



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 45/07- Wilson

Date of Award: 25 June 2007

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **CHHIV PHYRUM**

Arbitrator chosen by the worker party: **AN NAN**

Chair Arbitrator (chosen by the two Arbitrators): **KONG PHALLACK**

DISPUTING PARTIES

Employer party:

Name: **Wilson Garment (Cambodia) Co., Ltd.**

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

Telephone: 023 890 191; 012 555 829 Fax:

Representative:

1. Mr. Long Phally Head of Administration of the Company
2. Mr. Cheav Tola Lawyer of the Company

Worker party:

Name: **Local C.CAWDU at Wilson Garment Factory**

Address: 6C, Sangkat Tuol Tompoung 1, Khann Chamkarmorn, Phnom Penh

Telephone: 023 210 481; 012 282 653 Fax: 023 210 481

Representative:

1. Mr. Oum Visal Dispute Resolution Officer of C.CAWDU
2. Mr. San Socheat President of local C.CAWDU at Wilson Company
3. Mr. Te Sela Vice-President of local C.CAWDU at Wilson Company

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The union still demands the company to continue to provide US\$ 15 per month in lieu of day care center to the women who have children from the age of 18 months to 18 years old. The company mentions that it is able to provide US\$ 15 only to women who have children from the age of 18 months to 36 months old.
- 2- The union demands the company to make back payments of US\$ 10 per month in lieu of a day care center to the women who have children from the age of 18 months to 18 years old because the company provided only US\$ 5 per month before the award of the Arbitration Council was issued. The company cannot make back payments of US\$ 10 per months to women who have children as demanded; the company's practice is to provide payment in lieu of day care center in the amount of US\$ 15 per month from the day the [prior] Arbitral Award was issued.
- 3- The women to whom the company stopped providing allowance when their children are 36 months old demand the company to continue to give the allowance until the children are 18 years old. The company cannot provide this but [is able to do it until the children are] 36 months old.
- 4- The union demands the company to reinstate San Sothy, ID 1141, and Lach Ratana, ID 2230. The company does not agree as it has paid them according to the Labour Law and the two people already received the money.

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. 076/07 KKBV./PrK, dated 10 May 2007 (Fifth Term).

An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation hearing was unsuccessful, and the non-conciliation report No. 457 K.K.B.V/AK, dated 30 May 2007 was submitted to the Secretariat of the Arbitration Council on 31 May 2007.

HEARING AND SUMMARY OF PROCEDURE **Article 38C**

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

Date of hearing: 12 June 2007 (From 2:00 p.m. to 5:00 p.m.)

Procedural issues:

On 10 April 2007, the Department of Labour Disputes received a complaint letter from C.CAWDU, No. 021/07, dated 09 April 2007 regarding demand for the company to improve working conditions according to the Labour Law. After receiving the complaint, the Department of Labour Disputes assigned an officer to conciliate this dispute and the last conciliation was held on 08 May 2007 with a result of 0 of 4 issues being conciliated. The four non-conciliated issues were referred to the Arbitration Council on 31 May 2007.

Upon receipt of the case, the Secretariat of the Arbitration Council summoned the employer and the worker parties in the factory to attend a hearing and conciliation on the 4 non-conciliated issues on 12 June 2007 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 four non-conciliated issues in the non-conciliation report by the Department of Labour Dispute but did not receive any conciliated result. In the hearing, the worker party agreed to combine issue 3 with issue 1 because they have the same purpose in the demands. Thus, in this case, the Arbitration Council will consider these issues based on evidence and the clarification of the parties in the hearing as follows:

EVIDENCE

Witnesses and experts: *names*

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Company's statute
2. Company's Internal Work Rules, dated 29 October 2002
3. Letter to authorize Mr. Cheav Tola, lawyer, dated 08 June 2007
4. Minute of collective dispute conciliation, dated 08 May 2007
5. List of April 2007 of US\$ 15 allowance paid to 62 women who have children age over 18 months old to
6. Name list of women workers who received allowance for day care fee for babies aged between 18 months old to 36 months old, dated 14 November 2006
7. Letter by the general department of Labour and Vocational Training to the director of Cambodia Textile Limited under subject: Delivery room [breast feeding room] and day care center for women workers' children, dated 17 August 2007
8. Document of dismissal indemnity of San Sothy, ID 1141, dated 21 August 2006
9. Document of dismissal indemnity of Lach Rattana, ID 2230, dated 21 August 2006

Provided by the worker party:

1. Summary statement of the case, dated 09 June 2007
2. List of names of 188 workers who pay for union contribution fee

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

1. Report of collective dispute resolution at Wilson Company, No. 457 K.K.B.V/AK, dated 30 May 2007.
2. Minute of collective labour dispute conciliation dated 08 May 2007.

Provided by the Secretariat of the Arbitration Council:

1. Invitation letter No. 204 K.K.B.V/AK/VK/LKA dated 04 June 2007 to invite the worker party to attend the hearing.
2. Invitation letter No. 203 K.K.B.V/AK/VK/LKA dated 04 June 2007 to invite the employer party to attend the hearing.

FACTS

- Having reviewed documents the parties submitted to the Arbitration Council
- Having reviewed the report of collective labour dispute conciliation
- Having listened to statements by the representatives of the worker party and the employer party

The Arbitration Council finds that:

Wilson Company is located in Trea Village, Sangkat Chom Chao, Khann Dangkor, Phnom Penh; it employs approximately 1,100 workers.

- Based on the minute of collective labour dispute conciliation, dated 08 May 2007, 188 workers are complainants in this case.
- There are three unions in the company: C.CAWDU, KYTU and Democratic Thormear Union. There is no union with representative status yet.
- According to the workers, C.CAWDU who is the complainant has about 190 members.

Issue 1 and 3: The workers demand the company to continue the payment in lieu of a day care center for women who have children from 18 months to 18 years in an amount of US\$ 15 per month.

- The workers mention that they based their demand for the company to continue to provide US\$ 15 per month in lieu of building of a day care center for women who have children from 18 months to 18 years on the Arbitral Award dated 24 November 2006 and Article 186 of the Labour Law 1997.

- The Arbitral Award (96/06 – Wilson) dated 24 November 2006 is a binding award because the worker party and the employer party did not object to the award. The Decision in relation to Issue 2 of the Arbitral award states as follows:
 - “A. Order the company to set up a nursing room and day care center for women who have babies starting from the date the women return to work. The company shall establish the nursing room and day-care centre within three months of this Award coming into effect;*
 - B. The company shall provide a US\$15 allowance to female workers who have babies aged over 18 months, if the company is not able to establish a day care centre for babies over 18 months of age;”*
- Part B of this award does not specify that the employer should pay the amount of US\$ 15 in lieu of day care center from the age of 18 months until what age.
- The company mentions that from 2000 to 2003 the company provided US\$ 5 in lieu of day care center for women who had babies for 18 months from the day the women came back to work. The workers do not object to this.
- From 2003 to October 2006, the company limited the provision of US\$ 5 per month in lieu of a day care center for women who have babies age range from 18 months to 36 months. The workers do not object to this testimony.
- From the issuance of the Arbitral Award in November 2006 to now, the company followed the Arbitral Award by providing US\$ 15 per month in lieu of a day care center for women who have babies over 18 months old. But the company provides only up to 36 months. This means that to babies whose ages are between 18 months to 36 months. The workers do not object to this.
- The company mentions that most companies in Cambodia provide from the time the babies are 18 months old to 36 months old. The company provided documents relating to this claim by the deadline set for submission of 15 June 2007 at 5 p.m.
- The employer relies on a letter No. 213 SKBY.ABK, dated 17 August 2000 by Mr. **Om Mean** on behalf of the then Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation to advise **Cambodia Textile Limited Company** to provide payment in lieu of day care center to children of employees aged between 18 and 36 months, to show that this is the industry practice.
- The worker party objects to the employer’s testimony that other factories follow this practice and raises that other companies have better practices but did not specify about the exact duration. The Arbitration Council set the deadline for the submission of documents on 15 June 2007 at 5 p.m. Documents were not provided by the employee party.

- Mr. San Socheat, who has a 3 years old child and is the president of local C.CAWDU at Wilson Factory and Mr. Te Sela who has a 5 years old child and is the vice-president of C.CAWDU at Wilson Company testify to the Arbitration Council that they keep their children with their neighbours by paying the US\$ 15 provided by the company to the caretakers. The Arbitration Council asks Mr. Socheat and Mr. Sela to state to what age do people normally keep their children with caretakers. The two men say that workers normally keep their children with their neighbours until they are 6 years old. The company does not respond to this.
- In the hearing, the worker party changes their demand from 18 months old to 18 years old to 18 months to 6 years old. The company does not agree [to the demand] but maintains the provision of US\$ 15 in lieu of day care center for babies from 18 months to 36 months because 3 year old kids are then aware of things and the care of children over 36 months old is the parents' obligation.
- The company mentions that it has not built a day care center yet. It is considering building one but this is still under consideration of the boss in Hong Kong.

Issue 2: The workers demand the company to payback US\$ 10 per month in lieu of a day care center for women who have babies from 18 months old up for the period prior to the issuance of the Arbitral Award in 96/06 - Wilson.

- The Arbitration Council issued an award providing that the employer was obliged to make a payment to employees in lieu of an onsite day care centre on 24 November 2006. This award became binding on the parties 4 December 2006.
- The workers mentioned that they demand the company to pay back the amount of US\$ 10 in lieu of a day care center for women who have babies from 18 months from 2000 to October 2006 because before the Arbitration Council issued an award, the company paid only US\$ 5 per month while the actual price the workers paid for day care was between 60,000 - 70,000 riels.
- The representatives of the company do not agree to this as the Law does not require this and, in addition, the company think that the amount US\$ 5 it provided was enough otherwise the workers would have made the demand a long time ago. In addition, the company has followed the Arbitral Award in case 96/06, dated 24 November 2006. The company has provided women who have babies from 18 months to 36 months old an amount to US\$ 15 per month in lieu of day care center.
- The workers do not object to what the employer raises and do not provide documents regarding the number of workers or receipts of expenses they are demanding the company to pay back --US\$ 10 per month-- in lieu of day care center to women who have babies over 18 months old from 2000 to October 2006.

- The Arbitration Council set the deadline for the submission of documents on 15 June 2007 at 5 p.m. The employer provided a document setting out which employees were paid the day care allowance prior to the Arbitral Award in 96/06 coming into effect. This document sets out the amount paid (US\$5) and the ages of the children.

Issue 4: The union demands the company to reinstate San Sothy, ID 1141 and Lach Rattana, ID 2230.

- The workers mention that San Sothy worked in the warehouse section and Lach Rattana was a mechanic.
- According to the workers' claim, Mr. Lach Rattana started work on 20 February 2006 and was terminated on 11 August 2006 without reason. The company provided compensation as required by the Labour Law and Mr. Lach Rattana already received the money.
- Mr. San Sothy started working on 1 May 2002 and was terminated on 21 August 2006 without reason. The company provided compensation as required by the Labour Law and Mr. San Sothy already received the money.
- Both workers were employed on undetermined duration contracts.
- In addition, around the time of San Sothy's and Lach Rattana's dismissal the company terminated about 100 other workers, but they were not dismissed at the same time. The workers claimed that there was union discrimination but did not provide any details or evidence to support this claim. The termination of the two workers does not cause any interruption to the production line.
- The employer's representatives do not object to the above mentioned claim by the workers but add that the company dismissed about 100 workers during July and August 2006 because the company had an economic crisis causing the company to eliminate some workers who did not work well and this was the reason why the company terminated workers' employment contracts and paid according to the law. The workers do not object to this.
- The employer provided copies of the workers termination pay slips which set out the following:
 - o Mr. Lach Rattana received final wages for the period worked in August, payment for unused annual leave and payment in lieu of notice; and
 - o Mr. San Sothy received final wages for the period worked in August, payment for unused annual leave, payment in lieu of notice, an indemnity for dismissal and a damages payment.
- The Arbitration Council requested the workers to provide more clarification regarding the case of San Sothy and Lach Rattana. The union representing the workers could not provide any details relating to the dismissal beyond claims that the workers were

dismissed without a valid reason because they did not commit any mistakes or misconduct.

- The Arbitration Council also sought information as to why the case took so long to reach the Arbitration Council. The workers mention that after the company terminated Mr. San Sothy and Mr. Lach Rattana in August 2006, the two people filed their complaint to the union on 29 September 2006.
- The union filed a complaint to the Department of Labour Disputes on 07 November 2006. The Department of Labour Disputes conducted conciliation on this issue on 21 November 2006 but it was not conciliated. The Department considered that this was an individual dispute thus requested the workers to file a complaint to the court but the workers did not file this complaint to the court but filed a second complaint to the Department of Labour Dispute on 09 April 2007. The Department of Labour Disputes [tried to] conciliate this issue again on 26 April 2006 but it was not conciliated and the dispute was referred to the Secretariat of the Arbitration Council on 31 May 2007.
- The workers demand the company to reinstate Mr. San Sothy and Mr. Lach Rattana because the company has recruited other workers but it does not recruit the two workers. Mr. San Sothy and Mr. Lach Rattana were not present at the hearing.
- The company does not agree because it paid termination compensation according to the Law. In addition, the recruiting of new workers is the company's rights.
- The employer also argued that this is not a problem of mass lay-off, although the company did not provide reasons why this was the case. The workers do not object to this.
- The company still considers this an individual dispute and requests the Arbitration Council to consider this point.

REASONS FOR DECISION

Issue 1 and 3: The workers demand the company to continue the payment in lieu of day care center for women who have children from 18 months to 18 years old in an amount of US\$ 15 per month.

In the hearing the worker party testifies that they keep their children with caretakers until they are 6 years old when they are able to go to school and the workers party changed their demand for payment from 18 months old to 18 years old to 18 months old to 6 years old. Thus, the Arbitration Council will consider this as follows:

Article 186 of the Labour Law states, *“Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a crèche (day-care center). If the company is not able to set up a crèche on its*

premises for children over eighteen months of age, female workers can place their children in any crèche and the charges shall be paid by the employer.”

Based on this Article, the Arbitration Council considers that women workers can keep their children in a day care center and the employer pays for the fee of this child-care, in case the enterprise is unable to set up a day care center to accommodate children over 18 months old. However, the contents of this Article does not mention until what age can the women workers keep their children in the day care center and it does not mention either to what age should the employer be responsible to pay for a day care center.

Regarding this issue, in case 96/06-Wilson, the Arbitration Council ordered “the company shall provide a US\$15 allowance to female workers who have babies aged over 18 months, if the company is not able to establish a day care centre for babies over 18 months of age.”

The Arbitration Council finds that the contents in this arbitral award does not mention either if the employer should provide the US\$ 15 in lieu of day care center for women who have children age range from 18 months to how old.

Although Article 186 of the Labour Law does not provide an end date to the provision of day care facilities it is unreasonable to expect that the intention of the Article is that the employer must provide these facilities in perpetuity. The Arbitration Council considers that intention of Article 186 of the Labour Law which requires for day care center in enterprises is to facilitate children’s parents to be well concentrated on work without worries about their children and enable women in particular to fully participate in the workforce.

Thus, if the employer builds a day care center, women who have children should be able to use these facilities until a time when either the child is of an age to take care of itself or an alternative service is available. Public kindergarten services are available for children over the age of 36 months. This means that women who have children can send them to kindergarten when they are over 3 years old and by that time they won’t need to stay in a day care center anymore.

In this case too, the Arbitration Council found that from 2003 to 2006 the company limited the provision of US\$ 5 in lieu of day care center for women who have **children age range from 18 months to 36 months.** Then, from November 2006 to the present, the company continued to practice the payment in lieu of day care center to women who have **children age range from 18 months to 36 months** but increased the amount up to US\$ 15 based on the Arbitral Award. No objection to the 36 month age limit was made by workers until November of 2006, three years after the policy was put in place by the company.

Regarding the duration of the provision of payment in lieu of a day care center, the employer provides evidence about the practice in other factories through letter No. 213 SKBY.ABK, dated 17 August 2000 by **Mr. Om Mean** on behalf of the then Ministry of Social

Affairs, Labour, Vocational Training and Youth Rehabilitation to advise **Cambodia Textile Limited Company** to provide payment in lieu of a day care center to children of employees aged between 18 and 36 months (3 years old). The Arbitration Council considers that the letter was to give advice and thus effective only to **Cambodia Textile Limited Company**, but it does not have a legal binding effect on the whole garment industry. However, in the absence of contrary evidence from the employee party it suggests that industry practice is to provide this payment until children are aged 36 months old or three years old.

Based on the above interpretation, the Arbitration Council considers that the intention of the Labour Law is that a reasonable maximum age of admittance for children in a day care place is 3 years.

Thus, the Arbitration Council considers that the provision of payment in lieu of day care center paid to the employees' children from the age of 18 months to 36 months is reasonable.

In conclusion, the Arbitration Council reject the demand for the employer to pay for the fee of day care up to when the children are 6[3] years old.

Issue 2: The workers demand the company to payback US\$ 10 per month in lieu of day care center for women who have babies from 18 months old up.

The dispute between the two parties is about the provision of day care fee in lieu of building a day care center in the factory.

Article 186 of the Labour Law states, *“Managers of enterprises employing a minimum of one hundred women or girls shall set up, within their establishments or nearby, a nursing room and a crèche (day-care center).”*

“If the company is not able to set up a crèche on its premises for children over eighteen months of age, female workers can place their children in any crèche and the charges shall be paid by the employer.”

Regarding this issue, the Arbitration Council found that in case 96/06-Wilson, the Arbitration Council ordered *“the company shall provide a US\$ 15 allowance to female workers who have babies aged over 18 months, if the company is not able to establish a day-care centre for babies over 18 months of age.”*

In this case, the Arbitration Council found that issue 2 of this case is the same as the issue in case 96/06-Wilson mentioned above, related to the provision of day care fee in lieu of the establishment of a day care center in the factory and it is only an additional demand for the company to pay the fee for day care in lieu of day care center before the arbitral award.

Based on the Principle of Res Judicata, a dispute already considered will not be taken for consideration again where the dispute happens to the same parties on the same dispute.

In previous cases, the Arbitration Council interpreted that “based on the principle of *res judicata* of the Arbitration Council that in the same issue which the Arbitration Council has already decided, the Arbitration Council cannot re-decide it” (See Arbitral Award 10/06-North Gaiety, 24/06-Fortune, and 106/06-Quick Sew).

In conclusion, the Arbitration Council decides to decline to consider or re-decide on this issue as requested by the worker party.

Issue 4: The union demands the company to reinstate San Sothy, ID 1141, and Lach Rattana, ID 2230.

Before considering on this issue, the Arbitration Council will consider if it has jurisdiction on this issue.

In principle, the Labour Inspector and the Ministry of Labour and Vocational Training have the duty to decide which dispute is individual and which is collective before sending the case to the Arbitration Council. Thus, normally the Arbitration Council will follow the decision of the Labour Inspector and the Ministry of Labour and Vocational Training if there is not an explicit reason to object to such decision (See Arbitral Award 10/03-Jaqushintex, 07/05-Coca Cola, 41/04-Micassa, and 02/04-Cambodiana Hotel).

In this case, the employer argues that the Arbitration Council does not have jurisdiction because this claim relates to individual disputes, therefore the Arbitration Council will consider this objection and determine whether the dispute is an individual or collective dispute. Article 302 of the Labour Law states:

“A collective labor dispute is any dispute that arises between one or more employers and a certain number of their staff over working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peacefulness.”

Based on Article 302 of the Labour Law, in order to call a dispute a collective dispute, it has to fulfill three conditions. The three conditions are:

- a. It is a dispute between some workers and one or more employer
- b. Subject of the dispute is related to working conditions, the exercise of the recognized rights of professional organizations, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers
- c. The dispute could jeopardize the effective operation of the enterprise or social peacefulness.

As stated above, the Arbitration Council presumes that all claims contained in the MoLVT non-conciliation report are collective. **As the employer has made an objection**

against this presumption, they have the burden of proving their claim. The employer argued that as the dispute was initially considered an individual dispute by the MoLVT and not forwarded to the Arbitration Council, it should not now be considered a collective dispute even though a second representative of the MoLVT classified it as such.

As the employer party did not provide any evidence or reasons to rebut the Arbitration Council's presumption that based on the MoLVT's classification that this dispute is collective, the Arbitration Council determines that this dispute is within its jurisdiction and will therefore consider the workers' claim.

The worker party demands the reinstatement of Mr. Lach Rattana and Mr. San Sothy. The worker party argues that these workers did not commit any mistakes or misconduct and on this basis the dismissals were unlawful. The worker party did not provide any evidence in relation to this claim, nor did the two workers seeking reinstatement attend the hearing.

In case 27/03-Standard Garment, the Arbitration Council has determined that *"an employer who seeks to dismiss an employee because of misconduct must be able to show evidence of the employee's misconduct"* (see 27/03 – Standard Garment). However, employees have an initial duty to make an arguable case; one that has sufficient evidence, if not rebutted, to prove a particular proposition or fact. The employee party in this case did not offer any evidence (either documentary or witness testimony) in relation to their claim. Indeed, the workers in question – Mr. Lach Rattana and Mr. San Sothy – did not even attend the arbitral hearing in order to provide testimony on their own behalf.

Based on this, the Arbitration Council determines that the employer does not have a case to answer. Therefore the Arbitration Council rejects the workers demand for reinstatement of San Sothy, ID 1141 and Lach Rattana, ID 2230.

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

DECISION

Issues 1 and 3: Reject the demand for the employer to pay US\$ 15 per month for day care fees to women who have children ranging in age from 18 months up to 6 years old.

Issue 2: Reject the workers' demand for the company to pay back US\$ 10 per month in lieu of a day care center for women who have children of 18 months old up.

Issue 4: Reject the demand for the company to reinstate San Sothy, ID 1141 and Lach Rattana, ID 2230.

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 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: **AN NAN**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **KONG PHALLACK**

Signature: