



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាគ្មាន

THE ARBITRATION COUNCIL

Case number and name: 103/08-Vivatino

Date of Award: 08 September 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Ing Sothy**

Arbitrator chosen by the worker party: **Liv Sovanna**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

DISPUTING PARTIES

Employer party:

Name: **Vivatino Design (Cambodia) Garment Pte. Ltd.**

Address: International Street, Group 3, Phum Trapeang Chuk, Sangkat Tekthlar, Khan
Russey Keo, Phnom Penh

Telephone: 089 776 253 Fax: N/A

Representative:

Mr. Nuth Bunsakarya Chief of administration

Worker party:

Name: **Democratic Thoamear Union Federation**

Address: #07, New Market Prek Leap, Sangkat Prek Leap, Khan Russey Keo, Phnom Penh

Telephone: 012 941 662 Fax: N/A

Representatives:

1. Mr. Ngoun Bunnarith Vice-President of Democratic Thoamear Union Federation
2. Mr. Hou Narith Secretary general of Democratic Thoamear Union Federation
3. Mr. Net Nayan Official of Democratic Thoamear Union Federation

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| 4. Mr. Sor Chanthy | President of Democratic Thoamear Union at Vivatino Factory |
| 5. Mr. Sor Sokly | Vice-president of Democratic Thoamear Union at Vivatino Factory |
| 6. Mr. Yorng Sophea | Secretary of Democratic Thoamear Union at Vivatino Factory |
| 7. Eang Mara | Worker |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The workers demand that the Company issue the provision of US\$ 5 (as from March 27, 2008 the Company provided this to the workers). The Company party states that it cannot provide the money because it is acting in accordance with the the agreement with the workers dated April 10, 2008.
2. The workers demand that the Company provide US\$ 20 per month in lieu of building a daycare center. The Company party does not agree as it has already provided US\$ 5 per month.

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, Articles 309 to 317); 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. 076/07 KKBV/Prakor 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 was unsuccessful, and the non-conciliation report No. 849 K.B/AK/V.K dated 06 August 2008 was submitted to the Secretariat of the Arbitration Council on 12 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:

- First Hearing: 19 August 2008 at 8:30 a.m.
- Second Hearing: 22 August 2008 from 2:00 p.m. to 5:30 p.m.

Procedural issues:

On 12 June 2008 the Department of Labour Dispute received a complaint from the Democratic Thoamear Union Federation, which demanded that the Company improve working conditions. After receiving the complaint, the Department of Labour Dispute assigned an official to conciliate the dispute. On 31 July 2008, the parties engaged in the final conciliation, resolving three of the five remaining issues. The two non-conciliation points submitted to the Secretariat of the Arbitration Council on 12 August 2008.

After receiving this case, the Secretariat of the Arbitration Council invited the employer and the workers to the hearing and twice tried to conciliate the two non-conciliation points for as mentioned above.

The first hearing, scheduled for 19 August 2008 (at 8:30 a.m.), was postponed as per the employer's request, upon agreement from the workers and the Arbitration Council. At the second hearing, held on 22 August 2008 at 2:00 p.m., both parties presented their case the Arbitration Council. The Arbitration Council tried to continue the conciliation, but the parties were unable to reach agreement on the issues. Therefore, the Arbitration Council will consider and settle the dispute based on evidence and fact findings as follow:

EVIDENCE

Witnesses and experts: *names*

Documents, Exhibits and other evidence considered by the Arbitration Council**A. Provided by the employer party:**

1. Authorization letter from the Company to Mr. Nuth Bunsakarya the chief of administration the full power in settle the dispute on behalf of the Company dated 22 August 2008
2. Letter of request for postponement of the hearing at the Arbitration Council dated 19 August 2008
3. Commercial registration certificate of Vivatino Design Company no. 482 BN.NTK dated 11 February 2000
4. Patent of Vivatino Design Company no. LTU. 019942. 2008 dated 28 February 2008
5. Request Letter of visa to the internal work rule of the Vivatino Design Company dated 10 October 2000
6. Minute on the meeting dated 27 March 2008
7. Record on the settlement of the collective labour dispute at Vivatino Design Company dated 10 April 2008

8. Record on the settlement of the collective labour dispute at Vivatino Design Company dated 31 July 2008

B. Provided by the worker party:

1. Union registration certificate of Democratic Thoamear Union at Vivatino Factory dated 29 September 2004
2. Notification of the Company no. HR/0027/03/08 dated 27 March 2008
3. Declaration of the Labour Advisory committee dated 04 April 2008
4. Statute of Democratic Thoamear Union at Vivatino no. 663 K.B.V/AK dated 29 September 2004
5. Record on the settlement of the collective labour dispute at Vivatino Design Company dated 10 April 2008
6. Letter no. 1291 K.K.B.V/AK/VK. concerning the request to acknowledge the new leaders of the Union dated 8 September 2006
7. Receipt of Case registration 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 Vivatino Company No. 849 K.B. / AK/V.K dated 06 August 2008
2. Record on collective labour dispute settlement at Vivatino Company dated 31 July 2008

D. Provided by the Secretariat of the Arbitration Council:

1. Invitation letter to the employer to attend the first hearing No. 521 KB/AK/VK/LKA dated 14 August 2008
2. Invitation letter to the workers to attend the first hearing No. 522 KB/AK/VK/LKA dated 14 August 2008
3. Letter of the Arbitration Council on the decision to postpone the hearing and the schedule for the second hearing No. 003/08 KBA. dated 19 August 2008

FACTS

- Having examined the collective labour dispute conciliation report
- Having listened to assertion of the workers party and employer party
- Having reviewed supplementary documents

The Arbitration Council finds that:

- Vivatino Company started its operation in 2000. The Company employs about 1200 workers.

- There are five unions in Vivatino Company; (1) Democratic Thoamear Union, (2) Free Trade Union of Workers of Kingdom of Cambodia, (3) Cambodian Labour Union, (4) Union for Increasing Khmer Employees and (5) Industrial Trade Union.
- Democratic Thoamear Union of Vivatino is the complainant in this case. Approximately, 100 workers are Democratic Thoamear Trade Union members.

Issue 1: Workers demand that the company provide an additional wage of USD\$ 5, which the company agreed on 27 March 2008 to provide, as separate from the declaration of the Labour Advisory Committee dated 4 April 2008, which required the company to provide US\$ 6 living allowance to the workers.

- In early March, the workers' representatives negotiated with the company and demanded a wages increase because of the continuously increasing in prices of the products at the markets.
- At the same time, Federation Trade unions and local unions at all factories requested that the Ministry of Labour and Vocational Training and the Government help increase the workers' wages because of the due to the continuously increasing market prices.
- On 27 March 2008 the company issued a notice to the workers which said that, starting on 1 April 2008, the company would add US\$ 5 to their wages for every new and for full-rights workers. But the company has not yet implemented the notice yet, and thus has not yet provided the additional US\$ 5.
- On 4 April 2008, following the recommendation of Samdach Akah Moha Sena Badey Techau Hun Sen Prime Minister of the Kingdom of Cambodia the Labour Advisory committee issued a declaration, Point 1 of which requires the employer to *"Provide an additional living allowance to support all workers who are working in the garment and shoe making factory, enterprise, establishment in the amount of US\$ 6 per month....."*
- On 10 April 2008 the company called for a meeting and invited the officials from the Ministry of Labour and Vocational Training and Union Workers to resolve whether it would provide US\$ 6 per month. The company claimed that a technical problem caused them to accidentally issue a notice promising to provide an additional US\$ 5 to the workers' wages. As the result the same as what stated in the collective labour dispute conciliation report: *"Workers agree with the notice of the company dated 10 April 2008 that the workers agree to accept the additional US\$ 6 wages to their main wages by adding to the previous main wages dated 27 March 2008. For the additional main wages US\$ 6 is the US\$ 6 living allowance according to the declaration of the Labour Advisory Committee dated 4 April 2008. For the main wages increase US\$ 5 on 27 March 2008 is the technical mistake of the company*

that access wrong information." But the president of Democratic Thoamear Union did not agree to sign on this agreement.

- The company claims at the hearing that it orally apologized for making the technical mistake which led to this agreement. The workers are satisfied with this company statement.

- The company further claims that, currently, workers get their salary on the 7th of every month, while the company adds to the main wages the monthly US\$ 6 living. No worker claims that s/he didn't get the salary. The Union workers do not object to the company statement.

- The Union workers claim at the hearing that the union did not agree to sign on the agreement above means does not agree to implement the agreement. Therefore, the Union keeps claiming for additional US\$ 5 wage separate from the US\$ 6 living allowance.

Issue 2: The workers demand that the company provide US\$ 20 per month for the milk in lieu of building a daycare center.

- The workers demand that the company provide US\$ 20 per month for the milk in lieu of building a daycare center if the company is unable to build a daycare center.

- The workers claimed at the hearing that workers are making this demand because of the increasing prices at the market. However, if the company is not able to provide US\$ 20, the company should provide more than US\$ 5, which has been the consistent rate in the past.

- The employer clarified at the hearing that he started work for the company in late 2007; therefore, he is unsure when the company actually provided US\$ 5 for milk in lieu of building the daycare center. The company is unable to provide the requested increase.

- The workers further clarify that the US\$ 5 per month for milk is not enough, nor are the workers able to pay for external daycare with the US\$ 5. Nevertheless, if the company follows the labour law by building a daycare center in which the workers can keep their children, they will not demand for the milk allowance.

REASONS FOR DECISION

Issue 1: Workers demand that the company provide additional wage UD\$ 5 which the company noticed to provide on 27 March 2008 separated from the declaration of the Labour Advisory Committee dated 4 April 2008 required the company to provide US\$ 6 living allowance to the workers.

Based on the fact finding above, the Arbitration Council Foundation finds that the company issued a notice to the workers on 27 March 2008, stating that from 1 April 2008 the company will provide an additional US\$ 5, on top of main wages, for all new and full-rights workers, because the company wanted to help improve the worker living standard due to the increasing prices at the market. The Union workers also agreed that the company cooperates well with the workers and understand the difficult situation of the workers. Therefore, the company provided an additional US\$ on top of worker's main wages before the Labour Advisory Committee issued the declaration.

After approximately one week, the Labour Advisory Committee issued a declaration dated 4 April 2008, in which point 1 stated: "*Provide an additional living allowance to support all workers who are working in the garment and shoe making factory, enterprise, establishment in the amount of US\$ 6 per month.*" After receiving the declaration of the Labour Advisory Committee, the company immediately attempted to resolve this issue. It called a meeting and invited officials from both the Ministry of Labour and Vocational Training and the Union workers in order to settle the discrepancy between the US\$ 6 per month living allowance that the Labour Advisory Committee had issued in its declaration, the US\$ 5 that the company indicated in its notice to the workers. The company said that the mistake was because of technical error and acquiring the wrong information, the company has replaced by adding US\$ 6 to the main wages. The workers in this case acknowledge that the company has called for a meeting and apologized for the mistake of acquiring wrong information. The Arbitration Council finds that the purpose of providing additional wages to the workers is to help their living due to the higher prices at the market. Moreover, the Arbitration Council finds that when the company made a declaration explaining that the US\$ 5 was a mistake, the company also called a meeting to explain its mistake. Hence, requiring the company to provide an additional US\$ 5 separate as a separate requirement from the declaration of the Labour Advisory Committee constitutes undue pressure on the company, and is unreasonable.

Furthermore, the workers accepted that all the workers get their salaries on the 7th of every month, at which time the company includes the US\$ 6 living allowance. No worker objects when acquiring his/her salary during this monthly event. The Arbitration Council finds that the company has reasonable reason for not providing the US\$ 5 which the company has issued in its notice. Therefore, the Arbitration Council finds that the workers' demand for the company to provide an additional US\$ 5 in accordance with the notice that the company issued on 27 March 2008, as a separate allowance from that provided in the declaration of the Labour Advisory Committee dated 4 April 2008 regarding the US\$ 6 living allowance, not appropriate because both payments fulfill the same purpose. They both are responses to increased prices at the market.

Issue 2: The workers demand that the company provide US\$ 20 per month for the milk in lieu of building a daycare center.

The workers demand that the company provide US\$ 20 per month for milk in lieu of building the daycare center. They claiming that the company used to provide only US\$ 5 per month, and that this amount is not enough because the increasing of the market price and it is not possible to keep their children in external care.

Thus, the Arbitration Council considers whether the company has the obligation to build the daycare center or not; whether the agreement to provide US\$ 5 per month for milk in lieu of daycare center is valid or not according to labour law.

Does the company have the obligation to build the daycare center according to the labour law?

Article 186 of labour law stated "*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 the above article, the Arbitration Council finds that the employer has the obligation to build a daycare center. Moreover, in previous cases, the Arbitration Council has found that an employer who employs at least 100 women workers has the obligation to build a daycare center. If the employer is not able to build a daycare center for children who are older than 18 months, then women workers may put their children at the external daycare center at the employer's expense. (See Arbitral Award No. 63/04- Shine Well, reasoning issue 2 and No. 68/04- City New, reasoning issue 1)

In this case, the parties' dispute is not about the external daycare service. However, the workers demand that the company provide US\$ 20 in lieu of building a daycare center. Therefore, the Arbitration Council finds that the workers demand that the company provide money in lieu of building a daycare center is against the labour law. Nevertheless, the workers also claim that, if the company were to follow the labour law Article 186 and to build the daycare center in order to let the workers use it for keeping their children, the workers will not demand for the milk allowance. The Arbitration Council finds that there is no daycare center at the company and that the company currently provides US\$ 5 in lieu of building a daycare center.

Therefore, the Arbitration Council further considers ***whether the agreement to provide US\$ 5 per month for milk in lieu of daycare center is valid or not according to labour law.***

Related to the agreement, the Arbitration Council finds that Workers and the Union that has the right to represent its members has both have the right to agree or sign an agreement, regardless of whether that agreement produces benefit above or below the labour law, and that such an agreement is taken into consideration in order to settle the dispute of the parties.

Article 13 of labour law sated "*The provisions of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or a convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void..*"

The policy of the government of Cambodia is to maintain the safety of children while their mothers are working. Thus, the Arbitration Council finds that the purpose of the labour law provision in question is to facilitate the ability of mothers to be close to, and to provide warmth to, their children, and to afford these mothers the opportunity to naturally breast feed their children, without using milk, during the first six months of their children's' lives (See Arbitral Award No. 77/08- Xing Tai, reasoning issue 3).

Therefore, the Arbitration Council finds that, even though the company and the Union agreed for the company to offer payment in lieu of building a daycare center, this agreement is not in accordance with the purpose of the labour law. The payment in lieu of building the daycare center does not absolve the employer of the requirement to build the daycare center as required by the labour law. However, when the employer is unable to build the daycare center for children older than 18 months, he has the option to pay money instead. Women workers may put the children at the external daycare center and the employer pays for the daycare center service upon receiving a receipt.

In conclusion, the Arbitration Council decides reject the demand that the company provide money in lieu of building a daycare center, and orders the employer to build a daycare center. Nevertheless, during the period that the company is building a daycare center, the company may provide the workers with US\$ 5 per month, in accordance with the agreement.

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

DECISION AND ORDER

Issue 1: Reject the demand of the Workers that the company provide an additional \$ 5 in wages, which the company indicated that it would provide in a 27 Mar 08 notice, separate from the declaration of the Labour Advisory Committee on 04 Apr 08 that required the employer to provide the \$ 6 per month living allowance.

Issue 2: - Reject the workers' demand that the company pays money in lieu of building a daycare center.

- Order the Company to build a daycare center. During the construction process, the Company should provide \$ 5 per month follow the agreement.

Type of Award: binding award

This Award is immediately binding upon the parties after the notification of the award. Both parties agreed to choose this binding Award on 22 August 2008.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Liv Sovanna**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: