

KINGDOM OF CAMBODIA
NATION RELIGION KING

THE ARBITRATION COUNCIL

Case: 63/04

Date of award: 24 August 2004

ARBITRAL AWARD

(Issued under Article 313 of the Labour Law)

Shine Well Industry Co Ltd.

(Employer party)

AND

**Local Union of Shine Well Company and Khmer Youth Federation Trade
Union (KYFTU)**

(Employee party)

DETAILED INFORMATION OF EMPLOYER PARTY:

Representative: 1- Mr. Lim Sok

Address: Village Chamcar Ouv Leak, Street Wat Taing Kar Sang, Kar
Kabquarter, Dang Kao district, Phnom Penh.

Tel: 012 886 360/ 023 890 201 Fax: N/A

DETAILED INFORMATION OF EMPLOYEE PARTY:

Representatives: 1- Ms. Nol Sarim, President of KYFTU;
2- Mr. Chheav Vandeth, Member of KYFTU;
3- Ms. Pao Sokha, Union Secretary
4- Mr. Mr. Naov Titha, KYFTU officer
5- Mr. Sea Sorn, KYFTU officer

Address: Village Chamcar Ouv Leak, Street, Wat Taing Kar Sang, Kar
Kabquarter, Dang Kao district, Phnom Penh.

Tel: 011 62 29 63 Fax: N/A

ISSUES IN DISPUTE:

(In non-conciliation report)

- 1- The employee party demands the company reimburse all current workers for the medical check fee.

- 2- The employee party demands the company set up a day care center and a babysitter. The employee party demands the company determine the definite time to prepare the day care center.
- 3- The employee party demands the company pay the basic wage to the employees when there is no work.
- 4- The employee party demands the company pay the round trip [transportation] fee of the probationary workers when the company terminates [their contracts].
- 5- The employee party demands the company make it easier for the employees to take leave and sick leave with medical certificates, and demands the company maintain full wage and attendance bonuses [during these leaves].
- 6- The worker demands the reinstatement of the Chinese translator, Chhive Vandeth, and two other workers, Sao Siem and Phine Chinda, who were dismissed on 1 July 2004.

JURISDICTION OF THE ARBITRATION COUNCIL :

The Arbitration Council derives its power to make this Award from Section IIB of Chapter 12 of the Labour Law (1997); the Prakas on the establishment of the Arbitration Council 338/02; the Prakas on the Arbitration Council 099/04; the Arbitration Council Procedural Rules which form an Annex to the same Prakas; and the Prakas on the Nomination of Arbitrators 103/04 and 265/04.

An attempt to conciliate the collective dispute which is the subject of this Award was made as required by Chapter XII Section 2A of the Labour Law. That conciliation hearing was successful in two issues, with six unsuccessful issues. The non-conciliation report dated 30 July 2004 was submitted to the Secretariat of the Arbitration Council on 3 August 2004.

COMPOSITION OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:	Mr. Mar Somborana
Arbitrator chosen by the worker party:	Mr. Ven Pov
Chair arbitrator (chosen by the two arbitrators):	Mr. Kong Phallack

HEARING AND EVIDENCE:

Date and place of hearing: on 10 August 2004 at 2:30 p.m. at the Secretariat of the Arbitration Council.

Witnesses and Experts: N/A

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

Provided by the employer party: N/A

Provided by the employee party:

- 1- Registration certificate No 644 dated 15 July and registration letter No. 429 dated July 2004.
- 1- Minutes of the collective labour dispute conciliation dated 2 July 2004.

Received from MoLVT:

- 1- Non-conciliation report dated 30 July 2004 from the Ministry of Labour and Vocational Training.
- 2- Minutes of the collective labour dispute conciliation dated 22 July 2004.
- 3- Letter from the Ministry of Labour dated 3 August

CASE SUMMARY:

Shine Well is located in Chamkar Outloek, Phlov Vat Tang Kasang, Sangkat Kakab, Khan Dangkor, Phnom Penh and employs a total of 690 workers. The workers filed a complaint with the Labour Inspection Department at Dangkor on 20 July 2004 demanding the factory to improve some working conditions. After receiving this complaint, the Labour Inspectors went to the factory to conciliate and settle on 27 July 2004. The parties reached agreement on two out of eight issues, and there are six non-conciliated issues as summarized above.

The Secretariat of the Arbitration Council instructed both parties to provide evidence and witnesses and invited them to appear at a hearing on 10 August 2004 at 2:30 p.m. at the Secretariat office.

On 10 August 2004 at 2:30 p.m., the Arbitration Council heard this case 63/04 at the Secretariat of the Arbitration Council. The employer party informed the Secretariat that she/he could not appear at the hearing, but did not provide a valid reason to the Arbitration Council. Under Article 21 of Prakas 099/04, the Arbitration Council decided to hear the case without the employer party.

FINDINGS OF FACT:

- Having examined the minutes of the collective labour dispute conciliation

- Having listened to both parties' arguments as described above and in the hearing minutes
- Having reviewed the documents as mentioned above

We find that:

1-The Shine Well Company has operated since November 2003. There are approximately 200 workers who received medical checks. But most of the workers have not received the checks yet. Those who received the checks paid of the amount of the 10100 riel themselves and provided Administrator Lim Sok Ty a medical check bill in exchange for an employment certificate of the Company. Those who do not have checks do not have employment certificates, only receipts. Based on the non-conciliation report, the employer party asked for an extension to discuss this issue first.

2- There are approximately 600 women workers and a smaller number of men working for this factory. There is not a nursing room, a day care center, or a babysitter. The workers previously negotiated with the employer, and the employer agreed to comply with the Labour Law but did not set up a definite time to build the nursing room or day care center. The workers asked the employer to pay US\$10 a month for the day care center and two cans of milk for a total of US\$12, instead of setting up a day care center and providing a babysitter for sixteen months after maternity leave

3- The workers agreed to accept the company's offer as stated in non-conciliation report if the company applies the policy that the company pays full basic wages when the company occasionally has no work, as long as the workers are in the workplace for eight hours. But if the employees request to not be in the workplace, the agreement is the employer will provide only 50 percent of wages.

4- The workers demand the company pay transportation fees for probationary workers when the company terminates them. The workers did not demand the company pay those who were terminated in the past. [Instead,] the workers demand the company pay probationary workers that may be terminated in the future a transportation fee. The worker representatives did not provide any specific information or a complete address of any specific worker whose home is far away from the factory. According to the non-conciliation report, the company agreed to comply with the Labour Law.

5-Those who, in the past, took leave with an appropriate medical certificate, the company maintains only the wage but not attendant bonus. The workers demand the company maintain the attendance bonus if the workers take leave with an appropriate certificate.

6- The Chinese translator, Chhive Vandeth, began work on 26 May 2004. Chhive Vandeth was a probationary worker from 26 May to 1 July 2004. The company terminated him on 1 July 2004. Other workers, Sao Sim and Phin Chinda, were terminated on 1 July 2004 and did not appear at the hearing. Although they did not appear at the hearing, neither gave the union an authorization to file a complaint lawfully. (Refer to (1) 02/03 - Chou Sing, 21/03 - Loyal Cambodia, 19/04 - Kbal Koh 2, 53/04 - Kong Hong, and 60/04 - United Art, and (2) Article 274 (c) of the Labour Law (1997) and Prakas 09/94 on health checks for Khmers and foreigners working in Cambodia, which require the employer to pay health check fees for its employees. Further, Article 7 of the Prakas states that the owner of the enterprise has to pay health check fees for its employees.)

REASONS FOR DECISION:

First issue:

Following the preceding awards, the Arbitration Council notes that Prakas 09/94 is valid. This Prakas was established by the Labour Law (1992), not Article 247 of the Labour Law (1997). However, Prakas 09 does not contradict the Labour Law (1997) and this Prakas is not void as defined by Article 395 of Labour Law 1997 (see 02/03 - Chou Sing, 53/04 - Kong Hong, and 60/04 - United Art).

Also, although the Prakas is void, the Arbitration Council considers that Article 274 of the Labour Law (1997) provides sufficient legal principles to conclude that the employer has to pay for the employees' medical check fees. Article 274 (c) states clearly that when the new Prakas is made, it requires the employer to pay the employees' medical check fees (please see 60/04 - United Art).

According to this meaning, the employer has a legal obligation to pay his/her employees. In this case, the employees paid [the fee] themselves and then brought the employer the receipt in order to provide the results of the medical check. The employer is not divested of legal responsibility if the employee pays the medical check fee, as defined by Article 7 of the above Prakas and Article 274 (c) of the Labour Law (1997). Furthermore, Article 377 of the Labour Law states that "Those guilty of violating the provisions of Article 274 or violating the Prakas instructing application of labour health are liable to a fine of one hundred twenty days to three hundred sixty days of the base daily wage and to imprisonment of one to five years, or to only one of the both penalties." This Article clearly states that if the employer does not

follow Article 274, the employer will be financially disciplined and punished according to the law.

Therefore, the Arbitration Council decides that the employer has to reimburse the health check fees in the amount of 10100 riel to each worker who had a health check and paid for it themselves and must pay for those who have not yet had health checks.

Second issue:

Article 186 of the Labour Law stipulates that managers of enterprises employing a minimum of 100 women or girls shall set up, within their establishments or nearby, a nursing room and a day-care center.

If the company is not able to set up a day-care center on its premises for children over 18 months of age, female workers can place their children in any center and the employer shall pay the charges. Also, Article 187 states that a Prakas (ministerial order) of the Ministry of Labour shall determine the conditions for setting up a hygienic environment and supervising these nursing rooms and day-care centers. In this case, Shine Well Company has approximately 600 women workers.

Therefore, the Arbitration Council finds that the employer has a legal obligation to prepare a nursing room in the factory and the employer has to build a day care center for children aged more than 18 months. If the employer cannot build a day care center, the employer can pay outside day care center fees to those whose children are older than 18 months, but the employer has to build a nursing room. The Arbitration Council considers the employees' request, demanding US\$10 a month for outside day care centers and US\$12 for milk [per month] in a period of 18 months instead of building a nursing room, contradictory to the Labour Law. Therefore, the Arbitration Council does not consider the request.

Third issue:

Workers agreed to accept the company's offer as stated in the non-conciliation report, that *the company pay full basic wages when the company has no work occasionally as long as the workers are in the workplace for eight hours. But if the employees request not to be in the workplace, the agreement is 50% wage.*

Fourth issue:

Article 68 states that a contract for a probationary period cannot be for longer than the amount of time needed for the employer to judge the professional worth of the worker and for the worker to know concretely the working conditions provided. However, the probationary

period cannot last longer than three months for regular employees, two months for specialized workers and one month for non-specialized workers. The round trip travel costs incurred by a worker during the probationary period when *working far from his/her habitual residence* are to be covered by the employer.

Based on the above, the Arbitration Council finds [this applies] in two instances:

- 1- In cases when the employee's habitual residence is far from his/her place of work;
- 2- In cases when the employee comes from a remote province to work for the factory (or company) which is located in Phnom Penh (or another province).

Regarding point 1, when the employer requires the employee to work far from his/her habitual residence, the round trip travel cost will be paid by the employer, and if the employee paid by him/herself, the employer has to reimburse the employee.

Regarding point 2, the employee has to provide specific information related to specific employees who come from a definite province/city.

But in this case, the employee party did not demand round trip travel costs for probationary workers who have to work far from their habitual residences, which is required by the employer as stated in point 1 above.

Therefore, the Arbitration Council considers that the employee demands the round trip travel costs as established in point 2. In their complaint, the Arbitration Council finds that the employee did not demand this travel cost for those who are currently working for the factory or those who were specifically terminated, but instead demands the costs for probationary workers who are terminated in the future.

At the hearing, the employee party did not provide any specific information about any specific worker who was terminated and whose residence was far [from the factory]. According to Article 68, round trip travel costs are offered to those whose habitual residences are far from the factory. In general, the Arbitration Council considers such demands if the employee party did not provide evidence to show a specific probationary worker whose habitual residence is far from the factory (company) which is located in another province. Thus, the employee has an obligation to indicate that there is a particular worker whose house is located in a particular province far from Phnom Penh where the factory is located, then the Arbitration Council will consider the travel cost (i) when such worker comes to work and (ii) when h/she returns home after probationary termination.

Therefore, the Arbitration Council considers that workers' claim in this case does not have any specified and clear basis. The Arbitration Council decides not to consider the claim.

Fifth Issue:

The employee demanded [the company] to maintain the US\$5 attendance bonus when they take sick leave with appropriate medical certificate, since Notification 017/00 of MoLVT states that "... the employees who work regularly on regular working days in a month are entitled to receive at least US\$5 per month..." But the Notification does not provide a clear statement in case the employee takes sick leave and cannot come to work; and there are not any provisions of Labour Law that speak of granting workers' rights related to sick leave and being entitled to receive attendance bonus as well.

Meanwhile, the parties to the dispute did not provide the Arbitration Council the Internal Work Rules to consider whether the Internal Work Rules offer this benefit to the employees who take sick leave. Based on the meaning of the attendance bonus, the Arbitration Council considers that it is a bonus for motivation for those who come to work regularly for a full month without taking leave inappropriately. However, the provisions of the Law on the attendance bonus, including Notification No. 017 and the Labour Law, provide that [employers cannot] discipline employees who take sick leave with proper permission. The Arbitration Council considers that if the employees take sick leave with proper permission in a period of any month and completely lose the US\$5 attendance bonus, it is unfair because it is not their fault that they cannot come to work regularly due to sickness. In contrast, if the employer is required to pay the attendance bonus for the period when the employees take sick leave, it is unfair for the employer to lose his/her entitlements during the workers' sick leave.

Because Notification No. 17 does not clearly provide for this issue, the Arbitration Council decides to approach an equity principle which allows the employer to deduct an attendance bonus proportional to the number of days which workers took sick leave for each month.

Therefore, the Arbitration Council determines that the company is to provide attendance bonuses to workers who take leave with permission in proportion to the amount of days which they performed [work] per month.

Sixth issue:

This issue relates to the employment contract termination of three workers, Mr. Chhive Vandeth, Mr. Sao Sim and Ms. Phin Chinda.

Generally, the Arbitration Council considers that the Labour Inspector and the Minister of Labour are responsible for deciding if a dispute is individual or collective before submitting it to the Arbitration Council. Generally, the Arbitration Council accepts only cases sent by the Labour Inspector and Minister of Labour to further conciliate and settle according to the procedures (see 41/04 - Micasa).

But in this case, the Arbitration Council finds that the employment contract termination of the above three workers is an individual dispute as defined in Article 300 of the Labour Law, which states that "An individual dispute is one that arises between the employer and one or more workers or apprentices individually, and relates to the interpretation or enforcement of the terms of a labour contract or apprenticeship contract, or the provisions of a collective agreement as well as regulations or laws in effect."

Furthermore, based on Article 302 of the Labour Law, "a *collective labour 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 within the enterprise, and issues regarding relations between employers and workers, and this disputes could jeopardize the effective operation of enterprise or social peace." In this case, Chhive Vandeth began work on 26 May 2004 and was terminated on 1 July 2004, and Sao Sim worked for the company for two months and was terminated by the employer during the probationary period. Also, Phin Chinda was terminated due to a sickness and agreed to accept indemnity for dismissal. The Arbitration Council considers that this issue is a dispute between individual workers and the employer over employment contract termination, and this dispute does not jeopardize the effective operation of enterprise or social peace. Therefore, the Arbitration Council does not have jurisdiction to decide this individual dispute.

Therefore, the Arbitration Council decides not to consider this issue.

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

DECISION:

First issue:

The employer has to pay medical check costs to those who received medical checks and paid the 10100 riel themselves. The reimbursement has to be made within seven days after this Award comes into force. The employer has to pay medical check costs to those who have not received medical checks yet and were required to have medical checks as defined by law.

Second issue:

- a) The employer has to build a nursing room in the factory within two weeks after this Award comes into force.
- b) The employer has to either build a day care center in the factory under the control of Ministry of Labour or pay outside day care center costs; this must be implemented by 10 September 2004.

Third issue:

Order the employer and employee to comply with their agreement in the non-conciliation report. The company has to pay basic wages to workers who are in the workplace for a full eight hours per day when the company has no work, but the company has to pay 50 percent of basic wages to workers who do not come to work

Fourth issue:

Deny the workers' claim regarding round trip travel costs for probationary workers when they are terminated.

Fifth issue:

Order the company to provide "attendance bonus" to workers who take sick leave with proper permission in proportion to the amount of days which they performed their job in that month.

Sixth issue:

The Arbitration Council does not have jurisdiction over the claim for reinstatement of Chhive Vandeth, Sao Sim and Phin Chinda.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL :

Arbitrator chosen by the employer party:

Name: **Mar Somborana**

Signed:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signed:

Chair of arbitration panel:

Name: **Kong Phallack**

Signed:

This Award will become binding after eight 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.