



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាអាជ្ញាកណ្តាល

THE ARBITRATION COUNCIL

Case number and name: 63/07 – Phnom Penh Garment

Date of Award: 25 July 2007

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: **Ven Pov**

Chair Arbitrator (chosen by the two Arbitrators): **Kong Phallack**

DISPUTING PARTIES

Employer party:

Name: **Phnom Penh Garment City**

Address: No. 650, National Road No. 2, Sangkat Chak Angre Krom, Khan Meanchey,
Phnom Penh

Telephone: 023 425 620, 012 766 423

Fax: 023 219 609

Representatives:

1. Mr. Plang Phinra Assistant to the Company's Director;
2. Mr. Ly Chheng Assistant to the Company's Director;
3. Ms. Lor Bun Thavry Administrator.

Worker party:

Name: **Free Trade Union of Workers (FTUW) at Phnom Penh Garment Factory**

Address: N/A

Telephone: 012 1 827 841

Fax: N/A

Representatives:

1. Mr. Kao Meng President of Free Trade Union of Workers (FTUW) at
Phnom Penh Garment Factory;
2. Mr. Sé Thy Vice-President of the FTUW;

3. Mr. Heng Sophon Secretary of the FTUW.

Name: **Labour Free Union of Lever Khmer (LFULK) at Phnom Penh Garment Factory**

Address: N/A

Telephone: 011 757 092

Fax: N/A

Representatives:

1. Mr. Sok Ravuth President of the LFULK;
2. Mr. Tuy Thuon Vice-President of the LFULK;
3. Kem Bunnath Treasurer of the LFULK.

Name: **Khmer Youth Federation Trade Union (KYFTU) at Phnom Penh Garment Factory**

Address: N/A

Telephone: 012 373 653

Fax: N/A

Representatives:

1. Mr. Poeun Sam Oeun Officer from the KYFTU;
2. Mr. Tom Bunthoeun President of KYFTU;
3. Mr. But Vuthy Vice-President of KYFTU;
4. Mr. Sao Sambor Committee Member of KYFTU.

ISSUE IN DISPUTE

(In the Non-Conciliation Report)

1. The workers demanded that the company maintain workers' wages and attendance bonuses during the striking day of 5 July 2007 because based on previous practice, the company never deducts workers' wages and bonuses during the striking day(s). On the contrary, the company disagreed to the demand claiming that the company applies the Labour Law.

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 hearing which took place on 9 July 2007 was unsuccessful, and the non-conciliation report No. 644 was submitted to the Secretariat of the Arbitration Council on 9 July 2007.

HEARING AND SUMMARY OF PROCEDURE

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

Date of hearing: 18 July 2007 (from 2:00 to 2:30 p.m.)

Procedural issues:

EVIDENCE

Witnesses and experts: N/A

Documents, Exhibits and other evidence considered by the Arbitration Council

Provided by the employer party:

1. Letter from the Company Director dated 18 July 2007 authorizing legal rights to Mr. Ly Chheng, Mr. Plang Phinra and Ms. Lor Bun Thavry;
2. Daily report of the security guards dated 4 July 2002;
3. Minute of discussion meeting dated 20 June 2007;
4. Minute of discussion meeting dated 27 June 2007;
5. Announcement No. Admin/0003PPG/07 dated 27 June 2007 on the misconduct as stated in Article 83;
6. Announcement No. Admin/0002PPG/07 dated 27 June 2007 on the Production's Labour Measurements;
7. Minute of discussion meeting dated 5 July 2007;
8. Announcement No. Admin/0004PPG/07 dated 5 July 2007 on the deduction of wages and bonuses of workers;
9. Company's Prohibitory Notice dated 30 June 2007 banning workers from bringing snacks into the factory, taking materials and drinking water from the factory;
10. Request for discussion on some labour issues of the workers in Phnom Penh Garment factory dated 5 July 2007;
11. Minute of the collective labour dispute conciliation dated 6 July 2007;
12. Internal Work Rules of the Company No. 045 dated 7 May 1999;
13. Statute of Phnom Penh Garment Company;
14. Business Registration License dated 28 December 2006;
15. Report on the five-and-a-half-day (from 4 to 10 July 2007) strike at Phnom Penh Garment factory.

Provided by the worker party:

1. Letter No.245 dated 13 June 2007 on the acceptance of the new union leaders of Free Trade Union of Workers at Phnom Penh Garment factory;

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

1. Report No. 644 dated 9 July 2007 on the collective labour dispute conciliation at Phnom Penh Garment Company of the Director of the Department of Labour Disputes;
2. Minute of the collective labour dispute conciliation dated 6 July 2007;

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 269 dated 12 July 2007 to the worker party to attend the hearing;
2. Invitation No. 268 dated 12 July 2007 to the employer party 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:

- Phnom Penh Garment factory employs around 857 workers.
- The three claimants are Khmer Youth Trade Union, Free Trade Union of Workers of Kingdom of Cambodia and Labour Free Union of Lever Khmer.
- The workers demanded that the company maintain their wages and attendance bonus during the four striking days—5, 6, 7 and 9 July 2007. The employer disagreed but requested just to apply the Labour Law.
- Both the worker and employer parties agreed that there were approximately 857 workers who staged the strike on 5 July 2007 and the strike continued until 9 July 2007.
- The workers started the strike at 7:20 a.m. on 5 July 2007 because the employer had accused 11 workers of stealing the factory's scissors on 4 July 2007, [and] workers were not allowed to talk during working hours; the company ceased to provide the workers their wages and other bonuses on the striking days.
- The workers returned to work on 10 July 2007 as ordered by the Arbitration Council;
- Both the worker party and the employer party agreed that there are about five to six strikes within the factory each year. Each strike lasts from one to two days.
- Both the worker party and the employer party claimed that there has been no written agreement or in principle to maintain the wages and bonuses of workers during striking day(s). However, according to the employer's common practice since 1996, workers' wages and attendance bonuses have never been deducted during striking day(s).

- In November 2006, the factory's management was replaced because the former investors fell into bankruptcy. Under the management of Mr. Liu Chundy, the new investor, the old practices were gradually changed, for example, workers were not allowed to bring food/snacks into the factory and workers' wages and attendance bonus are deducted during striking day(s).
- The employer party claimed that the company held a meeting with group leaders, worker representatives and trade union representatives on 30 June 2007 on the new changes to the old practices. One of the changes was that workers' wages and attendance bonuses during striking day(s) would be deducted and this new change came into effect from June 2007. In the meeting, the company requested the group leaders, worker representatives and trade union representatives to convey this message to all their group members and trade union members.
- Based on the document submitted by the company to the Arbitration Council, the company officially issued the notification on the deduction of wages and attendance bonus during striking day(s) on 5 July 2007 via Notification No. Admin/0004/07/07 signed by Mr. Yang Sung.
- Based on the testimony of the worker party, they officially received the information regarding the deduction of wages and attendance bonuses on 6 July 2007.
- The worker party claimed that the strike was staged without submitting any written notification to the factory.
- According to the confirmation from both the worker party and the employer party, no new workers were employed during the striking day(s).

REASONS FOR DECISION

In this case, the workers demanded that the company keep their wage and attendance bonus for the striking days on 5, 6, 7 and 9 July 2007. The employer disagreed, but requested to follow the law. The Arbitration Council will consider this case as follows:

A. The demand that the company maintain workers' wages during the four striking days of 5, 6, 7 and 9 July 2007

Article 332 of the Labour Law dated 13 June 1997 provides, "*A strike suspends the labour contract. During a strike, the allowance for work is not provided and the salary is not paid.*"

Based on the same Article in other previous cases, the Arbitration Council always rejected the demand of workers that the company maintain their wages (See Award 04/03 – Lida, Issue 1). In this case, the Arbitration Council also agrees with such decision because the Labour Law does not require the employer to pay the wages to workers for the striking day(s). Moreover, the Labour Law does not encourage workers to go on strike and during the

strike, workers do not work to bring benefit to the employer, but only losses to the employer. So both parties lose, meaning that workers do not earn wages and employer does not obtain any production from the workers.

However, Article 334 of the Labour Law provides that, *“During a strike, the employer is prohibited from recruiting new workers for a replacement for the strikers except to maintain minimum service provided for in Articles 326 and 328 if the workers who are required to provide such service do not appear for work. Any violation of this rule obligates the employer to pay the salaries of the striking workers for the duration of the strike”*.

In this case, the Arbitration Council finds that the employer did not employ new workers to replace the striking workers during 5, 6, 7 and 9 July 2007. So according to the Labour Law, the employer is not required to provide workers their wage during the striking day(s).

At the hearing, the worker party raised that they were demanding that the company maintain their wages and bonuses during striking day(s) because this practice has been going on since 1996. The worker party added that the practice has become an oral agreement between the employer and the workers, which entitles the employer to pay workers during the striking days.

The Arbitration Council finds that the practice of paying workers on striking days has taken place within the factory since its first operation in 1996. It shows that the practice has been going on for a long time. However, the practice has not taken the form of any written principle or agreement which requires the employer to do so. On the other hand, the Arbitration Council considers that the employer paid workers wage on each case of strike simply because they were generous.

In the hearing, the worker party claimed that the practice has become an oral agreement between the employer and the workers, but the worker party did not provide any concrete evidence to support the claim. Based on the workers' testimony and evidence, the Arbitration Council finds that the claim was not appropriate. The employer's practice was not clear enough for the workers to be used as “Clause” and condition of the employment contract between both parties. The Arbitration Council notes that for the senior workers who have been working for the factory since the beginning, may expect the employer to pay them wages during striking day(s) because this has been practiced continuously since the beginning. Furthermore, these workers should have been aware that the employer may reject to provide them wage at any time. In the hearing, the worker party neither mentioned nor provided any evidence to show that once the employer hires new workers, they expect or understand fully that the employer would pay them during striking day(s), which could be used as “Clause” or conditions of the employment contract. Based on the existing evidence, the Arbitration Council finds that the employer's practice was not made clear enough for new

workers to expect wage payment during striking day(s). Therefore, the Arbitration Council considers that the employer's practice regarding this case has not become oral contract which requires the employer to pay workers' wages during striking day(s). (For further discussion regarding the previous practical principles, see Arbitral Award 109/06–Trinunggal).

Moreover, the Arbitration Council finds that this practice cannot be considered as a **custom** because the habit of maintaining the wage on striking day(s) does not satisfy the elements of **customs**. **Customs** are non-written laws which people always follow like laws. In order for a practice to become a custom, it needs to fulfill two main elements: **material elements** and **psychological elements**.

'Material elements' means all people shall follow the practice. In this case, it means that every factory and company in Cambodia maintains workers' wages during striking day(s). But based on the Arbitration Council's and general people's observations, the practice of maintaining workers' wages during striking day(s) is not practiced in every factory and company in Cambodia.

'Psychological elements or opinio iuris necessitatifs' means all legal subjects believe that the performance of that practice is an act of abiding by the law. Psychological elements of customs refers to the belief that the practice of what people always do also has the absolute power as the Law. In this case, it would mean that the maintaining of workers' wages during striking day(s) is an act of abiding by the Law. But the Arbitration Council and people generally consider that the practice of maintaining workers' wages during striking day(s) is not necessarily an act of abiding by the Law.

Therefore, the Arbitration Council finds that the employer's previous practice of paying the workers' wages during striking day(s) is neither [custom] nor an oral contract which requires the employer to continue the practice. In conclusion, the Arbitration Council rejects the demand that the company keep the workers' wages during the striking days of 5, 6, 7 and 9 July 2007.

B. The demand that the company maintain workers' attendance bonuses during the four striking days of 5, 6, 7 and 9 July 2007

Clause 3 of Notification No. 745 dated 23 October 2006 provides, "*Other benefits being received by workers through Notification No. 017 dated 18 July within Issue 3, 4, 5 and 6 are kept the same*".

Clause 3 of Notification No. 017 dated 18 July 2000 provides, "*workers, who come to work regularly on working days of each month, shall receive a minimum bonus of USD 5 per month*".

In Issue 2 of Award 44/07–Winner Knitting, the Arbitration Council ruled that “*The Arbitration Council considers that the words ‘come to work regularly’ can be explained in two ways as follows:*

- a. Working for 26 days per month if there are no public holidays or days off set by the state;*
- b. Working less than 26 days per month if there are public holidays or days off set by the state, or days off with appropriate permission from the employer”.*

Therefore, the Arbitration Council will consider whether or not the workers’ striking days are considered as the days workers come to work regularly as follows:

Article 323 of the Labour Law provides, “*A strike shall be declared according to the procedures set out in the union’s statutes, which must state that the decision to strike is adopted by secret ballot*”.

Article 324 of the Labour Law provides, “*A strike must be preceded by prior notice of at least seven working days and be filed with the enterprise or establishment. If the strike affects an industry or a sector of activity, the prior notice must be filed with the corresponding employer’s association, if any. The prior notice must precisely specify the demands which constitute the reasons for the strike.*

The prior notice must also be sent to the Ministry in Charge of Labour.”

Clause 4 of Article 320 of the Labour Law requires that the right to strike can be exercised only when all peaceful methods for settling the dispute with the employer have been exhausted.

In this case, the Arbitration Council finds that the workers staged the strike without prior notice and did not do their best in using all peaceful methods to settle the dispute. It means that the worker party did not follow the procedures in staging the strike on 5, 6, 7 and 9 July 2007. Therefore, the strike was not staged according to the procedures stated in the Labour Law. The Arbitration Council considers that when the workers did not comply with the procedures to go on strike, they did not come to work regularly. Therefore, the workers were not entitled to receive the attendance bonuses according to Notification No. 017 in 2000. (See Arbitral Awards 04/03 – Lida; Issue 1, 15/04 – Lucky Zone; Issue 4, 03/05 – Flying Dragon; Issue 3)

However, in the hearing the worker party mentioned that the employer used to provide workers attendance bonuses during the previous striking day(s) and this has become an oral contract which requires the employer to pay workers’ attendance bonuses on striking day(s). Regarding this statement, the Arbitration Council considers that it is not appropriate.

(See the reasons provided by the Arbitration Council regarding the provision of workers' wage on striking day(s) as discussed above).

With this respect, the Arbitration Council decides to reject the workers' demand that the company maintain their attendance bonus during the striking days of 5, 6, 7 and 9 July 2007.

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

DECISION

- Reject the workers' demand that the company maintain their wages and attendance bonus during the striking days of 5, 6, 7 and 9 July 2007.

Type of Award: Binding Award

This Award is immediately binding upon the parties after the notification of the award.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **Ouk Ry**

Signature:

Arbitrator chosen by the worker party:

Name: **Ven Pov**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **Kong Phallack**

Signature: