



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាសវនកម្មជាតិ

THE ARBITRATION COUNCIL

Case number and name: FineGis

Date of Award: 14 March 2008

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: **Ann Vireak**

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

DISPUTING PARTIES

Employer party:

Name: **FineGis Cambodia Garment Co., Ltd**

Address: Prey Tea Village, Sangkat Chom Chao, Khan Dangkor, Phnom Penh

Telephone: 023 890 758

Fax: 023 890 759

Representative:

- | | |
|-----------------------|--------------------------------|
| 1. Mr. Kim Gil Sik | Managing Director |
| 2. Nam Hyo In | Senior Manager for Procurement |
| 3. Ms. Kong Sokunthea | Interpreter |

Worker party:

Name: **Free Trade Union of Workers of Kingdom of Cambodia (FTUWKC)**

Address: #28B, Street 222, Sangkat Boeung Rang, Khan Doun Penh, Phnom Penh

Telephone: 012 263 543

Fax: N/A

Representative:

- | | |
|----------------------|---------------------------|
| 1. Mr. Pao Sina | Officer of FTUWKC |
| 2. Ms. Kong Sam | Worker in FineGis factory |
| 3. Ms. Keo Sokhen | Worker in FineGis factory |
| 4. Ms. Chhon Sam Art | Worker in FineGis factory |
| 5. Ms. Phan Theara | Worker in FineGis factory |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the company should not require them to punch-in when their employment contract is suspended.
- 2- The workers demand US\$ 20 wages during the employment suspension.
- 3- The workers demand that the company pay their wages on the 10th of each month.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B of the Labor Law (1997); the Prakas on the Arbitration Council No. 099 dated 21 April 2004; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Appointment of Arbitrators No. 076 dated 10 May 2007 (Fifth Term).

An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation was unsuccessful, and the non-conciliation report No.236 KB/AK/VK, dated 14 February 2008 was submitted to the Secretariat of the Arbitration Council on 18 February 2008.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center, Building A, Sothearos Blvd., Sangkat Tonle Basak, Khann Chamkarmorn, Phnom Penh.

Date of hearing: 28 February 2008 (from 2:00 p.m. to 5:30 p.m.)

Procedural issues:

On 12 January 2008, the Department of Labour Disputes received a complaint from workers regarding a demand for the company to improve some employment conditions. Immediately after the receipt of the complaint, the Department of Labour Dispute assigned an officer to conciliate the dispute and the last conciliation session was held on 1 February 2008; [the dispute] involved three issues, none of which was resolved. The three non-conciliation issues were referred to the Secretariat of the Arbitration Council on 18 February 2008.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party at the factory to the hearing and conciliation on the three non-conciliation issues on 28 February 2008 at 2:00 p.m. Both parties were present as invited by the Arbitration Council.

On the hearing day, the Arbitration Council attempted to further the conciliation on the three non-conciliation issues mentioned in the non-conciliation report of the Department of

Labour Disputes but was not able to resolve the issues. Therefore, in this case the Arbitration Council will consider [the issues] based on the evidence and clarification by the parties 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:

- Announcement by the company regarding employment suspension, dated 8 January 2008;
- Letter to the Department of Labour Inspection regarding notification about employment suspension No. FG 241207, dated 24 December 2008;
- Statute of the company, dated 25 March 2003;
- Internal Work Rules of the company, registration number 072 SKBY.AK, dated 16 October 2003;
- Minutes of meeting regarding union contribution fee, dated 2 February 2008.

Provided by the worker party:

- Letter regarding the above three demands and workers' thumbprints to support the demand, dated 15 January 2008.

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

- Report on the collective labour disputes resolution at FineGis Company, No. 236 KB/AK/VK, dated 14 February 2008 by the Department of Labour Dispute;
- Minutes of the collective labour dispute conciliation dated 1 February 2008.

Provided by the Secretariat of the Arbitration Council:

- Invitation No. 142 KB/AK/VK/LKA to the employer party to attend the hearing, dated 25 February 2008;
- Invitation No. 143 KB/AK/VK/LKA to the worker party to attend the hearing, dated 25 February 2008;

FACTS

- Having reviewed the collective labour dispute conciliation report;
- Having examined the documents submitted;
- Having listened to the statements of the worker and the employer representatives;

The Arbitration Council finds that:

- Before the employment suspension, FineGis Company employed approximately 1,373 workers.
- According to the company, the registered union in the company has approximately 600 members. The worker party does not object to this fact.
- The three workers who appeared in the hearing represented the 500 workers making the demand. FTUWKC was requested by the worker representatives to represent them in this dispute resolution.

Issue 1: The workers demanded that the company should not require them to punch-in when their employment contract is suspended and wages of US\$ 20 per month during the [period of] employment suspension

- The employer stated that the company did not have work for the workers to do during December 2007 because the buyer withdrew its product. Both parties acknowledged that FineGis Company's employment operations were suspended.
- The employer stated that it informed the Ministry of Labour, Department of Labour Inspection, about the suspension of employment of workers in all sections, by letter dated 25 December 2007. However, the company did not receive a response from the Labour Inspector.
- On 31 December 2007, FineGis Company made an announcement about the employment suspension, [the announcement contained] a note from the Ministry of Labour acknowledging receipt of the application for suspension; the suspension would begin on 2 January 2008.
- Workers were not accepted to work from 2 January 2008 onwards. According to the company's announcement, the suspension would be in effect until 29 January 2008.
- According to this announcement, all workers would receive US\$ 10 per month and would be required to punch-in regularly two times a week; on Monday and Thursday from 6:30 a.m. to 9:00 a.m. If workers did not come in to punch-in regularly, the company would follow its Internal Work Rules. The registered local union agreed with the announcement.
- The workers claimed that some workers could come to punch-in but others could not. The main reason that some workers were not able to come to punch-in was because they had got a new job in another place and others had gone back to their hometown.
- The employer stated that the company's requirement for the workers to punch-in was to [allow them to] monitor the number of workers during the period of employment suspension; if the company agreed to provide wages to those workers who did not come to punch-in according to the announcement it would not be fair to those [workers] who came to punch-in during the employment suspension as there were

300 to 600 workers who came to punch-in. The company is unable to provide US\$ 20 as demanded by the workers because it has no orders from buyers. The workers did not refute the fact raised by the employer party that there were some workers who came to punch-in during the period of [suspension].

- The reason the workers demanded not to punch-in and receive US\$ 20 wages during the employment suspension was because they needed to pay rent and that they would incur more expenses if they had to come to punch in. Moreover, the workers added, that some companies in the area provided part wages without a requirement for their workers to punch-in.
- Based on the evidence submitted by the employer party, the Arbitration Council was not able to find a response letter from the Labour Inspector to approve the suspension of employment.

Issue 2: The workers demanded that the company pay their wage on the 10th of each month

- The lack of work at FineGis Company due to the withdrawal of products by buyers started in December 2007. The shortage of orders led to disruption in FineGis Company regarding payment of wages to workers. Both parties agreed that there was a strike on 10 December. The company director negotiated [with workers] on 15 December 2007 and promised that workers' wages in November would be paid to them on 22 December 2007. On 22 December 2007, the employer paid all the outstanding wages to workers.
- Both parties stated that in the past workers would receive their wages on the 10th of each month but there were some months that payment was late and was paid after the 10th.

REASONS FOR DECISION

Because the demands in issues 1 and 2 are related, the Arbitration Council decided to consider these issues together.

Issue 1: The workers demand that the company should not require them to punch-in when their employment contract is suspended and demand wages of US\$ 20 per month during the employment suspension

The Arbitration Council will consider *whether the 2-month employment suspension is in accordance with the Law.*

According to Article 71(11) of the Labour Law, "*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.*"

According to Article 71(11) of the Labour Law mentioned above, [suspension of the] employment contract is allowed only when there is evidence that the company is really facing economic difficulties; more importantly, the suspension needs to be under the control of the Labour Inspector.

What does it mean by the employment suspension shall be under the control of the Labour Inspector?

According to Arbitral Award 22/05-Ocean, issue 2, *“Employment suspension requires notification to and approval from the Labour Inspector.”* (See Arbitral Awards 22/05-Ocean, issue 2; 72/05-North Gaiety, issue 1).

In this case, the Arbitration Council agrees with the above interpretation that the Labour Inspector must be notified of and approve the employment suspension. Based on the above findings of fact, the company notified the Labour Inspector on 25 December 2007; however, the Arbitration Council does not find that the Labour Inspector made any response to the company regarding the 2 month employment suspension.

Thus, the Arbitration Council will consider whether the fact that the Labour Inspector did not respond [to the company] could mean that the suspension of the employment contract was approved.

In general, if a request is submitted to the Labour Inspector but no response received, this can be interpreted in two different ways: (a) the Labour Inspector approved or (b) the Labour Inspector did not approve the request.

Regarding the request for suspension of the employment contract in accordance with Article 71(11) of the Labour Law, the Arbitration Council considers that if the Labour Inspector does not respond to the request, it means that the Labour Inspector does not agree to the request. The reason for this is that, based on real practice in the field of Labour Law in Cambodia related to suspension of employment, the company needs to receive approval in writing from the Labour Inspector before it can suspend [workers'] employment legally. This practice is applied in all factories. Thus, the fact that there is no response from the Labour Inspector means that the Labour Inspector did not approve the request for suspension of employment. (See cases 22/05-Ocean; 72/05-North Gaiety, issue 1).

In case 105/04-United Eternity, issue 1, *“The control by the Labour Inspector during the period the company suspends its activities is in order to avoid serious impact to employment contract and livelihood of workers.”*

In this case, the Arbitration Council agrees with the above Arbitral Award that the [requirement of] control by the Labour Inspector is to avoid any serious effects because the suspension of [workers'] employment contracts can seriously affect the national economy and workers' benefits. As a matter of past practice when a company requests permission to

suspend workers' employment contracts, the Labour Inspector has always issued a permission letter if it approves the suspension.

Therefore, the Arbitration Council considers that the suspension of the employment contract in FineGis Company is not in accordance with Article 71(11) of the Labour Law.

Article 72(1) of the Labour Law, *"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."*

Based on Article 72(1) of the Labour Law above, the Arbitration Council considers that when workers' employment contracts are suspended in accordance with the Labour Law the employment contract is suspended and the main obligations of the employment contract are affected; which means that workers are not obliged to work for the employer and the employer does not have an obligation to pay wages to the workers, unless there are provisions to the contrary.

In this case, however, the suspension of the employment contract by the company was not in accordance with the Labour Law; thus the company has an obligation to pay full wages to workers from the first day of the employment suspension; from 1 January 2008 to 29 February 2008.

Article 13(1) of the Labour Law states, *"The provisions of this law are of the nature of public order, excepting derogations provided expressly. Consequently, all rules resulted from a unilateral decision, a contract or convention that do not comply with the provisions of this law or any legal text for its enforcement, are null and void."*

The announcement dated 31 December 2007 by the employer regarding provision of US\$ 10 to workers if they come to punch-in twice a week during the two-month suspension of employment provides less benefit to the workers than what is provided by the law [and] is considered null and voided according to Article 13(1) of the Labour Law.

In conclusion, the Arbitration Council decides that the company should provide full wages to workers during the 2 month employment suspension; which was conducted without the permission of the Labour Inspector.

Issue 3: The workers demand that the company pay their wages regularly on the 10th of the each month

According to the practice of wage payments in the garment sector in Cambodia, wages should be paid once per month and generally [wages] should be paid on the 10th of each month.

The Arbitration Council considers that the employer has fulfilled this obligation but there was some interruption during the last period (worker's wages for November were paid

in December). In the hearing, both parties acknowledged this. The employer party stated that it would pay workers' wages regularly and would avoid such delay again.

The Arbitration Council considers that the employer party has already responded to the workers' demand and the workers did not object to this. Thus, the Arbitration Council will decide according to the response provided by the parties in the hearing.

Based on the above facts, legal principles, and evidence the Arbitration Council decides as follows:

DECISION AND ORDERS

- 1. Order the employer to pay full wages to workers during the two month employment suspension; which was conducted without permission from the Labour Inspector.
- 2. The employer should pay wages on the 10th of each month according to the request and agreement of both parties.

Type of Award: Non-binding award

This Award will become binding after 8 days of the date of its notification unless one of the parties lodges a written opposition to the Minister of Labour through the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Chhiv Phyrum**

Signature:

Arbitrator chosen by the worker party:

Name: **Ann Vireak**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Ang Eng Thong**

Signature: