

**KINGDOM OF CAMBODIA
NATION KING RELIGION**

THE ARBITRATION COUNCIL

Case number and name: 43/06- Win Cam

Date of Award: 23 June 2006

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Mar Samborana**

Arbitrator chosen by the worker party: **An Nan**

Chair Arbitrator (chosen by the two Arbitrators): **Nhean So Munin**

DISPUTING PARTIES

Employer party:

Name: Win Cam Corporation

Address: Building 62 R, Sangkat Tuol Sangke, Khann Russey Keo, Phnom Penh

Telephone: 023 883 392/ 012 333 738 Fax: 023 883 393

Representative:

- | | |
|---------------------|-------------------------|
| 1. Mr. Kim Chanvong | Director of the Company |
| 2. Mr. Ben Visno | Administrator |

Worker party:

Name: Development Federation Union for Workers' Rights (DFUWR) and Local DUWR at Win Cam Factory

Address: Khann 7 Makara, Phnom Penh

Telephone: 012 690 594 Fax: N/A

Representative:

- | | |
|--------------------|---|
| 1. Mr. Cheng Nen | Head of DFUWR |
| 2. Mr. Suy Samnang | Officer of DFUWR |
| 3. Mr. Oul Pisey | President of local DUWR at Win Cam Factory |
| 4. Ms. Pang Lot | Committee member of local DUWR at Win Cam Factory |
| 5. Mr. Sok Vichet | Committee member of local DUWR at Win Cam Factory |
| 6. Ms. Mot Thanen | Committee member of local DUWR at Win Cam Factory |

7. Ms. Soon Sreyloch	Committee member of local DUWR at Win Cam Factory
8. Ms. Tha Sineth	Committee member of local DUWR at Win Cam Factory
9. Ms. Huot Chrep	Committee member of local DUWR at Win Cam Factory
10. Ms. Hi Sanon	Committee member of local DUWR at Win Cam Factory
11. Ms. Ly Thavy	Committee member of local DUWR at Win Cam Factory
12. Ms. Pheang Savy	Committee member of local DUWR at Win Cam Factory

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

According to the non-conciliation report, the following non-conciliated issues are the demands of the worker party in this dispute.

1. The workers demand the company to reinstate Mr. Oul Pisey, President of the local DUWR at Win Cam Factory.
2. The workers demand the company to provide 50 percent wages when the company has no work.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Article 309 to 317) of the Labour Law (1997); 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 Appointment of Arbitrators 099/06 (Fourth 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. The non-conciliation report No. 718 dated 26 May 2006 was submitted to the Secretariat of the Arbitration Council on 29 May 2006.

HEARING AND SUMMARY OF PROCEDURE

Place of hearing: The Arbitration Council, Phnom Penh Center Building "A", Sothearos Blvd, Sangkat Tonle Bassac, Khan Chamkamorn, Phnom Penh

Date of hearing:

- 6 June 2006 (2:00 p.m. to 5:00 p.m.)
- 15 June 2006 (2:00 p.m. to 5:00 p.m.)

Procedural issues:

On 22 May 2006, the Department of Labour Disputes received a complaint from the workers and assigned an officer to settle the workers' strike. [The workers] demanded that the company improve working conditions with respect to 18 issues. 16 issues were conciliated and

two were not [at this time]. The two non-conciliated issues were referred to the Arbitration Council on 29 May 2006. After receiving this case, the parties in dispute were summoned by the Arbitration Council to attend a first hearing on 6 June 2006 from 2:00 p.m. to 5:00 p.m. and a second hearing on 15 June 2006 at the same times.

Both parties were present at the hearings. The Arbitration Council suggested attempting further conciliation on the remaining two issues sent to the Arbitration Council, but the employer party did not think that they would be able to conciliate any of the points and thus did not agree to further conciliation by the Arbitration Council.

However, before the second hearing was called and before starting the hearing with respect to the second issue in dispute, the worker party suggested withdrawing the second issue of the non-conciliation report in consideration of the fact that this issue was not yet an actual dispute. Therefore, there remains only one remaining issue which the Arbitration Council will consider and issue an award with respect to.

Therefore, in this award, the Arbitration Council will consider the one non-conciliated issue based on evidence and findings of fact as follows:

EVIDENCE

Witnesses and experts:

1. Ms. Hean Navy (Head of the Cutting Section)
2. Ms. Pen Rany, labourer
3. Mr. Hun Ratha, labourer
4. Ms. Huy Huoch, labourer

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Minute of the collective labour dispute conciliation dated 23 May 2006
2. Letter No. 2027/06 C.I.L.F. dated 25 May 2006 about legal consultation service at Win Cam Company by the Cambodian Internal Lawyer Group.
3. Letter No. 1919 dated 19 August 2005 about the confirmation of registration of Win Cam Corporation with the Ministry of Commerce.
4. Certificate of registration of Win Cam Corporation, registration No. Inv. 969/05E dated 16 August 2005.
5. Statute of Win Cam Corporation Company.
6. Internal Work Rules of Win Cam Company, registration No. 037 dated 17 March 2006.
7. Some documents about product shipment to customers by air.
8. Sample of spoiled fabric.

9. Notification of the termination of Mr. Oul Pisey of Win Cam Company dated 11 May 2006.
10. Report by five workers about Mr. Oul Pisey's mistaken cut to cutting model No. 0146.
11. Job application of Mr. Oul Pisey dated 3 February 2006.
12. Mr. Oul Pisey's labour contract of two months probation, from 3 February 2006 to 3 April 2006.
13. Report of the amount of product No. 0146 ordered by the customer(s) and the actual amount of product the company sent to the customer(s).

Provided by the worker party:

1. Letter dated 4 May 2006 by DFUWR to the Director of Win Cam Garment factory about election for leaders of local DUWR at Win Cam factory.
2. Signature recognizing receipt of the letter by the security guard named Soeung Channa.
3. Statute of the local DFUWR at Win Cam Factory.
4. List of names of participants in the election.
5. List of names of the election candidates
6. List of names list of the [union] leaders elected
7. Minute of the election dated 4 May 2006
8. Minute of the collective labour dispute dated 23 May 2006
9. Thumbprints of some workers who support the reinstatement of Mr. Oul Pisey.
10. Thumbprints of some workers who testify that Mr. Oul Pisey did not cut the fabric wrongly, received by the Secretariat of the Arbitration Council on 22 June 2006. (As this document was received one day before the award was due to be issued, the Arbitration Council has not considered this document [in this award].)

Provided by the Ministry of Labour and Vocational Training:

1. Letter No. 576 dated 2 June 2006 by H.E. Vorng Sauth, Minister of Labour and Vocational Training about the request to resolve the collective labour dispute of Win Cam Corporation Company.
2. Report on the collective dispute resolution at Win Cam Company, No. 718, by Mr. Koy Tepdaravuth, Chief of the Labour Dispute Department, dated 26 May 2006
3. Minute of the collective dispute conciliation, dated 23 May 2006.

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to the worker party to attend the hearing, No. 213, dated 30 May 2006.

2. Letter of invitation to the employer party to attend the hearing, No. 214, dated 30 May 2006.

FACTS

- Having examined the report of the collective labour dispute conciliation
- Having listened to statements made by the representative from the employer and employee parties
- Having reviewed additional documents

The Arbitration Council finds that:

- Win Cam Corporation started its garment textile business in Toulkok district, Phnom Penh recently and employs a total of approximately 400 workers. The local DUWR at Win Cam factory is the first union established by the workers. [The workers] have prepared its statute and organized an election for union leaders on 4 May 2006 at the office of the Union Federation located at 7 Makara District, Phnom Penh. This union has not yet been officially registered at the General Department of Labour Disputes of the Ministry of Labour and Vocational Training.
- The union representative claims that the letter about the election of union leaders was sent to the Company on 8 May 2006 and the letter was delivered to the security guard named Soeung Channa, security staff of CSM Company working at the Company, at about 4 p.m. The letter mentioned that Mr. Oul Pisey was elected the leader of the union. But the company denied receiving the notification letter and did not know which security guard was working at that time because the security guards are subject to change all the time. Besides the one page of paper with the specific date and name of the person the union claimed to be the security guard working at Win Cam Company at that time, the union did not seek to have a witness [give testimony] or provide any additional evidence to support the receipt of the letter of notification. Thus there is not enough evidence to certify that the company received the notice letter.
- Mr. Oul Pisey started work as a cutting worker for the company on 3 February 2006 pursuant to a probationary contract of two months duration. When the probation period was over, the company allowed Mr. Oul Pisey to continue working but did not make a new written contract with him. Thus the employment contract between the company and Mr. Oul Pisey is an undetermined duration contract.
- The Arbitration Council believes that Mr. Oul Pisey did make the mistaken cut with respect to the fabric style 0146 and while some fabric can be fixed [by cutting] smaller

size [pieces] some cannot. The fabric which was cut wrongly by Mr. Oul Pisey is a rainbow coloured fabric for about one thousand swimming suits. Mr. Oul Pisey made some small wrong cuts but these could still be fixed and used. He received direct oral instruction from the leader of the cutting section telling him to pay more attention to his work. Because the mistaken cutting of the fabric was of a very big amount the company summoned Mr. Oul Pisey to find a solution to the problem; [to determine whether] he had to pay for the damage or he was to be dismissed. The company decided to dismiss him on 11 May 2006 at about 4 p.m. (after the inquiry and the decision was told to him orally).

- After having a long holiday, on 18 May 2006, Mr. Oul Pisey attempted to return to work, but he was banned from entering the company by the security guard. Up until the date of the hearing a dismissal letter was not yet delivered to him.
- The Company mentioned that Mr. Oul Pisey was terminated because he committed serious misconduct as stated in the company's Internal Work Rules.
- Mr. Oul Pisey was careless and spoiled the fabric which did cause damage to the company. But the actual damage caused was not in the amount of US\$10,000 as the Company stated, and the misconduct of Mr. Oul Pisey, based on the company's Internal Work Rule was not serious misconduct, that is, [the misconduct] was only considered medium misconduct. From the day Mr. Oul Pisey commenced his work for the company to the day of his dismissal, the company has never issued any written warning letter or registered such letter in his personnel file about his medium misconduct.

REASONS FOR DECISION

1. Is Oul Pisey entitled to the special protections accorded to a leader of a union or a founder of a union within the period of election and registration of the union?

Article 12 of the Labour Law 1997 states, "*...no employer shall consider on account of... membership of workers' union or the exercise of union activities to be invocation in order to make a decision on: ... hiring, ... discipline or termination of employment contract.*" Article 293 of the law states, "*The dismissal of a shop steward or a candidate for shop steward can take place only after authorisation from the Labour Inspector...*"

Therefore, worker delegates (also known as shop stewards) are entitled to special protections at the time of their dismissal. This means that without the approval of the Labour Inspector, the dismissal of a worker delegate is null and void, and the employee must be reinstated (see 02/04-Hotel Cambodiana).

Further, paragraph 3, Article 3 of Prakas 305/01 states that, "*Any worker belonging to a union who runs for a leadership position in that union shall enjoy the same protection from*

dismissal as a shop steward. This protection begins 45 days prior to the election and ending, if she/lie is not elected, 45 days after the election. To this end, the employer must be duly informed of the candidacy by any reliable means.” In the past, the Arbitration Council has issued awards 05/05-GHG and 64/05-Chian Hwey [which outline] that in order to receive protection from dismissal, the union has to inform the employer about the employee’s candidacy.

In addition, Article 4 of the same Prakas 305/[01] provides this protection to all workers who are founding members of a union, as well as those who voluntarily join the union [in its founding stage]. This protection shall last for a period of up to 30 days following the date of registration of the union. In order to get this protection, the union must inform the employer about the names of those who should receive protection by all reliable means. One copy of this notification must be sent to the Ministry of Labour and Vocational Training.

Therefore, the Arbitration Council finds that a candidate for a union election or an elected union leader or any person who is a founding member of the union or voluntarily joined as a member of the union within the period of union registration shall receive protection from dismissal in the same manner as a worker delegate under Article 293 after the employer is notified of their candidacy or membership.

This means that in order to receive the special protection under Article 293 and Prakas 305/[01], any worker who is a candidate for election or candidate for union leader or founder of the union must fulfill the following requirements: (i) the worker is a type of worker set out in Article 3 and 4 of Prakas 305/[01], (ii) the dismissal takes place within the period during which s/he is under protection, and (iii) the worker has notified the employer of the name of the person who should enjoy the protection through any reliable means (see 50/05-Fortune, 64/05-Chien Hwey Shoes, and 24/06-Fortune).

According to the above facts, DUWR conducted its union election on 4 May 2006. However in the time since, it has not submitted its registration application to the Ministry of Labour and Vocational Training. Mr. Oul Pisey is a union leader candidate who was elected within the period of 45 days following the election and the union was in the first stage of its establishment. Therefore, he is someone who falls within Article 3 and 4 of Prakas 305/[01]. Mr. Oul Pisey also meets the second condition because the dismissal took place within the period of 45 days following the date of the union election.

However, with respect to the third requirement, because the union did not provide any precise evidence to show that they had notified through a reliable means to the employer about the names of members of the union who should receive protection under Article 3 or 4 of Prakas 305/[01], Mr. Oul Pisey is not entitled to the protection provided to worker delegates in relation to dismissal from work.

2. Was the dismissal of Mr. Oul Pisey proportionate to his misconduct?

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. This termination shall be subject to the prior notice made in writing by the party who intends to terminate the contract to the other party. 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.”* Article 27 of the Labour Law states that, *“Any disciplinary sanction must be proportional to the seriousness of the misconduct.”*

The Arbitration Council stated in 18/04 [- Hotels] that the employer cannot carry out a punishment on a worker if there is no provision which states about that punishment in the Internal Work Rules of the company.

Moreover, the Arbitration Council found that in the *“Internal Work Rules of the company issued on 22 February 2006, point 11 (method of punishment) on the point describing types of misconduct which are considered serious misconduct and lead to dismissal, carelessness at work which causes damage to the property of the company was not included. However, the Internal Work Rules clearly state that damaging company property through carelessness is medium misconduct which means that committing this misconduct a first time will lead to a written reprimand which is recorded on the [employee’s] personnel file. The second time the misconduct is committed, [the employee] will be suspended for a period of time of not more than seven days without wages and at the third time, [the employee] will be terminated from work.”*

In this case, the employer decided to terminate Mr. Oul Pisey for serious misconduct, that is, that he cut the fabric wrongly which caused the company damage and in the company’s argument, was in accordance with the company’s Internal Work Rules and the Labour Law.

At the hearing, the Arbitration Council found that Mr. Oul Pisey did damage the fabric because of his carelessness.

Based on the Internal Work Rules of the company, the Arbitration Council found that Mr. Oul Pisey’s mistake, that he wrongly cut the fabric which was the property of the company is medium misconduct which should be reprimanded in writing and recorded in his personnel file, but that his misconduct should not lead to dismissal. The Arbitration Council finds that the company should not ban Mr. Oul Pisey from returning to work after his permitted holiday. To the contrary, the company should have allowed Mr. Oul Pisey to come back to work on 18 May 2006 when he tried to go back to work on that day.

Therefore, the Arbitration Council considers that, in conformity with Article 27 of the Labour Law and the company’s Internal Work Rule about punishment for medium misconduct, the dismissal is not proportionate to the medium misconduct and it is not a proper application of the company’s Internal Work Rules because this is the first time that [the employee committed]

medium misconduct. In order to ensure that Mr. Oul Pisey's punishment conforms with the content stated in the Internal Work Rule and the law, the company can only issue a first written warning.

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

DECISION

- Mr. Oul Pisey shall be punished by receiving a written reprimand and his first time misconduct shall be recorded in his personnel file.
- The company must reinstate Oul Pisey immediately after this award enters into effect and reimburse his wage from 18 May 2006 to the day he is reinstated. The company must pay the reimbursed wage to Mr. Oul Pisey along with his July 2006 wage.

Type of Award: non binding

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: **Mar Samborana**

Signature:

Arbitrator chosen by the worker party:

Name: **An Nan**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Nhean So Munin**

Signature: