

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

**ARBITRATION COUNCIL**

Phnom Penh Center, Building A  
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Chamkar Morn District  
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**Case Number: 66/04**

**Date of Award: 10 September 2004**

**ARBITRAL AWARD**

Issued under Article 313 of the Labour Law

**Winner Garment**

(Employer Party)

**AND**

**Khmer Youth Federation of Trade Union [KYFTU]**

(Worker Party)

**DETAILS OF EMPLOYER PARTY:**

Address: Luek Themy Street, Ka Kaab Commune, Dangkao District, Phnom Penh  
Representatives: Mr. Nail Senlou – Company Director  
Ms. Yeng Ee Mee - Accountant  
Telephone: 023 890 387, 012 775 552 Fax: 023 890 387

**DETAILS OF WORKER PARTY:**

Address: On a dirt road without a number, Chaom Chau Commune,  
Dangkao District, Phnom Penh  
Representatives: 1- Nouv Titha - Officer of the Khmer Youth Federation of Trade Unions;  
2- Bu Lisa - Committee Member of KYFTU);  
3- Gnel Srey Mom - Committee Member of KYFTU);  
4- Sier Son - Officer of KYFTU;  
5- Sim Phally - President of KYFTU;  
6- Hong Sokhon - Vice President of KYFTU;  
7- Mr Yun Rithy - President of KYFTU;  
8- Mr Phong Somkhan Vannaek - Officer of KYFTU.  
Telephone: 011 750 126 Fax: None

## ISSUES IN DISPUTE

1. The workers request that the company send the workers to have their health checks at the company's expense. The employer party agreed to send the workers to have their health checks and to pay 5 percent of the costs of the procedures saying that they do not have the means to pay more than this.
2. The worker party demands that the company employ workers on probation for two months and repay the amounts that were underpaid in the past. The workers set one week as the time within which these repayments must be made. The company agrees to pay wages in accordance with Notice 17 (MOSALVY) dated 18 July 2000 regarding probationary workers. As for workers who have completed their probationary period and to whom the company did not pay correct wages, the company will repay these amounts within two months at the most.
3. The worker party demands that the company pay various benefits with regard to the termination of contracts of undetermined duration (before making contracts of fixed duration). If the company does not repay these amounts within seven days the workers demand that the company discard the fixed duration contracts. The company agrees to pay the severance benefits for the termination of the undetermined duration contracts in accordance with the law but requests two months to do so.
4. The worker party demands that the company reorganize elections to select shop stewards because the president of the union at the factory did not know about the elections. The company does not agree to hold new elections stating that they already held the shop steward elections in accordance with the law, and gave one week's notice before the election to all workers at the factory including the vice president of the union at the factory.
5. The worker party demands that the company pay the round trip costs when the company terminates workers on probation. The company will not pay the costs of this travel for probationary workers who have been terminated, unless they are required to do so by law.
6. The worker party requests that the company accept Mr Sim Phally back to work and provide him with a basic salary of US\$90 per month and not require him to sign a fixed duration contract. The company agrees to accept Mr. Some Phally back to work

with a basic salary of US\$60 per month but on a fixed duration contract. With regard to the undetermined duration contract, the company will pay all of the benefits payable under law [for the termination of that contract].

7. The worker party demands that the company provide full wages to workers when the company does not have any work to do. The company agrees to provide 100 percent of wages to workers who come to the factory for eight hours per day, but if a worker decides to leave the factory the company will provide only 50 percent of wages.

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

The Arbitration Council derives its power to make this Award from Section II B2 of Chapter 12 of the 1997 Labour Law; the Prakas on the Formation of the Arbitration Council 99/04; and the Rules on the Arbitration Council Procedure.

An attempt to conciliate the collective dispute which is the subject of this Award was made in accordance with Chapter XII Section 2A of the Labour Law. However, that conciliation was unsuccessful and a non-conciliation report (#130 MOSALVY) dated 24 May 2004 was sent to the Secretariat of the Arbitration Council on 24 May 2004.

#### **COMPOSITION OF THE ARBITRATION PANEL:**

Arbitrator chosen by the employer party: **Mr Kao Thach**

Arbitrator chosen by the employee party: **Mr. Liv Sovanna**

Chair arbitrator (chosen by the above two arbitrators): **Mr Kong Phallack**

#### **EVIDENCE AND HEARING**

Date and Place of Hearing: 26 August 2004 at 8.00 a.m. at the Secretariat of the Arbitration Council

#### **THE EVIDENCE WHICH THE ARBITRATION PANEL REVIEWED WAS AS FOLLOWS:**

##### **A. Documents received from the employer party**

1. Letter requesting approval of Internal Work Rules dated 21 May 2004 together with a copy of the company's Internal Work Rules.
2. Identifying letter of shop stewards dated 21 May 2004.

3. Agreement with regard to the nomination of shop stewards dated 15 April 2004.
4. Probationary contract of a worker named Yot Rem dated 16 April 2004.
5. Tables of contract divisions.
6. Proof of registration in the commercial register dated 18 December 2004.
7. Letter from the Department of Labour Inspection dated 27 May 2004.
8. Minutes of elections of shop stewards dated 26 April 2004.
9. Notice issued by Winner Garment dated 17 April 2004.
10. List of candidates issued by the company.
11. Minutes of conciliation between the company and workers dated 05 August 2004.

**B. Documents received from the employer party**

1. Minutes of conciliation of the collective labour dispute of KYU dated 26 April 2004.
2. Proof of registration dated 29 April 2004.
3. Letter confirming registration of KYU at Winner dated 24 April 2004.
4. Minutes regarding the selection of the committee of the KYU at Winner dated 23 March 2004.
5. List of names of members and union committee dated 23 March 2004.
6. CVs and personal declaration of criminal record of Hun Sophat, Sem Phally and Hon Sokhon.
7. Letter of KYU (#95) dated 23 March 2004.

**C. Documents received from MOLVT**

1. Minutes of conciliation of labour dispute at Winner dated 05 Aug 2004.
2. Report on unresolved labour dispute at Winner dated 05 August 2004.

**D. Statements and answers of witnesses from the employer and worker parties.**

**E. The two parties decided in the hearing that: The award would be binding.**

**CASE SUMMARY**

Winner Garment has 300 workers located in a factory on Luek Thmey Road, Ka Kaab Commune, Dongkao District, Phnom Penh. On 15 July 2004 the Department of Labour

Inspection in Dongkao District received a complaint from workers at Winner Garment demanding that the company improve 12 points relating to working conditions. After receiving the claim the Department of Labour Inspection appointed an inspector to conciliate the dispute immediately and they conducted a final attempt to conciliate the dispute on 05 August 04 at which time five of the 12 points were resolved.

The report on the points which were not resolved was sent to the Arbitration Council on 12 August 2004. On 26 August 2004 at 8 a.m. the Arbitration Council held a hearing to resolve the dispute in which both parties participated. On the date of the initial hearing the Arbitration Council asked for additional information and also tried to conciliate, which was successful with regard to five of the seven points which the two parties settled on the basis of an agreement (attached pages 13 and 14).

### **FINDINGS OF FACT**

- Having examined the non-conciliation report
- Having examined all documents provided by both parties
- Having listen to both parties, the employer and the employees

#### **The Arbitration Council finds that:**

1. On 17 April 2004 Winner Garments notified workers, by posting a notice on the company notice board, that there would be elections to choose shop stewards on 26 April 2004 at 2:00 p.m. and on 25 April 2004 the company verbally informed workers of this.
2. On 26 April 2005 Winner Garment organized shop steward elections under the supervision of Mr. Nel Sonla, Director of the company and 192 workers took part including Ms Hong Sokha, who is the deputy president of the union. As a result of the elections, three shop stewards and three assistants were chosen.
3. On the date of the elections, the president of the union at the factory level, Mr Sem Phally did not participate, because he was suspended and not in the factory at the time.
4. The elections were acknowledged by the ministry responsible for labour in a letter dated 27 May 2004.
5. There were casual workers representing approximately 50 percent of the total workforce, who were hired by the company and some of these workers' contracts were terminated, and some of these workers had residences far away from the factory. The union did not provide substantial evidence about the number of

probationary workers who were terminated or about how distant their residences were from the factory.

6. Mr Sem Phally started work as an electrician on 26 November 2003 and received a wage of US\$90 per month. Because of a lack of work, on 24 April 2004, the company decided to dissolve the electricians' team.
7. After a meeting to try and resolve the dispute at the Chinese/Taiwanese community [centre] by raising the case of Mr Sem Phally as an individual who is protected by law because he is the president of the local union which was registered by the Ministry of Labour on 29 May 2005, the company accepted Mr Sem Phally back to work to fix the electricity system and replace light bulbs at a salary of US\$60 per month and Mr. Sem Phally agreed to this. Further Mr Phally stated clearly in the hearing that he would work for US\$60 per month but that he did not agree to a fixed duration contract.
8. On 26 June 2004, Mr Phally was suspended from work again (and this suspension has lasted up until now), on the basis that he refused to accept the fixed duration contract which the company wants all workers to enter into. Mr Phally and the company explained that Mr Phally was paid a total of US\$60 for the month of June.
9. Mr Phally is the president of the local level union with a two-year term. The union claims that if Mr Phally has to sign a three or six month contract it will cause the union to have problems in maintaining sustainability of the leadership level and thus the union asks the company to enter into a two-year fixed duration contract.

### **REASONS FOR DECISION**

#### ***Point 4:***

Before deciding this issue the Arbitration Council will consider if this dispute is a collective labour dispute, and if the Arbitration Council has jurisdiction over this case or not.

According to the Labour Law (1997) the Arbitration Council has the power to resolve collective labour disputes which are not settled by conciliation as set out in Article 312 which states that “the Arbitration Council has no duty to examine issues other than those specified in the non-conciliation report or matters, which arise from events subsequent to the report, are the direct consequence of the current dispute.”

Further, Article 302 of the Labour Law (1997) defines a collective labour disputes as “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, the recognition of professional organizations within the enterprise, and issues regarding relations between employers and workers, and this dispute could jeopardize the effective operation of the enterprise or social peacefulness.”

Therefore with regard to the workers' fourth claim, the Arbitration Council finds that this is a dispute regarding the election of shop stewards which is a collective labour dispute because this conflict arises between many workers who are represented by a union. In this case the union argued that the employer did not allow the union to fully participate in the shop steward elections as was their right according to the Labour Law (1997) and Prakas 266/01.

Article 298 of the Labour Law (1997) provides that, “Disputes relating to the election, eligibility and the fairness of the elections of shop stewards shall be referred to the Labour Court, or to the common court that has jurisdiction to rule promptly without the possibility of appeal recourse if the Labour Court does not exist.” Referring to the language which is used in this Article, neither the Arbitration Council nor the Labour Inspector is prevented from attempting to resolve such disputes as relate to shop steward elections, before they are referred to the courts for final resolution. The Arbitration Council finds that the intention of this Article is to show that if the parties complain to the court regarding such a dispute, the court should decide promptly and that there shall be no appeal. Further, this Article does not provide that it is only the court which can resolve these election disputes, which is different from the language of Article 337 of the Labour Law. [Article 337] provides that “Labour Courts or, in the absence of the Labour Courts, the common courts, have sole jurisdiction to determine the legality or illegality of a strike.” This Article expressly provides that no other institution or person can decide if a strike is illegal except the court. Additionally, if Article 12 of Prakas 99/04 on the Arbitration Council is considered, then the Arbitration Council is required to resolve collective labour disputes [which are referred to it] in accordance with Article 309 of the Labour Law, and the Arbitration Council finds that the issue in this case does constitute a collective labour dispute. Also in the hearing of this case, neither party objected to the jurisdiction of the Arbitration Council in the resolution of this election dispute. On the contrary, the two parties demonstrated their confidence in the Arbitration Council's ability to resolve the dispute by sending the dispute to the Arbitration Council, and during the hearing they decided to accept binding arbitration. If Article 298 of the Labour Law means that the Arbitration Council does not have the power to resolve these election disputes and that they can only be sent to the courts, this would then also lead to the conclusion that the skilled officers of MoLVT would also be prevented from conciliating these disputes.

For these reasons the Arbitration Council finds that it has jurisdiction to decide election disputes.

In this case the union disputed the results of the shop steward elections because they said that the union was not notified of the elections in accordance with the law. Beyond this general objection the union did not provide evidence as to how the elections were not in accordance with the procedures for the election of shop stewards as set out in Article 299 of the Labour Law and Prakas 286/01 (MOSALVY). Further, in the hearing the vice president of the union stated that she did know about the shop steward elections, and also according to Prakas 286/01 the company is only obliged to discuss the shop steward elections with unions who have representative status. In order to have the rights of a representative union, unions must register with the Ministry in accordance with Article 277 of the Labour Law. The Khmer Youth Union at Winner has not yet registered their representative status with the Ministry. Thus the company did not have the obligation to consult with this union before organizing the shop steward elections.

Thus the Arbitration Council finds that the union's request for an order that new elections be held cannot be granted.

***Point 5:***

Article 68 of the Labour Law provides that “the cost of a return journey for probationary workers who have to go to work at a location distant from their usual residence shall be at the expense of the employer.” According to the sense of this Article, the Arbitration Council finds that with regard to probationary workers who work far away from their usual places of residence, the employer must pay the cost of return travel during the period of probation. Accordingly, the Arbitration Council finds that this Article cannot be applied to the workers’ claim that they be paid for the cost of returning home to distant locations once their contracts have been terminated. The Arbitration Council finds that this issue is determined by Article 188 of the Labour Law which relates to the payment of travel costs upon the termination of a contract.

Article 188 of the Labour Law (1997) provides that “all workers who were recruited far from the work place and whose trip to the work place was paid for by the employer are, at the expiration of the contract or during leave period, entitled to a return trip to the place of recruitment at the expense of the employer under the same conditions as the original trip.” This Article does not specify whether it applies to probationary or regular workers, and thus it

should be considered to apply to all workers who live far away from the workplace, even probationers. According to the sense of this Article, the employer must pay workers the cost of returning to their residences if two conditions are met, namely: 1. if the workers were chosen to go to work far from their residences, and 2. if the employer paid the price of the journey to the workplace. In the current case, the employer did in fact terminate a number of probationary workers, but the union did not provide details (names and id numbers) of these workers, nor did they provide information about the number of workers who were chosen to work far away from their residences and for whom the employer undertook to pay the cost of transport to work. Thus the Arbitration Council finds that the union has not provided sufficient evidence to substantiate the claim of the number of probationary workers who were terminated and who claimed for the company to pay the cost of their return journey home. These workers were not chosen from far away and transported to the factory. On the contrary, the company only has to pay for the return journey if the workers were recruited from distant locations, transported to the factory, and then had their contracts terminated.

***Point 6:***

The workers demand that Mr Sem Phally be accepted back to work with a salary of US\$90 [per month]. The company agreed to take Mr Sem Phally back to work on the condition that he receive a salary of US\$60 per month. Mr Phally agreed to this salary as he had been paid this amount for six months already. The Arbitration Council finds that the issue in dispute here is that the company wants to provide fixed duration contracts to all their employees, including Mr Phally, by terminating all of their workers, paying out their severance benefits, and thereafter rehiring them all on fixed duration contracts. The Arbitration Council is not required to decide on the legitimacy of such a strategy with regard to workers in general because it is not in dispute. With regard to Mr Phally as president of the union, he is provided with special protection by the law, and before terminating such a person who has protection, the employer needs permission from the labour inspector. This protection is contained in Article 293 of the Labour Law, which provides that, "The dismissal of a shop steward or a candidate for shop steward can take place only after authorization from the Labour Inspector," and Article 7 of Prakas 313/02 of the Ministry of Labour, which provides that "the three main leaders of a union at the enterprise level, namely the president, vice-president ... shall receive the same protection from termination as shop stewards." Thus the Arbitration Council finds that the company's act of terminating [Mr Phally] from employment without permission from the labour inspectorate and paying him various severance benefits was in breach of Article 293 of the Labour Law and Prakas 313 of MoSALVY. Thus the employment contract of Mr Phally, which is of undetermined duration, continues, whether or not he was

dismissed. Thus the employer must accept Mr Phally back to work with the salary of US\$60, being the salary which he received in June 2004.

**DECISION**

Based on the facts, reasoning, and legal principles above as well as equity principles, the Arbitration Council decides as below:

1. Rejects the claim of the workers to have the company hold new elections for shop stewards.
2. Orders the company to pay the cost of travel to probationary workers terminated by the company in the case that the workers were recruited far from the workplace and the company took responsibility for transporting them to the workplace.
3. Order the company to accept Mr Sem Phally back to work with an undetermined duration contract and to pay him a wage of US\$60 per month starting from July 2004.

**Signatures of Members of the Arbitration Panel:**

Arbitrator chosen by the employer party:

Name: **Mr Kao Thach**

Signature: .....

Arbitrator chosen by the worker party:

Name: **Mr Liv Sovanna**

Signature: .....

Chair of arbitration panel:

Name: **Mr Kong Phallack**

Signature: .....

*This Award will become binding immediately upon receipt by the parties. Neither party shall have the right to object to this Award to complain to the municipal/provincial court about it, nor shall they have the right to conduct a strike or lockout [with regard to the issues decided herein].*