitration Council invited the employer and workers to the hearing and tried to conciliate the 5 non-conciliation points on 19 August 2008 at 2 p.m. Both parties present at the hearing followed the invitation of the Arbitration Council.

On the hearing date the Arbitration Council tried to continue conciliation, and were able to conciliate issue four, while merging together issues one and two. In non-conciliation points one and two, the local union of CWLFU at GDM demands that the company properly compensates the damage done to the workers, and stops using the Garuda Security Guard Company service. Therefore, in this Award, the Arbitration Council will consider on non-conciliated issues one, two, three and five only based on evidence and fact findings as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

A. Provided by the employer party:

- 1 - Authorization letter from the company to Mr. Taing Meng and Mr. Soeng Sithun dated 19 August 2008
- 2 - Request Letter of visa to the internal work rule of the company dated 26 October 2006

- 3 - Internal work rule No. 115 K.K.B.V/AK/ATK dated 01 December 2006
- 4 - Patent of GDM No. LTU 021584. 2008 dated 26 March 2008
- 5 - Registration certificate in the tax exemption system for GDM Company No. 0140 BN. BAB dated 18 January 2008
- 6 - Statute of GDM company dated 28 October 2005

B. Provided by the worker party:

- 1 - Union registration certificate of Cambodian Workers Labour Union at GDM No. 1331 K.B/VK. dated 14 January 2008
- 2 - Letter No. 511 KB/AK/VK requesting recognition of new leaders of the Union, dated 06 May 2008
- 3 - A copy of Santipheap Newspaper No. 6381 dated Thursday, 26 June 2008 which is titled "Two body guards beat the workers of GDM, seven wounded, by handcuffing and taking money"
- 4 - Non-conciliation record of collective labour dispute of GDM company dated 01 August 2008
- 5 - Record of the Cambodian Workers Labour Federation Union on violence incident at GDM Factory dated 28 June 2008
- 6 - Strike notification letter of Cambodian Workers Labour Federation Union dated 25 July 2008
- 7 - Name list of the pregnant workers dated 20 August 2008

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

- 1 - Report on the settlement of the collective labour dispute at GDM No. 841 K.B. / AK/V.K dated 05 August 2008
- 2 - Record on collective labour dispute conciliation at GDM dated 01 August 2008

D. Provided by the Secretariat of the Arbitration Council:

- 1 - Invitation letter to the Company to attend the hearing No. 519 KB/AK/VK/LKA dated 12 August 2008
- 2 - Invitation letter to the workers to attend the hearing No. 520 KB/AK/VK/LKA dated 12 August 2008

FACTS

- Having examined the documents submitted by the parties to the Arbitration Council
- Having reviewed the report concerning collective labour dispute conciliation
- Having listened to assertion of the workers party and employer party

The Arbitration Council finds that:

- GDM company employed approximately 700 workers

- There are two unions in GDM company, one is Khmer Youth Trade Union and the other is Cambodian Workers Labour Union
- Cambodian Workers Labour Union has about 400 members, but is not yet registered as the Most Representative Status Union

Issue 1 and issue 2: Cambodian Workers Labour Union at GDM demands that the company appropriately provides damages to the injured workers, and eliminates security guards of Garuda Security Company from GDM

- On 23 June 2008 there was a fight between the workers of GDM company and the Garuda company security guards at GDM inside and outside the compound of GDM company. These incidents occurred three times between 6 p.m. to 8:30 p.m.
- Seven workers were injured due to the incidents, among them were San Kosal and Chhum Dara, who presented at the hearing. The other five workers were absent from the hearing. Among the five workers absent, one worker who received damage compensation from Garuda Company with the facilitation from GDM Company.
- San Kosal claimed at the hearing that he left work at four p.m. and went home. Then he came to sit in front of the factory waiting for his friend, who worked overtime. After that, he bought a drink and asked the security guards to help pass the drink to his friend who worked overtime in the factory, but the security guard refused to help. However, the security guard provided the requested help to a female worker. Mr. Kosal did not give any reasons why the security guard did not accept his request. Then, he sat back down to wait for his friend so that they could go home together. At about 6:30 p.m., a group of security guards (Mr. Kosal didn't specify the number of security guards) beat him where he was sitting until he passed out. He was brought to Garuda Security Guard Company until midnight, when he regained consciousness, and he went back home. Mr. Kosal failed to clarify the reasons that he was brought to Garuda Security Guard Company.
- Mr. Chhum Dara clarified that he left work at 4 p.m. and went back to the factory wait for his relatives. While waiting, the security guards at the company beat him for no reason. This incident occurred after Mr. Kosal's incident.
- The representative of the Cambodian Workers Labour Union clarified that after the incidents occurred with Mr. Kosal and Mr. Dara, the security guards at GDM company call for intervention from additional forces stationed elsewhere. They closed the gate and beat the workers after the workers left night overtime work, at about 8:30 p.m. The office staff and the owner of the company also saw this incident. The employer representative did not provide a response to this claim.
- The workers demand that the company pay damages to those victimized during this incident. The employer party stated that the company had already paid for the

treatment fee in accordance with the labour law's provisions concerning work related accident. Moreover, the company claims to have been a victim of this incident as well.

Issue 3: The workers demand that when working on Sundays and public holidays the company provide triple wages

- The present practice for work on Sundays and on public holidays is a 100% increase, equal to double wages.
- At the hearing, the workers clarified their demand, explaining that those workers who work on Sundays seek a 300% rate (triple wages), and the workers who work on public holidays seek an additional 300% wages, totaling 400% on public holidays.
- The workers demand payment in accordance with the above rate in order to provide motivation to workers who volunteer to work on days off. The employer party stated that the company could not pay as demanded but follow the law.

Issue 5: The workers demand that the company provide the cost of milk powder US\$ 20 per month to the women workers who have just given birth to their babies.

- The worker party stated that women workers who have recently given birth request via the Union that the company provide US\$ 20 per month for buying milk powder for the period of one year starting from the birth date of their babies, because they are unable to afford milk powder. According to the worker name list, there are seven pregnant workers, one worker on maternity leave, and four workers who have already given birth, as stated in the letter dated 20 August 2008.
- The employer party stated that the company cannot afford to accede to these requests. Previously, the company had provided an allowance of US\$ 7 to fund someone to look after children in lieu of the daycare service and building daycare center, in conformity with the agreement dated 04 December 2006.
- The agreement, dated 04 December 2006, was made between the owner of the company and the worker delegates, and concerned the expense to the employer of looking after the worker's child, in lieu of building a daycare center, totalling to US\$ 7 per month. This agreement did not stipulate about providing milk powder every month.

REASONS FOR DECISION

Issue 1 and issue 2: Cambodian Workers Labour Union at GDM demands that the company provides appropriate damages to the injured workers and, demands that the company eliminate security guards of Garuda Security Company from GDM

The Arbitration Council combines the non-conciliation issue 1 and 2 together because they are related to each other. The Arbitration Council considers this issue as below:

1-Demand for damages for those victim workers

1-A- Whether the accident happened to San Kosal and Chhum Dara a work related accident. Whether the workers are entitle to damages.

Article 248 of Labour states " *An accident is considered to be work related, regardless of the cause, if it happens to a worker working or during the working hours, whether or not the worker was at fault; it is the accident inflicted on the body of the worker or on an apprentice with or without wage, who is working in whatever capacity or whatever place for an employer or a manager of an enterprise.*

Equally, accidents happening to the worker during the direct commute from his residence to the work place and home are also considered to be work-related accidents as long as the trip was not interrupted nor a detour made for a personal or non-work-related reason.

All occupational illness, as defined by law, shall be considered a work-related accident and shall be remedied in the same manner."

According to the meaning of Article 248 above work related accident may happen in three cases: (1) the accident happens because of the work or during the working hours no matter what its cause or whether it happens because of worker mistake; (2) the accident happens during the workers' commute from between home and work, without stopping for personal purposes; or (3) the worker has an occupational illness (See *Arbitral Award No. 85/07-Vivatino, reasoning issue 1*).

In this case, the Arbitration Council also agrees with the interpretation above. Therefore, Arbitration Council finds that the accident that occurred to San Kosal and Chhum Dara is not a work related accident as defined in Article 248 of the Labor Law because it accident happened neither during the working hours, nor when commute home. It happened when they workers were not working; they were sitting in front of the factory.

The Arbitration Council finds that the demand for damages of the workers, San Kosal and Chhum Dara, is not under the labour law; therefore, the Arbitration Council finds that the Arbitration Council has no jurisdiction in hearing this issue.

Hence, the Arbitration Council decide decline to consider the demand of the two workers in damage compensation.

1-B- Whether the accident happened to the four workers was work related accident. Should the four workers be entitled to the damages?

At the hearing the workers stated that one worker among the five had already received compensation payment from Garuda Security company; therefore, the Arbitration Council will consider only the four remaining workers.

The Arbitration Council finds that, on 23 June 2008, there was a fight at the factory between the security guards and the workers. However, the Arbitration Council cannot

ascertain the reasons or details related to the fight. The parties to the dispute also failed to clarify the facts surrounding the fight, and only clarified that this accident happened at around 8:30 p.m., when the workers leave the factory.

In the previous cases, the Arbitration Council decided that if a party to the dispute failed to provide evidence to support their argument the Arbitration Council would not take their argument into account (See 79/05- Evergreen, issue 1; 99/06- South Bay, issue 1 and 77/08- Xing Tai, issue 1).

The Arbitration Council in this case agrees with the interpretation above. In this case, the parties to the dispute did not provide sufficient evidence related to the fighting, such as how or why it started. Therefore, the Arbitration Council doesn't have any basis to determine whether the accident is work related accident.

Hence the AC rejects the demand of the four workers that demanded the Co. to pay compensation.

2 - The demand of the workers that GDM Company stops using Garuda security company service

Article 22 of Decree 38 on contract and other liabilities stipulated that "A contract is a legally binding agreement between the parties. Amendments to the contract can only be made with the consent of both contracting party. A contract shall be executed with honesty and according to the will of the parties."

Based on Article 22 of Decree 38 on contract and other liabilities above, the Arbitration Council finds that only parties to the contracts may amend the contract terms and conditions, or terminate the agreement. In general the Arbitration Council may not order the parties to terminate their contracts with other entities, except when a worker causes danger to the health and safety of others (See the Arbitral Award no. 32/04-Ecent, reasoning issue 1).

In the hearing, the workers demanded that the company stop contracting with Garuda Company, citing that the security guards of this company endangered and frightened the factory workers. The employer stated that the Company cannot stop using Garuda security service because the Company has a one-year service contract with Garuda Company. Nevertheless, the company may stop utilizing the security guards whom the company finds do not follow the contracts. In this case the workers didn't present sufficient evidence to the Arbitration Council to indicate which worker instilled fear and insecurity in the workers.

In general the Arbitration Council rejects the demand of the workers in case that there is no sufficient evidence (See Arbitral Awards no. 63/04- Shine Well, reasoning issue 4; no. 99/06- South Bay, reasoning issue 5; no. 74/07- Global Apparel, reasoning issue 2; no. 94/07-Fortune Garment, reasoning issue 6&8).

However, in this case, the workers argued, and the employer agreed, that the accident on 23 June 2008 put the security and safety of the workers at risk; the company acknowledged this problem. In addition, the Arbitration Council finds that the employer party also intended to change those security guards who caused danger to the workers. Therefore, the Arbitration Council orders the employer of GDM Company to take affirmative action to organize and provide security and safety to the workers at the factory.

Over all, the Arbitration Council rejects the demand of the workers that GDM stop using the Garuda security company service, and orders the employer to take affirmative action to organize and provide security and safety for the workers at the Factory.

Issue 3: The workers demand that the company pay triple their wage rate when working on Sundays and public holidays.

The Arbitration Council will consider whether the workers are entitled to the 300% rates in accordance with labour law.

Article 139 (new) of Labour on the amendment of Article 139 and Article 144 of labour law stated that "*In case of special urgency which requires workers to work overtime other than the usual working hours, the overtime hours shall be paid at an increase rate of 50% (fifty percent). Working overtime at night between 22:00h to 05:00h or weekly time off shall be additionally paid at an increase rate of 100% (one hundred percent).*"

Article 164 of Labour Law stated, "*In establishments or enterprises where work cannot be interrupted because of the nature of their activities requiring the workers to occupy with working during holidays; those workers shall be entitled to an indemnity in addition to wages for the work performed. The amount of this indemnity to be paid by the employer shall be set by a Prakas of the Ministry in Charge of Labor.*"

Clause 4 of Prakas no. 10 SKBY dated 04 February 1999 stated that "*Employees working on holidays have the right to get the same payment as the payment of work on a usual day.*"

In accordance with Article 139 (new) and Article 164 of Labour Law and Clause 4 of Prakas No. 10, the Arbitration Council finds that the workers are entitled to a total wage augmentation of 200 percent when they work on public holidays, or on weekly paid holidays. According to the facts, the Company follows the law regarding overtime payment on weekly holidays and public holidays by providing a 200 percent rate. Therefore, the Arbitration Council finds that the demand of the workers in this case is above the law. Thus, this issue is an interests dispute.

In cases related to interests disputes, the Arbitration Council shall consider whether the Union has the most representative status. According to the facts, the Cambodian Workers Labour Union has registered with 400 members among approximately 600 workers.

However, the Union not yet registered as the most representative status union. The Arbitration Council finds that a most representative status Union is legally entitled to negotiate the formation of a Collective Bargaining Agreement with the Company, and is entitled to bring the interest dispute to the Arbitration Council. In order to get the most representative status, Article 277 of Labour Law 1997 states that the union must register and fulfill other conditions that are stated in this Article.

Moreover, clause 43 of Prakas 099 dated 21 April 2004 states, "*An arbitral award which settles an interest dispute takes the place of a collective bargaining agreement and shall remain in effect for one year from the date on which it becomes final unless the parties agree to make a new collective bargaining agreement replacing the award.*"

If a union doesn't have most representative status that union is not legally entitled to negotiate a collective bargaining agreement representing all the workers in the factory (See Article 96 paragraph 2-B and Prakas 305 clause 9 paragraph 1). This right belongs to which ever registered union has a majority of the workers among its members, and which fulfills the conditions stated in Article 277 of Labour Law. In general, the Arbitration Council declines to consider the interests dispute brought by the union without most representative status in the factory. (See Arbitral Awards no. 81/04-Evergreen, reasoning issue 4; no. 09/05- Kin Tai, reasoning issue 2; no. 84/07-Yung Wah II, reasoning issue 1; 108/07- 8 Star Sportwear, reasoning issue 3, no. 135/07-Wilson, reasoning issue 1 and no. 14/08- Quick Sew, reasoning issue 3)

However, clause 9 paragraph 2 of Prakas 305 SKBY dated 22 November 2001 stated, "*In any enterprise or establishment where there is no union holding status as most representative, all the unions with members at the enterprise or establishment, or a number of them, may Join together to submit a Joint draft of a collective bargaining agreement. The employer shall be required to negotiate if all these unions represent the majority of workers in the enterprise or establishment, or category of personnel that the collective bargaining agreement seeks to cover. In the event of a challenge, a vote shall be held in accordance with the rules of Article 6 above.*"

Therefore, the Arbitration Council finds that if there is no union with most representative status in the factory, the joint unions which have the total number of members is the majority number of the workers in the factory may bring the interests dispute to the Arbitration council. Base on above interpretation when the Arbitration Council decides on interests dispute makes the parties can not go on strike or lock out or bring other interests dispute to the Arbitration Council for a whole year.

In Case 19/08 & 20/08- Quint Major Industrial issue 2 "*The Arbitration Council decides that the three unions which have the total members over 50% of the total workers are entitled to join together to bring the interests dispute to the Arbitration Council.*" However,

this Case is different from previous cases in which the Arbitration Council has issued Awards. In this case there are two unions in the factory, but the two unions did not join together to bring this dispute to the Arbitration Council; there is only one Union - the Cambodian Workers Labour Union.

According to the interpretation above, the Arbitration Council finds that Cambodian Workers Labour Union is not entitled, under the law, to bring the interests dispute to the Arbitration Council. Therefore, the Arbitration Council decides to decline to consider this demand.

Issue 5: The workers demand that the Company provides US\$ 20 milk allowance per month to the workers.

The workers demand the Company provides US\$ 20 per month to the workers for the cost of the milk, since the workers cannot afford to buy milk for their children.

Thus, the Arbitration Council considers whether the Company is obligated to pay US\$ 20 per month for the cost of the milk for the women workers who have just given birth.

Article 184 of Labour Law stated that *"For one year from the date of child delivery, mothers who breast-feed their children are entitled to one hour per day during working hours to breast-feed their children. This hour may be divided into two periods of thirty minutes each, one during the morning shift and the other during the afternoon shift. The exact time of breast-feeding is to be agreed between the mother and the employer. If there is no agreement, the periods shall be at the midpoint of each work shift."*

Article 186 of Labour Law stated that *"Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a crèche (day-care center).*

If the company is not able to set up a crèche on its premises for children over eighteen months of age, female workers can place their children in any crèche and the charges shall be paid by the employer."

Based on Articles 184 and 186 of Labour Law, the Arbitration Council finds that the women workers who breast feed their children are entitled to a one hour breast feeding break to breast feed their children. They may use the nursing room or daycare center provided by the employer, or the employer must pay for external daycare center if he cannot build the daycare center.

In the previous Awards, the Arbitration Council finds that *"The purpose of the Labour Law that requires the employer to build the daycare center is to make it convenient for the mothers and their children to be closed to each other with warmth. It gives the chance for mothers to breast feed their children naturally by not using the milk within the first six months after birth in conformity with the policy of the Government which is disseminating and*

ensuring the safety of the children when the mothers are working." (See 77/08-Xing Tai, reasoning issue 3)

At the hearing, the employer referred to the agreement on 04 December 2006 between the employer and the worker delegates, which stipulated that "*Women workers who have children are entitled to US\$ 7 per month for taking care of their children in lieu of building a daycare center in the factory.*"

In this Case the parties did not dispute about this agreement. Thus, the Arbitration Council will not consider this agreement.

In this Case, the Arbitration Council finds that the demand of the workers in this issue is above the law. Therefore, this issue is related to the workers' interests and is an interests dispute. In general, the Arbitration Council will decline to consider the interests dispute if the union that brings the claim doesn't have most representative status in the factory. In this Case the Union doesn't have the most representative status. Therefore, the Arbitration Council declines to consider this demand (*See reasoning issue 3 related to the interests dispute to the Arbitration Council*).

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

DECISION AND ORDER

Issue 1&2:

- Decline to consider the demand to pay compensation.
- Decline to consider the demand to stop using Garuda security guard Copany service at GDM Company.
- Order the employer of GDM Company to take measure to ensure safety and security to workers at the Company.

Issue 3: Decline to consider the demand to multiply 3 when working on Sundays and holidays.

Issue 5: Decline to consider the demand that the Company provides US\$ 20 milk allowance per month to women workers who have given birth to their children.

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: **Kol Vathana**

Signature:

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: