

KINGDOM OF CAMBODIA
NATION RELIGION KING

THE ARBITRATION COUNCIL

Case: 47/04

Date of award: 7 July 2004

ARBITRAL AWARD

(Issued under Article 313 of the Labor Law)

The Day Young (Cambodia) Co., Ltd.

(the employer party)

AND

The Cambodian Workers' Labor Union of Day Young

(the employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Address : #388, National Road no.5, Russey Keo commune, Russey Keo district, Phnom Penh

Telephone : (855) 23 725 155

Fax : (855) 23 723 319

Representatives:

- 1- Mr. Hyun Chue Lee, the owner of the company;
- 2- Mr. Bou Sakhan, Manager;
- 3- Ms. Mak Sokunthea, Supervisor;
- 4- Mr. Chhun Kolab, Worker;
- 5- Mr. Lay Chandy, Worker;
- 6- Mr. Pov Sony, Worker;
- 7- Mr. Dim Navy, Worker;
- 8- Mr. Sok Thy, Worker;
- 9- Mr. Sim Sarin, Worker;
- 10- Mr. Sok Sopheak, Worker;
- 11- Mr. Ouk Narom, Worker; and
- 12- Mr. Mat Sariphaf, Worker.

DETAILED INFORMATION OF EMPLOYEE PARTY:

Address: National Road no.5, Russey Keo commune, Russey Keo District

Telephone: (855) 12 798 221

Fax: N/A

Representatives:

- 1- Mr. Vong Sovann, president of Cambodia Workers Labor Federation Union;
- 2- Mr. Chhin Sony, vice-president of Cambodia Workers Labor Federation Union;
- 3- Miss. Chhin Sreyneang, president of Cambodia Workers Labor Union of Day Young;
- 4- Mr. Meas Sokhoeurn, vice-president of Cambodia Workers Labor Union of Day Young;
- 5- Mr. Nget Touch, advisor of Cambodia Workers Labor Union of Day Young;
- 6- Mr. Thorn vuthy, committee member of Cambodia Workers Labor Union of Day Young;
- 7- Mr. Ngoun Bunnarithy, representative of CTTU;
- 8- Mr. Hour Narith, representative of CTTU;
- 9- Mr. Yean Norin, committee member of Cambodia Workers Labor Union of Day Young;
- 10-Mr. Mey Samean, worker (victim);
- 11-Miss. Ouk Sreypeov, worker (victim);
- 12-Mr. Moeun Uy, representative of victim;
- 13-Miss. Chea Leakhena, worker (victim);
- 14-Mr. Mao Kony, worker (witness);
- 15-Mr. Chheng Sokny, worker (witness); and
- 16-Mr. Kim Sour, worker (witness and victim).

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The workers demand that the company must eliminate unconditionally the letter of request for leave at 4:00pm. The factory maintains that they cannot meet the workers' request because it was company policy.
- 2- The workers demand that the factory must transport workers home when they work overtime until 8:00pm. The employer states that the company will provide transportation for those who work overtime until 10:00pm.

- 3- The employees ask the factory to dismiss Mrs. Mak Kunthea and Ms. Chhon Sophea by reason of serious misconduct. The employer disagrees and says that the workers failed to provide proof and witnesses to support their claims
- 4- The workers demand the factory maintain payment of wages and bonuses for the period of strike. The employer said he will abide by the labor law.

JURISDICTION OF THE ARBITRATION COUNCIL :

The Arbitration Council derives its power to make this Award from Section II B2 of Chapter 12 of the 1997 Labor Law (Labor code), the Prakas on the Arbitration Council (No. 099, of 21 April 2004) and the Arbitration Council Procedural Rules of the same Prakas.

An attempt to conciliate the collective dispute which is the subject of this Award was made in accordance with Chapter XII Section 2A of the Labor Law. That conciliation hearing was unsuccessful and a non-conciliation report dated 21 June 2004 was sent to the Secretariat of the Arbitration Council on 22 June 2004.

COMPOSITION OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party: **Mr. Kao Thach**
Arbitrator chosen by the worker party: **Mr. Vuong Vanna**
Chair arbitrator (chosen by the above two arbitrators): **Mr. Kong Phallak**

HEARING AND EVIDENCE :

Date and place of hearing: 25 June 2004 from 2:00pm to 6:00pm at the Arbitration Council Secretariat, Phnom Penh Center (A), Sothearos Blvd., Sangkat Tonlebasak, Phnom Penh.

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

A. Documents received from the employer party : N/A

B. Documents received from the employee party:

- 1- Declaration notice of strike dated 25 May 2004;
- 2- Minutes of meeting dated 1 February 2004;
- 3- Minutes of meeting dated 27 March 2004 in two different copies;

- 4- A complaint of workers dated 29 May 2004;
- 5- A complaint of workers against Ms. Tsin (two copies);
- 6- A minute regarding a worker named Kuy Kim Hiek;
- 7- A complaint of workers against Mrs. Chhoy called Toeu (two copies);
- 8- A complaint of Miss. Chanthy;
- 9- A complaint of workers against Ms. Tsin and Mr. Kan;
- 10- A minute regarding the transportation of new workers to replace the strikers;
- 11- A minute of a victim named Mey Saman;
- 12- A minute of a victim named Chea Leakhena;
- 13- A minute of a victim named Oum Srey Peov;
- 14- A letter of union registration with MoSALVY dated 6 February 2004;
- 15- Certification of registration dated 6 February 2004 on the Recognition of union;
- 16- A notification letter to the administration forwarded to the factory;
- 17- A receipt of receiving filed complaint dated 4 June 2004; and
- 18- A resignation letter from shop steward Mr. Chhon Sophea dated 12 May 2004.

C-Presentation of evidence and answer of the witness of the both parties at the hearing.

D- Both sides agreed that this award is not binding

CASE SUMMARY:

Day Young (Cambodia) Co., Ltd employs 826 workers. On 16 June 2004, workers filed a verbal complaint to the Labor Inspectorate of Russey Keo district about their strike [in relation to their demand] to dismiss Ms Mak Kunthea for committing an act of serious misconduct and proposal to the factory for the improvement of labor conditions in the factory. On 16 June 2004, after receiving the complaint, the district office of the Labor Inspectorate in Russey Keo attempted to conciliate the dispute but it was not successful. The strikers and the employer reached an agreement on four of eight demands. On 22 June 2004 the Arbitration Council received the complaint from the workers and the employer about the four non-conciliated points listed above. On 25 June 2004 at 2:00pm the Arbitration Council conciliated and heard this case according to the procedures. The four issues in dispute which were heard in the hearing were the following:

- 1- The workers demand that the company must eliminate unconditionally the letter of request for leave at 4:00pm.

- 2- The workers demand that the factory must transport workers home when they work overtime until 10:00pm.
- 3- The employees ask the factory to dismiss Ms. Mak Kunthea and Ms. Chhon Sophea for committing misconduct.
- 4- The workers demand the factory to maintain payment of full wages and bonuses for the period of the strike.

With regard to these four points mentioned above, the employer party objected and put in some conditions:

- 1- The factory maintains that they cannot meet the workers' request because it was the company policy.
- 2- The employer states that the company will provide transportation for those who work overtime until 10:00pm.
- 3- The employer cannot dismiss the two women because the workers failed to provide proof and witnesses to support their claims.
- 4- The employer will abide by the Labor Law regarding the wages and bonuses for the period of strike.

At the hearing, the arbitrators questioned both parties and attempted to conciliate but failed to bring the two parties to any agreement. However, both parties agreed to let the arbitrators decide the case.

FINDINGS OF FACT:

- Having considered the non-conciliation report of labor dispute
- Having heard the two parties
- Having reviewed documents as described above,

We find that:

Issue 1

The worker party stated that the punch out paper [system] is a reason for forcing the worker to work overtime. If there is no such letter, workers who finish their work at 4:00pm cannot go home.

In response to this, the company gives the following reasons:

- 1- The security was required by the buyer after the events of 11 September 2001; and
- 2- This method makes it easy to manage the workers.

Moreover, the company affirms that it never forces the workers to work overtime against their will. For some sections, the line production requires overtime work. If there are few people, the line production will be interrupted. In this case, if someone disagrees, the factory will not force them.

The workers still maintain that they are being forced by their supervisors but failed to prove this with any evidence or testimony. The workers agreed to keep the letter of request for leave the same as before if the reasons raised by the employer are appropriate. They do demand the assurance of the employer not to force workers to work overtime. If they want to go home, the factory must allow them to do so.

Mr. Hyun Chue Lee supports the workers' idea by proposing that the factory shall request the workers each month about their desires to work overtime or not, and write down their names in a list separately in order to make the production line go smoothly.

The worker party also agreed with the idea but required some conditions:

- 1- The employer shall allow workers who registered in the overtime list for the current month to go home if they're busy;
- 2- For those who listed for no overtime work in the current month, if they want to work overtime for the next month, the employer shall meet their need, and should not force them to work overtime if they're busy inevitably; and
- 3- The group supervisor shall provide workers who do not want to work overtime with a letter of request for leave.

With regard to these requests, the employer agreed, if the letter of request for leave is maintained.

Issue 2:

The workers state that the claim to provide transportation is given for the following reasons:

- 1- The safety and security of the workers when going home at night.
- 2- The experiences of some factories such as Seng Yong factory, Chu Tsing, City New and Vin Tay.

In respect of this, the employer replied that the situation of each factory is not the same. The reasons why the factory rejects the workers' proposition was that:

- 1- The factory has already provided the workers with 2,000 Riels for food for those who work till 6:00pm and 8:00pm. But other factories give only 1,000 Riels. Thus, the factory can provide transportation for workers who leave work after 9:30 or 10:00pm.
- 2- Most other factories provide transportation after 10:00 pm. The company promised to ask for more information from the four factories mentioned by the workers above with regard to this matter.
- 3- On the other hand, the company is a new one and has only been established for one year, and it loses profit of around USD30,000 to 40,000 every year. The company affirmed that if the workers required transportation at 8:00pm, the factory will cut 1,000 Riels from food. The union representative replied that if the company does so, the transportation should be provided at 6:00 pm. The employer did not agree.

Issue 3:

With regard to the claim to dismiss Ms. Mak Kunthea and Ms. Chhon Sophea, the workers have produced some witnesses and victims. The company has also produced some witnesses.

1-The case of Ms. Mak Kunthea

a). The victims:

- Miss Oum Srey Peov affirmed that Ms Kunthea has kicked her buttocks two times and pointed in her face at around 9 or 10am on 23 May 2003 blaming her for spilling water while cleaning the floor.
- Miss My Samean testified that Ms Kunthea gave her a slap on the eyebrow on 19 May 2004 and insulted her by calling her a no-brain bastard because of her slow sewing.
- Miss Chea Leakhena also testified that Ms Kunthea had used bad and strong language with her by calling her a blind girl, no brain etc. on 19 May 2004 as well.

b) Ms. Kunthea:

She rejected the accusations and asked for eye-witness testimony.

c) The eye-witnesses for the workers:

- Mr. Kim Sour attested that Ms Kunthea had kicked the buttocks of Miss Srey Peov two times on 23 May 2003.

- Miss. Mao Kony assured [the Arbitration Council] that she had seen Ms Kunthea beat the eyebrow of Miss My Samean on 19 May 2004.
- Mr. Chheng Sony also affirmed that he had heard Ms Kunthea use bad language with Miss Leakhena on 19 May 2004.

d) The eye-witness for the employer:

- Mr. Dim Navy said that he didn't see Ms Kunthea kick Miss Srey Peov because he works far away from Srey Peov.
- Miss Chhun Kolab said that she didn't see Ms Kunthea kick Miss Srey Peov because he works far away from Srey Peov, and she was asked by the factory to be an eye-witness.
- Mr. Lay Chandy said that he didn't see Ms Kunthea kick Miss Srey Peov because he works far away from Srey Peov.

2) The case of Ms. Chhon Sophea:

Ms. Chhon Sophea was a former union president in the factory. She has resigned from work because the workers accused her of corruption and being too closely involved with the employer. There is no evidence or testimony given to the arbitrators to support the accusation, except the resignation letter of Ms. Chhon Sophea. At the hearing, Ms. Chhon Sophea said that the reason why she has resigned from work is that workers have no more confidence in her to manage the union.

Furthermore, at the hearing, the employer agreed to transfer Ms. Chhon Sophea but keep her position as team supervisor as before. The workers insisted the factory to remove Ms. Sophea.

Issue 4:

The employee party demands the employer maintain their wages and bonuses for the period of the strike from 16 to 23 June 2004.

With regard to this issue, the employer said that they could not provide wages or bonuses, arguing that the strike was illegal without legal notification, and furthermore the factory hasn't hired new workers to replace the strikers.

But the employees have accused the factory of hiring new workers to replace the strikers. In fact, on 19 June 2004 Miss. Mey Samean saw many new workers standing in front of the

factory. She has asked where were the workers were from. Those new workers replied that they work at Samnong 12. She then saw them enter the factory to work.

The employer said that he has indeed hired 43 casual workers a week before the strike. During the strike period the factory did not hire new workers. The factory is a sub-contractor of New City Company. On 17 June 2004 approximately 60 workers were sent by New City to the factory to collect and take back their goods.

Accordingly, those workers were present in the factory around 3:00pm on 17 June 2004 till 6am on 18 June 2004. The employee party did not object to this statement.

REASONS FOR DECISION:

Issue 1:

At the hearing, both parties agreed to the following points:

- 1- To maintain the letter of request for leave;
- 2- To list the workers who desire to work overtime and not to work overtime each month;
- 3- For those who have been listed for no overtime work in the current month, if they want to work overtime for the next month, the employer shall meet their need, and should not force them to work overtime if they're busy;
- 4- The group supervisor shall provide the workers who don't want to work overtime with the letter of request for leave.

Issue 2:

Paragraph (b) of Prakas No.80 dated 1 March 1999 stipulates that night work must be performed at night from 10:00pm to 5:00am. Article 5 of the present Prakas seems to be contrary to Article 144, paragraph 1 of the Labor Law 1997 which states that the term "night" represents a period of at least eleven consecutive hours that includes the interval between 10:00pm and 5:00am. In cases where the Law and the Prakas are contrary in meaning, in reference to legal principles and hierarchies of legal norms, the law is considered higher than Prakas and Anukret (Sub-decree). Accordingly, the Arbitration Council must consider this issue in reference to the Labour Law. The company should fix the night work as follows: the night work must be performed at night from 10:00pm until 7:00am or from 7:00pm until 6:00am etc. Because the company failed to fix eleven consecutive hours for the night work, the Arbitration Council finds that night work must be counted from 7:00pm to 6:00am. Article 6 of the Prakas No.80 states that "Enterprises shall provide transportation for night workers when they finish their work at night". Accordingly,

the factory must provide transportation to night workers who finish at 10:00pm as requested by the workers.

Issue 3:

Based on the reasons and evidence mentioned above, the Arbitration Council finds that the claim for dismissal Ms. Mak Kunthea and Ms. Chhon Sophea is unjust and illegal in respect of the procedure for termination of a work contract. The Arbitration Council has consistently found that it is not entitled to order the employer to dismiss any worker. (Please see case of Lida #04/03, Chu Tsing#14/03, Huo Hing#17/03, Chou Tsing#06/04, Lucky Zone#15/04, Yada Printing#16/04, Y Tsing#32/04 and Full well U#34/04).

The Arbitration Council notes that there is an exception where the arbitrators are able to order the employer to dismiss or remove any employee from work, for example, when that employee causes problems affecting the health, security of other workers. (Please see Chu Tsing#14/03).

Article 65 of the Labor Law 1997 on work contracts states that a labor contract establishes working relations between the worker and the employer. It is subject to ordinary law and can be made in a form that is agreed upon by the contracting parties. As the labor contract is covered by ordinary law, Decree No.38 dated 28 October 1988 referring to Contracts and other Liabilities will apply to the labor contract as well. According to Article 22 of this decree, a "contract is a legally binding agreement between the parties. Amendments to the contract can only be made with the consent of both contracting parties. A contract shall be executed with honesty and according to the will of the parties. A contract binds only the parties to the contract."

Consequently, only the parties of the contract are entitled to terminate the labor contract. It clearly means that the hiring or dismissal of employees is the sole right of the employer being a party of the contract. Even if an employee has committed serious misconduct as set out in Article 83 of the Labor Law, the Arbitration Council has found that the Labor Law does not impose on the employer an obligation to dismiss the worker. On the contrary, the Labor Law simply gives the right to dismiss the employee from work to the employer. (Please see Chu Tsing case#14/03, Hou Hing#17/03 and 18/04).

In this case, the employer acknowledged that Ms Kunthea was at fault, and the company agreed to change her position to another one. It was a concession by the employer. In respect of Ms Chhon Sophea, there is no strong evidence to prove that she has committed serious misconduct and should be removed.

Issue 4:

Article 332 of the Labor Law 1997 stipulates that a strike suspends the labor contract. During a strike, allowance for work is not provided and salary is not paid. But, according to Article 334, if, during a strike, the employer recruits new workers to act as replacements for the strikers, the employer is obligated to pay the salaries of the striking workers for the duration of the strike. Even though there is an accusation against the employer that it recruited new workers to replace the strikers, the Arbitration Council does not need to mention this Article 334 as applying to the facts in this case because the strike was illegal. Therefore, the refusal of the employer to keep the bonuses is just. (Please see the case of Lida Garment #04/03, Wash Concept #08/04, Lucky Zone #15/04, Yada Printing #16/04 and Standard Garment #25/04).

Based on the above reasoning and law, as well as principles of equity, the Arbitration Council makes its decision and orders the following in full settlement of this collective dispute:

Decisions and Orders:

- 1- The company shall follow the settlement agreement between the employer and the employee made during the Arbitration Council hearing commencing on 1 July 2004.
- 2- The company shall provide transportation for night workers who finish their work at 8:00pm.
- 3- The company shall remove Ms. Mak Kunthea from her current position and move her to another position as promised at the hearing.
- 4- Reject the employees' claim regarding wages and bonuses during the strike.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: Mr. **Kao Thach**

Signature:

Arbitrator chosen by the worker party:

Name: Mr. **Vuong Vanna**

Signature:

Chair of arbitration panel:

Name: Mr. **Kong Phallak**

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