

**KINGDOM OF CAMBODIA
NATION KING RELIGION**

THE ARBITRATION COUNCIL

Case number and name: 24/06- Fortune

Date of Award: 11 April 2006

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: Ouk Ry

Arbitrator chosen by the worker party: Sin Kim Sean

Chair Arbitrator (chosen by the two Arbitrators): Tang Try

DISPUTING PARTIES

Employer party:

Name: **Fortune Garment and Woolen Knitting Factory**

Address: Prek Khsav Village, Roka Khpors Commune, Sa Ang District, Kandal Province.

Telephone: 012 222 879, 012 522 266, Fax: 023 425 035

Representative:

- Mr. Sok Hak, Deputy Director
- Mr. Long Heang, GMAC Officer
- Mr. Ly Sang, Assistant Director

Worker party:

Name: **Cambodian Apparel Workers Democratic Union of Fortune Factory, CAWDUF**

Address: Prek Khsav Village, Rokar Khpors Commune, Sa Ang District, Kandal Province.

Telephone: 012 282 653

Representative:

- Mr. Oum Visal, C.CAWDU Officer
- Mr. Lun Limeth, Leader of CAWDUF
- Mr. Than Vantha, Secretary of CAWDUF
- Mr. Sao Sokeang, CAWDUF activist

ISSUES IN DISPUTE

In reference to the non-conciliation report, the non-conciliation points set out below are the demands of the union party in this case:

1. The union side demanded that the factory reinstate a worker, bearing the ID No: BM 13, in the piece-counting Section. The employer disagreed based on the reason that termination of employment contracts is at the sole discretion of the employer and that he had agreed to pay the dismissed worker in accordance with the law.
2. The workers demanded that the factory pay them maternity allowance in accordance with the law by using the average of the 12-month accumulated wages. The employer disagreed with the demand, but he [stated that he] would pay based on Art. 183 of the Labour Law.
3. The workers demanded that the factory build a child-care center to make it easier for the mothers to work and breast- feed their babies. [In the alternative, they sought] payment of \$12 /month instead for a period of 20 months accounting from the day they returned to work and provide 1 hour per day for breast- feeding. The employer does not yet have the capacity to build the child-care center, so he would pay the mothers \$5 per month for 12 months from the day the mothers came back to work in lieu of giving 1 hour per day for breast- feeding and pay another \$5 per month starting from when the child reached 18 months old for the period of 12 months in lieu of building a child-care center.
4. The workers demanded that the factory implement annual leave of 18 days for years 1 and 2; 19 days for years 3,4 and 5; and 20 days for year 6 and onwards. The employer denied negotiating this claim since it has already been ruled by the Arbitration Council.

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 099/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators 513/05 (Third 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 17 March 2006 was unsuccessful, and the non-conciliation report No. 048/06 K.B.V. was submitted to the Secretariat of the Arbitration Council on 17 March 2006.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Bassac, Khan Chamkar Morn, Phnom Penh.

Date of hearing: 28 March 2006, 8:00-12:00 p.m.

Procedural issues:

On 10 March 2006, the Kandal Provincial Department of Labour assigned a labour official to settle and conciliate the labour disputes of the workers in the Fortune factory who demanded improvement in 11 working conditions. Seven of the 11 issues have been successfully resolved. The other four non-conciliation issues were referred to the Arbitration Council on 17 March 2006. Having received the case, the Arbitration Council summoned the parties to attend a hearing on 28 March 2006 at 8:00 a.m.

Both parties were present at the hearing. The Arbitration Council attempted once again to conciliate the four issues which were referred, but was unsuccessful. Therefore, in this award the Arbitration Council considers the four non-conciliation issues based on the facts and evidence as follows:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

A. Provided by Employer party:

1. The letter of delegation dated 11 March 2006 from Mr. Fung Kin Chor, the Director of the factory, to Mr. Long Heang and Mr. Sok Hak to represent the factory in order to resolve the dispute at the Arbitration Council.
2. The notification of the termination of the employment contract of worker, Sao Sokeang dated 22 Feb. 2006.
3. The factory's Internal Work Rules registered no: 059/03 MoSALVY dated 10 October 2003.
4. The salary calculation from the factory to Mr. Sao Sokeang.
5. The [letter of] objection to the Arbitral Award in case 75/05 from the factory dated 2 January 2006.
6. Letter dated 17 February 2006 from the Supervisor, Mr. Zhao Ahi Rong, about the work performance of Mr. Sokeang.
7. The Piece-Rate notes, which Mr. Sokeang erased and corrected.

B. Provided by workers party:

- The summary on the Collective Labour Dispute in Fortune Factory dated 27 March 2006 of C.CAWDU.

C. Provided by MoLVT:

1 - The letter No: 329 K.K.B.V. dated 30 March 2006 of H.E Nhep Bunchin, Minister of the Ministry of Labour and Vocational Training on the request for the resolution of the dispute at Fortune factory.

2 - Report on the resolution of the collective dispute at Fortune factory, 048/06 K.B.V./K.N. dated 17 March 2006 of Mr. Thul Neang, Director of the Department of Labour and Vocational Training in Kandal province.

3- Report on the resolution of the collective dispute dated 10 March 2006.

D. Provided by The Secretariat of the Arbitration Council:

1- Letter of invitation to the worker party to attend the hearing, 128 L.K.A. dated 20 March 2006.

2- Letter of invitation to the employer party to attend the hearing, 126 L.K.A. dated 20 March 2006.

FACTS

- Having examined all documents submitted to the Arbitration Council
- Having reviewed the report on the resolution of the collective dispute
- Having listened to the testimonies of the representatives of the employers and workers parties

The Arbitration Council finds that:

Issue 1:

- Fortune Garment and Woolen Knitting Factory is located at Prek Khsav village; Roka Khpors Commune; Sa Ang district; Kandal province. The company employs a total of 2,700 workers. Amongst these workers, 85% are women. On the evening of 22 February 2006 the company notified the termination of the employment contract of a worker named Mr. Sao Sokeang who was the Chief of the piece-counting section. [This notification] invited him to get his termination compensation in accordance with the Labour Law.
- Mr. Sao Sokeang has worked for Fortune Company for nearly six years (from 1 June 2000 to 22 Feb 2006) pursuant to an undetermined duration contract and has been promoted to the position of chief of the piece- counting section. In this section there are three workers, two of them are responsible for quality control and the other for counting the product (Mr. Sao Sokeang). Among the three workers in this section, the company only terminated the employment contract of Mr. Sao Sokeang, who is the only worker counting the product. The factory asked another worker from quality control to replace him. The three workers are under two supervisors, one is Khmer and the other is

Chinese. These two are responsible for management tasks and supervising the three workers' work, as well as analyzing and calculating the amount of the piece rate.

Issue 2:

The previous practice of the factory has been to provide 50 percent of minimum wage (US\$45) and seniority bonus of US\$5 (at 100 percent) to any workers who have worked in the factory for over one year when they are on maternity leave. The worker party demanded that the factory provide them a maternity allowance in accordance with the Labour Law by calculating the 50 percent wage with reference to the last 12 months accumulated wages. The factory rejected this claim.

Issue 3:

- The factory employs 2,700 workers and the majority of them are women.
- The factory does not have a nursing room or a child-care center.

Issue 4:

- The employer and union parties have previously brought this issue to the Arbitration Council (in case 75/05-Fortune). So the Arbitration Council would not take it into consideration again.

REASONS FOR DECISION

Issue1. The worker party demanded that the factory reinstate the piece-counting worker bearing ID BM 13.

The Arbitration Council will consider the procedure relating to termination of employment contracts to determine whether the termination was conducted in a way that is prohibited by the law.

In this case, the worker disagreed with his contract termination because he thought that it was unreasonable and was motivated by union discrimination.

The Arbitration Council must consider if the factory really discriminated against the union or if the termination was reasonable.

1- Union Discrimination:

Article 293 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.”

Mr. Sao Sokeang claimed that he did not reveal his duty as the advisor to C.CAWDU to the factory. He argued that the factory knew of his duties as the advisor to C.CAWDU through

his activities such as signing the letter to ask for higher piece-rate amount for workers (on 11 January 2006), bringing that letter to the employer (on 12 January 2006), collection of union dues and advising the workers about their rights.

However, the employer side said that he was not aware of Mr. Sokeang's duty as the advisor to C.CAWDU, because he was not informed and did not receive or read the letter mentioned above.

During the hearing, the worker side did not show adequate evidence to prove that the employer really discriminated against the union. The Arbitration Council suspects that the termination of Mr. Sokeang's contract was related to his activities on behalf of the union, but as the worker side did not provide enough evidence to prove this allegation, the Arbitration Council [must] consider that the termination was not motivated by union discrimination.

2- Was the [undetermined duration] contract reasonably or unreasonably terminated?

Article 74 of the Labour Law states that, *"The labour contract of unspecified duration can be terminated at will by one of contracting parties ... However, no layoff can be taken without a valid reason relating to the worker's aptitude or behaviour, based on the requirements of the operation of the enterprise, establishment or group."*

The employer can terminate the unspecified duration contract of Mr. Sao Sokeang only when he has a valid reason relating Mr. Sokeang's aptitude or behaviour based on the requirements of the factory. The employer must also think about balancing the disciplinary sanction and the mistake.

The Arbitration Council has also reviewed the Internal Work Rules of the factory at Article 10, point A, which stipulates that minor misconduct warrants a first and second warning before termination. Point B specifies that if there is medium misconduct [the perpetrator] would be given a written warning and the misconduct recorded and if the worker commits the same misconduct a second time, the worker would be suspended from work. [if the worker commits the misconduct] a third time [the worker] will be terminated from work. Point C specifies that any type of serious misconduct such as destroying company property, disrupting the production line of the factory, misinformation and falsifying documents would result in the worker being sent to the competent authority.

The Arbitration Council found that the allegation made against Mr. Sokeang in respect of his laziness was not a valid reason. In addition, it was not stated in the Internal Work Rules that laziness would result in contract termination. Having checked the Labour Law and the Internal Work Rules of the Fortune factory, the Arbitration Council finds that the [alleged] misconduct was not minor, medium nor serious misconduct and [in addition], there was no supporting

evidence [of the misconduct]. The reason provided by the factory was unreasonable and they had no evidence to prove to the Arbitration Council because:

- 1- Based on the document concerning the payment for contract termination which was submitted to the Arbitration Council, a part of the document showed the wages of Mr. Sokeang for February 2006 which showed that his wages included attendance bonus, seniority bonus, skill allowance and incentive bonus. This shows that Mr. Sokeang was an acceptable worker for the factory and that's why he received all of these benefits. In addition, working for the factory for six years meant that he was an acceptable worker. He had even been promoted to be the leader of the piece-counting section.
- 2- The company did not follow its Internal Work Rules in terminating the employment contract.
- 3- The suspension of the employment contracts of over a thousand workers in this factory was not related to Mr. Sokeang's work because his work was different from their work. In addition, shortly after the termination of Mr. Sokeang's contract, the employer transferred a worker from the Quality Control section to be trained and to replace him. Above all, Mr. Sokeang has passed the period in which the company suspended the contracts of over a thousand workers. He was terminated only when he demanded an increase in the piece-rate cost. Thus the Arbitration Council finds that the employer has contravened Article 74 above by terminating Mr. Sokeang's contract without any valid reason (see 41/04-Micasa Hotel). The Arbitration Council will use its rights and powers to decide on this issue, relying on Prakas 099/04 on the Arbitration Council. Based on Article 34, Point A of this Prakas, the Arbitration Council orders the employer to reinstate Mr. Sokeang to work in his previous position.

Issue 2: The worker party demanded that the factory pay the maternity leave [benefit] based on the Labour Law by using the average [monthly wage calculated with reference to the last] 12 months of accumulated wages.

The worker side demanded that the factory pay them 50 percent wages during maternity leave using the average [monthly wage calculated with reference to the last] 12 months accumulated wages (divide the 12 months accumulated wages by 12 to get the average [monthly wage]) in addition to the other bonuses such as attendance bonus (US\$5), incentive bonus (US\$2,3,4), skills bonus (US\$10), seniority bonus (US\$1 for workers who have worked for the factory for 1 year, US\$2 for those who have worked for 2 years and US\$4 for those who have worked for the factory for 3 years and so on) and overtime bonus. This claim was based on Article 103 and 183 of the Labour Law. However, the company agreed to pay only 50 percent of the basic wage (US\$45) and 100 percent of the seniority bonus. The company claimed that this

payment was made based on Article 183 of the Labour Law. For the other bonuses, [the employer argued that] it was not their obligation to pay, [that rather this decision] is based on the ability of the employer to pay.

This issue has arisen because of the different interpretations made by parties with respect to Article 183 of the Labour Law. The Arbitration Council shall therefore consider whether the 50 percent wages paid during maternity leave should include the bonuses.

Article 183 of the labour law states that,

“During the maternity leave as stipulated in the preceding article, women are entitled to half their wage, including their perquisites paid by the employer.

Women fully reserve their rights to other benefits in kind, if any.

Any Collective agreement to the contrary shall be null and void.

However, the wage benefits specified in the first paragraph of this article shall be granted only to women having a minimum of one year uninterrupted service in the enterprise.”

Based on Article 183 of the Labour Law, the employer has an obligation to pay the women workers on maternity leave 50 percent of their wages including their perquisites. But this Article does not clearly say what the 50 percent should be calculated in regard to (basic wages or the wages that the workers have received during the working period including perquisites). In this case, the employer has paid 50 percent of the basic wage to the women workers during maternity leave and the full seniority bonus. In the hearing, the company side claimed that Article 183 of the Labour Law means that payment during maternity leave is properly 50 percent of the basic wage (US\$45). Payment of the other bonuses provided to the workers is based on the ability of employers. The [employer alleged that] the Fortune factory is already kind because they provide 100 percent of the seniority bonus to the workers in addition to the above payment. The factory claimed that the attendance bonus is just for workers who come to work regularly. The workers who are on maternity leave do not have the right to get this bonus. Based on the same reason, they also should not receive the incentive bonus, overtime allowance and skills allowance.

The Arbitration Council finds that Article 183 just makes a general statement about half of the wage. It fails to say that it is half the basic wage. So the question is how the Arbitration Council define the term “Wages”.

In accordance with [Article] 103 of the labour law, wages are composed of the following [elements]:

- Actual wage
- Overtime payments
- Commissions
- Bonuses and indemnities
- Profit sharing
- Tips
- The value of benefits in kind
- Family allowance in excess to the legally prescribed amount;
- Holiday pay or compensatory holiday pay
- Amount of money paid by the employer during disability or during maternity leave.

In relation to wages, Article 103, point 2 and 4 of the Labour Law states that wages include overtime payments, bonuses and indemnities. Based on this meaning, the Arbitration Council finds that the attendance bonus is included in this provision [and therefore in “wages”] if the worker used to receive it before they go on maternity leave.

Further, the last paragraph of Article 183 of the Labour Law states that the wage benefits specified in the first paragraph of that Article shall be granted only to women having a minimum of one year of uninterrupted service in the enterprise. Thus the Arbitration Council finds that limiting [the calculation to referencing] the one year of service before women take maternity leave is appropriate and fair for both the employee and employer. This means that wages shall be calculated with reference to the 12-month period before women workers take their maternity leave, including all benefits. The total amount should then be divided by 12 to find the monthly average wage, and then divided by two to find 50 percent of the wage. This amount is the amount that the employer must provide to women on maternity leave.

Based on the previous cases, the Arbitration Council has found that women workers who take maternity leave shall be paid 50 percent of their total average wage per month. This average wage is equal to the total wages during the 12 months [prior to their leave] divided by 12. (See 49/04- Ho Hing; 68/04 City New and 18/06- GHG)

Therefore the Arbitration Council considers that the employer shall pay half wages to the workers by using the average of the 12-month accumulated wages [prior to the maternity leave] divided by 12 to get the average wage per month for the women workers on maternity leave.

Issue 3: Demand the company to build a day care center and provide one hour per day for breast-feeding.

The workers raised two points in regard to their demand that; the employer build a day care center for children and provide one hour [per day] for mothers to breast-feed their babies. The workers demanded the building of a day-care center, but as the factory [does not] yet have a day-care center, they asked for US\$12 per month instead for a period of 20 months from the day that the mother comes back to work ([that is] from the time that the baby is three months old to [the time that the baby is] 23 months old). They also asked the factory to provide one working hour per day in order to breast- feed their babies.

For children who are 18 months old and older, the factory agreed to pay the mothers US\$5 per month for a period of 12 months instead of [building] a day-care center, which the factory [argued they] did not have the ability to build. The factory also proposed to pay US\$5 per month instead of giving one hour per day for the purpose of breast feeding. This provision is for the period of 12 months from the day that the mother comes back to work ([that is] from the time the baby is three months old to [the time the baby is] 15 months old).

Article 186 of the Labour Law states that, *“Managers of enterprises employing a minimum of 100 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 18 months of age, women workers can place their children in any day-care center and the charges shall be paid by the employer”*.

Based on Articles 184 and 186 of the Labour Law, the establishment of the day-care center and the nursing room are two separate obligations. The Arbitration Council therefore divides the demands into two as follows:

- Demand for the day-care center

In respect of the first demand, both parties agreed that the company had not built a day care center for children or a nursing room, even though the number of female workers in the company exceeds the number stated in Article 184 (of over 100 hundred [women workers]). The provision of Article 184 determines the duty of the employer who employs either old or young women workers of at least 100, must fulfill a duty to build a day care center and a nursing room in the enterprise or nearby [the enterprise]. Article 184 allows the employer to pay female workers instead of [building a] day care center if the company is not able to build a day care center.

The parties still have different ideas on the [appropriate] fee for baby sitting which replaces the day care center [facility] which the employer must pay to female workers. To date, the Arbitration Council has not seen any Prakas of the Ministry or provision of the Labour Law which states the parameters of the fee for looking after the baby at the enterprise. Nevertheless the Arbitration Council has resolved the same [subject matter] of the labour dispute according to the facts of each case. The Arbitration Council has made a decision on the fee for baby-sitting

in the amount of US\$15 per month and that, that amount will be paid by the employer. The employer, in such case also agreed to follow the arbitral award.

Regarding the demand in this case, and according to the parties' argument in the hearing and because there is not any Prakas from the Ministry which states what the fee for looking after children outside the enterprise [should be], the Arbitration Council finds that the employer should at least build a nursing room and a day care center both, in order to help the female workers to keep their children at a day care center and to breast-feed their babies, and as determined by the Law. However, both the parties agreed on a fee for baby-sitting. This obligation is compulsory for employers unless the employer has paid the mothers the actual cost of the day-care center (as prescribed in the invoice if any).

- Demand for nursing room and retaining 1 working hour per day for breast-feeding:

Article 184 of the Labour Law 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 30 minutes each, one during the morning shift and the other during the afternoon shift. The exact time of breast feeding is to be at a time agreed between the mother and the employer. If there is no agreement, the periods shall be at the midpoint of each work shift."*

In respect of the demand for the nursing room, the Arbitration Council finds that the company does not have an ability to build this [nursing room]. Based on Article 186 which is the same [provision as that concerning] day care centers, any enterprise, employing at least 100 female workers has an obligation to build a nursing room. The point which is not stated in Article 186 is the [possibility of an] exceptional case in which the employer can pay the female workers instead of providing the nursing room. Therefore, building the nursing room is the the employer's legal obligation. It cannot be replaced by another option.

With respect to the demand for a period to breast feed children, the factory proposed to pay the female workers US\$5 per month instead of providing one-hour's worth of breaks for breast feeding. The Arbitration Council finds that Article 184 does not mention the exceptional case of providing employers [a choice] to pay the female workers instead of giving them time to breast feed their babies. The Arbitration Council considers that providing the female workers a period for breast feeding is necessary. It is naturally very important that babies be breast fed by their mothers in order [to best] be able to survive and grow up. Paying US\$5 per month cannot replace breast feeding. Besides, giving the one-hour break for breast feeding can allow mothers to check on their babies and the mothers' health can also be cared for since they have to breast feed their babies after their milk is produced. The female workers also have the right to demand

for breast feeding [breaks] for their babies instead of receiving payment. Thus giving a period to female workers for breast feeding is a legal obligation and cannot be replaced by another option.

Issue 4: Demand the company to provide annual leave of 18 days for years 1 and 2; 19 days for years 3, 4, 5; and 20 days for year 6 and onwards.

With respect to this demand the Arbitration Council finds that there are different interpretations of the language mentioned in Article 166 of the Labour Law. The workers thought that annual leave should be increased by one day every three years. The employer, on the other hand, understands that annual leave should be provided [in the amount of] 18 days in year one and year two and only in the third year are workers granted one more day. Therefore in the fourth year onwards the workers are granted only 18 days of annual leave like years one and two. However, this issue has been ruled upon by the Arbitration Council in the case of 75/05-Fortune. In compliance with this jurisprudence and based on the principle of *res judicata*, the Arbitration Council cannot rule on any case that it has already ruled on before. (See cases 18/04- Raffles Le Royal and Raffles Grand the Angkor hotel, 08/06- Himawari hotel, 10/06- North Gaiety). Therefore, the Arbitration Council considers that it is unfair for the parties to submit this case to the Arbitration Council for a second ruling.

Based on the facts, law and reasons as described above, the Arbitration Council decides as follows:

DECISION

1. Order Fortune Company to reinstate Mr. Sao Sokeang after this award comes into effect.
2. Order Fortune Company to provide half wages and perquisites [to workers on maternity leave]. This money must [be calculated with reference to] the total amount (including seniority and attendance bonus) for the period of 12 months before taking of [maternity leave] divided by 12 to find an average of wage per month and divided by 2 to find an amount of wage pay for mother each month.
3. Order Fortune Company to build a nursing room and a day care center for children, except if the company agrees to pay the female workers in lieu of the day care center in the actual amount [spent on external baby sitting] (as prescribed in the receipts if any). Also, order the company to build a nursing room and provide female workers with one-hour's worth of breaks per day in order to breast feed their babies.

4. Decline to reconsider the workers' claim on this point.

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 with the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ouk Ry**

Signature:

Arbitrator chosen by the worker party:

Name: **Sin Kim Sean**

Signature:

Chair of Arbitration Panel:

Name: **Tan Try**

Signature: