



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអន្តរាជ្ញាភាព

THE ARBITRATION COUNCIL

Case number and name: 62/08-Pao Da

Date of Award: 30 May 2008

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **Chhiv Phyum**

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

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

DISPUTING PARTIES

Employer party:

Name: **Pao Da Company**

Address: Sangkat Boeung Kork, Khann Tuol Kork, Phnom Penh

Telephone: 011 982 322 Fax: N/A

Representative: Absent

Worker party:

Name: **Khmer Youth Trade Union Federation (KYFTU) and local union of Khmer Youth Trade Union at Pao Da factory (KYTU)**

Address: Sangkat Boeung Kork, Khann Tuol Kork, Phnom Penh

Telephone: 012 515 406 Fax: N/A

Representative:

- | | |
|----------------------|--|
| 1. Mr. Hang Sorya | Officer of KYFTU |
| 2. Mr. Orng Ra | Officer of KYFTU |
| 3. Mr. Sie Soly | Officer of KYFTU |
| 4. Ms. Thol Srey Mao | Vice-present of KYTU at Pao Da Company |

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

- 1- The workers demand that the company reimburse seniority bonus to workers who are entitled to receive it as the company postponed it for three or four months before paying it out.
- 2- The workers demand that the company arrange an on-duty physician and supply sufficient medicine during working hours and that, when workers fall unconscious, the company send them to the hospital.
- 3- The workers demand that when women workers take maternity leave (for 90 days), the company maintain their payment in lieu of annual leave [maintain] or annual leave.
- 4- The workers demand that the Company pay their January 2008 wages which were paid incorrectly in February 2008 to pieceworkers as some workers lost from US\$ 30 to US\$ 40 because the company set the piece rate at US\$ 1.20 (one dollar and twenty cents) for 100 shirts, but paid only US\$ 1.00.

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 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 was unsuccessful, and the non-conciliation report No. 428 KB/AK/VK, dated 24 April 2008 was submitted to the Secretariat of the Arbitration Council on 30 April 2008.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 1st hearing: 12 May 2008 (at 8:00 a.m.) and was rescheduled as requested by the employer party to 22 May 2008 (at 8:00 a.m.)

Procedural issues:

On 2 January 2008, the Department of Labour Dispute received a complaint by the Khmer Youth Federation Trade Union No. 124 SSKY, dated 31 December 2008 regarding the demand for the company to improve some working conditions. After receiving the complaint, the Department of Labour Dispute assigned an expert officer to settle this

collective dispute and the last conciliation was held on 19 March 2008 with a result that none of the four issues were conciliated. The four non-conciliated issues were referred to the Secretariat of the Arbitration Council on 30 April 2008 by the Department of Labour Dispute through a report of collective labour dispute resolution at Pao Da garment factory No. 478 KB/AK/VK, dated 24 April 2008.

After receiving the case, the Secretariat of the Arbitration Council summoned the employer party and the worker party to the hearing and [further] conciliation on the four non-conciliated issues on 12 May 2008 at 8:00 a.m. but only the worker party appeared as invited by the Arbitration Council. The employer party was absent and its representative telephoned to communicate with the Secretariat of the Arbitration Council only a few minutes before the hearing time to request postponement of the hearing time based on an allegation that the General Manager of the company had just had surgical operation two to three weeks ago.

After having considered the request for postponement of the hearing and discussing the request with the worker party, the Arbitration Council agreed to postpone the hearing to 22 May 2008 at 8:00 a.m. Although the representative of the employer made a confirmation with an officer of the Secretariat of the Arbitration Council at the time of the notification letter regarding the postponement of the hearing and the new hearing date, the employer party was absent again notifying its absence through a telephone call only a few minutes before the hearing and the excuse given was similar to the previous one. After thorough consideration of the absence of the employer party, the Arbitration Council decided to conduct the hearing with the presence of only the worker party.

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party: N/A

Provided by the worker party:

1. Slip of case receipt by the Department of Labour Dispute, dated 14 February 2008.
2. Letter No. 1243 SSK to the chief of the Department of Labour Dispute regarding request for resolution of labour dispute at Pao Da Company, dated 31 December 2007.
3. Letter No. 151 SSK to the chief of the Department of Labour Dispute regarding request for resolution of labour dispute at Pao Da Company, dated 14 February 2008.
4. Minutes of inquiry of representatives of workers in Pao Da Company, dated 7 March 2008.

5. Letter by the chief of the Department of Labour Dispute to the president of the local union of KYTU at Pao Da Company, dated 31 July 2007.
6. List of names of workers at Pao Da factory who lost their money (wages in January), dated 22 May 2008.

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

1. Report of collective labour dispute resolution at Pao Da Company No. 478 KB/AK/VK, dated 24 April 2008.
2. Minutes of collective labour dispute conciliation at Pao Da company, dated 19 March 2008.

Provided by the Secretariat of the Arbitration Council:

1. Letter of invitation to the company party to select arbitrator, No. 289 KB/AK/VK/LKA, dated 30 April 2008.
2. Minutes of selection of arbitrator by lot from the list of arbitrators nominated by the employer association, dated 5 May 2008.
3. Letter of invitation to invite the company party to attend the hearing, No. 308 KB/AK/VK/LKA, dated 6 May 2008.
4. Letter of invitation to invite the worker party to attend the hearing, No. 309 KB/AK/VK/LKA, dated 6 May 2008.
5. Letter of invitation to invite the company party to attend the second hearing, No. 321 KB/AK/VK/LKA, dated 12 May 2008.
6. Letter of invitation to invite the worker party to attend the second hearing, No. 322 KB/AK/VK/LKA, dated 12 May 2008.

FACTS

- Having reviewed the report of collective dispute resolution
- Having examined documents submitted by the parties to the Arbitration Council
- Having listened to statements by the worker party (the employer party was absent)

The Arbitration Council finds that:

- Pao Da Company employs approximately 300 workers.
- The local union of KYTU at Pao Da Company has 246 members and is the claimant in this case. It represents 163 workers, based on the non-conciliation report No. 478 KB/AK/VK, dated 24 May 2008, submitted to the Secretariat of the Arbitration Council on 30 April 2008. The employer party did not participate in the hearing as summoned by the Arbitration Council but only alleged that the General Manager of the company was still sick and no other representative was assigned to attend the hearing although

the hearing time had been postponed one time already. The employer party again provided the same excuse which it used to request postponement of the first hearing: that the General Manager was still sick and unable to attend the hearing on the date scheduled for the second hearing.

Issue 1: The workers demand that the company pay seniority bonus to workers who are entitled to receive it because the company consistently delays for three or four months before paying it.

- The workers demand the employer pay back their seniority bonus claiming that the employer delay for three to four months before paying it to workers who have been working for one year.
- However, the worker party cannot show any names of workers or a specific list of names, and the amount of money the workers with seniority lost or had not received.

The Arbitration Council advised the worker party to provide additional evidence to support this claim. As of 26 May 2008, the worker party did not provide any additional evidence.

Issue 2: The workers demand that the company provide a physician and sufficient medicine during working hours and when workers fall unconscious the company should send them to the hospital.

- In the hearing the workers claim that they demand only to have a physician, a clinic and sufficient medicine. The worker states that in the past when a worker fainted the company sent the unconscious worker to outside hospitals for treatment but it was very slow because there was no a company staff who was in charge of sending workers who fall unconscious to the hospital. Related to the issue of sending workers outside for treatment, the workers think that when they have an on-duty physician, the physician would be able to determine whether to send the patient outside. Thus, the workers agreed to withdraw the demand related to sending workers outside for treatment when they fall unconscious and the Arbitration Council does not need to decide this issue.
- The worker party claims that currently there is no physician on duty or clinic or sufficient medicine for workers who are in need of them in the factory. The workers add that about one-and-a-half years ago, for a period of two to three months, the company used to have some medical supplies such as bandages, balm, and medicine for headache which workers could request at the accounting department.

- The company party was not at the hearing to respond to what was claimed by the workers.

Issue 3: The workers demand that the Company maintain payment in lieu of annual leave when women workers take maternity leave (for 90 days).

- The workers claim that as a practice in Pao Da Company when a worker takes maternity leave, the company provides only 50 percent of payment in lieu of annual leave for the period of three months (one-and-a-half days of wages divided by two and multiplied by 3).
- So far, there are around two to three workers who take maternity leave every month, but the worker party does not remember their names.
- The company party was not at the hearing to respond to the workers' allegations.

Issue 4: The workers demand that the company pay [the correct amount of] their wages in January, paid in February 2008, for piece rate workers who were not paid the right amount, as some workers lost around US\$ 30 to US\$ 40 because the company determined the piece rate at US\$ 1.20 (one dollar and twenty cents) per 100 shirts but paid only US\$ 1.00.

- The worker party provided a list of workers' names who claimed that they lost wages in January 2008 and this demand is only for workers whose names are stated in the list. The workers are:

No	Name	ID	Position	Piecerate No.	Unit cost	Amount of money lost
1	Yim Sreyleak	0212	Two needles, sewing shoulder and neck	Piecerate No. 7	1000 shirts = 6.7 dollar	27 dollar
2	Sun Sokunthy	0193	Two needles, sewing shoulder and neck	Piecerate No. 7	1000 shirts = 6.7 dollar	47 dollar
3	Nhim Vuochlim	0001	Two needles, sewing armpits of shirt	Piecerate No. 9	1000 shirts = 5 dollar	10 dollar
4	Chhoeun Bopha	0574	Overlocking cuff of shirt	Piecerate No. 12	1000 shirts = 1.2 dollar	18 dollar
5	Nov Nary	0001	Overlocking lower end of shirt	Piecerate No. 11	1000 shirts = 6.7 dollar	7 dollar
6	Chhum Ny	0296	Overlocking lower end of shirt	Piecerate No. 11	1000 shirts = 6.7dulaø	15 dollar
7	Chhun Yeklim	0215	Overlocking cuff of shirt	Piecerate No. 12	1000 shirts = 1.2 dollar	9 dollar
8	Vet Sophea	0303	Overlocking body of shirt	Piecerate No...		9 dollar
9	Khun Kuntha	0096	Two needles,	Piecerate	1000 shirts	19 dollar

			sewing shoulder and neck	No. 7	= 6.7 dollar	
10	Lim Sokkheng	0052	Overlocking lower end of shirt	Piecerate No. 11	1000 shirts = 6.7dulaø	7 dollar
11	Phong Ren	0010	Two needles, sewing armpits of shirt	Piecerate No. 9	1000 shirts = 5 dollar	7 dollar

- The Arbitration Council found that the representative of the workers could not explain the method of calculation of the amount of money lost, and the [claimed] amount of money is merely unilaterally asserted by the workers.
- The Arbitration Council advised the worker party to provide additional evidence regarding this point to clarify about the amount of lost wages or the amount not yet received from the company. Up to 26 May 2008, the worker party did not provide evidence to prove the method of calculation of the amount of money lost.

REASONS FOR DECISION

Preliminary Issue:

Should the Arbitration Council proceed to resolve this collective dispute where the employer party does not attend the hearing?

In this case, the Secretariat of the Arbitration Council issued twice issued invitation letters –on 12 and 22 May 2008– to invite the employer party and the worker party to attend the hearing of the Arbitration Council on 12 and 22 May 2008. However, the employer party did not attend the hearing as invited.

Clause 21 of Prakas 099/2004 states that “In the case that one of the parties, although duly invited, fails to appear before the arbitration panel without showing good cause, the arbitration panel may proceed in the absence of that party or may terminate the arbitral proceedings by means of an award.”

In this case, the employer party informed the Secretariat of the Arbitration Council via telephone that the General Manager was sick and unable to attend the hearing and there was no one to replace him. The Arbitration Council decided to reschedule the hearing time in order for the company representative to be able to attend it. On the date of the second hearing, the employer party did not attend the hearing and provided the same excuse that the General Manager had not recovered from his illness thus would be unable to attend the hearing but no reason was provided regarding why the party was not able to assign other representatives to attend the hearing. For such failure to attend the hearing without any proper reason, the Arbitration Council considers that the employer party has given up its right to defend itself before the Arbitration Council. Thus, the Arbitration Council decides to

continue its process according to Clause 21 of Prakas 099, dated 21 April 2004 even though the employer party does not show up before the Arbitration Council.

Issue 1: The workers demand that the company pay seniority bonus to workers who are entitled to receive it because the company always delays it for three or four months before paying it.

Notification 017 SKBY, dated 18 July 2000, of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation, Point 5.1, states: “*Workers who have been working for more than one year in a factory or an enterprise shall receive a seniority bonus of \$ 2.00 per month.*” ([After the first year, the worker] receives US\$ 2 per month; second year, US\$ 3 per month; third year, US\$ 4 per month; and fourth year, US\$ 5 per month.) The Arbitration Council observes that this Notification clearly mentions about the rights of workers to receive the seniority bonus after they have been working for more than one year. In the findings of fact, the worker party does not provide any specific evidence regarding the failure to provide the seniority bonus. The Arbitration Council acknowledges that the workers are entitled to seniority bonus as mentioned in the above Notification but the Arbitration Council cannot make a decision on this dispute if there is no specific evidence such as names of worker, date of their employment, amount of money lost or not received. In previous cases, the Arbitration Council always decline to consider the demand if the party does not provide sufficient facts. See Arbitral Awards of case: 44/06-Goldfame. The Arbitration Council in this case also agrees with the interpretation of the previous Arbitration Panel. Therefore, the Arbitration Council decides to decline to consider this issue.

Issue 2: The workers demand that the company provide an on-duty physician and sufficient medicine during working hours and when workers fall unconscious the company should send them to the hospital.

Clause 1 and Clause 3 of the joint Prakas 330 SKBY, dated 6 December 2000 regarding the Arrangement of an Infirmary within an Enterprise states:

Clause 1: *An employer of an enterprise/establishment as stipulated in Article 1 of the Labour Law that employs 50 or more workers shall set up a permanent infirmary in his or her enterprise.*

The permanent infirmary shall be under inspection by the Department of Labour Health of the Ministry of Social Affairs, Labour, Vocational Training and Youth Rehabilitation.

The permanent infirmary is arranged according to the requirements of location and size, the number and quality of the health care staff, medical equipment, materials, and medicines.”

Clause 3: *Number and quality of health care staff*

The number and quality of health care staff shall be determined according to the number of workers working at the enterprise/establishment as prescribed in the table below:

<i>Number of Workers</i>	<i>Number of Nurses</i>	<i>Number of Physicians</i>	<i>Minimum Number of Physicians Present for 8-hour shift per day</i>
<i>50-300</i>	<i>1 on duty</i>	<i>1 doctor or junior physician</i>	<i>2 hours</i>
<i>301-600</i>	<i>1 on duty</i>	<i>1 doctor</i>	<i>2 hours</i>
<i>601-900</i>	<i>2 on duty</i>	<i>1 doctor</i>	<i>3 hours</i>
<i>901-1400</i>	<i>2 on duty</i>	<i>1 doctor</i>	<i>4 hours</i>
<i>1401-2000</i>	<i>2 on duty</i>	<i>1 doctor</i>	<i>6 hours</i>
<i>Over 2000</i>	<i>3 on duty</i>	<i>1 doctor</i>	<i>8 hours</i>

When an enterprise/establishment has overtime work, infirmary staff shall have nurses and a physician on duty during the overtime.”

According to the workers’ argument, the Arbitration Council believes that Pao Da Company does not provide on-duty physicians or nurses, nor medicine for workers to use when they are sick. Thus, in order to be consistent with the above Prakas, the Arbitration Council decides to order the employer to properly implement the joint Prakas 330, dated 6 December 2000 regarding Arrangement of an Infirmary within an Enterprise.

Issue 3: The workers demand that the Company maintain payment in lieu of annual leave when women workers take maternity leave (for 90 days).

Article 166 of the Labour Law states, *“Unless there are more favourable provisions in collective agreements or individual labour contract, all workers are entitled to paid annual leave to be given by the employer at the rate of one and a half work days of paid leave per month of continuous service.”* The Arbitration Council considers that the Article allows workers to take 1.5 days paid annual leave per month. In addition, Article 167 of the Labour Law states, *“Any collective agreement providing compensation in lieu of paid leave, as well as any agreement renouncing or waiving the right to paid annual leave, shall be null and void.”*

In this case, Pao Da Company provides 50% of payment in lieu of annual leave (i.e. an amount of one and half a day of wage divided by 2 which equals to 50 percent and then multiplied by 3 which is the number of months for maternity leave) for the period of maternity leave. The Arbitration Council notices that in this case the employer does not respect workers' right to use their annual leave because the employer provides payment in lieu of annual leave which is against the intention of Articles 167 and 183 of the Labour Law which requires the workers to take annual leave and the leave should not be compensated in cash. The Arbitration Council considers that the workers' right to take their annual leave cannot be withheld. Therefore, the Arbitration Council decides to order the employer to maintain [workers'] rights in taking their annual leave for the period of their maternity leave.

Issue 4: The workers demand that the Company pay [the correct amount of] their wages in January, paid in February 2008, to piece rate workers who were not paid the right amount, as some workers lost around US\$ 30 to US\$ 40 because the Company determined the piece rate at US\$ 1.20 (one dollar and twenty cents) per 100 shirts but it paid only US\$ 1.00.

Based on the findings of fact, the workers provided a list of names and amount of money the employer paid incorrectly to 11 workers for their wages in January 2008. During the hearing, the workers could not explain why they knew that the employer made incorrect payments and paid different amounts of money for each worker. The worker representatives claim that they knew this information because the workers told them and they did not ask for detailed information. In general, the claimant is obliged to provide evidence to support their demand and the Arbitration Council can reject the demand if there is not sufficient evidence to support the demand. In this case, the worker party does not provide sufficient evidence to prove that wages of these 11 workers were paid incorrectly. Thus, the Arbitration Council can reject this demand. However, Article 118 of the Labour Law states:

"In case of disputes over the payment of wages, it is up to the employer to prove his payment was correct. This proof can be derived from the signature of the employee concerned, or by two witnesses if he is illiterate, in the payroll ledger that the employer is required to keep."

Based on this, the employer is obliged to provide evidence to prove that it has paid the workers' wage. In this case, the employer party was absent during the hearing which caused the Arbitration Council not to be able to ask for clarification on these facts.

Thus, the Arbitration Council considers that the employer should pay wages to the 11 workers who claim incorrect payments if the employer does not have evidence of correct payments.

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

DECISION AND ORDERS

Issue 1: Reject the workers' demand for the employer to pay seniority bonus to workers who are entitled to receive it, which demand was based on the grounds that the company always delays for three or four months before paying it.

Issue 2: Order the employer to properly implement the Joint Prakas 330 SKBY, dated 6 December 2000 regarding the Arrangement of an Infirmary within an Enterprise.

Issue 3: Order the employer to maintain women workers' right to accrue 100% paid annual leave for one and a half day per month according to the Law for the period of their maternity leave of 90 days.

Issue 4: The employer should pay wages to the 11 workers who claim incorrect payment.

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 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: **Nhean So Munin**

Signature: