



**KINGDOM OF CAMBODIA**  
**NATION RELIGION KING**

**ក្រុមប្រឹក្សាអន្តរាគ្នា**

**THE ARBITRATION COUNCIL**

**Case number and name: 53/08 – Yung Wah I**

**Date of Award: 30 May 2008**

### **ARBITRAL AWARD**

(Issued under Article 313 of the Labour Law)

#### **ARBITRATION PANEL**

Arbitrator chosen by the employer party: **Ouk Ry**

Arbitrator chosen by the worker party: **Tuon Siphann**

Chair Arbitrator (chosen by the two Arbitrators): **Pen Bunchhea**

#### **DISPUTING PARTIES**

##### **Employer party:**

Name: **Yung Wah Industrial (Cambodia) Co. Ltd. (Building 1)**

Address: Prek Samroung village, Ta Khmao commune, Ta Khmao district, Kandal province

Telephone: 012 510 966 or 023 425 389

Fax: N/A

Representatives:

- |                     |                         |
|---------------------|-------------------------|
| 1. Mr. Ng Min Chuan | General Affairs Manager |
| 2. Mr. Saum Uypisey | Administrator           |
| 3. Ly Muoy Cheng    | Administrator           |
| 4. Tao Davuth       | Administrator           |

##### **Worker party:**

Name: **Khmer Youth Trade Union Federation (KYFTU) and Local Union of Khmer Youth Trade Union (KYTU) at Yung Wah I**

Address: Prek Samroung village, Ta Kmao commune, Ta Kmao district, Kandal province

Telephone: 092 902 569

Fax: N/A

Representatives:

- |                     |   |
|---------------------|---|
| 1. Mr. Uy Sopharith | Official of KYFTU                             |
| 2. Mr. Pea Phyrun   | President of KYTU at Yung Wah I (night shift) |

- |                    |                                 |
|--------------------|---------------------------------|
| 3. Mr. Orn Kosal   | Committee of KYTU at Yung Wah I |
| 4. Mr. Neang Vandy | Committee of KYTU at Yung Wah I |
| 5. Hong Savann     | Committee of KYTU at Yung Wah I |
| 6. Pov Chenda      | Committee of KYTU at Yung Wah I |

### **ISSUES IN DISPUTE**

(In the Non-Conciliation Report)

1. If the company suspends work, the company should provide full wages. The company does not agree.
2. The company should resolve wages for cutters because the Chinese Group Chief, Meng Ly promised to increase wages for them. The company does not agree because the Group Chief did not receive approval from the Company Manager.
3. The company should reinstate Neang Kunthea to work at Yung Wah I. The company does not agree to the demand because she has been fighting in the factory.
4. If the company transfers workers from the old factory to the new factory or changes their work shifts, the company should pay severance payments first. The company does not agree.

### **JURISDICTION OF THE ARBITRATION COUNCIL**

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

*An attempt was made to conciliate the collective dispute that is the subject of this Award, as required by Chapter XII, Section 2A of the Labour Law. The conciliation hearing was unsuccessful, and the non-conciliation report No.215/08, dated 9 April 2008, was submitted to the Secretariat of the Arbitration Council on 9 April 2008.*

### **HEARING AND SUMMARY OF PROCEDURE**

**Place of hearing:** The Arbitration Council, Phnom Penh Centre, Building A, Sothearos Blvd., Sangkat Tonle Bassac, Khan Chamkarmon, Phnom Penh.

**Date of hearing:** 9 May 2008 (08:00am-12:30pm)

**Procedural issues:**

On 5 April 2008, the Department of Labour Disputes in Kandal province designated its officials to conciliate the 7 issues; the result was that 3 issues were conciliated. The 4 non-conciliated issues were submitted to the Arbitration Council on 9 April 2008.

Having received the case, the Secretariat of the Arbitration Council summoned both the employer party and the employee party to a hearing to conciliate the 4 unresolved issues on 9 May 2008 at 8:00am.

Both parties appeared at the hearing in accordance with the invitation from the Arbitration Council. The Arbitration Council was trying to seek more information related to these issues and to conciliate the 4 unresolved issues, but was unable to resolve [these issues]. Therefore, in this case the Arbitration Council will consider these issues based on the evidence and statements of the worker party in the hearing as follows:

## **EVIDENCE**

**Witnesses and experts:** N/A

## **Documents, Exhibits and other evidence considered by the Arbitration Council**

### **Provided by the employer party:**

1. Letter of authorization from the manager of Yung Wah to Mr. Ng Min Chuan, General Affairs Manager dated 2 April 2008;
2. Company Commercial Registration Certificate dated 27 March 1998;
3. Internal Work Rules of Yung Wah I dated 19 February 2002;
4. Memorandum and Statute dated 2 April 2002;
5. Record of wage list and other wages of Neang Kunthea who was dismissed on 13 March 2008 (thumb print of concerned party and signature of company manager);
6. Dismissal letter of worker Neang Chenda dated 31 January 2008;
7. Warning letter of worker Nean Chenda because of fighting during working hours with worker ID 5170 dated 30 January 2008;
8. Minutes of fighting incident dated 30 January 2008;
9. Employment contract of worker Neang Chenda dated 11 November 2008;
10. Internal Announcement of Yung Wah I Company dated 31 March 2008.

### **Provided by the worker party:**

1. Notification letter No. 235 dated 31 March 2008 on the election to select a committee for new leadership candidates of KYTU at Yung Wah I Company, night shift;
2. Registration of KYTU at Yung Wah I Company dated 9 January 2008.

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

1. Report No. 215 dated 9 April 2008 on the collective labour dispute settlement at Yung Wah I Company;
2. Minutes of the collective labour dispute conciliation at Yung Wah I Company dated 5 April 2008.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 303 dated 5 May 2008 to the worker party to attend the hearing
2. Invitation No. 302 dated 5 May 2008 to the Company Director to attend the hearing.

**FACTS**

- Having examined the report on the collective labour dispute conciliation;
- Having listened to the testimonies from both the employer party and the worker party;
- Having reviewed other supplementary documents;

**The Arbitration Council finds that:**

- Yung Wah I Company currently employs approximately 3100 workers.
- KYFTU is the claimant in this case. This union does not have most representative status.

**Issue 1: Workers demanded that the company provide full wages if the company has no work**

- The company asked the workers at Yung Wah I to stop work for 5 days from 1 April 2008 and provided half wages in accordance with the company's internal announcement 548/2008 dated 31 March 2008.
- The workers who were asked to take days off included those in groups B, D and F. They were asked to take days off because production was not busy. The employer party stated in the hearing that there were around 100 workers in each group.
- The company party confirmed in the hearing that the company issued an internal announcement regarding 5 days off for workers from work from 1 April to 5 April 2008, and that the company would provide half wages. The company prepared a list for workers to place their thumb prints or signatures; if they agreed to give their thumb print or signature, they did not need to come to work and the company provided them with half wages. If any workers did not agree to give their thumb print or signature and they came to work, the company gave them full wages. The worker party did not object to the employer's statement. (According to the name lists provided by the employer, there were some workers who agreed to give their thumb print or signature on the list, but some workers did not agree to provide their thumb print or signature).

- The worker party mentioned that they should provide full wages during the period that there was no work.
- The employer party added that it could not give full wages to workers during the period when there was no work, the company followed the workers' agreement and the company notice.

**Issue 2: Workers demand that the company increase the wages of the cutters**

- In the past, there were 6 cutters, each of them received wages of US\$ 60 per month. But now there are only 5 cutters because a worker named Pov Chenda has been transferred to work at the fabric arrangement section.
- The workers demanded that the company increase the wages for the 5 cutters because the Chinese Group Chief Meng Ly had promised verbally that she would increase wages to the 5 workers in the cutting section but did not state clearly how much [the wages] would be increased by.
- The 5 male cutters received US\$ 60 per month, but female cutters received only US\$ 50 per month.
- The employer party confirmed in the hearing that the company would research to ensure that there were relevant documents about the request for wage increases to cutters. The company mentioned that in general the process for increasing a worker's wage, [was that] the Group Chief should make a request to the company for review and decision. However, the Group Chief did not have right to make a decision about a wage increase by herself.
- The workers stated in the hearing that, the Chinese Group Chief took workers ID cards to photocopy in order to request a wage increase.

**Issue 3: The workers demanded that the company reinstate worker Nean Kunthea to her position at Yung Wah I**

- Worker Neag Kunthea was employed on an undetermined duration contract and worked in the control section.
- Neang Kunthea started work on 2 December 2004 and was dismissed on 31 January 2008 because she fought with another worker, Chen Son, ID 5170 during working hours. (Worker Chen Son was also dismissed).
- Worker Neang Kunthea agreed to receive a termination payment in the amount of US\$ 101.39, which was recorded in a letter dated 13 March 2008 about wages and other bonuses and which had [Neang Kunthea's] thumb print and signature and the company signature.

- The union mentioned in the hearing that it did not know the cause of the fighting. However, from what the union heard from other people, a female worker named Chen Son intended to stop working and she said that she would like to cause problems with someone else so that the person would also be terminated.

**Issue 4: Workers demanded that the company calculate workers' severance pay before transferring them from the old factory to new factory or changing their shift**

- The company has never transferred workers from the old factory to a new factory, but the company has changed workers' from night shift to day shift. The worker party agreed that the company had changed some workers from the old factory to new factory, but they did not know the exact number and requested that in the future if the company changed workers from the old factory to the new factory, the company should calculate the severance payment to workers.
- The worker party added in the hearing that the workers requested that if the company changed workers from night shift to day shift it should pay severance because the [workers'] employment contracts clearly set out which workers work on night shift and which workers work on day shift.
- The employer party said in the hearing that the company did not terminate workers contracts but the company only changed their shift from night shift to day shift so the company could not calculate the severance payment to workers.

**REASONS FOR DECISION**

**Issue 1: The workers demanded that the company provide full wages if the company has no work**

Related to this demand, the Arbitration Council will consider if it is a proper practice and in accordance with the Labour Law for the company to ask workers to provide their thumb prints or signatures on the name list [agreeing to] half wages when the company has no work [for them to do]?

In relation to work suspension, paragraph 6 of Article 71 of the Labour Law states that: *"Absence of the worker authorized by the employer, based on laws, collective agreements or individual agreements."*

The Arbitration Council finds that the employer and some workers agreed to the work suspension and to receive half wages. However, no notice was given to an official of the Labour Inspector or relevant institution regarding this suspension.

Paragraph 11 of Article 71 of the Labour Law provides that *"The labour contract shall be suspended under the following reasons:*

- a. *When the enterprise faces a serious economic or material difficulty or any particularly unusual difficulty, which leads to a suspension of the enterprise operation. This suspension shall not exceed two months.*
- b. *This suspension shall be under the control of the Labour Inspector.”*

The Arbitration Council finds in the findings of fact, that the employer party suspended [the workers' contracts] for 5 days. The work suspension period is reasonable according to clause 11 of Article 71. However, this Article requires that all work suspensions should be under the control of the Labour Inspector. In this case, the Arbitration Council finds that the work suspension is not under the control of the Labour inspector. The Arbitration Council finds that this work suspension does not fulfill the requirements of Article 71 of the Labour Law. Therefore, the Arbitration Council finds that when the company asked any workers to put their thumb prints or signatures on the name list to indicate their agreement to receive half wages when there was no work, it was not in accordance with the Labour Law.

Therefore, the Arbitration Council considers that although workers agreed to put their thumb prints or signatures on the name list and receive half wages when there was no work, it is not a valid practice and contrary to the Labour Law.

In previous Arbitral Awards [the Arbitration Council held] that failure to notify the Labour Inspector about a work suspension means the work suspension is not under the control of the Labour Inspector and ordered the employer to provide full wages to workers (see Arbitral Awards 08/07-Siu Quinh, Issue 2 and 31/07-Park View, Issue 1).

In this case, the Arbitration Council agrees with the decision in the previous Arbitral Awards that when the company does not follow the lawful procedure for work suspension, the employer has an obligation to provide full wages. In this case, the company suspended [the workers' contracts] for 5 days from 1 to 5 April 2008 (according to the name list provided by the employer to the Arbitration Council; the employer did not lawfully suspend the work of workers in groups B, D and F in accordance with the Labour Law).

Therefore, the Arbitration Council decides that the company should provide an additional 50% of wages to make up full wages for workers in groups B, D and F for the period 1 to 5 April 2008 when the company did not have work for them to do.

## **Issue 2: The workers demand that the company increase the wages of cutters**

The worker party demanded that the company increase the wages of 5 cutters because the Chinese Group Chief Men Ly had promised verbally to increase [their] wages, but did not mention the amount. The Arbitration Council finds that the Chinese Group Chief encouraged cutters to work hard by promising to increase [their] wages. The employer party confirmed in the hearing that a Group Chief has a right to propose to the company [that workers receive a]

wage increase, but cannot make a decision about a wage increase; as at the hearing day, the company had not made a decision [about the wage increase].

The Arbitration Council considers that in relation to a wage increase, the employer has the right to manage in accordance with the law and the company's Internal Work Rules.

The Arbitration Council reviews clause 5 of the company's Internal Work Rules dated 29 May 2006 about the determination of wages, bonuses, perquisites and deduction of wages, which provides that *"The company provides wages according to the work performance, ability and the work output of each worker. The company conducts an annual review [and determines whether to award a wage increase based on] the work output, discipline and the work performance of each worker as well as whether the company is able to provide it."* Based on the content of the company's Internal Work Rules, the company will conduct an **annual** review of the work performance, ability and work output of each worker as well as considering whether the company is able to provide [a wage increase]. In this case, in the findings of fact, the Arbitration Council was unable to find that the company conducted an annual evaluation of a worker's discipline and ability of each cutter and did not consider whether the company could provide a wage increase in accordance with its Internal Work Rules. The Arbitration Council considers that the company should prepare a clear policy about the evaluation process to determine whether or not [a worker should be entitled to a] wage increase according to its Internal Work Rules.

In addition, Article 2 of the Labour Law does not state [anything] about wage increases and the amount of a wage increase seems to be at the direction of the employer, provided it is not contrary to law and regulation. As a result, the Arbitration Council considers that the wage increase issue is related to the administration of the company.

The Arbitration Council considers that the Arbitration Council can consider and make a decision about a wage increase claim only if a party provides clear facts and evidence about the reasons why the employer refuses to increase wages to workers. In this case, the worker party confirmed in the hearing that the Chinese Group Chief promised verbally to increase [workers] wages and took workers ID cards to photocopy them for submission to the company, but the company did not know whether or the Group Chief submitted this proposal to the company? The employer party mentioned that the company did not receive the proposal about the wage increase. The Arbitration Council considers that if the Group Chief submitted the wage increase proposal to the company, the company would review and decide whether or not to provide it because it is the right of the management of the company to [decide whether or not to] increase it in accordance with the proposal. If the Group Chief only took workers ID cards, but did not submit the wage increase proposal to the company, the company does not have anything to review and decide.

Therefore, in this case, because worker party did not provide sufficient evidence to prove that the Group Chief submitted the proposal to the company for review and decision, and because there was no evidence to prove that the company had decided whether to give, a wage increase or not, the Arbitration Council has no legal basis to decide whether the employer should increase the wages to the 5 cutters.

In addition, the Arbitration Council notes that in the many of the previous Arbitral Awards, workers at Yung Wah have demanded that the company increase wages to workers by arguing that the company director promised to increase them. (See Arbitral Awards 84/07-Yung Wah, Issue 1; 53/08, issue 2 and 58/08, Issue 1).

Therefore, the Arbitration Council rejects the demand that the company increase the wages of the 5 cutters.

### **Issue 3: The workers demand that the company reinstate worker Neang Kunthea to work at Yung Wah I**

A worker named Neang Kunthea had a fight with worker Chen Son, ID 5170 in the factory and during working hours and was dismissed on 31 January 2008 because of serious misconduct in accordance with Article 83 of the Labour Law.

The Arbitration Council finds that clause 10 of the company's Internal Work Rule does not mention whether fighting is considered serious misconduct. Article 83 of the Labour Law provides that fighting with other workers is considered to be serious misconduct which the company can use as a basis to dismiss a worker.

Article 83 of the Labour Law states that *"The following are considered to be serious offenses:*

*A....*

#### ***B. ON THE PART OF THE WORKER***

- 1. Stealing, misappropriation, embezzlement.*
- 2. Fraudulent acts committed at the time of signing (presentation of false documentation) or during employment (sabotage, refusal to comply with the terms of the employment contract, divulging professional confidentiality).*
- 3. Serious infractions of disciplinary, safety and health regulations.*
- 4. Threat, abusive language or assault against the employer or other workers.*
- 5. Inciting other workers to commit serious offenses.*
- 6. Political propaganda, activities or demonstrations in the establishment."*

Based on the above findings of fact, the Arbitration Council finds that the two workers were quarrelling and fighting during working hours. As a result, according to the Labour Law, the Arbitration Council considers that the employer has a right to dismiss Neang Kunthea because of serious misconduct.

Therefore, the Arbitration Council rejects the workers demand to reinstate worker Neang Kunthea to work at Yung Wah I.

**Issue 4: The workers demand that the company [should] calculate workers' severance payment before transferring them from the old factory to new factory or changing their shift**

**A. Demand for the severance payment for workers in the future**

The workers mentioned that if in the future the company transfers workers from the old factory to the new factory, the company should calculate the workers' severance payment first. Regarding future disputes, the Arbitration Council considers that the Arbitration Council cannot consider resolving it because the Arbitration Council does not know when the dispute will occur? How many workers will be affected? In what section or group do they work?

In the previous Arbitral Awards, the Arbitration Council has consistently held that *"The Arbitration Council was created in order to resolve existing labour disputes and not in order to resolve disputes which have not yet occurred."*(See Arbitral Award 10/03-Jacqsintex, Issue 2).

In this case, the Arbitration Council agrees with the previous decision of the Arbitration Council.

Therefore, the Arbitration Council declines to consider the workers demand in the future.

**B. The workers demand that when the Company changes the workers from night shift to day shift, the company should pay them severance**

The workers demand that when the company changes workers from night shift to day shift the company should pay them severance. The Arbitration Council finds that Yung Wah I factory has workers working on day shift and night shift. Hence, the Arbitration Council will consider whether or not the company has right to change workers from night shift to day shift?

Article 2 of the Labour Law provides that *"...Every enterprise may consist of several establishments, each employing a group of people working together in a defined place such as in a factory, workshop, work site, etc., under the supervision and direction of the employer."*

In previous Arbitral Awards, the Arbitration Council considered Article 2 of the Labour Law to mean that the employer has a right to supervise and manage the company (see Arbitral Awards 28/04, Hotel Grand d'Angkor, Issue 2; 20/06-New Star, Issue 5; 17/07-Charm Textile, Issue 3 and 116/07-Grace Sun, Issue 2).

In the previous Arbitral Awards, the Arbitration Council held that the employer's right to supervise and manage [extended] as follows:

1. transferring workers from one place to another provided it would not affect [the] wages, position or employment service of the workers (see Arbitral Awards 108/06 – Trinunggal; 33/07 – Gold Fame, Issue 3);
2. determining whether a worker should work on a piece rate or base wage as long as this practice was in accordance with the law and was reasonable (see Arbitral Award 39/07 – San San, Issue 2);
3. managing and leading human resources in the company if the management and authorization was in accordance with the law (see Arbitral Award 28/04 – Raffle Grand D'Angkor);
4. setting the work schedule of workers (see Arbitral Award 62/06 – Quick Sew, Issue 5);
5. managing and supervising the process of production and managing the human resources of the enterprise, including managing the workers and determining leave request procedures and if the request is legal and reasonable (see Arbitral Award 54/07 – Yung Wah 1, Issue 9);
6. putting an expiration [date] on the workers cards provided that it does not affect their seniority (see Arbitral Award 40/08-Supreme Garment, Issue 2).

In this case, the Arbitration Council considers that the workers' demand is for the company to pay termination payments when the company changes from night shift to day shift. The Arbitration Council considers that when the company changes workers from night shift to day shift, the company does not terminate workers' contracts meaning that it does not affect workers seniority as mentioned in the above findings of fact; it is consistent with the employer's right to manage and supervise in accordance with the Article 2 of the Labour Law. In addition, at the hearing the worker party did not provide any reason or evidence to prove that changing workers from night shift to day shift would affect their seniority. The employer party will be bound to pay termination payment according to Article 73 of the Labour Law if the employer terminates them. Since a change of work shifts is not a dismissal or termination of contract, the employer is not bound to pay termination payments to workers.

Therefore, the Arbitration Council rejects the demand that the company pay severance [to workers] if the company changes them from night shift to day shift.

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

**DECISION AND ORDER**

**Issue 1:** Order the company to provide an additional 50% wages to workers in Groups B, D and F for the period that the company suspended their work from 1 to 5 April 2008.

**Issue 2:** Reject the workers' demand that the company increase the wages of 5 cutters.

**Issue 3:** Reject the workers' demand that the company reinstate Neang Kuthea.

**Issue 4:**

- Reject the workers' demand that the company provide a seniority bonus [to workers] when the company transfers [workers] from the old factory to new factory in the future.
- Reject the workers' demand that the company pay severance [to workers] if the company transfers workers from night shift to day shift.

**Type of Award: Non-binding award**

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

**SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:**

Arbitrator chosen by the employer party:

Name: **Ouk Ry**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Tuon Siphann**

Signature: .....

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Pen Bunchhea**

Signature: .....