

KINGDOM OF CAMBODIA
NATION RELIGION KING

THE ARBITRATION COUNCIL

Case: 11/05-South Bay

Date of award: 1 April 2005

ARBITRAL AWARD

(Issued under Article 313 of the Labor Law)

South Bay Company

(Employer party)

AND

Khmer Youth Free Trade Union (KYFTU) and CCAWDU Union of South Bay Factory

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representative: 1- Mrs. Sun Goo Hong, Administration Manager;
2- Mr. Kong Lim, Assistant;
3- M. Lin Soo Ly, administration staff member; and
4- Mr. Dong Sok Chea, Shipping staff member.

Address: Building A, new street on the corner of Chaum Chao, Chaum Chao quarter,
Dangkao district, Phnom Penh.

Tel: (855) 23 985 636 Fax: (855) 23 985 635

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representative: 1- Mr. Mai Vathana, KYFTU officer;
2- Mr. Sim Phally, KYFTU officer;
3- Mr. Yang Yuan, Vice President of KYFTU;
4- Mr. Kao Bien, CCAWDU officer;
5- Mr. Hean Roatha, President of CCAWDU;
6- Mr. Choun Sen, Vice President of CCAWDU; and
7- Mrs. Va Sothin, Secretary for CCAWDU.

Address: #6C, Street 476, Tuol Tompoung I quarter, Chamkarmorn district, Phnom
Penh.

Tel: (855) 474 605 / (855) 11 622 963

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- Worker party demands that the company offer for women who have already given birth to a baby to leave for home an hour per day - half an hour in the morning and another half an hour in the afternoon - to breast-feed their baby, for the South Bay company does not have a nursing room and a day-care center.
- 2- Worker party demands the company offers pregnant women to leave fifteen minutes earlier to avoid having their health affected. But at the conciliation stage before the Arbitration Council, the worker party consented to the employer that pregnant women may leave five minutes earlier, but to stand waiting at the card-punching place until it is time, as is specified in the attached agreement, without having it discussed in this award.
- 3- Worker party demand the company properly reimburse the health check fees worth of 3.50 US dollars (US\$3.50) to each worker in accordance with Article 247 of the Labour Law.
- 4- Worker party demand the company open the factory gate for workers to enter the factory compound at 12:00 PM, for the reason that neither is there any hall nor shade for workers to take shelter.
- 5- Worker party request that the company keep the five-dollar attendance bonuses (US\$5.00) per month and provide the wages for the strike from 12 to 18 February 2005. At the hearing, the worker party decided to withdraw this issue; therefore, the Arbitration Council will not consider it in this award.

JURISDICTION OF THE ARBITRATION COUNCIL:

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labor Law (1997); the Prakas on the Arbitration Council No.099, dated April 21, 2004; and the Prakas on the Nomination of Arbitrators No.103, April 26, 2004 and No.265 of July 13, 2004; and the Arbitration Council Procedural Rules which form an Annex to Prakas No. 099 dated April 21, 2004.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labor Law. That conciliation hearing was not successful; the non-conciliation report No. 292, dated February 28, 2005 was submitted to the Secretariat of the Arbitration Council on March 14, 2005.

COMPOSITION OF THE ARBITRATION PANEL:

- | | |
|---|--------------------------|
| - Arbitrator chosen by the employer party: | Mr. Ly Tayseng |
| - Arbitrator chosen by the worker party: | Mr. Huon Chundy |
| - Chair arbitrator (chosen by the two arbitrators): | Mr. Kong Phallack |

HEARING AND EVIDENCE:

Date and place of hearing: March 18, 2005 from 8:00 AM to 12:30 PM at the Secretariat of the Arbitration Council.

Witnesses and Experts: N/A

EVIDENCE THAT WAS CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:**Provided by the employer party:**

- 1- Certificate of registration in Commercial Tax Exemption System dated May 28, 2004.

Provided by the employee party:

- 1- Letter from KYFTU dated February 6, 2005;
- 2- Certificate of registration of CCAWDU Union of Suoth Bay factory;
- 3- Bylaw of CCAWDU Union of Suoth Bay factory dated August 23, 2002;

Received from Ministry of Labour and Vocational Training (MoLVT):

- 1- Letter of request to resolve the collective disputes taking place at an enterprise under the name of South Bay Company, No. 340 of March 14, 2005, by HE. Nhep Bunchin, MoLVT Minister;
- 2- Report on collective dispute resolution at South Bay Company, No. 292 of February 25, 2005, by Mr. Huot Chanthy, Director of Department of Labour Inspection;
- 3- Non-conciliation report dated February 16, 2005.

CASE SUMMARY:

South Bay company, which is positioned at Building E, Vathanak Garden street, Chaum Chao quarter, Dangkau district, Phnom Penh, employs 620 workers.

On February 16, 2005, the Dangkau district-based Labour Inspection Office received a phone call of complaint from workers about their demand for the company to improve 13 working conditions. Having received the information, the Dangkau district-based Labour Inspection Office assigned its officials to start the process to conciliate these issues; and the last conciliation hearing took place on March 18, 2005 with eight of the workers' 13 issues being successfully conciliated and five issues unsuccessfully conciliated, as are specified in the Issues in Dispute above, and were forwarded to the Arbitration Council to be further resolved on March 14, 2005.

On March 18, 2005 at 8:00 AM, the Arbitration Council called the two parties to attend a hearing. At the hearing the Arbitration Council conducted further conciliation on the basis of a win-win

principle, with the result that two of the five issues, (issues 2 and 5) as specified above in the Issues in Dispute, were successfully conciliated. Therefore, the Arbitration Council takes into consideration only the remaining three issues.

FINDINGS OF FACT:

- Having examined the non-conciliation report;
- Having listened to the presentation and testimony given by both parties at the hearing;
- Having checked the above documents;

We find that:

Union issue: The workers have established the "**KYFTU Union of South Bay**" under the arrangement of the "**KFYTU**", but this union has not registered or received representativeness under the law yet. In this case, there is another union named **CCAWDU**, which has properly registered and received representativeness for the workers of South Bay company, and it has the representative right to decide on the issues in this case.

1st issue: Time and place to breastfeed the baby

- Women who have given birth make up 5% of the total 620 workers. Workers demand that the company allow women who have given birth to leave for home to breastfeed their babies for an hour per day, that is, half an hour in the morning and another half an hour in the afternoon; the reason is that South Bay company does not have a nursing room or a day-care center. The company agreed to provide one hour per day for women who have given birth to leave to breastfeed their babies in the nursing room which is located in Golden Crown company.
- The Arbitration Council finds that South Bay and Golden Crown company are companies with the same owner. South Bay company is at Building E while Golden Crown is at Building F.
- There is an agreement as to the arrangement for the day-care center and nursing room, dated December 8, 2004. The agreement states, *"the company offers to arrange for a day-care center and nursing room (one room only) in Building F, which is 20 square meters in size and will be put into operation within 7 days, as from the date the agreement is signed. A female worker who has a baby of 18 months old downwards and works at Building E has the right to send her baby and do the breastfeeding there. The Union and worker representatives may also, from time to time, monitor the day-care center and nursing room at the request of workers who place their babies there. In case the day-care center and nursing room is too small to host all workers, the company agrees to arrange for more rooms."*

- Since the time of making the agreement, the company did arrange for a nursing room and day-care center at Building F, but no worker has sent their children there. Workers gave two reasons why they are not sending or breastfeeding their children there: 1- it is too far in distance between Building E and Building F and 2- there are no babysitters. The company responded that it was not far from Building E to Building F. Concerning babysitters, the company cannot afford it. The Arbitration Council found that it is about 50-60 meters in distance between Building E and Building F.

- At the hearing, workers brought up two options to demand the company to consider allowing women with small babies the chance to leave in order to breastfeed:

- 1- going to breastfeed at Golden Crown (Building F) at the request of the company, but the company must have babysitters in place in accordance with the law.
- 2- If it cannot afford babysitters, the company must allow breastfeeding at home from 11:00 to 11:30 in the morning and from 16:00 to 16:30 in the afternoon. For this option, the worker representatives described that the female workers lived far away and half an hour was difficult for traveling back and forth, and such a rush may also affect the health of the female workers who are mothers.

- The company kept the position that it cannot afford to provide babysitters, as is set out in the first option, as doing so would cause a lot of trouble over disputes taking place in relation to failure to take care of the children in the way that the mothers preferred. In response to the workers' request, the company offered 30 minutes in the morning from 9:30 to 10:00 and 30 minutes in the afternoon from 14:30 to 15:00 to the female workers to go and breastfeed their babies at home. The company provided the reason that by doing so, the mothers can have many times for breastfeeding and divide the times appropriately according to their babies' hunger. In addition, the company would have difficulty controlling the working hours in the computer system where all workers have to punch their cards in and out of work at the beginning and end of the working hours, the benefits of which is for the calculation of workers' wages according to the working hours. If a female worker punched out to leave earlier, they would lose their working hours and their wages accordingly. Programming the computer system is complicated, [and it is] not easy to find those who can re-program it, and even if they are found, it will still be expensive.

The differences in the first option was that the company did not offer to have babysitters in place while in the second option, it was different in terms of time since the workers demanded to leave 30 minutes before the end of each shift, that is, from 11:00 to 11:30 in the morning and from 16:00 to 16:30 in the afternoon.

2nd Issue: Regarding health check fees

- In December 2004, approximately 60 workers (not yet a clear statistic), obtained medical checkups together with employment books, with each one of them paying a total of six (6) dollars. For the health check fees of 15,000 Riel, the company paid 1,000 Riel for workers while for the remaining 14,000 Riel, they had to pay on their own; the company deducted the money from the workers' wages in January 2005, arguing that the deductions were made with the consent from both workers themselves and their team leaders. The company said that it had a collection of internal work rules and had submitted it to the Ministry but [the Ministry] has not returned it yet. The internal work rules do not require the company to pay for medical check fees and that workers have to do medical check fees on their own before recruitment.

- The workers' position was to ask the company to pay 14,000 Riel or US\$3.50 (three and a half dollars) for the medical check fees, under Article 247 of the 1997 Labour Law, but the company retained the position of not reimbursing them in accordance with the internal work rules.

3rd Issue: Regarding the demand for the company to open the factory gate for workers to enter the compound of the factory at 12:00 noon

- The company's working hours are 7:30 to 11:30 in the morning and from 12:30 to 16:30 in the afternoon. From 11:30 to 12:30 is when the company lets the workers break for lunch for an hour. Before, the company used to open the gate for workers to enter the factory at 12:00 after lunch, but then the company began to open the small gate at 12:10 and the large gate at 12:15, for the reason that some workers were always scattering rubbish all over the place although there had been a lot of warnings. In addition, the company's internal work rules do not allow workers to bring food to eat in the compound of the factory. Workers argued in respect of their demand for the company to open the gate at 12:00 that there is neither shade nor a place where workers could take shelter before entering the factory. Workers have to stand in the sun's heat and dust; the rainy season is also nearing.

- Approximately 40 percent of the workers live in the provinces, meaning they have to take a car to and from work both in the morning and afternoon. Some others rent places far away; only a few travel back and forth. The workers asked the company to understand about their health conditions while promising to keep up [levels of] hygiene, which is also their duty.

- Regarding the issue over the eating hall at South Bay, there is also an agreement between the company and technical assistants of C.CAWDU and the president of the Union of South Bay, dated December 8, 2004, in which the company promised to build an eating hall behind the factory

in order to lessen the workers' difficulty. This case also came before the Arbitration Council in Case 24/04 dated May 21, 2004.

REASONS FOR DECISION:

Issue 1:

The worker party and company do not agree with one another to allow women with small babies to breastfeed. Workers demanded [the right] to breastfeed at home because there are no babysitters in the nursing room. Therefore, they have to use their breastfeeding time to leave 30 minutes early in each shift (11:00 to 11:30 in the morning and 16:00 to 16:30 in the afternoon) to breastfeed at home. However, the employer refused to have babysitters in place in the nursing room or to allow workers to leave 30 minutes earlier, either.

Article 184 of the Labor Law 1997 states 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.***"

In this case, the Arbitration Council finds that the two parties did not agree with one another on a time for breastfeeding. Under Article 184 of the Labour Law above, if the two parties do not have an agreement on the timing, the midpoint of each shift is chosen. Therefore, the Arbitration Council decides that the time for breastfeeding [breaks] must be set at the midpoint of each working shift - that is, from 9:30 to 10:00 in the morning and from 14:30 to 15:00 in the afternoon.

However, Article 186 of the Labor Law states 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 day-care center. If the company is not able to set up a day-care center on its premises for children over eighteen months of age, female workers can place their children in any day-care center and the charges shall be paid by the employer." Article 186 clearly states the company's obligation to build a nursing room and day-care center. The Arbitration Council finds that the company shall set up a nursing room and day-care center in South Bay Company for those working for this factory because the factory employs more than one hundred female workers. In this case, there was an agreement on the arrangement for a nursing room and day-care center at Building F, which is located in Golden Crown company, made between the company and the union in December, 2004. Therefore, the Arbitration Council finds that the company has already fulfilled

their obligations under the law to set up a day-care center and nursing room near the factory, but the company fails to have babysitters in place.

Although the Law does not have any specific provisions as to having people in place to serve in the day-care center and nursing room, Article 187 of the Labour Law requires the Ministry of Labour to render a Prakas with regard to the day-care center and nursing room. Therefore, while awaiting such a Prakas by the Ministry of Labour, the Arbitration Council finds that it is necessary to have babysitters in the day-care center; babies cannot be left without sitters. Therefore, the employer must either place babysitters in the nursing room and day-care center the company has already arranged in Building F or arrange for babysitters in any nursing room and day-care center the company may arrange for its workers.

Issue 3:

The workers claim reimbursement for the deducted 14,000 Riel for the medical checkup. The Arbitration Council finds that, the employer's argument that the deductions were made with the group leader and staff representative's agreement, [do not change the fact that] the company did deduct the money.

Regarding medical check costs, the Arbitration Council has issued many awards such as:

- Award 02/03-Chou Sing issued on May 21, 2003;
- Award 21/03-Loyal issued on December 08, 2003;
- Award 19/04-Kbal Koh issued on May 21, 2004;
- Award 53/04-Kong Hong issued on July 26, 2004;
- Award 60/04-United Art issued on August 16, 2004;
- Award 63/04-Shinewell issued on August 24, 2004;
- Award 106/04 -Suit Way issued on January 10, 2005; and
- Award 05/05-GHG issued on February 1, 2005, etc.

Article 274 (C) of Labor Law states that the employer has to pay his/her workers the medical check cost and Article 247 also stipulates that the Ministry in charge of Labor shall issue a Prakas to determine: a) the conditions under which pre-employment, re-employment, periodical, and special physical exams are given; and c) the conditions under which employers are required to establish and provide at their expense: the employee's medical check as defined in point (a) of this Article.

Even in the absence of the new Prakas which is to be created by the Ministry in charge of Labor, the Arbitration Council finds that Article 247 of the Labor Law 1997 provides sufficient legal ground to conclude that the employer is responsible for employees' medical check costs, including those of newly recruited workers. The meaning of Article 247 (C) clearly states that when recruiting new

workers, it is the employer's responsibility to pay medical check costs. (Please see the Dissenting Decision in Case 60/04-United Art and Joint Prakas No. 09 of January 19, 1994 on medical checks for Cambodians and foreigners working in Cambodia, which requires the employer to pay his/her employees medical check costs.)

In addition, Article 377 of the 1997 Labour Law states that those who violate Article 247 or the Prakas of labour health are liable for a fine of one hundred twenty (120) days to three hundred and sixty (360) days of the base daily wage and to imprisonment of one to five years, or to only one of these two penalties. This article shows that the employer is responsible for paying for [the cost of the] health check fees to workers and that if the employer fails to comply with Article 247, the employer is liable for a fine and punishment under the law.

Thus, the Arbitration Council decides that the employer must reimburse the [cost of the] health check fee of 14,000 Riel to each worker from whom the company has made a deduction from their wages.

Issue 4:

Workers demanded the company to open the gate for workers to come in at 12:00 since outside the factory, there is no shade, it is dusty and the rainy season is coming near. The company objected to this, maintaining the position that the factory opens the small gate at 12:10 and the large gate 12:15.

The Arbitration Council finds that the workers' above demand is not lawfully founded enough as determining working hours and allowing the gate to be opened for workers to enter the factory is under each company's jurisdiction. According to Article 138 of the Labour Law, working hours must be determined by the employer. Besides, the Arbitration Council found in Case 28/04 that Article 2 of the Labour Law provides the employer with the right and power to *manage and lead* the human resource work in the company as long as the work is done in accordance with the law. In this case, the Arbitration Council finds that the right and power means the employer is not obligated to open the gate for workers to enter the factory outside of working hours. The Arbitration Council finds that the lunch break is not included in the working hours.

If we regard this dispute as an interest dispute, the workers' demand for the sake of their own benefit and ease may cause the company to spend money on security, sanitation and safety of the workers who are in the compound of the factory outside the working hours; therefore, the Arbitration Council finds that based on principles of equity, the employer should not have such a burden imposed upon them.

The Arbitration Council found that on 21 May 2004, an arbitration panel, in Award #24/04 dated 21 May 2004, ordered the company to build a canteen for workers. The company did not follow the award, as the company already had a canteen in place in the wake of the agreement dated 21 May 2004. Thus, workers should choose to eat meal at the place the company had in place for them.

Based on the above reasons, workers who choose to leave the factory for lunch outside the factory do not have the right to force the company to open the gate for them to get back into the factory before the time set by the company; workers should know how to use their noon break for the sake of their own convenience.

Based on the foregoing facts, law, equity and evidence, the Arbitration Council issues an award and makes decisions which shall be a solution in full to the disputes as follows:

DECISION

- 1- Accept the request of female workers with small babies to take one (1) hour break per day for breastfeeding.
- 2- Order the employer to allow workers to rest thirty (30) minutes in the morning from 9:30 to 10:00 and another thirty (30) minutes in the afternoon from 14:30 to 15:00, which is the midpoint of each shift. Female workers can choose to breastfeed their baby either at home or in the nursing room the employer has arranged at Golden Crown factory at Building F, which is near the South Bay factory, as is set forth in the agreement of December 8, 2004.
- 3- Order the company to provide staff to take care of the babies of the female workers who breastfeed their babies in the nursing room and daycare center the company has arranged at Building F.
- 4- Order the company to reimburse the workers the 14,000 Riel or three and a half dollars (US\$3.50) it has deducted from workers for [the cost of the] health check, as is determined by the law, from the date this award comes into effect.
- 5- Reject workers' request for the company to open the gate for workers to enter and take shelter at 12:00 noon during the lunch break.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Mr. Ly Tayseng

Signed:

Arbitrator chosen by the worker party:

Mr. Huon Chundy

Signed:

Chair of arbitration panel:

Mr. Kong Phallack

Signed:

This Award will come into effect after 8 days of the date of its notification unless any of the parties lodges a written opposition with the Secretariat of the Arbitration Council within this time period.