



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 110/07 – Now Corp

Date of Award: 12 November 2007

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: **Tuon Siphann**

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

DISPUTING PARTIES

Employer party:

Name: **Now Corp**

Address: Choeung Ork Village, Lom Hach Commune, Angk Snuol District, Kandal Province

Telephone: 012 787 957

Fax: N/A

Representatives:

- | | |
|----------------------|-------------------------|
| 1. Mr. Mao Veasna | Administrator; |
| 2. Mr. Hom Phea | The Company's Attorney; |
| 3. Mr. Jin Chun Wan | Chief of Packing Unit; |
| 4. Mr. Phin Sophon | Administrator; |
| 5. Mr. Som Chanthy | Account; |
| 6. Mr. Cheat Khemara | GMAC representative; |

Worker party:

Name: **Khmer Youth Trade Union (KYTU) at Now Corp Factory**

Address: Choeung Ork Village, Lom Hach Commune, Angk Snuol District, Kandal

Telephone: 012 907 902

Fax: N/A

Representatives:

- | | |
|------------------|---------------------|
| 1. Mr. Yon Rithy | President of KYFTU; |
|------------------|---------------------|

- | | |
|----------------------|---|
| 2. Mr. Nov Titha | KYFTU officials; |
| 3. Mr. Chhem Somrith | President of KYTU at Now Corp Factory; |
| 4. Mr. Muth Sam Art | Vice-President of KYTU at Now Corp Factory; |
| 5. Mr. Khy Sophal | Secretary of KYTU at Now Corp Factory; |
| 6. Mr. Sreng Hak | KYTU committee member at Now Corp Factory; |
| 7. Mr. Sreng Rith | KYTU committee member at Now Corp Factory. |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. [The worker party] demanded that the company provide workers with full wages when the company does not have work for the workers and back pay [the workers for the prior periods of suspension]. The employer party asked for some time for discussion.
2. [The worker party] demanded that the company reinstate KYTU leaders and other workers who were dismissed on 19 September 2007. The employer party asked for some time for discussion.
3. [The worker party] demanded that the company maintain their wages and attendance bonus when workers violate the Labour Law. The employer party asked for some time for discussion.
4. [The worker party] demanded that the company build a day-care centre and a breastfeeding room and if the company cannot afford it, workers can accept two cans of milk (1.5 kilogramme each) and a day-care fee of US\$ 20 per month in replacement. The employer party asked for some time for discussion.
5. [The worker party] demanded that the company build a clean dining hall within the factory. The employer party asked for some time for discussion.
6. [The worker party] demanded that the company provide workers with a 500-riel meal allowance per hour when workers are asked to work overtime for more than two hours. The employer party asked for some time for discussion.
7. [The worker party] demanded that the company not deduct their wages when their ID cards are lost or damaged. The employer party asked for some time for discussion.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labour 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 which took place on 8 October 2007 was unsuccessful, and the non-conciliation report No. 203/07 was submitted to the Secretariat of the Arbitration Council on 16 October 2007.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Centre, Building A, Sothearos Blvd., Sangkat Tonle Bassac, Khan Chamkarmon, Phnom Penh.

Date of pre-hearing: 22 October 2007 (from 8:00am to 11:00am)

Date of hearing: 26 October 2007 (from 2:00pm to 5:30pm)

Procedural issues:

Having receiving a complaint from the striking workers on 21 September 2007, the Kandal Department of Labour and Vocational Training designated its officials to conciliate the dispute and the last conciliation session was held on 27 September 2007; as a result 13 out of the 20 issues were conciliated. The seven non-conciliated issues were submitted to the Secretariat of the Arbitration Council on 16 October 2007 via the non-conciliation report No. 203 dated 8 October 2007.

Having received the case, the Secretariat of the Arbitration Council invited the disputing parties to a hearing on 26 October 2007 at 2:00p.m.

Both parties were present as requested by the Arbitration Council. The Arbitration Council attempted to obtain more information regarding the issues and to conciliate the unresolved issues and as a result four issues – issues 4, 5, 6 and 7 were conciliated.

On 7 November 2007, the Secretariat of the Arbitration Council received Letter No. 1087 from the Khmer Youth Trade Union requesting that the Arbitration Council intervene in the labour dispute at Now Corp Company. The Arbitration Council considers that a separate labour dispute arose from the dispute in this case which required the disputing parties to commence new proceedings in order for the Arbitration Council to settle the dispute.

The Arbitration Council considers the non-conciliated issues – issues 1, 2 and 3 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. Internal Work Rules of Now Corp dated 21 August 2006;

2. Notification of Now Corp dated 25 October 2007;
3. Report on workers' strike;
4. Letter to the Prime Minister of Kingdom of Cambodia for intervention in the labour dispute dated 3 October 2007;
5. Warrant inviting Muth Sam Art, Chhem Somrith and Khi Sophal dated 17 October 2007;
6. Letter regarding the reduction in the number of workers dated 17 September 2007;
7. Notification letter on the election of committee members of KYTU at Now Corp dated 19 September 2007.
8. Protection order No. 55 dated 26 September 2007;
9. Final order No. 01 replacing Protection order dated 2 October 2007;
10. Lawsuit of workers and Bath Phay dated 15 and 16 October 2007;
11. Authorisation letter to lawyers Hom Phea and Chhun Vynita dated 28 September 2007;
12. Authorisation letter to Mr. Hom Phea dated 22 October 2007;
13. Letter No. 009/07 for intervention in the workers' strike at Now Corp Factory dated 7 September 2007.

Provided by the worker party:

1. Notification No. 906 dated 19 September 2007 on the election of committee members of KYTU at Now Corp;
2. Minutes on the election of committee members of KYTU at Now Corp dated 19 September 2007;
3. Statute of KYTU at Now Corp dated 19 September 2007;
4. Name list of participating workers in the election of committee members of KYTU;
5. Name list of workers who were dismissed by the company;
6. Notification dated 17 October 2007 on the failure to comply with the Arbitral Award/Order No. 011.

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

1. Report No. 203/07 dated 8 October 2007 on the collective labour dispute conciliation at Now Corp;
2. Minutes dated 27 September 2007 of the collective labour dispute conciliation at Now Corp.

Provided by the Secretariat of the Arbitration Council:

1. Arbitral Award/Order No. 011 dated 17 October 2007;

2. Arbitral Award/Order No. 012 dated 22 October 2007;
3. Invitation No. 502 to the director of Now Corp to attend the hearing dated 25 October 2007;
4. Invitation No. 503 to the President of KYTU at Now Corp to attend the hearing dated 25 October 2007.

FACTS

- Having examined the report on the collective labour dispute conciliation;
- Having listened to the testimonies from both the employer party and the worker party;
- Having reviewed other supplementary documents;

The Arbitration Council finds that:

Issue 1: [The worker party] demanded that the company provide workers with full wages when the company does not have work for workers and the workers seek back pay for past suspensions

- The company did not have work for 70 percent of the workers (out of the total of 1,553 workers) in July, August and September 2007. The duration for which workers had no work lasted from two to seven days. During these times, the employer did not suspend the labour contracts of the workers with the supervision of the Labour Inspector.
- The company did not inform the workers in advance that the company had no work for workers. Only when the workers arrived at the factory did the company then announce to all workers that the company had no work for workers and workers were asked to return home and provided with 50 percent of wages. On the other hand, those workers, who worked until 10:00 a.m., were deducted two hours of wages out of their normal working hours.
- The employer dismissed 36 workers because the company did not receive sufficient purchasing orders from its clients.
- The employer party and the worker party did not have any agreement regarding the provision of wages when the company had no work for workers.
- The worker party claimed that if the company had no work for workers and did not suspend workers' labour contracts [in accordance with the Labour Law] then the company should provide 100 percent wages to workers. However, if the workers' labour contracts were suspended by the company in accordance with the Labour Law, the workers would receive nothing.

Issue 2: The workers demanded that the company reinstate the leaders of KYTU and those [workers] who were dismissed on 19 September 2007

- The KYTU claimed that on 19 September 2007 the company dismissed 200 workers but the employer party rejected [this claim] arguing that the company dismissed only 36 workers and after 19 September 2007, the company did not dismiss any other workers. For those [workers] whose names were not listed in the name list of the 36 dismissed workers, the company would reinstate them whenever they returned to work.
- The worker party demanded that the company reinstate five workers. Three of the five workers, Chhem Som Rith, Muth Sam Art and Khi Sophal, claimed to be union leaders. The union did not provide the Arbitration Council with the names of the other two workers.
- According to the union's testimony in the hearing, at around 9:00 a.m. or 10:00 a.m. on 19 September 2007, the KYTU organized an election to elect its committee members at Now Corp Factory located in Choeung Ok Village, Lum Hach Commune, Angk Snuol of Kandal Province. Around 45 workers participated in the election (thumb prints were available). The employer party objected to the worker party's claim, adding that from 9:00 a.m. to 10:00 a.m. on 19 September 2007, workers were working in the factory. According to the minutes of the election, the Arbitration Council found that the election was held at 4:20 p.m. with the participation of six officials from the Khmer Youth Federation Trade Union and a total of 45 workers (40 women).
- Based on the minutes, the Arbitration Council considers that the union's election was held at 4:20 p.m. on 19 September 2007.
- The Khmer Youth Trade Union did not notify the company's director of the number and names of nominated candidates of the KYTU at Now Corp Company.
- Based on the minute of the election of KYTU's committee members at Now Corp dated 19 September 2007, the nominated candidates included 1) Chhem Som Rith, male, 28 year-old; 2) Muth Som Art, male, 27 year-old; and Khi Sophal, male, 26 year-old.
- Through letter No. 906, on 19 September 2007, KYFTU notified the company's director of the election of KYTU's committee members at Now Corp Factory at around 9:00 a.m. or 10:00 a.m. The elected candidates were: 1) Mr. Chhem Som Rith, President; 2) Mr. Muth Som Art, Vice-President and 3) Mr. Khi Sophal, Secretary. The company claimed in the hearing that the company received the notification on the election of committee members of KYTU at Now Corp on 19 September 2007 at around 11:00 a.m. or 12:00 a.m.

- In the afternoon of 19 September 2007, the company dismissed 36 workers. The employer party claimed that the dismissal was made because there were no purchasing orders from his clients and it was not related to union discrimination. Regarding the 36 dismissed workers as well as five other workers, the company did provide them with severance pay in compliance with the Labour Law.
- Five out of the 36 dismissed workers demanded that the company reinstate them. The union claimed that the employer dismissed the workers due to union discrimination.
- On 20 September 2007, workers went on strike demanding that the company resolve some issues. Regarding the strike, the union and workers did not notify the employer in accordance with the [proper] legal procedures and no secret ballot was held in order to stage the strike.
- On 25 September 2007, the union applied for registration with the Ministry of Labour and Vocational Training
- Workers stopped striking on 22 October 2007 when the Arbitration Council issued the second order.

Issue 3: The workers demanded that the company provide workers with their wages and attendance bonus during the strike days

- On 20 September 2007, workers went on strike without notifying the employer and no secret ballot was held in order to stage the strike.
- The strike continued until 22 October 2007;
- Workers staged the strike without giving prior notice or holding a secret ballot within the union.

REASONS FOR DECISION

Issue 1

The suspension of labour contracts shall comply with the procedures set out in the Labour Law as stated in Article 71(11) as follows:

“When the enterprise faces a serious economic or material difficulty or any particularly unusual difficulty, which leads to a suspension of the enterprise operation. This suspension shall not exceed two months and be under the control of the Labour Inspector”

In previous cases, the Arbitration Council has interpreted Article 71(11) of the Labour Law to mean that in the case that an enterprise faces a serious economic or material difficulty or any particularly unusual difficulty, which leads to the suspension of the operations of an enterprise [for a period] not exceeding two months, the employer has the right to suspend his

operation under the control of the Labour Inspector. (See Arbitral Awards 21/03 – Loyal Cambodia, Issue 8, 46/04 – M&A Cambodia, Issue 1, 01/04 – New Point, Issue 1 and 60/04 – United Art, Issue 1)

In this case, the Arbitration Council agrees with the previous arbitrators' ruling.

In this case, the company did not suspend workers' labour contracts during those times when the company did not have work for workers in the months of July, August and September 2007, which lasted from two to seven days. Moreover, the company did not inform the workers in advance that the company would not have work for them. Only when the workers arrived at the factory did the company tell the workers that it had no work for them to do and asked them to return home with 50 percent of wages. As for workers who worked until 10:00a.m., the company deducted only two hours of wages out of their normal working hours.

In this case, the Arbitration Council finds that the company's suspension of its operation was not under the control of the Labour Inspector. That means the employer did not comply with the procedures set out in Article 71(11) of the Labour Law. Thus, the Arbitration Council considers that the employer did not suspend its operation.

Article 72(1) of the Labour Law states that, "*The suspension of a labour contract affects only the main obligations of the contract, that are, those under which the worker has to work for the employer, and the employer has to pay the worker, unless there are provisions to the contrary that require the employer to pay the worker...*"

In this case, the employer did not suspend its operation in accordance with the [proper] legal procedures. Therefore, the suspension was not conducted pursuant to Article 72(1) of the Labour Law.

In previous cases, the Arbitration Council held that where the labour contract was suspended in compliance with Article 71(11) of the Labour Law, workers were not entitled to receive wages during the [period of the] labour contract suspension. The Arbitration Council also held that where the company did not have work for workers and the company did not suspend workers' labour contracts in compliance with Article 71(11) of the Labour Law, the company was obliged to provide 100 percent of wage to the workers (see Arbitral Awards 21/03 – Loyal Cambodia, Issue 8, 46/04 – M&A Cambodia, Issue 1, 01/04 – New Point II, Issue 1, 60/04 – United Art, Issue 1).

The Arbitration Council considers that even though workers signed the name list to take leave when the company did not have work for them and accepted 50 percent of wages, the Arbitration Council considers that the company should have suspended the labour contracts of the workers in compliance with Article 71(11) of the Labour Law when the company did not have work for the workers during the months of July, August and September 2007. If the

company did not suspend the labour contracts in compliance with Article 71(11) of the Labour Law, the employer was obliged to provide workers with 100 percent of wages.

In this case, because the company [only] provided workers with 50% of wages during the period that the company did not have work for workers but did not suspend workers' labour contracts in compliance with Article 71(11) of the Labour Law, the Arbitration Council considers that the employer was obliged to provide workers with an additional 50 percent of wages in order to make up the full wage that workers should have received during the period that the company did not have work for workers.

Therefore, the Arbitration Council decides that the company is obliged to provide an additional 50 percent of wages to workers during the months of July, August and September 2007 when the company did not have work for workers.

Issue 2

In this issue, the union party demanded that the company reinstate the five workers who were dismissed by the company due to union discrimination.

Therefore, the Arbitration Council considers the issue as follows:

1. Was the employer obliged to comply with the termination procedures to dismiss Mr. Chhem Som Rith, Mr. Muth Som Art and Mr. Khi Sophal, who received special protection in accordance with the law?

Article 293 of the Labour Law states that, "*The dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector.*"

Clause 4 of Prakas 305 dated 22 November 2001 states that, "*From the time of applying for union registration, all employees that are union founders or all employees that voluntarily joined the membership of the union while asking for registration, also receive protection like a worker delegate. This protection lasts for 30 days after the date of union registration.*

Exceeding the period mentioned in the above paragraph, this protection will be granted to 3 union leaders pursuant to the conditions set out in Articles 282 and 293 of the Labour Law. For a union having more than 200 members, this protection shall be granted to one union member for each 100 members. Additional protected members can be granted through a collective agreement. In order to receive this protection, the union shall notify the employer of the names of people receiving protection by official means. A copy of this information shall be sent to the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation..."

According to Clause 4 of Prakas 305 dated 22 November 2001, union leaders also receive the same special protection as worker delegates.

In Arbitral Award 28/07 – De Fang, the Arbitration Council held that union leaders will receive special protection provided they fulfill the following four conditions:

- Condition 1: Workers are the type of workers [entitled to receive] protection under the Labour Law.
- Condition 2: The union has informed, by all reliable means, the employer about the identity of workers who should receive this special protection.
- Condition 3: The union has submitted a copy of its notification to the employer to the Ministry of Labour and Vocational Training.
- Condition 4: The union has applied for registration with the Department of Labour Disputes.

Based on the above facts, the worker party said in the hearing that at around 9:00 a.m. or 10:00 a.m. on 19 September 2007, the Khmer Youth Trade Union held an election to elect its committee members at Now Corp Factory. The election was held in Choeung Ok Village, Lum Hach Commune, Angk Snuol District of Kandal Province with 45 participants. However, according to the minutes dated 19 September 2007 submitted to the Arbitration Council by the worker party, the Arbitration Council finds that the election of committee members was held at 4:20 p.m. Because the evidence and the testimony were not consistent, the Arbitration Council cannot use them as evidence to prove that the company dismissed Mr. Chhem Som Rith, Mr. Muth Som Art and Mr. Khi Sophal before they held the election and before they were elected as union leaders. Furthermore, condition 1 was not met because when the company dismissed the three workers, they were not yet in the category of workers who [are entitled to] receive special protection under the Labour Law.

Therefore, it is not necessary that the Arbitration Council considers the other three conditions.

2. Did the employer discriminate [on the grounds of] union [membership] or [participation in union] activities when the company dismissed the five workers?

Article 12 of the Labour Law states that, “*Except for the provisions fully expressing under this law, or in any other legislative text or regulation protecting women and children, as well as provisions relating to the entry and stay of foreigners, no employer shall consider on account of:*

- ...
- *membership of workers' union or the exercise of union activities;*
- ...
- *discipline or termination of employment contract.”*

Article 279 of the Labour Law states that, *“Employers are forbidden to take into consideration union affiliation or participation in union activities when making decisions concerning recruitment, management and assignment of work, promotion, remuneration and granting of benefits, disciplinary measures and dismissal”*.

According to the previous awards, the Arbitration Council held that the worker party, who claimed that the employer dismissed workers due to union membership, was obliged to provide evidence to support its claim. (See Arbitral Awards 93/06 – Evergreen, Issue 1, 12/06 – River Rich, Issue 1 and 01/07 – Supreme)

In the hearing, the worker party claimed that the employer dismissed the five workers on the grounds of union membership because the dismissal was made after the union notified the employer of the election of union leaders and the union establishment. The employer party claimed that the dismissal was made because the company did not receive purchasing orders from its buyers.

The Arbitration Council finds that the employer dismissed the five workers along with the other 31 workers (36 in total) because the company faced economic difficulty as a result of not having received any purchasing orders from its buyers. Regarding the workers' claim that the employer dismissed the five workers after the establishment and the election of the union, the Arbitration considered the above claim and found that Mr. Chhem Som Rith, Mr. Muth Som Art and Mr. Khi Sophal did not receive special protection provided by the Labour Law.

Further, the union did not provide any other evidence to show the link between the dismissal of the five workers and union membership. Thus, there was not sufficient evidence to prove that the employer dismissed the five workers on the grounds of union membership.

In conclusion, the Arbitration Council decides to reject the workers' demand that the company reinstate them because they were dismissed as a result of union membership.

Issue 3

The worker party demanded that the company provide workers with [their] wages and attendance bonus during the period the workers went on strike from 20 to 22 October 2007.

1. Provision of wages during strike period

Article 332 of the Labour Law states that a labour contract is suspended when a strike is staged. During the strike, wages and allowances are not provided. However, Article 334 states that during a strike, if new workers are recruited to replace the striking workers, the employer is obliged to pay the wages of the striking workers for the duration of the strike. In this case, the worker party did not claim that the employer recruited new workers to replace the striking workers during the strike period.

The Arbitration Council considers that under the the Labour Law workers are not entitled to [receive a] wage during a strike (See Arbitral Awards 04/03 – Lida, 03/05 – Flying Dragon, 07/05 - Coca Cola). Moreover, the Arbitration Council notes that the content of Article 332 of the Labour Law infers that striking workers are not entitled to receive wages for the period of the strike. Even though the strike was staged in accordance with the [proper] procedures of the Labour Law workers are still not entitled to receive wages for the period of the strike (See Arbitral Award 22/04 – Raffles le Royal, Issue 2).

In this case, the Arbitration Council also agrees with the previous rulings of the previous panels. Thus, workers are not entitled to receive wages for the strike days from 20 to 22 September 2007.

2. Provision of attendance bonus during strike days

Point 3 of Notification 017 dated 18 July 2000 stipulates that, *“Workers who come to work regularly on regular working days of a month shall receive a bonus of at least US\$ 5.00 per month.”*

In previous cases, the Arbitration Council decided that workers, who did not strike in compliance with [proper] legal procedure, were considered not to be working regularly, thus, they were not entitled to the attendance bonus. (See Arbitral Awards 04/03 – Lida, Issue 1, 15/04 – Lucky Zone, Issue 4, 03/05 – Flying Dragon, Issue 3 and 63/07 – Phnom Penh)

In this case, workers did not comply with the legal procedures for strikes for the following reasons:

Article 323 of the Labour Law states that, *“A strike shall be declared according to the procedures set out in the union’s statutes, which must state that the decision to strike is adopted by secret ballot.”* In this case, the union party did not adopt the decision to strike by secret ballot.

Article 324 of the Labour Law states a strike must be preceded by prior notice of at least seven working days and be filed with the enterprise or establishment. In this case, workers went on strike on 20 September 2007 after the employer dismissed 36 workers on 19 September 2007.

Article 320(4) of the Labour Law states that, *“The right to strike can be exercised only when all peaceful methods for settling the dispute with the employer have already been tried out.”* In this case, workers did not try all means to settle the dispute in accordance with Article 320(4) because workers went on strike before utilising the procedures for settling disputes such as negotiation by the Labour Inspectors and via the Arbitration Council, the institution where collective labour disputes are settled in a peaceful manner. On the contrary, workers went on strike without complying with the Labour Law. Workers went on strike at their own will.

The workers' strike was not staged with respect to the strike procedures set out in the Labour Law. Thus, the Arbitration Council considers that workers did not come to work regularly during the strike. Therefore, the Arbitration Council decides that workers are not entitled to the attendance bonus during the strike period from 20 to 22 October 2007.

In conclusion, the Arbitration Council decides to reject workers' demand that the company provide workers with [their] wages and attendance bonus for the strike days.

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

DECISIONS AND ORDERS

Issue 1: Order the employer to provide workers with 50 percent of wages to make up the full wage of workers during the times that the company did not have work for the workers in July, August and September 2007 within 15 days after this award comes into effect.

Issue 2: Reject the demand of workers that the company reinstate the five workers who were dismissed by the company on 19 September 2007.

Issue 3: Reject the demand of workers that the company provide workers with their wages and attendance bonus for the strike days from 20 to 22 October 2007.

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 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: **Tuon Siphann**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: