



KINGDOM OF CAMBODIA

NATION RELIGION KING

ក្រុមប្រឹក្សាសវនកម្មជាតិ

THE ARBITRATION COUNCIL

Case number and name: 108/08-Hugo

Date of Award: 17 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: **Ann Vireak**

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

DISPUTING PARTIES

Employer party:

Name: **Hugo International Investment Co., Ltd.**

Address: Wat Tang Krasang Road, Kbaldamrey Village, Sangkat Kakab, Khan Dang Kor

Telephone: 012 860 715

Fax: 023 890 202

Representative:

- | | |
|----------------------|---------------------------------|
| 1. Mr. Un Dara | Chief of Administration |
| 2. Mr. Hun Chhorath | Assistant to Executive Director |
| 3. Mr. Min Vireak | Communication staff |
| 4. Mr. Seng Rattanak | Security staff |

Worker party:

Name: **Democratic Independent Solidarity Union Federation (DISUF) and local union of Democratic Independent Solidarity Union at Hugo factory (DISU)**

Address: Wat Tang Krasang Road, Kbaldamrey Village, Sangkat Kakab, Khan Dang Kor

Telephone: 012 619 491 or 012 639 698 Fax: N/A

Representative:

- | | |
|-----------------------|---|
| 1. Mr. Yang Phany | President of DISUF |
| 2. Mr. Sem Yourakphan | President of local union of DISU at the factory |

3. Mr. Mech Sokpov	Vice-president local union of DISU at the factory
4. Ms. Chhuon Lina	Treasurer of local union of DISU at the factory
5. Ms. Sam Vanny	Advisor to local union of DISU at the factory
6. Ms. Mao Thany	Advisor to local union of DISU at the factory
7. Ms. Orn Ly	Advisor to local union of DISU at the factory
8. Mr. Kruoch Sarom	Advisor to local union of DISU at the factory
9. Ms. Pum Kimlon	Activist
10. Ms. Meng Chanthy	Activist
11. Ms. Keo Vanney	Activist
12. Mr. Sok Saman	Activist
13. Ms. Chrek Ang	Activist
14. Ms. Keo Sokchea	Member
15. Ms. Chin Men	Member
16. Ms. Soum Seangpheng	Member

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the company stop using fixed duration contracts. The company states that it will not stop using this type of contract as this is in accordance with the Labour Law.
- 2- The workers demand that the company pay 15 percent of [a worker's] annual wage to workers who resign from work and whose length of service is equal to or exceeds 10 years at the [date of] submission of their resignation application. The company does not agree.
- 3- The workers demand that the company maintain the practice it had in 2002 to 2005 of providing two cans of formula milk per month to female workers whose babies are aged between one and eighteen months. The company cannot give this benefit to the workers, as it did in 2002 to 2005, because the company is facing a lot of loss now.
- 4- The workers demand that the company terminate Mr. Un Dara, administration staff of Hugo International Investment. The company cannot terminate Mr. Un Dara as he did not commit the misconduct workers accused him of.

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 was unsuccessful, and the non-conciliation report No. 898 KB/AK/VK, dated 19 August 2008 was submitted to the Secretariat of the Arbitration Council on 19 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: 28 August 2008 from 2:00 p.m. to 5:30 p.m.

Procedural issues:

On 18 August 2008, the Department of Labour Disputes received a complaint from workers in Hugo factory who were striking to demand the company improve some working conditions. The Department of Labour Disputes assigned an officer to settle the collective labour dispute on 19 August 2008 and was able to conciliate 4 out of 8 issues. The four non-conciliation issues were referred to the Arbitration Council on 19 August 2008 by non-conciliation report No. 898 KB/AK/VK, dated 19 August 2008.

As the workers were still on strike when the Arbitration Council received the case, the Arbitration Council issued an interim order No. 010 KBA, dated 20 August 2008 ordering the workers to immediately stop their strike in Hugo Company and return to work according to their shift by 21 August 2008. The workers returned to work according to their shift as ordered by the Arbitration Council.

The Secretariat of the Arbitration Council summoned the employer party and the worker party to the hearing and conciliation on the 4 non-conciliation issues on 28 August 2008 at 2:00 p.m.

Both parties were present at the arbitral hearing. The Arbitration Council tried to ask for information relevant to this dispute and attempted to further the conciliation on the 4 non-conciliation issues and issue 1 was conciliated. Thus, the Arbitration Council will consider and resolve non-conciliation issues 2, 3, and 4 based on the evidence and findings of fact as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Notification regarding resignation of Mr. Un Dara from FTUWKC, dated 1 December 2007 ([signed] as seen and received by Mr. Va Chankosal, Deputy President, dated 2 December 2008).
2. Notification regarding change of leadership structure to Mr. Som Oun, President of the Chamber of Union Federation to inform about the change of leadership of FTUWKC which provides full authority to Mr. Va Chankosal to lead FTUWKC instead of Mr. Un Dara who resigned on 31 August 2008.
3. Letter to clarify some points of accusation against Mr. Un Dara, dated 2 September 2008.
4. Letter to the Arbitration Council regarding a strike at Hugo International Company, dated 21 August 2008.
5. Minutes of meeting, dated 23 December 2005.

Provided by the worker party:

1. Certificate of registration of the local union of DISU at Cheer View factory No. 912 KKB/VK, dated 9 March 2006.
2. Letter by the Department of Labour Dispute regarding recognition of the 2nd mandate union leadership to recognize Mr. Sem Yourakphan as Union President, Mr. Mech Sokpov as Union Vice-President and Mr. Neang Sophorn as Secretary of the union, No. 674 KB/AK/VK, dated 23 June 2008.
3. Certificate of most representative status of the local union of DISU at Cheer View Company, No. 039/07 KKBV, dated 11 May 2007.
4. Notification that workers at Hugo Garment Faction were preparing to go on strike according to procedure by the committee of the local union of DISU, dated 18 August 2008.
5. Letter to request negotiation by the local union of DISU, dated 9 August 2008.
6. Complaint letter by workers, dated 13 August 2008.
7. List of names of workers (with thumbprints) to request that the union negotiate and resolve their request on 8 issues with the company's representatives.
8. Statute of the local union of DISU, dated 17 December 2005.
9. Attendance list in the monthly regular meeting of the governance board of the National Union Alliance Chamber of Cambodia (5 July 2008).
10. Letter by the National Union Alliance Chamber of Cambodia regarding nomination of 4 candidates and 4 reserved candidates as members of the 4th mandate of labour advisory committee, dated 25 January 2008.
11. Letter by the National Union Alliance Chamber of Cambodia regarding 15 trainees who attended a training on the labour market economy, dated 28 March 2008.

12. List of names of members of the National Union Alliance Chamber of Cambodia, dated 11 January 2008.
13. Letter by the National Union Alliance Chamber of Cambodia regarding request to add reserved members for the program held on 1 May 2008, dated 24 April 2008.
14. Letter by the National Union Alliance Chamber of Cambodia regarding the submission of report of membership of the National Union Alliance Chamber of Cambodia, dated 20 June 2008.
15. List of names of the leadership of the local union of FTUWKC, dated 4 March 2008.
16. Attendance list of the monthly regular meeting of the governance board of the National Union Alliance Chamber of Cambodia (18 July 2008).
17. Request letter endorsed by thumbprints of workers who are members of DISU.

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

1. Report No. 898 KB/AK/VK, dated 19 August 2008 on the collective labour dispute settlement at Hugo International Company.
2. Minutes of the collective labour dispute resolution at Hugo International Company, dated 18 August 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 535 KB/AK/VK/LKA dated 21 August 2008 to invite the worker party to attend meeting to provide information.
2. Invitation No. 534 KB/AK/VK/LKA dated 21 August 2008 to invite the employer party to attend meeting to provide information.
3. Invitation No. 537 KB/AK/VK/LKA dated 22 August 2008 to invite the worker party to attend the hearing.
4. Invitation No. 536 KB/AK/VK/LKA dated 22 August 2008 to invite the employer party to attend the hearing.

FACTS

- Having reviewed the report of collective dispute conciliation;
- Having listened to the statements by the worker party and the employer party;
- Having examined additional documents.

The Arbitration Council finds that:

- Hugo International Company employs approximately 1,149 workers.
- The local union of DISU is the claimant in this case. The local union of DISU has 897 members and has a certificate of most representative status at DISU No. 039/07 KKBV, dated 11 May 2007.

Issue 2: The workers demand that the company pay 15 percent of [a worker's] annual wage to workers who resign from work and whose length of service is equal to or exceeds 10 years at the [date of] submission of their resignation application.

- Up to 2008, 29 workers have been working for 10 years at the company.
- In the hearing the workers claim that the company has provided termination payments to the workers according to the Labour Law when they submit a resignation letter. However, the workers request that the company provide 15 percent per year to workers whose length of service is 10 years or more because they have been working for the company for 10 years and they are getting older. Thus, they deserve some kind of incentive provided by the company when they resign from work.
- The company claims in the hearing that it is unable to provide this as requested because the company has no ability to do so.

Issue 3: The workers demand that the company maintain the practice it had in 2002 to 2005 of providing two cans of formula milk per month to female workers whose babies are aged between one and eighteen months.

- The company provided two cans of formula milk per month to babies aged between one to eighteen months from 2002 to 2005. However, in September 2005 the company stopped providing the [formula] milk without providing any reason to the workers why it stopped providing this.
- The company provided this formula milk but there was no agreement in writing.
- On 23 December 2005, the workers submitted a letter to request negotiation with the company and the result mentioned in point 1 of the minutes of the meeting states, *“Provision of formula milk (it does not mean that the company will absolutely not give formula milk but the company will reconsider this provision if the company can make profits or if there are buyers again.)”*
- After the agreement [was signed] the workers did not make a request that the company provide formula milk to them until 18 August 2008 when they raised the request again (as mentioned in the minutes of the collective labour dispute resolution at Hugo International company, dated 19 August 2008, issue 2 of this case).
- The workers mentioned in the hearing that they made request to support their living costs because the price of goods has gone up. Moreover, the workers have been working hard for the company for many years, for instance, some workers have been working for 10 years.
- In the hearing the company claimed that it will resume providing this when it makes profit again or has good buyers and production goes smoothly. However, the

company cannot determine in how many more months the company will be able to provide the formula milk again.

- The company added that it has faced economic difficulties after a worker fainted [at work]; currently it has difficulties in exporting and importing products and this has caused the company to be unable to make profit. The worker party agreed that one worker fainted [at work]. Nonetheless, workers still had work to do in each of their sections; the workers objected to the company's claim that it makes no profit.
- The Arbitration Council ordered the company to provide certain monthly statistical information to the Arbitration Council within three days after the hearing date but the company did not submit the document to the Arbitration Council.

Issue 4: The workers demand that the company dismiss Mr. Un Dara, Chief of Administration.

- On 29 December 2007 the company asked Mr. Un Dara to introduce himself to workers as the Chief of Administration of the company.
- The workers stated in the hearing that Mr. Un Dara had not resigned from union work because his name was still listed as a president of FTUWKC in letters or the attendance list of meetings of the National Union Alliance Chamber of Cambodia.
- In the hearing, Mr. Un Dara presented his letter of resignation from the union, dated 1 December 2007 ([signed] as seen and received by Mr. Va Chankosal, Deputy President, dated 2 December 2008). The worker party did not object to this resignation letter.
- The workers claim that Mr. Un Dara interfered in the internal affairs of the local union of DISU as he incited union members to resign from the union and he had his staff spy on workers' activities. Moreover, the current president of the local union of FTUWKC is Mr. Un Dara's relative. However, the workers did not provide any evidence or testimony to support their claim.
- Mr. Un Dara claimed that he was the Chief of Administration and the company asked him to look at the [factory] environment such as health of buildings in the factory and he had two assistants who accompanied him.
- Mr. Un Dara added that according to the name list provided by the local union of FTUWKC to the company, this union has approximately 90 members and up to now the number of members has not changed. Thus, if he was involved with the union, the number of members of this union should have increased. The worker party did not object to the claim that currently the local union of FTUWKC has approximately 90 members.

REASONS FOR DECISION

Issue 2: The workers demand that the company pay 15 percent of [a worker's] annual wage to workers who resign from work and whose length of service is equal to or exceeds 10 years at the [date of] submission of their resignation application.

Based on the findings of fact in this case the Arbitration Council found that, when workers submit an letter to resign from work, the company pays wages, bonuses and other benefits to workers, in accordance with the Labour Law. However, the workers request that the company should provide 15 percent of annual wages to workers whose length of service is equal to or exceeds 10 years or more because they have been working hard for the company for 10 years.

The Arbitration Council will consider ***whether workers whose length of service is 10 years or more and resign have a legal entitlement to demand that the employer provide 15 percent of their wages?***

In this case, the workers recognize that the company follows the Labour Law properly when they resign from work. The Arbitration Council found that generally the Labour Law does not require that the employer provide 15 percent of wages to workers who resign from work. Thus, the workers demand is more than what is required by law, and this is related to an interests which is more than what is provided by the Labour Law; thus it is an interests dispute.

The Arbitration Council has consistently determined that only a union with most representative status can bring an interests dispute to the Arbitration Council for resolution. In previous cases, the Arbitration Council declines to consider an interests dispute if the union who brings the case does not have the most representative status in the factory. (See Arbitral Awards 81/04-Evergreen, issue 4; 09/05-Kin Tai, issue 2; 84/07-Yung Wah II, issue 1; 108/07-8 Stars Sportswear, issue 3; 135/07-Wilson, issue 1; 14/08-Quick Sew, issue 3 and 101/08-GDM, issue 3).

In this case, the Arbitration Council agrees with the interpretation of the Arbitration Council in previous cases that only a union with most representative status can bring an interests dispute to the Arbitration Council for resolution. In this case, the local union of DISU has most representative status in the factory. Thus, the union has a legal right to enter into a collective bargaining agreement on behalf of all workers and represent all workers in the company (see paragraph 2B of Article 96 of the Labour Law and Clause 9, paragraph 1, of Prakas 305). Thus, the local union of DISU has the right to bring an interests dispute to the Arbitration Council for resolution. (See Arbitral Awards 48/07-Eternity, issue 2 and 17/08-Trinunggal Komara, issue 2).

Article 12, paragraph 2, of the Labour Law states, *“The Council of Arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council’s decisions are in equity for all other disputes.”*

Paragraph 2 of Article 312 grants authority to the Arbitration Council to resolve other disputes based on equity.

In this case, the worker party did not provide any reliable testimony to the Arbitration Council to prove that it is reasonable and equitable that the workers are entitled to this right in addition to the minimum rights provided by the Law. Thus, based on the principle of equity, the Arbitration Council decides to reject the demand.

Issue 3: The workers demand that the company maintain the practice it had in 2002 to 2005 of providing two cans of formula milk per month for babies aged between one and eighteen months.

In this case, based on the findings of fact, the Arbitration Council found that, between 2002 and 2005, the company provided two cans of formula milk per month for babies aged between one to 18 months. However, from September 2005 until now the company has not provided the formula milk for the reason that it has not earned any profit.

The Arbitration Council considers that there is no article in the Labour Law or any regulation that requires the employer to provide two cans of formula milk for babies aged between one month and 18 months. However, the Labour Law does not prohibit the employer from providing something greater than what is stipulated in the law.

On the other hand, when a provision which is better than what is provided by the law is stopped, the two parties need to cooperate to find a solution and provide clear and sound reasons. The fact that the two parties failed to cooperate to find a solution to the dispute meant that the dispute reached an impasse.

The Arbitration Council found that it is three years from September 2005 to September 2008, during which time the two parties met only once to find a solution as recorded in the minutes of the meeting, point 1 which states, *“Provision of formula milk (it does not mean that the company will absolutely not give formula milk but the company will reconsider this provision if the company can make profit or if there are buyers again.)”* Yet, the solution produced no outcome except a promise that the company would reconsider this if it made profit again.

The Arbitration Council considers that if the employer is required to provide two cans of formula milk per month to workers who have babies aged between one month and 18 months, it is not fair to the company if it is really making no profit. However, it is not reasonable either if the company continues to withhold the provision of formula milk because the price of goods in the market has increased.

Thus, the Arbitration Council considers that in order to be fair both parties need to continue to cooperate to reach a sound resolution on this issue. In the hearing, the workers showed that they were willing to further discuss and negotiate with the company about this issue and the company was willing to bring this dispute to the company director's attention to discuss a resolution; but the company could not promise when this would be possible until it obtained approval from the company director.

Article 312, paragraph 2, of the Labour Law states, *"The Council of Arbitration legally decides on disputes concerning the interpretation and enforcement of laws or regulations or of a collective agreement. The Council's decisions are in equity for all other disputes."*

Clause 34, point E of Prakas 99 states, *"... the Arbitration Council has the power and authority to provide any civil remedy or relief which it deems just and fair, including:*

E. orders to bargain;..."

According to Article 312, paragraph 2, of the Labour Law and Clause 34 of Prakas 99 above, the Arbitration Council can provide a remedy which is equitable and reasonable. Thus, in this case the Arbitration Council decides to order the employer to discuss and try and resolve the workers' demand that the company continue to provide two cans of formula milk per month for babies aged between one month and 18 months, which was provided by the company in the past, within three months after this Arbitral Award enters into effect.

Issue 4: The workers demand that the company dismiss Mr. Un Dara, Chief of Administration.

The workers party demands that the company terminate Mr. Un Dara, Chief of the company's administration, for the reason that he interfered in the internal affairs of the local union of DISU at Hugo Company. Thus, the Arbitration Council will consider ***whether the workers are entitled to demand that the company dismiss Mr. Un Dara.***

In previous cases, the Arbitration Council decided that workers who claim that there is union interference needs to provide documents and testimony to support their demand. If there are no documents or testimony to prove that there is interference in the union in order for the Arbitration Council to have sufficient basis to believe, the claim will not be considered by the Arbitration Council. (See Arbitral Awards 79/05-Evergreen, issue 1; 99/06-South Bay, issue 1; 77/08-Xing Tai, issue 1 and 101/08-GDM, issue 1 and 2).

In this case, based on the findings of fact, the workers only mentioned in the hearing that Mr. Un Dara interfered in the internal affairs of the local union of DISU and had not resigned from his union position as President of the local union of FTUWKC. The workers provided documents and evidence [to show] that Mr. Un Dara was still a member of FTUWKC.

However, based on the documents and evidence submitted by the workers the Arbitration Council did not find sufficient basis to consider that Mr. Un Dara interfered in the work of the local union of DISU. The employer party, on the other hand, provided evidence to prove the resignation of Mr. Un Dara from FTUWKC on 1 December 2007.

Generally, the Arbitration Council will reject a workers' demand if there is insufficient evidence. (See Arbitral Awards 63/04-*Shine Well*, issue 4; 99/06-*South Bay*, issue 5; 74/07-*Global Apparel*, issue 2; 94/07-*Fortune Garment*, issue 6 and 8 and 101/08-*GDM*, issue 1 and 2). Thus, the Arbitration Council considers that the Arbitration Council does not have [sufficient] basis to consider the workers' claim.

Article 65 of the Labour Law states, *"A labour contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties."*

Article 22 of Decree 38 ANKr, dated 28 October 1988 regarding Contract and other Liability states, *"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."*

According to provision in Article 65 of the Labour Law and Article 22 of Decree 38 above, the Arbitration Council considers that only parties to the contract have a right to terminate the contract. This means that, in principle, entering into a contract is at the discretion of parties to the contract and no third party has a right to force the party to the contract to do something they do not agree with. Thus, it is clear that hiring or terminating a worker in a company is at the discretion of the employer who is a party to the contract. In previous cases, the Arbitration Council considers that *"the workers are not entitled to order or demand the employer to dismiss or transfer any worker unless the workers can provide evidence showing that the worker is a dangerous person who can no longer be allowed to work in the company, and allowing the dangerous worker will do harm or really cause chaos to the workplace"* (see Arbitral Awards 14/03-*Chou Sing*, issue 1; 17/03 and 18/03-*Ho Hing*, issue 4; 15/04-*Lucky Zone*, issue 2; 73/04 - *Genuine*, issue 2 and 87/04-*Noble*, issue 2).

In relation to this accusation, the Arbitration Council does not find any specific evidence to prove that Mr. Un Dara threatened the security or safety of other workers. Thus, the workers' demand for the company to terminate Mr. Un Dara does not have [sufficient] legal grounds for the Arbitration Council to issue an order for the company to terminate him.

Therefore, the Arbitration Council decides to reject the workers' demand for the company to terminate Mr. Un Dara, Chief of Administration.

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

DECISION AND ORDER

Issue 2:

- Reject the workers' demand for the company to pay 15 percent of wages to workers who resign from work and whose undetermined duration employment contract is equal to or exceeds 10 year on the date they submit their resignation letter.

Issue 3:

- Within three months of the date this award enters into effect, order the company to negotiate and discuss with the union to find a resolution [to the issue] of provision of two cans of formula milk per month for babies aged between one month and 18 months that it used to provide in the past.

Issue 4:

- Reject the workers' demand for the company to terminate Mr. Un Dara, Chief of the company's administration.

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: **Ing Sothy**

Signature:

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: