

**KINGDOM OF CAMBODIA
NATION RELIGION KING**

THE ARBITRATION COUNCIL
Case: 32/05
Date of award: 17 June 2005

ARBITRAL AWARD
(Issued under Article 313 of the Labour Law)

HS ENT Co., Ltd.

(Employer party)

AND

Khmer Youth Federation of Trade Union (KYFTU)

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representative: 1- Mr. Chan Sothea Administration Manager
2- Mr. Cheth Khemera GMAC representative
3- Mr. Long Heng GMAC representative

Address: Thnaut Phdem village, Bekchan commue, Ang Snoul district, Kandal province.

Tel: 011 355 666 024 393 777 **Fax:** 024 393 999

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representative: 1- Mr. Nou Titha Official from KYFTU
2- Mr. Our Pheoung Official from KYFTU
3- Mr. Mek Ton Official from KYFTU
4- Mr. Chom Ratana Union President at HS ENT Co., Ltd
5- Mr. Yi Roth Union Vice president at HS ENT Co., Ltd
6- Mr. Ly Kheng Secretary at HS ENT Co., Ltd
7- Mr. Phorn Bros Worker at HS ENT Co., Ltd
8- Mr. Hom Doungchan Worker at HS ENT Co., Ltd
9- Mr. Sous Samnang Worker at HS ENT Co., Ltd
10- Mr. Ros Rith Worker at HS ENT Co., Ltd
11- Mr. En Bottha Worker at HS ENT Co., Ltd

Address: Thnaut Phdem village, Bekchan commue, Ang Snoul district, Kandal province.

Tel: 092 902 569 **Fax:** N/A

ISSUES IN DISPUTE:
(In non-conciliation report)

- 1- The workers demand that the company retain the work of three leaders of the local union of whom the company terminated the employment contracts.
- 2- The workers demand that the company provide additional money according to the law in the amount of US\$500 to 28 workers.
- 3- The workers demand that if there is work [at the company], the company must reinstate the previously laid off workers without any conditions imposed upon them.

JURISDICTION OF THE ARBITRATION COUNCIL:

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labour Law (1997); the Prakas on the establishment of the Arbitration Council (338/02, the Prakas on the Arbitration Council 99/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas and the Prakas on the Nomination of Arbitrators 513/05.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labour Law. That conciliation hearing was unsuccessful. The non-conciliation report 88/MoVLT dated 24 May 2005 was submitted to the Secretariat of the Arbitration Council on 25 May 2004.

COMPOSITION OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:	Mr. Mar Samborana
Arbitrator chosen by the worker party:	Mr. Tuon Siphann
Chair arbitrator (chosen by the two arbitrators):	Dr. Sok Mathoeung

HEARING AND EVIDENCE:

Date of hearing: 1 June 2005 at 2:00 to 6:30 p.m.

Place of hearing: The Arbitration Council Phnom Penh Building "A", Sothearos Blvd, Tonlebasak, Chamkamorn, Phnom Penh.

EVIDENCE THAT WAS CONSIDERED BY THE ARBITRATION PANEL IS AS BELOW:

A. Provided by the employer party:

- 1- Letter delegating [authority] to Mr. Long Heng to resolve collective labour dispute dated 27 May 2005 .
- 2- The statute of the HS ENT Co., Ltd (Cambodia) registered at the Cambodian Development Commission.
- 3- Company' s certificate no. 771 dated 7 March 2002
- 4- Internal Work Rules of the company dated 20 April 2004.

- 5- List of names of 131 workers who work at Building 2B, and whose employment contracts were terminated and who received indemnity for dismissal.
- 6- Minute of meeting dated 5 May 2005 between the company and the worker representative on closing building 2, "B". and the termination of all the workers from building B.
- 7- Minute of meeting dated 6 May 2005 on the announcement of the termination of 131 workers and the closing of building 2, "B", to all workers at building 2, "B".

B. Provided by the employee party:

- 1- Registered certificate no. 699 dated 27 December 2004 of KYFTU at HS ENT Co., Ltd.
- 2- Letter recognizing the new union leader dated 21 February 2005.
- 3- Letters dated 1 and 9 June 2005 of 27 worker representatives to the Secretariat of the Arbitration Council.
- 4- Notification dated 6 May 2005 of worker representatives to the director of the HS ENT Co., Ltd.

C. Received from the Ministry of Labour and Vocational Training [MoLVT]:

- 1- Letter dated 27 May 2005 requested to resolve collective labour dispute at HS ENT Co., Ltd no. 695/MoVLT from H.E Nhep Bunchin, Minister of Labour and Vocational Training.
- 2- Report on collective labour dispute resolution at HS ENT Co., Ltd no. 88/MoVLT dated 24 May 2005 from Kandal province.
- 3- Minute on conciliation of collective labour dispute dated 12 May 2005.

D. Presentation and testimony from employee and employer parties at the hearing

E. Both parties agreed to choose a non binding award.

CASE SUMMARY:

HS ENT Co., Ltd employs a total of 740 workers. The company undertakes the washing of cloth. On 9 May 2005 the Office of Vocational Training at Kandal province received a phone call [informing them] that there was a strike in front of the factory led by the KYFTU who demanded that the employer resolve three of the workers' requests. [Once the Office was informed] about the dispute, the Office appointed two labour conciliators to help settle the dispute at the factory. After discussions, the workers and the employer agreed to negotiate on 12 May 2005 at 8:30 a.m. On 12 May 2005 the conciliation was held at the factory as scheduled. The employer allowed two representatives from KYFTU to be involved

in the conciliation process along with six workers from the union committee at HS ENT Co., Ltd. The conciliation was unsuccessful with respect to the three [issues in] disputes.

Regarding the termination of the three local union leaders, and based on the report from the Office of Labour and Vocational Training in Kandal Province, the employer argued that the company had terminated their employment contracts with the factory, but company did not object to the tasks of the union within the company.

Regarding the indemnity for dismissal issue, and based on the report from the Office of Labour and Vocational Training in Kandal Province, the company provides only the amount calculated for the indemnity for dismissal and the company could not provide as the workers' demand.

With regards to the reinstatement of the workers, the workers argued that:

- The employer laid off the workers, but followed the procedures set out for individual termination.
- The termination of the employment contracts did not follow the Labour Law because the [employer] undertook a mass layoff.
- At present the employer is still recruiting new workers, such as an electrician.
- The workers cannot accept the termination of their employment contracts without valid reason and because there was an incitement from GMAC representative (Mr. Long Heng), which made the workers lose their job and strongly affected their standard of living.
- The employer dismissed 131 workers from building 2, "B", on 6 May 2005 without any prior notice.
- All the workers from building 2, "B", are members of KYFTU.
- The termination occurred all at once while the machine was being repaired.
- One month before the termination, there was a change in the workers' [location] from building 1 to building 2. There were five workers who swapped from building 1 to building 2, and two who were swapped from building 2 to building 1. The five workers who were dismissed are named: 1. Phon Pros, 2. Hom DOUNGCHAN, 3. Mom Touch, 4. Kim Sann, and 5. Yong Chinda.
- The workers demand that the employer [give them] reinstatement priority, if there is work to do.

The employer argued that:

- If building 2 can be reopened, the company will make a public announcement, but requested that the 131 workers give the employer their clear and specific address [so that the employer can inform those employees].
- The company did not give any prior notice to the 131 workers but the company did correctly calculate [severance payments] according to the law, including [providing] payment in lieu of notice as well.
- On the afternoon of 5 May 2005 there was a meeting with the employees who were told that from 6 May 2005 onwards there would not be work anymore for the workers.
- The employer paid wage to all workers in April and for [also provided payment for] their work from 1 to 5 May 2005 on 12 May 2005. Money for severance pay [was provided] on 18 May 2005.
- The reason why the workers were dismissed was because there was no work [for them] to do and building 2 was closed [as a consequence].
- The termination did not follow the procedure for a mass layoff.
- The employer would provide a table of which shows the calculation of the termination payments of those workers to the Arbitration Council before issuance of the arbitral award.
- Some floating workers were hired. They have started working in the power generation section in building 2 (there are four power generation sections).

FINDINGS OF FACT:

- Having examined the minute of collective labour dispute resolution
- Having listened to the presentation of the employees and the employer at the hearing
- Having reviewed all documents as described above.

We find that:**Issue 1:**

- 1- The workers demand that the company reinstate the three local union workers. This demand involves the termination of the employment contract of the President, Vice President and Secretary of the KYFTU at the HS ENT company. They were among 131 workers that the company dismissed on 6 May 2005.
- 2- The three local union leaders, named Mr. Chom Ratana, union leader, Mr. Yi Roith, union Vice President and Mr. Ly Kheng, Secretary of the KYFTU of HS ENT company.
- 3- Mr. Chum Ratana – [worked as] the line leader for quality control in Building B. He commenced work on 10 July 1999 and was dismissed on 6 May 2005 and

received severance pay on 18 May 2005 in the amount of US\$1,113. He does not have a written contract.

- 4- Mr. Yi Roith – [worked as] a washing machine worker in Building B. He commenced work on 1 November 2002 and was dismissed on 6 May 2005. He received severance pay on 18 May 2005 in the amount of US\$410. He did not have a written contract.
- 5- Mr. Ly Kheng – [worked as] a chemical worker in Building B. He commenced work on 1 January 2000 as a casual worker until 1 November 2002. [At this time] he became a permanent worker and was dismissed on 6 May 2005. He received severance pay on 18 May 2005 in the amount of US\$403. He did not have a written contract.
- 6- The employer did not ask for authorization from the office of the Labour Inspector in Kandal Province in relation to the dismissal of these three union leaders.
- 7- The three union leaders demand that the employer reinstate them and that their seniority is maintained.

Issue 2

- 1- On 5 May 2005 the employer decided to close Building B, which is among three buildings at the company because there was no work to be done in Building B. The company called a meeting of the workers' representatives, which included shop stewards and union leaders, as provided in a minute from the company dated 5 May 2005. The company decided to dismiss the 131 workers by paying them severance pay in accordance to Articles 75, 89, 91, 116 and 166. On 5 May 2005 the company called another meeting and made an announcement to all the workers in Building B that this building would be closed and 131 workers would be dismissed because there was not enough work for the workers in Building B.
- 2- Among the 131 workers in Building B there were 28 workers who demanded an extra bonus of US\$500 for each worker. But at the hearing the workers' representative said that there were only 27 workers who made this demand, the other one worker had withdrawn his demand. Among the 27 workers there were the three union leaders mentioned above in issue one. The 24 other workers are KYFTU union members of HS ENT. The workers' representative said that the demand of the 27 workers was made because the severance pay was paid by the employer to the 27 workers but the employer did not include money for seniority, an extra bonus to compensate [the workers] for the time the workers will be unemployed and money for "seniority" in relation to family, as provided in Article 95.

- 3- At the hearing both parties stated that the 131 workers of Building B, including the 27 workers, do not have written contracts. The employment contracts of the Building B workers are undetermined duration contracts. The employer said that the 131 workers were paid severance pay and the company calculated their severance pay according to the Law. This included money for notice, indemnity for dismissal, untaken accrued annual leave and damages.
- 4- Among the 24 workers, two workers gave evidence that:
 - a) Worker: Phon Prosh, mechanic: He commenced work on 18 February 2003 and was dismissed on 6 May 2005. Phon Prosh received a basic wage of US\$47 [per month], a technical bonus of US\$10/month, an attendance bonus of US\$5 [per month] and an incentive bonus for regular overtime of US\$10. Phon Prosh received a termination payment on 18 May 2005 in the amount of US\$312.
 - b) Worker: En Botha, washing machine worker: He commenced work on 1 July 2003 and was dismissed on 6 May 2005. En Botha received a basic wage of US\$45 [per month], a technical bonus of US\$10 [per month], an attendance bonus of US\$5 [per month] and an incentive bonus for regular overtime of US\$10. En Botha received a termination payment on 18 May 2005 in the amount of US\$277.
- 5- The employer refused the above demand, by saying that the company had paid all 131 workers, including the 27 workers, according to law.

Issue 3

1. In relation to the dismissal of the 131 workers, the employer called all the workers to attend a meeting on the afternoon of 5 May 2005. The employer told the workers that they would be dismissed on 6 May 2005.
2. The reason for the dismissal was that the employer [wished to] close Building ["B"] because there was no work for the workers [who worked] in this building.
3. There were at least five workers who were from the front building (Building A) transferred to the rear building (Building B) one month before the dismissal.
4. The employer paid the 131 workers their wages on 12 May 2005 and paid them a termination payment on 18 May 2005.

REASONS FOR DECISION

Issue 1

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 authorization from the Labour Inspector."

Union leaders are protected by the Labour Law as provided in Article 293 which requires the employer to ask for authorization from the Labour Inspector before termination of any union leader.

In this case the Arbitration Council finds that Mr. Chum Roitha, union President, Mr. Yi Roith, union Vice President and Mr. Ly Kheng, Secretary of the [union at] HS ENT Co., Ltd were protected by the Labour Law pursuant to Article 282, 293, 295 and the Prakas 305/01. The employer's dismissal must therefore comply with the specific procedures, which are outlined in the Law. The Law requires authorization from the Labour Inspector before the dismissal of the [protected] worker. In this case the employer stated that it had not asked for permission from the Ministry or the Labour Inspector in Kandal Province; [instead,] based on the Minutes of the Meeting, the company by its own will decided to close the factory in Building 2 and dismiss all 131 workers in this building. The employer argued that s/he paid indemnity for dismissal in accordance with Article 75, 89, 91, 116 and 166. The employer representative also said that because building B was closed, all workers [from this building] were dismissed, including the union leaders of the KYFTU, and that the employer had agreed to maintain the union leaders' mandate in relation to the union's work in the factory.

The three union leaders, Mr. Chum Ratana, Mr. Yi Roith, and Mr. Ly Kheng, did not agree and demanded that the company reinstate them because in the other buildings [on site] there are also KYFTU union members [working].

The Arbitration Council finds that the dismissal of the three union leaders of the KYFTU by the employer did not comply with the procedures as set out in Articles 282, 293, 295 and Prakas 305/01. In cases where there is no permission from the Labour Inspector to terminate [protected workers, such as in this case,] the three union leaders are still employed according to law.

However, the Arbitration Council also finds that the three union leaders have received a payment in respect of their termination from the employer on 18 May 2005, as did the other 24 workers.

Thus the Arbitration Council decides that the employer must reinstate the three union leaders of the KYFTU of HS ENT factory and pay them back pay starting from 6 May 2005. The three workers must pay back to the employer the payment which was received on 18 May 2005.

Issue 2

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

In addition, Article 91 states that: "The termination of a labour contract without valid reasons, by either party to the contract, entitles the other party to damages ... The worker, however, can request to be given a lump sum equal to the dismissal indemnity. In this case, he is relieved of the obligation to provide proof of damage incurred."

According to this Article the employer has a valid reason [if the dismissal was] based on the operational requirements of the establishment like a reduction of work or the closure of some part of the operation. [If this is the reason for] the termination of the workers' employment contracts the employer is not required to pay damages.

In this case the employer dismissed 131 workers in Building B owing to the employer having to close this building because there was no longer any work for the employees of this building to do. Therefore the employer had a valid reason according to Article 74 to terminate the labour contracts of the 131 workers without requiring the employer to pay damages.

In this case however, the employer argued that it provided the 131 workers with severance pay including a payment for notice equal to the period required by Article 75, indemnity for dismissal as provided by Article 89, damages as provided by Article 91, last wages as mentioned in Article 116 and payment for unused annual leave as mentioned in Article 166 of Labour Law.

At the hearing neither party provided evidence about the calculation of severance pay. The parties only stated that they had provided or received the termination payment through/from the Administration Office of the company on 18 May 2005. At the hearing the workers' representative gave evidence about the amount of termination pay as follows:

- a) *Phon Prosh, mechanic: He commenced work on 18 February 2003 and was dismissed on 6 May 2005. Phon Prosh received a basic wage of US\$47/month, a technical bonus of US\$10/month, an attendance bonus of US\$5/month and an incentive bonus for regular overtime of US\$10/month. Phon Prosh received a termination payment on 18 May 2005 in the amount of US\$312.*

b) *En Botha, washing machine worker: He commenced work on 1 July 2003 and was dismissed on 6 May 2005. En Botha received a basic wage of US\$45/month, a technical bonus of US\$10/month, an attendance bonus of US\$5/month and an incentive bonus for regular overtime of US\$10/month. En Botha received a termination payment on 18 May 2005 in the amount of US\$277.*

The Arbitration Council considers the money which was provided by the employer to the workers in accordance with Articles 75, 89, 91, 116 and 166 of the Labour Law and finds the result below:

Name	Wages and Benefits	Notice	Indemnity for dismissal	Damages (not required)	Unused annual leave	Last Wages (1 - 6 May 2005)	Total
Phon Prosh	US\$62	US\$62	US\$71.54	US\$71.54	US\$50.08	US\$11.94	US\$317
En Botha	US\$60	US\$34.62	US\$69.23	US\$69.23	US\$34.62	US\$11.54	US\$268

Based on this calculation we find that the amount received by Phorn Pros and En Botha on 18 May 2005 is quite similar to that expressed in the above table.

Thus the employer provided termination pay to the workers above the law and it does therefore benefit the workers who were terminated.

Amongst the 131 workers there were 27 workers who demanded an extra bonus of US\$500 each in addition to the severance pay which was provided by the employer according to the above Articles of the Labour Law. The workers' representative who made the demand for an additional US\$500 argued that the employer has an obligation to make this payment for seniority, as additional compensation] for the workers during their time of unemployment and as a payment for their seniority in consideration of their familial situation pursuant to Article 95 of the Labour Law.

Article 95 of the Labour Law discusses that [workers acquire] one year's additional seniority if they are married and an additional year for each dependant child. The additional seniority as mentioned in this Article is simply to classify workers in respect of a mass layoff. [Workers are classified] according to skill, seniority and their [familial] burden when there is a mass layoff in order to reduce the number of workers [in a workplace] and when there will be some workers who will remain in the enterprise. This rule provides the method to be used for reducing the number of workers and attempting to minimize the effect on the workers.

Thus the [argument relating] to additional seniority bonus for family and compensation for the time of unemployment, in addition to severance pay, is not mentioned in Article 95 as raised by the 27 workers. Therefore the Arbitration Council finds that the demand for the extra US\$500 in addition to severance pay, which has already been received [by the workers], does not have a legal basis.

Thus the Arbitration Council rejects the workers' demand for an additional US\$500 for the 27 workers.

Issue 3

In the Findings of Fact the Arbitration Council found that among the 740 workers of the three buildings the employer dismissed 131 workers who worked in Building B on the same day, 6 May 2005, because there was no work for the workers and therefore Building B was closed.

The Arbitration Council finds that the dismissal of the 131 workers was due to a reduction of work in the factory. The employer has the right to [dismiss workers for this reason] according to the Law. Article 95 of the Labour Law allows the employer to dismiss workers because of a reduction in work in the establishment or an internal [organizational] restructure of the enterprise. Thus the dismissal of the workers because of a reduction in work at the factory is not unlawful.

The employer stated at the hearing that it notified the workers' representative on 5 May 2005 and made an announcement about the dismissal of the workers on 6 May 2005. Paragraph 3 of Article 95 requires the employer to notify the workers' representative in writing in order to solicit their suggestions, primarily, on the measures for a prior announcement of the reduction in staff and the measures to be taken to minimize the effects of the reduction on the affected workers. In this case the employer advised the workers' representative, including three shop stewards named Chom Del, Koy Rady and Chhoun Sovann and the union leaders of the KYFTU at the company named Kong Ratana, Ly Khieng, Yi Roith and Chem Sao. [These workers were asked] to take part in this meeting in order to make an announcement about the closure of Building B and the dismissal of the 131 workers in Building B, as stated in a Minute dated 5 May 2005. The employer called the employees to a meeting about the closure of Building B and made an announcement [at this meeting] about the closure.

The Arbitration Council finds that Building B was closed and the employer terminated all 131 workers in Building B without retaining any workers [from this building] because even

the main tasks completed in this building could no longer be offered. Thus, it is not required to classify the workers by considering skill, seniority in the establishment or the burden of the family as provided by Article 95 before termination. Hence the notice made on 5 May 2005 could be notice that conforms with Article 95 of the Labour Law. However, five workers who were transferred from Building A to Building B one month before the termination may be relevant to [a determination of] the intention of the employer, who may want to terminate these employees with the other workers in Building B. Because of this, the Arbitration Council finds that the employer should reinstate the five workers to their previous work in Building "A" before their transfer to Building "B" or to a similar job. This would indicate [to the workers] their good intentions and respond to any doubts about the employer's intentions towards the five workers.

The Arbitration Council will not issue an award relating to the demand for reinstatement of the five workers above, because this demand was not included in the non-conciliation report of the MoVLT dated 12 May 2005. It was only raised at the hearing. Article 312 of the Labour Law and Article 33 of Prakas 99/04 on the Arbitration Council dated 21 April 2004 provide that, "the power of an arbitration panel to consider a dispute shall be limited to addressing those issues which are contained in the non-conciliation report including issues which are the direct consequences of the dispute but which arise from events subsequent to the date of the report." The Arbitration Council finds that this demand is not [an event] which is a direct consequence [of the dispute] which happened after the [non-conciliation] minute was made, because the act of transferring the workers from building A to Building B occurred one month prior to the termination on 6 May 2005 of the five workers.

Article 95, paragraph 5 states, "the dismissed workers have, for two years, priority to be re-hired for the same position in the enterprise." Thus the Arbitration Council finds that the employer must respect and comply with the prioritization [requirement] for new worker recruitment as provided by Article 95, paragraph 5 in cases where there is a job vacancy or the company reopens [the building] within two years [of the termination] for all 131 workers (except the three union leaders). [The employer should inform these employees] by giving a notice to them by express mail, hand delivered letter to the last address of the worker who has priority to be rehired.

Thus the Arbitration Council decides the employer should give priority to all the workers from Building B who were terminated on 6 May 2005 for reinstatement to the same positions in the HS ENT factory within two years [of the termination].

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

DECISION

1. (a) Order the employer to reinstate the three union leaders of KYFTU at HS ENT immediately, from the date this award comes into effect. The employer must provide wages to these workers for the period 6 May 2005 onward;

(b) The workers named Chom Ratana, Yi Roith and Ly Khieng must pay back to the employer the severance pay which they received on 18 May 2005; if they accept their reinstatement.
2. Reject the claim for extra payment of US\$500 to 27 workers; and
3. Order the employer to give priority to the workers in Building B who were terminated on 6 May 2005 for reinstatement to the same positions in the HS ENT factory within two years from 6 May 2005.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Mar Samborana**

Signature:

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature:

Chair of arbitration panel:

Name: **Sok Mathoeung**

Signature:

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.

This Award is immediately binding upon the parties if parties have agreed as such in writing before the notification of the Award, or if parties are bound to comply with a collective bargaining agreement stipulating that no opposition to the Award may be lodged.