



KINGDOM OF CAMBODIA
NATION RELIGION KING

ក្រុមប្រឹក្សាសវនករជាតិ

THE ARBITRATION COUNCIL

Case number and name: 66/07 – Jia Fung

Date of Award: 9 August 2007

ARBITRAL AWARD

(Issued under Article 313 of the Labor Law)

ARBITRATION PANEL

Arbitrator chosen by the employer party: **MAR SAMBORANA**
Arbitrator chosen by the worker party: **AN NAN**
Chair Arbitrator (chosen by the two Arbitrators): **PEN BUNCHHEA**

DISPUTING PARTIES

Employer party:

Name: **Jia Fung Garment Company**
Address: Toul Sangke Village, Sangkat Toul Sangke, Khan Russei Keo, Phnom Penh
Telephone: 023 355 004, 012 815 898 Fax: 023 355 010
Representatives:

1. Mr. Chea Kong The Company's Administrative Manager;
2. Ms. Yan Kunthea The Company's Administrative Assistant.

Worker party:

Name: **Federation Union of Development Workers Rights (FUDWR)**
Address: No. 20, Sangkat Toeuk Thla, Khan Russei Keo, Phnom Penh
Telephone: 012 690 594, 016 202 056 Fax: N/A
Representatives:

1. Mr. Cheng Nen FUDWR President;
2. Mr. Suy Samnang FUDWR Officer;
3. Ms. Vann Lihorn Chief of Sewing Unit;
4. Ms. Chea Thavy Chief of Sewing Unit.

ISSUES IN DISPUTE

(In the Non-Conciliation Report)

1. The worker party demanded that the company pay their monthly wages on the tenth of each month and if the tenth falls on a holiday or Sunday, the company should then pay on the ninth. The employer party mentioned that the company pays the wages every first Saturday of the month.
2. The worker party demanded that the company reinstate Ms. Va Li Horn and Ms. Chea Thavy. The employer party claimed that the company would not reinstate them because they had abandoned their employment.

JURISDICTION OF THE ARBITRATION COUNCIL

The Arbitration Council derives its power to make this Award from Chapter XII, Section 2B (Article 309 to 317) 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 Labor Law. The conciliation hearing was unsuccessful, and the non-conciliation report No. 665/07 dated 17 July 2007 was submitted to the Secretariat of the Arbitration Council on 19 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: 31 July 2007 (from 2:00pm to 5:00pm)

Procedural issues:

Having received a complaint from the Federation Trade Union of Development Workers Rights demanding improved working conditions, on 12 June 2007 the Department of Labour Disputes designated its expert official to settle the labour dispute; the last conciliation session was held on 29 June 2007 and seven out of nine issues were conciliated. The non-conciliation report No. 665 dated 17 July 2007 of the two non-conciliated issues was submitted to the Secretariat of the Arbitration Council on 19 July 2007.

Having received the case, the Arbitration Council summoned the disputing parties to attend a hearing on 31 July 2007 at 2:00pm. Both parties were present at the hearing.

The Arbitration Council made a further attempt to conciliate the two unresolved issues. Issue one was successfully conciliated. Therefore, the Arbitration Council will only consider issue two based on the evidence and findings of fact 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 authorizing Mr. Chea Kong, Chief of Administration Office of the company to resolve the dispute before the Arbitration Council;
2. Summary thesis of the labour dispute of the company Director, dated 30 July 2007;
3. Company's Internal Work Rules dated 19 March 2007;
4. Business License registration dated 22 August 2006;
5. Notification dated 5 July 2007 on monthly payment and correction to Notification dated 11 May 2007;
6. Payroll of resigned female workers;
7. Payroll of workers of April 2007.

Provided by the worker party:

1. Notification dated 30 May 2007 from FUDWR on the union leader election held on 27 May 2007. Ms Ourn Seap was elected President; Ms. Kuy Kea was elected Vice-President; and Ms. Va Li Horn was elected Secretary;
2. Minutes of the meeting to establish FUDWR at Jia Fung Garment, dated 30 May 2007 (there is no signature of the Facilitator of the meeting);
3. Curriculum Vitae of Ms. Va Li Horn, dated 17 January 2007;
4. Probationary Contract between the company and Ms. Va Li Horn (contract period from 1 December 2006 to 3 March 2007);
5. Curriculum Vitae of Ms. Chea Thavy, dated 28 May 2007;
6. Probationary Contract between the company and Ms. Chea Thavy (contract period from 12 December 2006 to 12 March 2007).

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

1. Report No. 665 dated 17 July 2007 on the collective labour dispute conciliation at Jia Fung Garment;

2. Minutes of the collective labour dispute conciliation of Jia Fung Garment, dated 29 June 2006.

Provided by the Secretariat of the Arbitration Council:

1. Invitation No. 294 dated 23 July 2007 to the worker party to attend the hearing;
2. Invitation No. 293 dated 23 July 2006 to the employer party to attend the hearing.

FACTS

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

The Arbitration Council finds that:

The worker party demanded that the company reinstate Ms. Va Li Horn and Ms. Chea Thavy.

The case of Ms. Va Li Horn:

- Ms. Va Li Horn was the Deputy Leader of the Sewing Unit (B).
- She started work on 1 December 2006.
- She had a valid application form.
- Her minimum wage was US\$55.
- She had not taken her annual leave.
- The worker party mentioned that on 12 May 2007, Ms. Va Li Horn came to work as usual and waited to receive her wage at the end of the working day. She was then told that her contract would be terminated effective that day. She did not agree to sign to receive her wage, and asked why her contract had been terminated. However, she was told to contact the Administrative Office on 18 May 2007 to find out the reason.
- 13, 14 and 15 May 2007 were holidays because it was the King's birthday.
- Ms. Va Li Horn mentioned that on 18 May 2007, she went to meet the Head of Administration to receive her wages and she claims that she argued with the Administrative Manager and asked "what was my mistake?", "why did you terminate me?". The Administrative Manager replied "if you have come to receive the money we can talk but if you have come to argue, we don't need to talk."

- The employer party mentioned at the hearing that after 13, 14, and 15 May 2007, Ms. Va Li Horn did not return to work until 18 May 2007, the day she came for her wage.
- In the hearing, the Administrative Manager confirmed that he met Ms. Va Li Horn on 18 May 2007, and that she had done nothing wrong. However, she did not agree to sign for her wages and demanded to count the money first; but the company required her to sign before getting paid. Since then she has not returned to work, and the company considered that she has abandoned her employment.
- However, Ms. Va Li Horn confirmed that the Administrative Manager had asked her to sign an agreement to terminate her employment, but she did not agree to this. From that day she did not come to work because she was prevented from entering her workplace by the factory's guard.
- Ms. Va Li Horn mentioned that the company verbally terminated her employment on 12 May 2007. The employer party mentioned that after 12 May 2007, Ms. Va Li Horn never returned to work; therefore, the company could not allow her to return to work.

The case of Ms. Chea Thavy:

- Ms. Chea Thavy was the leader of Sewing Unit (C).
- She started work on 12 December 2006.
- She did not have a valid application form to be eligible for work because she forged her ID card. She did not refute this claim in the hearing.
- Her minimum wage was US\$55.
- The employer party mentioned in the hearing that in April 2007, the company reviewed the employment documents of workers and found that approximately 20 female workers had forged their ID cards in order to obtain employment. The company made an announcement through the speakers inviting the workers to meet individually and asking them to bring their original ID cards or family books so that the company could make photocopies. Ms. Chea Thavy was invited through the announcement on 12 May 2007 to come to the office to bring her original ID or family book to review and copy, but has not yet produced her original ID card or family book. Ms. Chea Thavy objected to the company's claim and alleged that she did not know about the announcement which is why she did not bring her original ID card or family book for review and copying. The company asked her to sign an agreement to receive her wage and terminate her employment, but she did not agree to this.

- She admitted that she did forge her ID card.
- In the hearing, the Arbitration Council found that worker named Ms. Chea Thavy certainly did not know about the company's announcement and that on 12 May 2007 the company terminated her employment without a valid reason. The Arbitration Council found that the employer party did not have concrete evidence to prove that the company actually made an announcement about forged ID cards.

The case of the union:

- In the hearing, the union alleged that Ms. Va Li Horn and Ms. Chea Thavy had helped organize the union's election, but they had been dismissed from work even before the election was held.
- The union did not allege that the dismissal of the two workers was an act of discrimination against the union.
- On 27 May 2007, FUDWR held the election for its leaders. Ms. Ourn Seap was elected President, Ms. Kuy Kea was elected Vice-President, and Ms. Va Li Horn was elected Secretary.
- The minutes of the meeting to establish FUDWR at Jia Fung Garment, dated 30 May 2007 (no signature of the Facilitator of the meeting) was neither submitted to the company nor registered with the Ministry.
- The union representatives mentioned that the union had not re-elected its leaders because they did not know whether or not the company would reinstate Ms. Va Li Horn and Ms. Chea Thavy. If they were not allowed, the union would have to re-elect its leaders. That was the reason why the minutes had not been submitted to the company.

REASONS FOR DECISION

Based on the above facts and the worker party's claim that the two workers, Ms. Va Li Horn and Ms. Chea Thavy, who were candidates of the union's election, were dismissed [unlawfully], the Arbitration Council will consider two issues. Firstly, whether or not the two workers should receive the special protection because they were election candidates; and secondly whether or not the company followed [proper] legal procedures in dismissing the two workers.

- 1. Are the two workers entitled to special protection as the union's election candidates?**

Clause 3 (3) of Prakas No. 305 states that, “*All employees who are candidates for election as union leader shall also receive protection from work dismissal like worker delegates. This protection lasts for 45 days prior to the election and ends 45 days after the election if these candidates are not selected. The union shall notify the employers about this candidacy through all reliable means. Employers shall apply this provision once only at every election of union leaders.*”

According to the above mentioned clause, candidates for election as union leader are protected from dismissal for 45 days before and after the election, if they are not elected. In this case, FUDWR did not provide the list of the union leaders, the election candidates, or the notification of the election to Jia Fung Garment in advance.

In the previous Arbitral awards, the Arbitration Council found that based on Clause 3 of Prakas No. 305, the workers would be entitled to special protection only if they fulfilled the following three requirements: 1) the workers are the type that are entitled to special protection; 2) the dismissal occurred during the period of special protection; 3) the union informed the company of the election candidates in advance by all means. (See Arbitral Awards 07/06 – Dai Young, Issue 1 and 09/06 – Grand Diamond City).

In this case, Ms. Va Li Horn and Ms. Chea Thavy fulfilled the first requirement as they were candidates for election as union leader. The Arbitration Council finds that the union’s election was held on 30 May 2007 and the dismissal happened on 12 May 2007. Therefore, the second requirement was also met because the dismissal occurred within the 45 day period before the election, the period when they were being specially protected. However, the third requirement was not met because the union did not inform the company about the election and/or candidates. Since the two workers did not fulfill all three requirements, they are not entitled to special protection.

Therefore, the Arbitration Council considers that Ms. Va Li Horn and Ms. Chea Thavy are not entitled to the special protection against the dismissal.

2. Did the company follow the legal procedures to dismiss Ms. Va Li Horn and Ms. Chea Thavy?

The Arbitration Council finds that both workers had verbal employment contracts with the employer.

Article 67 (7) of the Labor Law provides that, “*A contract of a fixed duration must be in writing. If not, it becomes a labor contract of undetermined duration.*” Based on this article, the Arbitration Council considers that since Ms. Va Li Horn and Ms. Chea Thavy did not have written employment contracts with the employer they were working under a contract of undetermined duration.

Article 74 of the Labor Law states that, “*The labor contract of unspecified duration can be terminated at will by one of the contracting parties... However, no layoff can be taken without a valid reason relating to the worker's aptitude or behavior, based on the requirements of the operation of the enterprise, establishment or group.*”

A. Ms. Va Li Horn

Based on the hearing, the Arbitration Council finds that the employer's claim was not valid. The employer failed to provide concrete reason and evidence to prove that Va Li Horn abandoned her employment. On the contrary, the employer claimed that Ms. Va Li Horn did not do anything wrong, but she abandoned her employment.

The Arbitration Council finds that the worker party's claim that Ms. Va Li Horn was asked to sign an agreement to have her labour contract terminated on 12 May 2007 is valid.

The Arbitration Council does not agree with the employer that Ms. Va Li Horn abandoned her employment, but believes that Ms. Va Li Horn was not allowed to enter the factory. Therefore, the Arbitration Council rejects the employer's claim that Ms. Va Li Horn abandoned her job.

Thus, the Arbitration Council finds that the employer dismissed Ms. Va Li Horn on 12 May 2007 without a valid reason.

According to Article 74, the employer may terminate employment at will, but not without a valid reason. In this case, the Arbitration Council finds that the termination was without any valid reason.

Article 91 of the Labor Law states, “*The termination of a labor contract without valid reasons, by either party to the contract, entitles the other party to damages... The worker, however, can request to be given a lump sum equal to the dismissal indemnity.*”

Article 91 provides that the termination of a contract by an employer without valid reasons entitles the worker to compensation. (See Arbitral Awards 29/05 – Kang Ning, Issue 1 and 111/04 – Sun City, Issue 1)

Based on Article 91, the dismissal of Ms. Va Li Horn without any valid reason requires the employer to compensate her.

Therefore, the company must pay her last-month's wage, indemnity for dismissal, compensation for annual leave as stated in the Labour Law and other severance payments and damages to Ms. Va Li Horn.

B. Ms. Chea Thavy

The Arbitration Council finds that Ms. Chea Thavy had forged her employment documents. She used the ID card of another person named Chea Thavy ID No. 100352492, dated 31 July 2002 with a different photograph.

Ms. Chea Thavy admitted that she had forged the ID card. However, she confirmed that she had not known about the announcement of the company to workers who had invalid documents.

Article 83 (B2) of the Labour Law states that, "*The following are considered to be serious offenses: ... Fraudulent acts committed at the time of signing (presentation of false documentation) or during employment.*" Thus, the Arbitration Council considers that, legally, the employer had the right to dismiss Ms. Chea Thavy because she committed serious misconduct and should pay her outstanding wages and compensation for annual leave.

The Arbitration Council considers that the company had earlier terminated Ms. Chea Thavy without a valid reason. The dismissal did not taken effect until the hearing day when Ms. Chea Thavy was told the valid reason for her termination. Thus, her wage shall be paid up to 31 July 2007.

C. The calculation of Ms. Va Li Horn's severance pay

In this case, Ms. Va Li Horn was an ordinary worker. Since the employer would not absolutely reinstate her, the Arbitration Council cannot order the company to reinstate her. However if the company terminates her, the company must pay compensation based on five months of work, in accordance with the Labour Law as follows:

- notice of termination of her contract as stated in Article 73 of the Labour Law (equal to seven days of wage and other benefits).
- indemnity for dismissal as stated in Article 89 of the Labour Law (equal to seven days of wage and other secondary benefits).
- compensation for annual leave as stated in Article 167 of the Labour Law (equal to 5 months multiplied by 1.5 days).
- damages for the termination of the labour contract without valid reasons as stated in Article 91 and Article 74(2) of the Labour Law.

Regarding the damages, the Arbitration Council considers that seven days wages and other benefits are reasonable (in addition to indemnity for dismissal and notice of termination of her contract). The decision is based on Article 73, paragraph 3 which entitles the worker to compensation in an amount at least equal to the dismissal indemnity without having to provide proof of damages incurred.

Therefore, the Arbitration Council considers that, in total, Ms. Va Li Horn is entitled to seven days of dismissal indemnity, seven days notice of termination, seven and half days of annual leave, and seven days of damages for the termination of the contract, which in total amounts to 28.5 days. The final payment shall be calculated based on the formula as follows:

$$\text{Average daily wage} = \frac{\text{amount of wage over the last 5 months}}{5 \text{ months multiplied by } 26 \text{ working days}}$$

The amount of the last five months wages includes the overtime wage and the attendance bonuses which she received during this period. Her total wage shall be equal to 28.5 days multiplied by the average daily wage plus her last months' wage. (See Arbitral Award 111/04 – Sun City, Issue 1).

D. Ms. Chea Thavy's remuneration

Ms. Chea Thavy is entitled to her outstanding wages up to 31 July 2007 and compensation for annual leave which is equal to five working months multiplied by 1.5 days.

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

DECISION AND ORDERS

- Reject the worker party's demand that the company reinstate Ms. Va Li Horn and Ms. Chea Thavy.
- Order the employer to pay Ms. Va Li Horn the amount of wage equal to 28.5 days multiplied by the average daily wage plus her last months' wage.
- Order the employer to pay Ms. Chea Thavy her last months' wage up to 31 July 2007 and 7.5 days compensation for annual leave.

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 with the Secretariat of the Arbitration Council within this time period.

SIGNATURES OF MEMBERS OF THE ARBITRATION PANEL:

Arbitrator chosen by the employer party:

Name: **MAR SAMBORANA**

Signature:

Arbitrator chosen by the worker party:

Name: **AN NAN**

Signature:

Chair Arbitrator (chosen by the two Arbitrators):

Name: **PEN BUNCHHEA**

Signature: