



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 124/07 & 128/07 – D.A

Date of Award: 18 December 2007

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Chhiv Phyrum**

Arbitrator chosen by the worker party: **Ven Pov**

Chair Arbitrator (chosen by the two Arbitrators): **Ang Eng Thong**

DISPUTING PARTIES

Employer party:

Name: **D.A Corporation Ltd**

Address: Banlar Saet Village, Sangkat Khmuonh, Khan Russei Keo, Phnom Penh

Telephone: 012 218 774

Fax: N/A

Representatives:

- | | |
|--------------------------|-------------------|
| 1. Mr. Chung Choow Young | General Director; |
| 2. Mr. Set Khiply | Administrator. |

Worker party:

Name: **Khmer Youth Federation Trade Unions (KYFTU) and Khmer Youth Trade Union (KYTU)**

Address: Banlar Saet Village, Sangkat Khmuonh, Khan Russei Keo, Phnom Penh

Telephone: 016 686 144

Fax: N/A

Representatives:

- | | |
|-----------------------|-----------------------------------|
| 1. Mr. Nong Samnang | KYFTU Conciliator; |
| 2. Mr. Hing Bunthoeun | KYFTU Conciliator; |
| 3. Mr. Muth Samay | President of KYTU at the factory; |
| 4. Mr. Mean Touch | Secretary of KYTU at the factory; |

5. Mr. Chheang Bun Nat	Adviser of KYTU at the factory;
6. Ms. Buor Sok Huoch	Treasurer of KYTU at the factory;
7. Mr. Suo Savorn	Committee member of KYTU;
8. Mr. Nheb Bun Thol	Worker;
9. Mr. U Sok Yoeun	Worker;
10. Mr. Vong Sokea	Worker;
11. Mr. Chhit Mao	Worker;
12. Mr. Chin Uong	Worker;
13. Mr. Phen Ry	Worker;
14. Mr. Sy Thon	Worker;
15. Mr. Choy Channa	Worker;
16. Mr. Hong Sok Hay	Worker;
17. Mr. Pim Rom	Worker;
18. Mr. Pick Savong	Worker;
19. Mr. Uong Sok	Worker;
20. Mr. Nhim Suy	Worker;
21. Mr. Nob Pha	Worker;
22. Mr. Hem Sareth	Worker;
23. Mr. Ouk Chanthoun	Worker;
24. Mr. Chorn Seng	Worker.

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. Workers demanded that the company provide workers with meal allowance of 1,000 riels per hour; but the company party rejected the demand arguing that the company complies with the Labour Law.
2. Workers demanded that the company pay workers no later than the tenth day of the month. The company claimed that it could not pay workers on the tenth day of every month, adding that the company will pay workers on the fifteenth day of the month in order to be consistent with the previous policy.
3. Workers demanded that the company reimburse the medical check fee of 10,100 riels and the wage and attendance bonus deducted by the company when workers took leave to undergo the medical check. The company party claimed that it will bring the demand for discussion with the company's director.
4. Khmer Youth Trade Union demanded that company deduct monthly union contribution fees of 1,000 riels from its members. The company claimed that it has no time to deduct union contribution fees for Khmer Youth Trade Union.

5. Workers demanded that the company double the wage of workers when workers are asked to work overtime on holidays, national holidays and Sundays. Workers also demanded that the company reimburse back wages in double because the company had not duly complied with this calculation.
6. Workers demanded that the company stop transferring workers from one section to another and reinstate workers and machine repairmen.
7. Workers demanded that the company stop dismissing workers without misconduct.
8. Workers demanded that the company comply with the agreement it signed with workers.
9. Workers demanded that the company stop taking revenge and discriminating against the union.
10. Workers demanded that the company reinstate worker Choub Anet and maintain her wage and attendance bonus.
11. Workers demanded that the company notify workers before 11:00 a.m. when workers are asked to work overtime.
12. Workers demanded that company pay 50 percent of wage and two-month severance pay to worker Bath Sreyneang who took maternity leave but the company had not paid her yet.
13. Workers demanded that the company warn group leaders in all section for using impolite words with workers.
14. Workers demanded the company reinstate the 30 workers or provide the workers with payment of contract termination in accordance to the Law. The employer rejected to reinstate the 30 workers arguing that the workers were dismissed because of serious misconduct.

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 13 November 2007 was unsuccessful, and the non-conciliation report No. 1651 was submitted to the Secretariat of the Arbitration Council on 13 November 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 hearing:

First hearing: 22 November 2007 (from 14:00 to 18:30)

Second hearing: 27 November 2007 (from 8:00 to 11:00)

Procedural issues:

On 18 November 2007, the Department of Labour Disputes received a complaint from Khmer Youth Trade Union demanding that the employer improve working conditions. Having received the complaint, the Department of Labour Disputes designated its officials to conciliate the dispute as a result of which seven of the 11 disputing issues were conciliated. The four non-conciliated issues were submitted to the Arbitration Council on 7 November 2007.

When the case was submitted to the Arbitration Council, the Secretariat of the Arbitration Council was informed that the worker party was striking to demand that the company resolve nine other issues. In this regard, the Arbitration Council issued an Order dated 8 November 2007 directing workers to return to work and wait for the dispute resolution by the Arbitral Procedures.

Having informed of workers' strike in D.A Company making more demanding issues, the Department of Labour Dispute designated its officials to conciliate the issues but none of the new issues was conciliated because the employer party did not attend the conciliation session.

On 13 November 2007, the Secretariat of the Arbitration Council received the Department of Labour Dispute's report No. 1207 dated 13 November 2007.

The Arbitration Council summoned the disputing parties to a pre-hearing meeting on 15 November 2007 at 8:30 a.m. Both parties attended the meeting summoned by the Arbitration Council and both parties agreed to send cases 124/07 – D.A and 128/07 – D.A to the Arbitration Council for settlement. The Arbitration Council encouraged the disputing parties to put a halt to any measure which could aggravate the situation during the resolution process at the Arbitration Council.

During the arbitral proceedings, the Department of Labour Dispute once again conciliated case 128/07 – D.A and as a result five out of nine disputes were conciliated. It means that the remaining four non-conciliated issues in case 128/07 – D.A are to be settled by the Arbitration Council.

At the Arbitration Council's hearing on 22 November 2007, both parties postponed all their [industrial] action and attended the hearing summoned by the Arbitration Council. In the

first hearing, the Arbitration Council made further attempts to conciliate the dispute and as a result, Issue 8 of case 128/07 – D.A was conciliated and Issue 7 was withdrawn by the worker party. On 27 November 2007, the Arbitration Council conducted the second hearing to settle the remaining non-conciliated issues from the first hearing. Thus, in this case the Arbitration Council considers only the remaining non-conciliated issues based on the evidence and statements of the worker party in the hearing as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Memorandum of Understanding and Statute of D.A Company dated 21 April 2001;
2. D.A Company's Internal Work Rules dated 22 November 2003;
3. Trade Registration Certificate of D.A Company dated 21 June 2002;
4. Minute of the collective labour dispute conciliation at D.A Company dated 22 October 2007;
5. Minute of the collective labour dispute conciliation at D.A Company dated 15 November 2007;
6. Notification dated 27 October 2007;
7. Nhanh Sok Khim's complaint dated 7 November 2007;
8. Letter of Regret of Choub Anet;
9. Letter dated 12 November 2007 inciting illegal strike and intimidating workers from working;
10. Protection Order No. 03 dated 15 November 2007;
11. List of workers voluntarily worked during the Water Festival;
12. Application forms and resumes of 32 workers;
13. Two copies of daily minute of D.A Company's security guards;
14. 14 photos and one Video CD;
15. List of persons intimidating workers from working;
16. Letters of Regret of 22 workers;
17. Letter dated 7 November 2007 requesting for intervention by issuing Order to stop workers from striking at D.A Company.

Provided by the worker party:

1. Notification No. 1042 dated 1 November 2007 on the election of committee members of Khmer Youth Trade Union at D.A Company;

2. Letter dated 12 November 2007 requesting to move the hearing date;
3. Statute of Khmer Youth Trade Union dated 23 November 2007;
4. Request for collective labour dispute conciliation at D.A Company;
5. Letter of voluntary strike attendance,
6. Minutes of the collective labour dispute conciliations at D.A Company dated 22 October and 12 November 2007.

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

1. Report No. 1651 dated 13 November 2007 on the collective labour dispute conciliation at D.A Company;
2. Report No. 1175 dated 7 November 2007 on the collective labour dispute conciliation at D.A Company;
3. Report No. 1207 dated 13 November 2007 on the collective labour dispute conciliation at D.A Company;
4. Minutes on the collective labour dispute conciliation at D.A Company dates 22 October and 12 November 2007;

Provided by the Secretariat of the Arbitration Council:

1. Arbitral Order No. 014 dated 8 November 2007;
2. Invitation No. 545 dated 13 November 2007 to the worker party to provide information;
3. Invitation No. 544 dated 13 November 2007 to the employer party to provide information;
4. Invitation No. 573 dated 20 November 2007 to the worker party to attend the hearing;
5. Invitation No. 572 dated 20 November 2007 to the employer party to attend the hearing.

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 submitted to the Arbitration Council

The Arbitration Council finds that:

- D.A Company employs 600 workers.
- The factory has one union - Khmer Youth Trade Union, the claimant in this case.
- Based on the claim of the union representatives, the union has 600 workers but it does not have the most representative status because it has just applied for the registration.

Issue 1: Workers demanded that the company maintain meal allowance of 1,000 riels per hour

- Workers demanded that the company maintain meal allowance of 1,000 riels per hour when workers are asked to work overtime for more than two hours. It means that when workers are asked to work overtime for more than two hours, the employer shall pay workers 1,000 riels for each extra hour.
- In general, the overtime work starts from 4:00 p.m. to 8:00 p.m. Based on the previous practice, for overtime work exceeding two hours the company paid workers 1,000 riels for each extra hour. Workers claimed that in accordance with the law, the overtime work shall not exceed two hours.
- Workers alleged that the reason for the claim was that the company had warned workers who refused to work overtime but there was no evidence or witness to support the allegation. The workers party claimed that every time workers were notified of overtime work, the company representatives walked around and told workers at the end of working hours at around 3:00 p.m.
- The company argued that it will maintain the meal allowance regardless of the amount of overtime work. The company did not provide any legal reference to support its argument.

Issue 2: Workers demanded that the company pay workers not later than the tenth day of the month

- Usually, the company pays workers on the fifteenth day of the month. The payment is made for the wage from the sixth day of the previous month to the fifth day of the following month.
- Workers claimed that the cause of the claim was that they need money to pay the rent.
- Workers also claimed that the company used to delay the payment until the 25th day of the following month. The company accepted the claim of workers, adding that such delay in wage payment takes place only once or twice per year.

Issue 3: Workers demanded that the company reimburse the medical check fee of 10,100 riels and wage and attendance bonus that the company deducted when workers took leave to undergo the medical checks

- Workers demanded that the company reimburse the medical check fee of 10,100 riels to workers who had undergone medical checks since the day they started working for the company and the company had never reimbursed them the medical check fee.

- Workers did not show the specific number of workers who had undergone the medical checks; for example, a name list of workers who underwent the medical check or other evidence other than the verbal allegations. Workers did not show any evidence or name list of workers who underwent the medical check on any specific date. Workers just claimed that all the workers, who had undergone the medical examination, have not been reimbursed by the company. Workers claimed that in accordance with the law, the payment of medical checks of workers is the burden of the company.
- The company said that it cannot accept the claim because the medical checks of workers were undertaken a long time ago but the company will reimburse the fee to workers who recently underwent the check with proper supporting documents. The company claimed that from now on, the company will reimburse the medical check fee to newly recruited workers.

Issue 4: Khmer Youth Trade Union (KYTU) at D.A Company demanded that the company deduct union contribution fees of 1,000 riels from its members

- Representatives of KYTU claimed that their union demanded that the company deduct union contribution fees from their members because KYTU submitted a notification of the election of the committee members of KYTU at D.A Company on 30 October 2007 but it was rejected by the company. The union representatives claimed that after the election was held, the union submitted the notification to the company but the company did not accept it because at that time the union members were all dismissed.
- Worker representatives did not show any evidence regarding the submission of name list of union members who requested to have their wages deducted to the company.
- The employer party claimed that the company had not deducted workers' wage for the union because the company has never provided such service to the union. It means that the company did not have any unions yet. The company did not mention any legal basis to support its rejection besides claiming that the company has never provided such service to any union.

Issue 5: Workers demanded that the company warn the team leaders of their attitude and words

- Workers claimed that some team leaders have intimidated workers from joining the union and sometimes they gossiped about workers.

- Leader of Team 2, Sor Rady had said that any worker who risks joining the union will face dismissal like past workers. The worker party did not show any evidence or witness to support its claim.
- The worker party claimed that leader of Team 3, Vath Sokvy had said that after the union establishment if workers go on strike, they will lose their jobs. Then, male workers will become thieves while female workers will become prostitutes. Regarding the statements of the two team leaders above, the worker party did not state the specific date or place of the [statements].
- The company party claimed that if concrete evidence is shown to prove the validity of the said statements, the company will provide a warning to and educate the individuals. The company has the intention of educating any team leader whose attitude and words seen to be rude and the company will take disciplinary action against them, if these incidents are found out to be real.

Additional Issue: The union demanded that the company reinstate the 30 dismissed workers or provide payment for contract termination in accordance to the law because they were dismissed without committing misconduct

- Workers demanded that the company reinstate the 30 dismissed workers. In the hearing, the worker party did not show any evidence regarding the information of the 30 workers; for example, their names. The employer party claimed that the company dismissed only 29 workers (See the name list of workers who were dismissed by the employer in the annex attached to the Award). Thus, the Arbitration Council finds that only 29 workers were dismissed the company.
- On 16 October 2007, workers started the strike and it lasted for one week and two days to demand that the company resolve nine issues. Five out of nine issues were conciliated before the Labour Inspector while the four non-conciliated issues were submitted to the Arbitration Council.
- On 23 October 2007, Khmer Youth Trade Union at D.A Company was established as a branch of Khmer Youth Federation Trade Union. On 1 November 2007, the union submitted the document to the Ministry for registration. The company claimed that the union has not been established yet.
- The company dismissed worker Choub Anet on 2 November 2007 and on the same date another worker was transferred.
- Workers staged another strike from 6 November to 16 November 2007 to demand that the company resolve nine new issues. The strike was staged when the Arbitration Council was conciliating the dispute in case 124/07 – D.A.

- The non-conciliation report of the Ministry of Labour on case 128/07 – D.A was made on 12 November 2007. On the same date, 29 workers were dismissed. After that day, all workers returned to work in their respective positions.
- According to the employer's claim, during the strike the 30 workers committed serious misconduct because they insulted hundreds of workers. They intimidated and even injured some workers with the attempt to stop other workers from entering the factory to work. The company showed the photos of the strike and photos of the 29 workers to the Arbitration Council. The worker party did not refute to the genuineness of the photos but claimed that it could not identify the persons in the photos. Regarding the strike, the employer showed two photos to prove that workers were prevented from entering the factory. The first photo shows the strikers holding one another's stretching hands in front of the factory while the second photo shows the strikers' motorbikes parked one after another in a row in front of the company.
- Workers did not refute to the photos' genuineness but just mentioned that during the strike they held one another's hands to show unity. Regarding the motorbikes, strikers just parked their motorbikes next to them because of the security concern but they had no intention to prevent other workers from entering the factory. The Arbitration Council considers that the explanation was not reasonable because unity could be expressed in other ways not to show intension to prevent other workers from entering the factory to work. Regarding the arrangement of their motorbikes, they could also be arranged in a way that did not show the intension to prevent other workers from entering the factory to work.
- The employer party claimed that the 29 workers life-threatening and injured other workers in order to prevent them from entering the factory to work. The Arbitration Council held the second hearing and requested the employer party to show witnesses to support the allegations (preventing, threatening or injuring); for example, the workers who were threatened especially the security guards who wrote the report which was later submitted to the Arbitration Council. In the second hearing, the employer failed to bring along any witness to support his testimonies.
- The employer party showed evidence in the form of photos of the activities of some strikers who held one another's hands in front of the factory but those photos did not specifically show who the strikers were and the type of threat the strikers used to prevent other workers from entering the factory to work.

REASONS FOR DECISION

Issue 1: Workers demanded that the company maintain meal allowance of 1,000 riels per hour

Clause 4 of Notification 017 dated 18 July 2000 stipulates that, “*Workers who voluntarily work overtime upon request from the employer shall receive a meal allowance of 1,000 riels per day or receive one free meal.*”

Based on the content of this Notification, the Arbitration Council considers that the employer has the obligation to provide a meal allowance of 1,000 riels to workers who work overtime. In this case, the Arbitration Council considers that the employer is obliged by the law. The Arbitration Council considers that workers’ demand that the employer provide an additional meal allowance of 1,000 riels per hour for overtime work exceeding two hours is an interest dispute because the demand is more than what the law provides. In general, the Arbitration Council rejects to consider interest disputes if the union who brings the dispute, does not have the most representative status in the factory. The most representative status provides the union legal capacity to negotiate a collective bargaining agreement in a company (see Article 96 (2B) of the Labour Law and Article 9 (1) of Prakas 305) and legal right to bring an interest dispute before the Arbitration Council. In order to receive the most representative status, Article 277 of the Labour Law states that a union must be registered and fulfill other requirements stated in this Article. (See Arbitral Awards 57/04 – Evergreen; 60/04 – United Art, Issue 3; 08/07 – Sui Qinh, Issue 3; and 33/07 – Gold Fame, Issue 2.)

In this case, Khmer Youth Trade Union does not have the most representative status in D.A Factory. Therefore, the Arbitration Council rejects to consider the demand of workers that the company pay a meal allowance of 1,000 riels per hour when workers are asked to work overtime more than two hours.

Issue 2: Workers demanded that the company pay workers not later than the tenth day of the month

Article 116 (2) of the Labour Law stipulates that, “*Employees’ wages must be paid at least once per month.*”

Based on the content of the above article, the Arbitration Council considers that workers’ wages shall be paid within each month; which means the payment period shall not exceed one month but this Article does not state which day the payment shall be made. It means that the practice of paying wage is based on the employer’s decision as long as the employer complies with Article 116 of the Labour Law because the employer has the right to supervise and direct the enterprise as what provides by Article 2 of the Labour Law.

Article 2 of the Labour Law stipulates that, “*...Every enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in factory, workshop, work site, etc., under the supervision and direction of the employer...*”

In Award 81/05 – Supreme, Issue 4, the Arbitration Council ruled that, “*Article 2 of the Labour Law provides the right and authority to the employer in supervising, directing and managing the human resource in the company as long as the direction and management are legal and appropriate. It means that the employer has the right to determine the pay day of the month as long as the determination is complied with the Law which states that at least once a month.*” In the following cases, the Arbitration Council developed an approach that, “*Employer has the right to supervise and direct his enterprise as long as the supervision and direction are legal and reasonable.*” (See Awards 14/07 – Supreme, Issue 1, 17/07 – Charm Textile, Issue 3, 18/07 – Trinunggal Komara, Issue 2 and 54/07 – Yung Wah I, Issue 9)

The interval of wage payment from one month to another is one month at the longest. The wage payment shall be made at the completion of work. In practice, the company pays workers on the fifteenth day of the following month by calculating the wage from the sixth day of the past month to the fifth day of the following month. The Arbitration Council considers that to pay the wage on the fifteenth day of the month is the right of the employer and it is not unreasonable or it does not violate Article 116 of the Labour Law.

Thus, the Arbitration Council decides to reject the demand of workers that the company pay workers on the tenth day of the month.

Issue 3: Workers demanded that the company reimburse the medical check fee of 10,100 riels to workers

Khmer Youth Trade Union at D.A Company claimed in the hearing that demand that the company reimburse the medical check fee of 10,100 riels was the demand for all workers who had undergone medical examinations and they have not been reimbursed by the company. They claimed to have paid the fee themselves when they were initially employed.

Article 247(A) and (C-4) of the Labour Law states that, “*The Ministry in Charge of Labour shall issue a Prakas to determine: a) the conditions under which pre-employment, re-employment, periodical, and special physical exams are given;... c) the conditions under which employers are required to establish and provide at their expense: 4) the medical exams of workers as stipulated in point a) of this article.*”

Regarding the claim for medical check fee in the previous Awards, the Arbitration Council considered that, “*Article 247(C) of the Labour Law has adequate basic capacity that requires the employer to pay the medical examination fee for workers before they are employed.*” (See Arbitral Awards 63/04 – Shine Well, Issue 1, 64/04 – Mercury Garment, Issue 1, 78/04 – AIA, Issue 1, 98/04 – Gate Union, Issue 2, 106/04 – Suit Way, Issue 1, 107/04 – Jacqsintex, Issue 3, 05/05 – GHG, Issue 1, 05/06 – WND, Issue 1)

In the previous Awards, the Arbitration Council found that, “*The employer party shall pay for the medical examination fee and reimburse the workers.*” (See Arbitral Awards 02/03

– Chu Sing, Issue 1, 21/03 – Loyal Cambodia, Issue 7, 19/04 – Kbal Koh II, Issue 2, 53/04 – Kong Hong, Issue 3, 60/04 – United Art, Issue 2 and 05/06 – WND, Issue 1)

The Arbitration Council considers that Article 247 of the Labour Law provides adequate basic to require the employer to pay for the medical check fee for workers. Thus, the Arbitration Council considers that the argument raised by the employer that he will pay for the medical check fee for newly recruited workers but rejects to pay for the old workers was not correct because the company has not fulfilled its obligation as stated in Article 247 of the Labour Law. (See Arbitral Awards 19/04 – Kbal Koh, Issue 2, 53/04 – Kong Hong, Issue 3)

In this case, the Arbitration Council agrees with the Arbitration Panels' ruling in the previous Awards. Thus, the Arbitration Council orders the employer to reimburse the medical examination fee of 10,100 riels to workers.

Article 120 of the Labour Law stipulates that, *“A lapse of a lawsuit for the payment of wages is three years from the date the wage was due.*

Claims subject to the lapse of lawsuit include the actual wage, perquisites and all other claims of the worker resulting from the labour contract, as well as the indemnity in the event of dismissal.”

Based on the content of the above Article, the lapse of a demand arising from a labour contract is limited to three years from the date the wage is due. It can be the date of signing the labour contract, the first day the worker starts work, or the date the wage is due. In this case, the employer required workers to have medical examination certificates issued before they were employed, so based on this, workers paid the medical examination fee themselves before they were employed by the company.

In the previous Awards, the Arbitration Council noticed that for workers who had undergone medical examinations before they started working, the demand for the medical check fee was the right of the workers for the company reimburse the medical check fee. The demand's lapse is three years from the date on which labour contract was signed or the date the wage is due. (See Arbitral Awards 05/06 – W&D, Issue 1 and 47/07 – Chhung Fai, Issue 1)

In this case, the Arbitration Council agrees with the Arbitration Panels' rulings in the previous Awards in which the employer was obliged to pay for the medical check fee for workers and the workers' right in making the claim lasts for three years from the date the medical check fee was paid.

However, in this case, the worker party did not show any evidence to the Arbitration Council to prove how many workers had undergone the examinations and when those examinations were undergone.

In the previous Awards, the Arbitration Council rejected workers' demand that the company reimburse the medical examination fee, if the worker party had not provided the

Arbitration Council with specific evidence of how many workers made the demand and when their medical examinations were undergone. (See Arbitral Awards 47/07 – Chhung Fai, Issue 2)

In this case, the Arbitration Council also agrees with the previous decisions. The worker party was the claimant but it did not show any evidence to the Arbitration Council to support its claim. With the absent of such evidence, the Arbitration Council has no bases to consider the demand.

Therefore, the Arbitration Council decides to reject the demand of workers that the company reimburse the medical examination of 10,100 riels to workers, who had paid the fee themselves because the Arbitration Council does not have sufficient evidence to consider the demand.

Issue 4: Khmer Youth Trade Union (KYTU) at D.A Company demanded that the company deduct union contribution fee of 1,000 riels from its members

1. In accordance to the Labour Law and relevant Prakas, shall the employer party deduct union contribution fee of 1,000 riels from workers' wages?

Article 129(2) of the Labour Law stipulates that, “...However, the worker can authorise deductions of his wage for contribution fees to the trade union to which he belongs. This authorisation must be in writing and can be revoked at any time...”

Article 281 of the Labour Law states that, “All employers are forbidden to deduct union contribution fees from the wage of their workers and to pay the dues for them.”

The Arbitration Council notes that Article 129 and Article 281 of the Labour Law are contradictory to each other. However, in the previous Awards, the Arbitration Council decided that the content of Article 281 of the Labour was developed to protect workers' rights and prohibit the employer from influencing the union in order to dominate the union as stated in Article 280 of the Labour Law (See Awards 05/03 – Top One, Issue 1, 62/04 – Ecent, Issue 8, 94/04 – Eternity Apparel, Issue 4, 99/06 – AIA, Issue 12, 16/05 – New Point, Issue 11). The Arbitration Council considers that the Labour Law does not forbid the employer from deducting union contribution fees from workers' wages in the case that workers submit their requests in writing to the employer. In this case, the employer is obliged to deduct the union contribution fee from workers' wages to the union.

In addition, Clause 5 of Prakas 305/01 of the Ministry of Social Affairs, Labour Vocational Training and Youth Rehabilitation states that, “All employees who are members of a union may request in writing to the employer at least 15 days in advance to deduct their wages to pay for union contribution fees in compliance with Article 129 of the Labour Law.”

Therefore, based on the content of the above law, the employer is obliged to deduct union contribution fees from the wages of workers who are union members and agree to have their wage deducted via written authorisation 15 days in advance.

2. In accordance to the Labour Law, does Khmer Youth Trade Union have the right to demand that the employer party deduct union due of 1,000 riels from its members' wages?

Article 268 of the Labour Law states that, *“In order for their professional organisation to enjoy the rights and benefits recognised by this law, the founders of those professional organisations must file their statutes and list of names of those responsible for management and administration, with the Ministry in Charge of Labour for registration. All request for registration shall be appended with the statement of constitution of the organisation.*

If the Ministry in Charge of Labour does not reply within two months after receipt of the registration form, the professional organisation is considered to be all ready registered...”

The Arbitration Council considers that the rights of a professional organisation stated in Article 268 of the above Law is in conformity with the right that requires the employer to deduct union contribution fees from the wages of workers who are union members and agree to the deduction.

The Arbitration Council considers that Khmer Youth Trade Union held the election of committee members of Khmer Youth Trade Union at D.A Company located in Banlar Saet Village, Sangkat Khmuonh, Khan Russei Keo, Phnom Penh. Khmer Youth Federation Trade Union held the election of committee members of Khmer Youth Trade Union at D.A Company on 23 October 2007. As a result, Ms. Muth Samay was elected as President; Ms. Ngong Seila was elected Vice-President; while Mr. Mean Touch was elected Secretary. After the outcome was released, Khmer Youth Trade Union at D.A Company applied for registration with the Ministry of Labour and Vocational Training but it did not show the application receipt.

The Arbitration Council considers that there was no adequate evidence to prove that Khmer Youth Trade Union at the company had applied for registration or had received the application receipt in order to receive the legal rights in accordance to Article 268(1) of the Labour Law. The Arbitration Council considers that Khmer Youth Trade Union does not have complete legal rights as stated in the Labour Law during the registration period (See Issue 1 above on the rights of the unregistered union). Thus, Khmer Youth Trade Union does not have absolute right to demand that the company deduct union due of 1,000 riels from the wages of its members.

Moreover, the Arbitration Council considers that in order for the worker party to demand that the company deduct union due from the wages of workers who are union

members, the union has to provide evidence or documents; for example, name list of workers who are the union members and name list of union members who agree to have their wages deducted of 1,000 riels for union due. However, because the union failed to provide the name list of workers to the Arbitration Council, the Arbitration Council does not have a basis to make its decision on the demand of the union.

In conclusion, within this transitional period the Arbitration Council decides that Khmer Youth Trade Union at D.A Company does not have absolute right to demand the company to deduct the union due of 1,000 riels from the wages of workers.

Issue 5: Workers demanded that the company warn team leaders of their attitude and words on workers

Article 2 of the Labour Law states that, *“All natural persons or legal entities, public or private, are considered to be employers who constitute an enterprise, in the sense of this law, provided that they employ one or more workers, even discontinuously.*

Every enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in factory, workshop, work site, etc., under the supervision and direction of the employer.”

In the previous Awards, the Arbitration Council defined that the management of work within the factory/enterprise is the [] right of the employer as long as the management is lawful and reasonable. (See Awards 06/06 – MV, Issue 1, 18/06 – GHG, Issue 2, 108/06 – Trinunggal Komara, Issue 1)

In this case, the Arbitration Council considers that the right of warning or imposing of other measures on workers is also included in the right of management of the employer as long as the management is exercised lawfully and reasonably.

However, in this case workers demanded that the company warn leaders of all teams of their attitudes and language to workers. Regarding the demand, the worker party claimed in the hearing that the leader of Team 2, Sor Rady had said that, *“Once a worker joins the union, he or she will face dismissal like those of the past workers.”* While leader of Team 3, Vath Sokvy said that, *“Once the union is established and whenever workers strike, they will lose their jobs. Male workers will become thieves and female workers will become prostitutes”.*

The exercise of right in warning is the privilege of the employer, not of the workers. Therefore, the Arbitration Council decides to reject the demand of workers that the company warn team leaders Sor Rady and Vath Sokvy.

Additional Issue: The union demanded that the company reinstate the 30 dismissed workers or provide payment for contract termination

Based on the above fact findings, the Arbitration Council defines that only 29 workers were involved in the claim.

During the Arbitral Proceeding, the employer dismissed some workers arguing that during the strike these workers prevented other workers from entering the factory to work. The issue was not stated in the non-conciliation report of the Ministry of Labour submitted to the Arbitration Council. Thus, the Arbitration Council considers whether or not the Arbitration Council has jurisdiction over the issue.

Article 312 of the Labour Law states that, *“The Council of Arbitration has no duty to examine issues other than those specified in the non-conciliation report or matters, which arise from events subsequent to the report, are the direct consequence of the current dispute...”*

The Arbitration Council finds that the employer had dismissed 29 workers during the Arbitral Proceeding. The dismissal took place on 12 November 2007 after the non-conciliation minute of the Ministry of Labour on case 128/07 – D.A was written from 6 to 16 November 2007 regarding the nine new issues being conciliated at the Arbitration Council for conciliation. In this case, the employer dismissed [29] workers because the employer found that during the strike the 29 workers were preventing other workers from entering the factory to work. The Arbitration Council considers that the dispute is the direct consequence of the dispute in case 128 – D.A that the Arbitration Council was conciliating. Therefore, based on Article 312 of the Labour Law, the Arbitration Council considers that the panel has the jurisdiction over the dispute regarding the demand for the reinstatement of the 29 dismissed workers. Thus, the Arbitration Council considers the fact on the demand as follows:

Article 331 of the Labour Law stipulates that, *“Freedom of work for non-strikers shall be protected against all form of coercion or threat.”*

Article 83 of the Labour Law stipulates that, *“The following are considered to be serious offenses: B. On the part of the worker 4..... Threat, abusive language or assault against the employer or other workers...”*

Based on the contents of the above Articles, the Arbitration Council considers that it will be considered to be serious misconduct, if other threats are imposed on the freedom of work for non-strikers. The misconduct can be the cause that the employer terminates labour contract of workers.

In this case, the Arbitration Council found that the 29 workers were holding hands in front of the factory with the intension to prevent other workers who were non-strikers from entering the factory to work. In the hearing, the employer party claimed that the 29 workers had used abusive language, threatened lives and injured other workers in order to prevent them from entering the factory to work.

In general, the Arbitration Council defines that the party who lodges the allegation is required to provide evidence to the Arbitration Council in order to support its allegation. (See Arbitral Awards 90/06 – Evergreen, Issue 1, 112/06 – River Rich, Issue 1, 01/07 – Supreme and 123/07 – E Garment, Issue 1)

In this case, the Arbitration Council also agrees with the other Arbitration Panels' ruling in the previous Awards. In this case, the employer party alleged that the 29 workers used abusive language, threatened lives and injured other workers in the attempt to prevent them from entering the factory to work. Therefore, the employer party is required to provide evidence to support its allegation to the Arbitration Council for consideration.

Regarding the evidence, the Arbitration Council conducted two hearings to request the employer party to bring witness to validate his allegation (prevention, threat and injuring); for example, the workers who were threatened particularly the security guards who wrote the report which was later on submitted to the Arbitration Council. On the second hearing day, the employer party failed to bring along the witness to support his allegation. The employer showed evidence in the form of photos of some strikers who were holding hands in front of the factory but the photos did not specifically showed who those workers were and what threats were used by the strikers to the non-strikers in order to prevent them from entering the factory to work. In conclusion, the Arbitration Council considers that there is not adequate evidence to show that the 29 workers used abuse language, threatened lives and injured other workers in the attempt to prevent them from entering the factory to work.

Therefore, the Arbitration Council considers that the employer has no adequate base in order to dismiss the 29 workers with the reason of serious misconduct as stated in Article 331 and Article 83(B-4) above.

In conclusion, the Arbitration Council decides to order the employer party to reinstate the 29 workers. However, in the hearing the worker party demanded that if the employer refuses to reinstate the 29 workers, the company may provide them with the payments for contract terminations as if they had committed serious misconduct. The Arbitration Council leaves the issue for the negotiation between the disputing parties after this Award takes effect and it is no longer necessary for the Arbitration Council to conciliate the issue.

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

DECISIONS AND ORDERS

- Issue 1:** Reject the demand of workers that the employer provide meal allowance of 1,000 riels per hour.
- Issue 2:** Reject the demand of workers that the company pay workers no later than the tenth day of the month.

Issue 3: Reject the demand of workers that the company reimburse the medical examination fee of 10,100 riels to workers who had paid the fee themselves because there was not sufficient evidence.

Issue 4: Reject the demand of workers that the company deduct union due of 1,000 riels from the wages of workers who are union members.

Issue 5: Reject the demand of workers that the company warn team leaders Sor Rady and Vath Sokvy.

Additional Issue: Order the company to reinstate the 29 workers.

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: **Chhiv Phyrum**

Signature:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Ang Eng Thong**

Signature: